

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'G': NEW DELHI**

**BEFORE SH. I.C. SUDHIR, JUDICIAL MEMBER
AND
SH. O.P. KANT, ACCOUNTANT MEMBER**

ITA No. 6865/Del/2015
Assessment Year: 2011-12

M/s. Garg Trading Co. , C/o- N.C. Garg, Chartered Accountant, M.G. Road, Rohtak	Vs.	Income Tax Officer, Ward-1, New Delhi
GIR/PAN : AAFFG5606F		
(Appellant)		(Respondent)

Appellant by	S/sh. Gautam Jain & Piyush Kumar Kamal, Advocates
Respondent by	Smt. Rishpal Bedi, JCIT (DR)

Date of hearing	18.04.2016
Date of pronouncement	31.05.2016

ORDER

PER O.P. KANT, A.M.:

This appeal of the assessee is directed against order dated 13/11/2015 of learned Commissioner of Income-tax (Appeals), Rohtak, for assessment year 2011-12, raising following grounds:

1. That the learned Commissioner of Income Tax (Appeals) has erred both in law and on facts in sustaining disallowance of Rs. 169829/- representing the alleged excess salary paid to the partner by invoking clause (v) of Section 40(b) of the Act.
- 1.1 That the learned Commissioner of Income Tax (Appeals) has failed to appreciate that the salary paid to the partners was in terms of clause (9) of the deed of partnership dated 12.04.2007 which had been allowed consistently in preceding and succeeding assessment years and, therefore, disallowance made is illegal, invalid and untenable.

It is, therefore, prayed that additions sustained of Rs. 169829/- be deleted and appeal of the appellant may kindly be allowed.

2. The facts in brief are that the assessee, a partnership firm, was engaged in sugar trading on wholesale basis during the relevant period. The assessee filed return of income on 28/05/2011 declaring income of Rs. 29,760/-. The income of the assessee was assessed at Rs. 3,21,840/- under section 143(3) of the Income Tax Act, 1961 (in short 'the Act') on 20/02/2014. Aggrieved, the assessee filed appeal before the learned Commissioner of Income-tax (Appeals), who allowed part relief to the assessee. Aggrieved, against the impugned order of the learned Commissioner of Income-tax (Appeals), the assessee is in appeal before the Tribunal.

3. In the grounds, the assessee has challenged sustenance of disallowance of Rs. 1,69,829/- out of the salary paid to the partners invoking clause (v) of section 40 (b) of the Act.

4. The Ld. Authorized Representative (AR) of the assessee submitted that the authorities below have not understood clause (9) of the partnership deed properly, in which the salary for the time being was fixed at the rate of Rs. 36,000/- per annum, but the parties were given the right to enhance or reduce the salary at any time by the mutual consent oral or written subject to the maximum limit allowable under section 40(b) of the Act. Thus, according to the Ld. AR the action of the authorities below in restricting the salary at Rs. 1,08,000/- and disallowing the balance amount of Rs. 1,69,829/- out of the salary paid to the partners in the profit and loss account was not in accordance to law. In support of his contentions, the Ld. AR relied on the following decisions/judgments:

- (i) Tribunal Delhi bench decision in the case of Shri Ranvir Singh and company versus ITO, Ward 3, Rohtak in ITA No. 3777 and 3778/Del/2015
- (ii) Judgment of Hon'ble High Court of Himachal Pradesh in the case of CIT versus Anil Hardware Store reported in (2010) 323 ITR 368 (HP)
- (iii) Judgment of Hon'ble High Court of Rajasthan in the case of CIT versus Asian marketing reported in (2012) 254 CTR 0453 (Raj)

- (iv) Judgment of Honøble Allahabad High Court in the case of CIT versus Great City Manufacturing Company reported in (2013) 256 ITR 420 (Allahabad) and
- (v) Judgment of Honøble High Court of Himachal Pradesh in the case of the Drgadas Devinandan versus ITO , Palampur.

5. On the other hand, the Ld. Departmental Representative (DR) relying on the order of the authorities below submitted that the partnership deed has specified salary of Rs. 36,000/- to each partner and further for increase or decrease in salary was not specifically provided in and it was left to the parties for deciding it for any future date and, therefore, following the judgment of the Honøble jurisdictional High Court in the case of Sood Brij and Associates Vs. Commissioner of Income Tax-XIII, New Delhi reported in 203 taxmann 188 (Delhi) , the action of the authorities below was justified.

6. We have heard the rival submissions and perused the material on record. In the case of the assessee the relevant clause 9 of the partnership deed, which specified remuneration to the partners is reproduced by the Commissioner of Income-tax(Appeals) in the impugned order as under:

“That all the partners are working partners and they shall be entitled to salary. For the time being the salary has been fixed @ 36000/- per annum each. However the parties reserve the right to enhance or reduce the amount of salary at any time by their mutual consent oral or written. The salary will be credited in the accounts of the parties at the close of the year. Further the salary payable to partners shall not exceed the amount allowable u/s 40(b) of the Act. The reduction in salary, if need be, shall be equal. ”

7. We find that identical clause was available in the case of Sh. Ranvir Singh and Company Vs. CIT (supra), wherein the Tribunal has observed that the judgment of the Honøble Delhi High Court in the case of Sood Brij and Associates (supra) was not applicable as facts of the case was different. The relevant findings of the Tribunal are reproduced as under:

“4. Before me, the ld. AR submitted the copy of the order of the Hon'ble Delhi High Court (cited supra) and contended that the assessee does not fall within the jurisdiction of Hon'ble Delhi High Court. The clauses in the decision regarding the

remuneration to the partners are entirely different from Clause 10 as mentioned in the Partnership Deed of the assessee. The order of the Hon'ble Delhi High Court is dated 04.11.2011 while the assessment order in the case of the assessee has been passed on 10.12.2010. He also relied before me on the order of the Hon'ble Rajasthan High Court in the case of CIT vs. Asian Marketing reported in 254 CTR 453, a copy of which is available at pages 56 & 57 of the paper book, and draw my attention that the similar clause for the payment of the remuneration was there as was in the case of the assessee. In any case, the interpretation of section 40B was debatable. I have gone through the decision of the Hon'ble Delhi High Court in the case of Sood Brij & Associates (supra). I noted that in that case, the clauses which deals with the remuneration paid to the partners read as under :-

"8. Clauses 1 and 2 of the supplementary partnership deed dated 1st April, 1992 read :

"1. That subject to mutual consent of the partners, and subject to the provisions of the Income Tax Act, 1961, the working partner or partners shall be paid such remuneration as may be mutually agreed between themselves, from time to time, and such remuneration shall be deductible expense before arriving at the share of the partners as allocable from the net profits.

2. That both the partners (hereinafter referred as working partners), shall devote their time and attention in the conduct of the affairs of the partnership firm, as the circumstances and need of the firms business may require. The total remuneration payable to the working partners shall be an amount permissible as remuneration to the working partners under the Income Tax Act, 1961 and as applicable from time to time."

Clause 10 of the Partnership Deed in the case of the assessee read as under:-

"10. That all the partners are working partners and they shall be entitled to salary of Rs.25,000/- P.A. each. However, the parties reserve the right to enhance or reduce the amount of salary at any time by their mutual consent oral or written. The salary will be credited in the accounts of the party at the close of the year. Further the salary payable to partners shall not exceed the amount allowable u/s40-B of the I.T. Act. The reduction in salary, if need be, shall proportionate."

If we look to both the clauses which is in the case of the assessee and in the case of Hon'ble Delhi High Court are entirely different. In the case before Hon'ble Delhi High Court, the Partnership Deed does not specify the remuneration paid to the partners while in the case of the assessee 5 ITA No.3777 & 3778/Del./2015 Partnership Deed specified the remuneration payable to the partners. The Partnership Deed in the case of the assessee given the powers to the partners to enhance or reduce the salary at any time but no such clause was there in the case before Hon'ble Delhi High Court. The remuneration has to be determined as mutually agreed between the partners from time to time. Even I noted that the case of the assessee is duly covered by the decision of Hon'ble Rajasthan High Court in the case of CIT vs. Asian Marketing reported in 254 CTR 453 in which also the similar clause regarding the payment of the remuneration to the partners was there as is in the case of the assessee....."

8. We find that clauses of partnership deed in the case of assessee are identical with the clause referred in the case of Sh. Ranvir Singh and company versus CIT (supra), thus, respectfully following the findings of the said decision, we hold that clauses of partnership deed in the case of the assessee are distinguishable from the clauses of partnership deed in the case of M/s Sood Brij and associates (supra) and therefore the ratio of the decision in the case of M/s Sood Brij and associate (supra) is not applicable over the facts of the assessee and the salary paid to the partners was in accordance to clauses of section 40(b) of Act . Accordingly the grounds of the appeal are allowed.

22. In the result, the appeal filed by the assessee is allowed.

The decision is pronounced in the open court on 31st May, 2016.

Sd/-

(I.C. SUDHIR)

JUDICIAL MEMBER

Dated: 31st May, 2016.

Laptop/-

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Sd/-

(O.P. KANT)

ACCOUNTANT MEMBER

Asst. Registrar, ITAT, New Delhi