

**आयकर अपीलीय अधिकरण, 'सी' न्यायपीठ, चेन्नई**

IN THE INCOME TAX APPELLATE TRIBUNAL

'C' BENCH : CHENNAI

**श्री अब्राहम पी. जॉर्ज, लेखा सदस्य एवं  
श्री धुव्वुरु आर.एल रेड्डी, न्यायिक सदस्य के समक्ष ।**  
[BEFORE SHRI ABRAHAM P. GEORGE, ACCOUNTANT MEMBER  
AND SHRI DUVVURU RL REDDY, JUDICIAL MEMBER]

आयकर अपील सं./I.T.A.Nos.229, 230 & 734/Mds/2017

निर्धारण वर्ष /Assessment years : 2010-2011, 2012-2013 & 2013-14

Price Waterhouse & Co  
8<sup>th</sup> floor, Prestige Palladium Bayan,  
129-140, Greams Road,  
Chennai 600 006.

**Vs.** The Assistant Commissioner of  
Income Tax,  
Non Corporate Circle 3,  
Chennai 600 034

**[PAN AAAFP 8828M]**

**(अपीलार्थी/Appellant)**

**(प्रत्यर्थी/Respondent)**

अपीलार्थी की ओर से/ Appellant by

: Shri. Sriram Seshadri, Advocate

प्रत्यर्थी की ओर से /Respondent by

: Shri. Asish Tripathi, IRS, JCIT.

सुनवाई की तारीख/Date of Hearing

: 06-09-2017

घोषणा की तारीख /Date of Pronouncement

: 21-09-2017

**आदेश / ORDER**

**PER ABRAHAM P. GEORGE, ACCOUNTANT MEMBER**

These are appeals filed by the assessee directed against orders dated 31.10.2016 for the assessment years 2010-11 and 2012-2013 and order dated 20.01.2017 for assessment year 2013-14 passed by the Id. Commissioner of Income Tax (Appeals)-4, Chennai.

**2.** Ld. Counsel for the assessee at the outset submitted that he was withdrawing appeals for assessment years 2012-13 and 2013-14 numbered 230/Mds/2017 and 734/Mds/2017. Letters were also filed in this regard. Accordingly, appeals 230/Mds/2017 for assessment year 2012-2013 and 734/Mds/2017 for assessment year 2013-14 are dismissed as withdrawn.

**3.** This leaves us with appeal No.229/Mds/2017 for assessment year 2010-2011. Assessee has altogether taken three grounds of which ground No.3 assails levy of interest u/s.234B of the Income Tax Act, 1961 (in short "the Act"). The said ground is consequential in nature needing no specific adjudication. Ld. Counsel for the assessee submitted that he was limiting his arguments only to the reopening issue assailed through ground No.1.

**4.** Facts apropos are that assessee a Chartered Accountant firm had filed its return of income for the impugned assessment year disclosing income of ₹1,09,01,953/-. The assessment was originally completed u/s. 143(3) of the Act on 30.03.2013 accepting the income returned by the assessee. Thereafter notice u/s. 148 of the Act for reopening the assessment was issued to the assessee on 26.02.2014. As per Id. Assessing Officer, assessee had arrived at a gross profit after deducting remuneration of ₹1,24,80,000/- to two of

its partners. Ld. Assessing Officer noted that as per principal partnership deed dated 15.05.2003 none of the partners were entitled to any remuneration or salary. As per the Id. Assessing Officer there was a supplementary partnership deed dated 23.09.2010 through which two partners namely Mr. Sagar Datta and Mr. Amitesh Dutta became entitled to remuneration of ₹6,00,000/- and ₹4,40,000/- per month with effect from 01.04.2009. According to the Id. Assessing Officer such salary could be allowed only from the date of execution of supplementary deed which was 23.09.2010 and could not be given retrospective operation from 01.04.2009. Reassessment was thereafter completed by making an addition of ₹1,24,80,000/- denying remuneration claimed by the assessee u/s. 40(b) (v) of the Act.

**5.** Aggrieved, assessee moved in appeal before the Id. Commissioner of Income Tax (Appeals). Assessee questioned the reopening done for the impugned assessment year on the ground that such reopening was based on existing materials which were already available on record before the Id. Assessing Officer when the original assessment was completed u/s. 143(3) of the Act. As per the assessee there was no new material to show that any income had escaped assessment. Assessee also pointed out that there was a proceeding u/s. 154 of the Act initiated by the Id. Assessing Officer on the very

same issue. Thus as per assessee reopening done was not according to law.

**6.** However, Id. Commissioner of Income Tax (Appeals) was not impressed by the above arguments of the assessee. According to him, rectification proceeding initiated against the assessee u/s. 154 of the Act for the very same issue stood dropped by the Id. Assessing Officer through his letter dated 24.02.2014. Further, as per Id. Commissioner of Income Tax (Appeals) return filed by the assessee for the impugned assessment year was selected for scrutiny only for examining taxability of interest income as appearing in form No.26AS. According to the Id. Commissioner of Income Tax (Appeals) in none of the replies given by the assessee during the original assessment proceedings, there was any mention on issues pertaining to payment of remuneration to partners. As per Id. Commissioner of Income Tax (Appeals) furnishing of the copies of partnership deed to the Id. Assessing Officer would not mean that Id. Assessing Officer had verified such partnership deeds or reached an opinion regarding allowability of the remuneration paid to partners. As per Id. Commissioner of Income Tax (Appeals), information for reopening the case could be discerned even from the material already available on record. Id. Commissioner of Income Tax (Appeals) also observed that there was no question of any change of opinion since Id. Assessing

Officer had never discussed this issue in the original assessment order. He thus held the reopening valid.

7. Now before us, Id. Authorised Representative strongly assailing the orders of the lower authorities submitted that reopening though it was attempted within four years from the end of the relevant assessment years, was still invalid. According to him, assessee had vide letter filed on 22.03.2013 furnished a copy of supplementary partnership deed dated 23.09.2010 pursuant to a requirement specified in a notice received by it on 13.09.2012. Further, as per Id. Authorised Representative assessee had also filed the principal partnership deed dated 15.05.2003 as well as computation of salary payable to its partners allowable u/s. 40(b) of the Act, on 28.03.2013. Thus as per Id. Authorised Representative, assessee had furnished original as well as supplementary partnership deed and Id. Assessing Officer had come to a conclusion that the salary to partners claimed by the assessee was allowable. Further, as per Id. Authorised Representative, the rectification proceedings initiated u/s.154 of the Act for the very same reason stood dropped. It was urged by the Id. Authorised Representative that without any new tangible material, an assessment completed u/s. 143(3) of the Act could not be reopened. Reliance was placed on the judgment of Hon'ble Delhi High Court in the case of *CIT vs. Usha International Ltd*,

*348 ITR 485* and that of Hon'ble Calcutta High Court in the case of *Berger Paints India Ltd vs. ACIT, 322 ITR 369*.

**8.** Per contra, Id. Departmental Representative submitted that remuneration to partners were allowable only as per the terms of the partnership deed and such terms in so far as it authorized any such remuneration prior to the date of its execution could not be allowed by virtue of Clause (iii) of Sec. 40(b) of the Act. According to him, the supplementary deed authorizing payment of remuneration to partners was executed only on 23.09.2010 and therefore such remuneration for the period from 1<sup>st</sup> April, 2009 to 23.09.2010 could not have been allowed by the Id. Assessing Officer. As per Id. Departmental Representative, Assessing Officer in the original assessment had not applied his mind to this issue at all. When no opinion was formed by the Id. Assessing Officer in the original assessment, as per Id. Departmental Representative there was no question of any change of opinion. Further, as per Departmental Representative, initiating a rectification proceedings u/s. 154 of the Act or dropping of such proceedings would not act as a bar against a reopening u/s.147 of the Act. Thus, according to him, the reopening was validly done.

**9.** We have considered the rival contentions and perused the orders of the authorities below. Facts which are not disputed are that

reopening was attempted within four years from the end of the impugned assessment year and assessee had furnished copies of its principal partnership deed dated 15.05.2003 as well as supplementary partnership deed dated 23.09.2010, during the course of original assessment proceedings before Id. Assessing Officer. Assessee had on 28<sup>th</sup> March, 2013, also filed a computation of salary allowable u/s.40(b) of the Act. Said computation filed by the assessee as it appears at paper book page 77 is reproduced hereunder:-

<i>Profit before partners' salary</i>	<i>23,381,953</i>
<i>Less: Interest income</i>	
<i>Book Profit</i>	<u><u>23,381,953</u></u>
<i>On Ist ₹3,00,000 of book profit</i>	<i>270,000</i>
<i>60% on balance ₹ 23,081,953 of book profit</i>	<i>13,849,172</i>
<i>Partners' salary to the extent allowable u/s. 40(b) (v)</i>	<u><u>14,119,172</u></u>
<i>Partners' salary charged in the financials</i>	<i>12,480,000</i>

Section 40(b) of the Act which enable a firm to claim payment of remuneration to partners is reproduced hereunder:-

*“(b) in the case of any firm assessable as such,--*

*(i) any payment of salary, bonus, commission or remuneration, by whatever name called (hereinafter*

*referred to as remuneration) to any partner who is not a working partner; or*

*(ii) any payment of remuneration to any partner who is a working partner, or of interest to any partner, which, in either case, is not authorised by, or is not in accordance with, the terms of the partnership deed; or*

*(iii) any payment of remuneration to any partner who is a working partner, or of interest to any partner, which, in either case, is authorised by, and is in accordance with, the terms of the partnership deed, but which relates to any period (falling prior to the date of such partnership deed) for which such payment was not authorised by, or is not in accordance with, any earlier partnership deed, so, however, that the period of authorisation for such payment by any earlier partnership deed does not cover any period prior to the date of such earlier partnership deed; or*

*(iv) any payment of interest to any partner which is authorised by, and is in accordance with, the terms of the partnership deed and relates to any period falling after the date of such partnership deed in so far as such amount exceeds the amount calculated at the rate of twelve per cent. simple interest per annum; or*

*(v) any payment of remuneration to any partner who is a working partner, which is authorised by, and is in accordance with, the terms of the partnership deed and relates to any period falling after the date of such partnership deed in so far as the amount of such payment to all the partners during the previous year exceeds the aggregate amount computed as hereunder:--*

<p><i>(a) on the first Rs. 3,00,000 of the book-profit or in case of a loss</i></p>	<p><i>Rs. 1,50,000 or at the rate of 90 per cent. of the book profit, whichever is more ;</i></p>
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<i>(b) on the balance of the book profit</i>	<i>at the rate of 60 per cent.</i>
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Sub clause (iii) of the above section is clear in that any provision contained in a partnership deed which ratified any retrospective entitlement of remuneration to the partners, cannot be considered while calculating such remuneration to the extent such claim relates to a period prior to the date of execution of such deed. Thus assessee under law was not entitled to claim remuneration to partners prior to 23.09.2010, whereas it had claimed such remuneration from 1<sup>st</sup> April, 2009.

**10.** Now the question before us, is whether the above error committed by the Id. Assessing Officer can be a reason for reopening an assessment. Ld. Assessing Officer was having before him both original partnership deed as well as supplementary partnership deed. Thus, we cannot say that Id. Assessing Officer was not aware of the partnership deeds and the claim of remuneration. However, obviously he allowed the claim overlooking clause (iii) of Sec. 40(b) of the Act. Or in other words, we have to presume that the remuneration was

allowed despite a specific bar on retrospectivity in the Act. Such an opinion that claim of remuneration was allowable was a patently untenable view, which was not in accordance with clause (iii) to Section 40(b) of the Act. In our view, Id. Assessing Officer, if he had applied his mind, as is expected of him, would never have reached an opinion which was patently unlawful. An opinion which is patently against the provision of law, is in our view no opinion at all. In other words, we cannot say that there was any change of opinion when reassessment proceedings were initiated for allowing remuneration beyond what was allowed under law.

**11.** Coming to the question whether any new tangible material was available with the Id. Assessing Officer for attempting a reopening, new tangible material cannot be given, in our opinion a narrow definition so as to bring within its ambit only material from external sources. As long as original and supplementary partnership deed were not verified in the manner required by law, we can definitely say that there was fresh information coming out of the existing material.

**12.** Coming to the judgment of Hon'ble Calcutta High Court in the case of *Berger Paints India Ltd (supra)* which was relied on by the Id. Authorised Representative, no doubt it was held that where recourse of Sec. 154 of the Act was taken for rectification of a mistake

apparent on record, then in the absence of any other ground reassessment proceedings u/s. 147 of the Act could not be initiated after concluding that there was no apparent mistake. However, in the said case, Id. Assessing Officer was satisfied that there was no apparent error in the computation of income based on the existing record. This was why rectification proceedings were dropped. However, in the case before us, the rectification proceedings were dropped not because there was no error in computation but because such error was not exigible to a rectification proceedings, and could be addressed only by a reopening of assessment. Coming to the judgment of Hon'ble Delhi High Court in the case of *Usha International Ltd (supra)* there was a deemed formation of opinion invoking presumption u/s. 114(e) of Evidence Act. Such opinion was a lawfully possible one. As against this, in the case before us, Id. Assessing Officer could not have reached a valid or lawful view to give a benefit to the assessee which was specifically mentioned as not allowable u/s. 40(b) (iii) of the Act. Thus, in our opinion both these cases are not applicable on facts here. We thus uphold the reopening done for the impugned assessment year.

**13.** Ld. Counsel of the assessee did not make any arguments on

the merits of the disallowance done by the Id. Assessing Officer.

**14.** In the result, appeals of the assessee stand dismissed.

Order pronounced on Thursday, the 21st day of September, 2017, at Chennai.

Sd/-

(धुव्वुरु आर.एल रेड्डी)  
(DUVVURU RL REDDY)

न्यायिक सदस्य/JUDICIAL MEMBER

Sd/-

(अब्राहम पी. जॉर्ज)  
(ABRAHAM P. GEORGE)

लेखा सदस्य /ACCOUNTANT MEMBER

चेन्नई/Chennai

दिनांक/Dated:21<sup>st</sup> September, 2017

KV

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|--------------------------|------------------------------|-------------------------|
| 1. अपीलार्थी/Appellant   | 3. आयकर आयुक्त (अपील)/CIT(A) | 5. विभागीय प्रतिनिधि/DR |
| 2. प्रत्यर्थी/Respondent | 4. आयकर आयुक्त/CIT           | 6. गार्ड फाईल/GF        |