आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'बी' अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL
" B " BENCH, AHMEDABAD

सर्वश्री वसीम अहमद, लेखा सदस्य एवं मधुमिता रॉय, न्यायिक सदस्य के समक्ष।

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And SMT MADHUMITA ROY, JUDICIAL MEMBER

आयकर अपील सं./I.T.A. No.3184/Ahd/2014
(**निर्धारण वर्ष** / Assessment Year : 2011-12)

M/s. Gandhinagar Telerads 314, Mangal Murti Park, Sector – 8, Gandhinagar – 382 008	**बनाम**/ Vs.	ITO, Ward – 2, Gandhinagar.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAHFG 9008 P		
(अपीलार्थी/**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से/ **Appellant by** :	Shri Bandish Soparkar, A.R.
प्रत्यर्थी की ओर से/**Respondent by**:	Shri Mudit Nagpal, Sr. D.R.

सुनवाई की तारीख/ **Date of Hearing**	26/09/2018
घोषणा की तारीख /**Date of Pronouncement**	15/11/2018

आदेश / O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the order of the Commissioner of Income Tax (Appeals)– Gandhinagar, Ahmedabad [CIT(A) in short] vide appeal no.CIT(A)/GNR/510/2013-14 dated 17.09.2014 arising in the matter of assessment order passed under s.143(3) of the Income Tax Act, 1961(here-in-after referred to as "the Act") dated 28.02.2014 relevant to Assessment Year (AY) 2011-12.

2. The grounds of appeal raised by the assessee are as under:-

> *"1. Ld. CIT (A) erred in law and on facts in confirming action of AO in computing interest and remuneration to partners not debited to profit and loss account for granting deduction u/s 10A of the Act. Ld. CIT (A) failed to appreciate that arbitrary foisting of compulsory claim is not permissible in absence of any payment made to the partners. It be so held now and deduction u/s 10A be directed to be given as claimed.*
> *2. Ld. CIT (A) erred in law and on facts in confirming view of AO that the appellant abstained from claiming interest and remuneration to partners despite specific provision in partnership deed in order to claim higher deduction u/s 10A of the Act. Ld. CIT (A) ought not to have subscribed to such arbitrary and baseless conclusion drawn by AO. It be so held now.*
> *3. Ld. CIT (A) erred in law in not appreciating ratio of decisions relied upon that AO cannot compel the appellant to charge interest and remuneration by invoking provisions of section 40(b) of the Act. Ld. CIT (A) ought to have held that it is discretionary & not mandatory for the appellant to make such a claim. It be so held now.*
> *4. Levy of interest u/s 234B of the act is not justified.*
> *5. Initiation of penalty u/s 271(1)(c) of the Act is not justified.*
>
> *The appellant craves leave to add, amend, alter, edit, delete, modify or change all or any of the grounds of appeal at all"*

3. The interconnected issue raised by the assessee in this appeal is that ld. CIT(A) erred in confirming the order of AO by allowing the deduction u/s 40(b) of the Act.

4. Briefly stated facts are that the assessee in the present case is a partnership firm and engaged in the business of medical transcription. The firm is comprising of two partners who are a qualified doctor. The firm is providing services to the hospital situated in Australia. As such, the assessee receives scanned images (x-rays) through E-mail and accordingly, the firm on the basis of such x-ray forms their professional opinion which is delivered to the hospital through E-mail. The assessee for these services receives professional fees from the hospital in Australian Dollars.

4.1 The assessee is also claiming deduction u/s 10A of the Act for the services rendered by it to the hospital. The assessee during the year has shown gross receipt of Rs. 1,21,23,715/- and Foreign Exchange Profit of Rs. 57428.70 only. The assessee against such gross receipt has shown a profit of Rs. 1,19,49,056/- which is 98.56% as profit from such professional activity. The assessee further claimed deduction u/s 10A of the Act for its profit of Rs. 1,19,49,056/-. The assessee in support of his claim also filed report u/s 10A of the Act in Form No.56F duly signed by the qualified Chartered Accountant.

4.2 The assessee in its profit and loss account has not claimed any remuneration/interest on capital to the partners. The assessee in response to the query raised by the AO about the applicability of the provision of Section 10A(7) r.w.s. 80-IA(8) and 80-IA(10), submitted that there is no

connection between the assessee and the company/hospitals based in Australia.

4.3 The fees were received for the services rendered by the assessee to the hospitals in Australia. These hospitals were also availing the services at the rate which were paid to the assessee. These services were received by the hospital from other radiologists based in India and outside India.

4.4 There was no transfer of fund outside India from the assessee. As such, the entire fund received from the hospital based in Australia was utilized in India only.

4.5 In providing the services above there is a need of high-speed internet connection along with high-quality computer and scanners. The services being specialized in nature were rendered by the partners of the firm only. Therefore, there was no need to hire employees for its business.

4.6 The margin earned by the assessee was high due to the fact of the difference in the foreign exchange rate.

4.7 The assessee also claimed that its partners did not draw any salary and charge any interest on their capital though the clause for the remuneration and interest on the capital was mentioned in the deed of

partnership. However, the assessee claimed that the remuneration to the partners and interest on the capital is not mandatory. Therefore the same was not claimed.

However, the AO disagreed with the submission of the assessee on the following grounds:

i. There was a specific clause in the deed of partnership for making the payment of the remuneration and interest on the partner's capital.
ii. The status of the partner is different from the firm. As such, the partners being professionally qualified doctors were rendering services to the firm and accordingly they were entitled to compensation for the services rendered to the firm.
iii. Similarly, the partners have invested money in the capital of the firm. Therefore, they were entitled to the interest on the capital contributed by them to the firm.
iv. There was regular/monthly withdrawal from the firm by the partners. The act of the assessee shows that instead of debiting the remuneration in the partner's account as well as interest on partner's capital account, the partners have chosen to draw a share of profit from the firm. Therefore, the act of the assessee to take a share of profit instead of remuneration/interest is nothing but a colorable device to escape from the tax liability which was supposed to be imposed on the partners of the firm.
v. The assessee in the immediately succeeding year, i.e. A.Y. 2012-13 in which it was not eligible for deduction u/s 10A of the Act has claimed partner's remuneration amounting to Rs.18,00,000/-.

In view of above, the AO deducted the amount of remuneration and interest on capitals against the profit declared by the assessee in its profit and loss account, as per the provision of Section 40(b) of the Act before applying the provision of section 10A r.w.s. 80IA(8) and 80IA(10) of the Act. The necessary working made by the AO for allowing the claim of deduction u/s 40(b) of the Act stands as under:

NET PROFIT AS PER P&L A/C	1,19,49,056.06
ROUNDED OFF TO	**1,19,49,056.00**
LESS: INTEREST @12% ALLOWED TO PARTNERS ON AVERAGE BASIS	6,29,284.00
BALANCE AMOUNT FOR REMUNERATION TO PARTNERS	1,13,19,772.00
LESS: REMUNERATION TO PARTNERS (PROVIDED AS PER PARTNERSHIP DEED) (WORKING ENCLOSED)	68,81,863.00
TOTAL INCOME	44,37,909.00
ELIGIBLE DEDUCTION UNDER SECTION 10A	44,37,909.00
LESS: DEDUCTION CLAIMED IN THE RETURN OF INCOEM	1,19,49,056.00
EXCESS DEDUCTION CLAIMED DISALLOWED AND ADDED TO THE TOTAL INCOME	**75,11,147.00**

Taxable income of the assessee **Rs.75,11,147.00**

In view of the above, the AO disallowed a sum of Rs. 75,11,147/- being excess deduction claimed u/s 10A of the Act and added to the total income of the assessee.

5. Aggrieved, assessee preferred an appeal before the ld. CIT(A). The assessee before the ld. CIT(A) submitted that the claim for the remuneration and interest on capital as deduction u/s 40(b) of the Act is not mandatory. Therefore, the same cannot be allowed as deduction compulsorily in the statement of income of the assessee.

5.1 The assessee also submitted that even after allowing the deduction for the remuneration and interest on capital the taxable income of the assessee will remain Nil. It is because the balance amount will be eligible for deduction u/s 10A of the Act.

The partners of the firm were entitled to draw the money from the firm which was credited as a share of profit in their capital account. There is no compulsion under the provision of the Act to draw the amount from the firm in the name of remuneration only. As such, it was the decision of the partners of the firm to draw the amount as a share of profit in place of remuneration/interest on capital which is within the purview of the provision of the Act. Thus, it cannot be concluded that the assessee used a colorable device to escape from the tax liability by not claiming the remuneration and interest on capital. The assessee in support of his claim relied on various orders which are recorded in the order of ld. CIT(A).

5.2 Without prejudice to the above, the assessee also claimed that even if it claims deduction u/s 40(b) of the Act on account of remuneration and

interest to the partners then also there will be no taxable profit in the hands of the firm. Therefore, the AO has exceeded Jurisdiction by treating the excess deduction claim by the assessee as taxable income in the hands of the assessee. The ld. CIT(A) after considering the submission of the assessee held that the assessee was to claim a deduction on account of remuneration and interest on capital. But at the same time the ld. CIT(A) directed the AO to tax such amount of remuneration and interest on capital in the individual hands of the partners. As per the ld. CIT(A) the amount of remuneration and interest on capital not claimed by the assessee cannot be charged in the hands of the firm. The relevant extract of the order is reproduced below:

> *6. I have considered the facts of the case, assessment order and the submission made by the Appellant, The AO has observed that Appellant has not shown any remuneration to working partner and not charged 12% interest on partners' capital account as provided in partnership deed. The AO has also compared profit & loss account of year under consideration with profit & loss account for subsequent year and came to conclusion that when Appellant was claiming deduction u/s 10A it has not charged any remuneration and interest in profit & loss account to claim higher deduction and in subsequent year even deduction u/s 10A was not claimed, both interest and remuneration was claimed in profit & loss account, It was also observed that both the partners are regularly withdrawing from their capital account and total withdrawal of both the partners is Rs. 58.5 lac in the case of Bhavesh Dave and Rs. 57.0 lac in the case of Mamta Dave, The partners of the firm are not paying any tax on such withdrawal and if entries relating to remuneration and interest were passed in appellant's case, partners would have to pay taxes on such income. Thus, this entire modus operandi was to avoid taxes. On this basis Assessing Officer has computed interest payable to partners at Rs.6,29,284/- and remuneration to partners at Rs.68,81,863/-. Thus, the aggregate amount of Rs. 75,11,147/- was considered to be payment pertaining*

to interest and remuneration not debited to profit & loss account. The AO has also assessed total income of appellant at Rs.75,11,147/- and no deduction u/s 10A was allowed on such income. On the other hand, Appellant has argued that AO has no right to compel the appellant to compulsorily claim remuneration to partners and interest on partners' capital in spite of the fact that same has been mentioned in the partnership deed as provisions of Income Tax Act override the partnership deed. Further, withdrawals made by partners are out of credit balance of partners lying in firm and said fact cannot lead to conclusion that Appellant has indulged in tax evasion. In support of it5 argument Appellant has relied upon various decisions including decision of Jodhpur ITAT, Amritsar ITAT, Chandigarh ITAT, etc. The Appellant in it:; alternate submission has argued that after charging of interest and remuneration, profit derived by industrial undertaking claiming deduction under Section IDA would be reduced and on such reduced amount Appellant would be eligible for deduction under Section 10A which means that addition made by Assessing Officer for remuneration and interest would not result into any taxable income in the case of Appellant.

On careful consideration of entire facts, it is observed that partnership firm is established by partners as per their mutual consent and same are categorically noted in partnership deed. The various clauses of such deed decide the nature of activities to be carried out, what will be the obligation or firm to partners and vice versa, etc. Even at the time of dispute among the; partners, the partnership deed is essential for resolving such issues of adjudicating legal matters. In the present case it is an undisputed fact that partnership deed categorically states that partners are entitled to interest and remuneration as per provisions of Income Tax Act. The Appellant has not brought any evidence to suggest that these clauses are modified subsequently by entering into supplementary partnership deed. In view of these facts AO Officer was correct in computing interest and remuneration payable to partners as per provisions of Income Tax Act. It is also observed that Appellant is not paying any interest or remuneration when it is claiming deduction under Section IDA but in subsequent year when Appellant did no; claim such deduction, it has paid interest and remuneration to partners. Thus, the net effect in present case of Appellant is that when entire profit i:;

eligible for deduction under Section 10A, Appellant has not claimed any interest and remuneration while computing total income of the firm which means that respective partners have not shown such amount as income in their respective returns. Had Appellant charged interest and remuneration there would not be any changes in taxable income of the firm but the respective partners had to pay taxes on such income. This modus operand itself suggests that Appellant has clearly evaded taxes. Similar issue was decided by jurisdictional Rajkot ITAT in the case of ACIT vs. Meridian Impex [2013] 37 Taxmann.com 22 wherein it is held as under:

> *"Section 10B exempts from tax any profit and gain derived by a 100% Export Oriented Undertaking from the export of articles or things or computer software subject to the fulfilment of conditions stipulated in section 10B The profits and gains eligible for exemption under section 10B can neither be artificial nor inflated profits and gains but actual profits and gains. In other words, all outgoings including expenses eligible for deduction need to be considered while computing the profits and gains of the business. Payment of interest on capital and remuneration to partners is eligible for deduction under section 37 subject to the restrictions placed by section 40(b). Section 40(b) however places certain restrictions on I he deducibility of amount of interest and remuneration payable to partners. The relevant clauses in the copies of partnership deeds filed do no! violate the prescription of section 40(b) Therefore interest on capital and remuneration payable to partners were admissible for deduction under section 37 and is therefore required to be taken into account for computing the profits eligible for exemption under section 10B, (Para 12)*
>
> *Perusal of the partnership deed dated 28-11-2002 requires payment of interest on capital and remuneration to partners. There is similar stipulation in partnership dated 14-09-2005. It is interesting to observe that the partnership deed was executed on 14,09.2005 which is not only duly signed by the existing partners as well as retiring partners but also registered with Sub-Registrar, The supplementary also stated to have been executed*

on 14-09-2005 but it is not registered Sub-Registrar. Both the deeds, ie., the partnership deed and the supplementary partnership deed, have reportedly been executed on 14-09-2005. Supplementary deed was not filed before the Assessing Officer at the time of original assessment proceedings. The supplementary partnership deed, if it was genuinely in existence at the time of origins) assessment proceedings, ought to have been filed before the AO not because it was required by law but because it was relied upon by the Assesses in support of its claim that interest and remuneration was not payable to partners as par supplementary partnership deed. ***Besides,*** *the supplementary deed contains a recital that both the partners have mutually agreed not to pay any interest or remuneration etc. for FV 2005-06. There is no similar supplementary deed for Assessment Year 2009-10. There is another deed of partnership dated 31-03-2006 which also provides for payment of interest on capital and remuneration to the partners, in fact, clause 17 of the aforesaid partnership* ***deed*** *provides* ***that the*** *remuneration shall be paid to the partners as per the derails given in the said clause. [Para 13]*

On careful perusal of the relevant partnership deeds, payment of interest on capital and remuneration to partners is not hit by section 40(b). The mere fact that the partners have chosen to forego interest on capital and remuneration payable to them does not Ipso-facto mean that they are not admissible for deduction. The fact that the Assessee has not debited such interest and remuneration payable to partners to its profit & loss account in spite of their admissibility to deduction makes its intention quite evident, namely, lo inflate the profits eligible for exemption under section 10B. Since the Assessing Officer had correctly worked out interest on capital and remuneration payable to partners and excluded them from overall profits of business for working out profits eligible for exemption under section 10B, order of Commissioner (Appeals) was reversed and that of the Assessing Officer restored. [Para 14]"

Thus, following the decisions of jurisdictional Tribunal which is directly on the present issue, it is held that AO was justified in computing

interest and remuneration of Rs.75,11,147/- in the case" of Appellant. However, interest and remuneration are allowable deduction while computing income from business and profession hence to that extent profit of partnership firm eligible for deduction under Section 10A would be reduced and on such reduced amount Appellant would be entitled to deduction under Section 10A which means that net total income in the case of Appellant would be NIL. At the end of the Computation of Income, the AO has again taxed the samo disallowance of Interest & Remuneration to the tune of Rs.75,11,147/- in the -hands of the appellant through oversight and the AO was not justified in taxing remuneration and interest in the hands of Appellant firm as separate taxable income. Therefore, it is held that interest and remuneration so computed would be taxable as income in the hands of partners of Appellant firm hence Assessing Officers directed to take necessary action in the hands of both the parties for remuneration and interest."

Being aggrieved by the order of ld. CIT(A) assessee is in appeal before us.

6. The ld. AR before us filed a paper book running from pages 1-60 and submitted that the assessee did not claim any remuneration and interest on capital in the A.Y. 2009-10, but no addition was made in its hand in the assessment framed u/s 143(3) of the Act pertaining to the A.Y. 2009-10. The ld. AR further submitted that there was also no addition on account of remuneration/interest in capitals in the A.Y. 2010-11. The ld. AR in support of his claim filed the copies of the assessment order pertaining to the A.Y. 2009-10 & 2010-11 which are placed on record.

6.1 On the other hand, the ld. AR further submitted that it is a fact on record that no remuneration/interest on partner's capital was given to the partners. Therefore no income can be taxed in the hands of the partners on the basis of real income theory.

6.2 The ld. AR also submitted that even if the remuneration is allowed to the firm then also it cannot be taxed in the hands of the assessee.

6.3 The ld. AR further submitted that the assessee in the subsequent year had claimed the deduction on account of remuneration/interest on partner's capital as per the provision of Section 40(b) of the Act. The assessee intentionally did not claim the remuneration/interest on partner's capital during the period when the deduction u/s 10A of the Act was available to it. Thus, the assessee made the tax planning within the purview of law which cannot be equated with tax evasion.

6.4 The ld. AR also submitted that it is not compulsory for the assessee to claim the deduction u/s 40(b) of the Act on account of remuneration/ interest on partner's capital account.

7. On the other hand ld. DR submitted that there is a specific clause for claiming the deduction on account of remuneration and interest on capital within the limit as specified u/s 40(b) of the Act. Therefore, it was imperative for the assessee to claim such a deduction.

7.1 The ld. DR further submitted that the assessee had claimed a deduction on account of remuneration and interest on capital in the subsequent year which proves that the assessee is not maintaining any consistency in its conduct. As such, the assessee cannot claim the deduction on his surmise and conjuncture, assumption/presumption basis. The ld. DR further submitted that the case laws relied by the assessee are distinguishable from the facts of the present case. The ld. DR vehemently supported the order of authorities below.

8. We have heard the rival contentions and perused the materials available on record. The controversy in the case before us relates to the deduction of remuneration/interest on partner's capital not claimed by the assessee in its profit and loss account. The fact is that there was a specific clause in the deed of partnership. Therefore, the deduction for the remuneration/ interest on capital was made by the AO which was subsequently confirmed by the ld. CIT(A) with the direction to allow the claim of deduction to the firm for the remuneration/interest on capital but tax the same in the hands of the partners of the firm.

8.1 It is an undisputed fact that the deed of partnership requires a partner to claim the deduction for the remuneration and the interest on capital. The dispute arises whether the clause mentioned in the deed of partnership is compulsory/mandatory on the part of the assessee.

8.2 The partnership firm comes into existence with mutual understanding between the persons. These understanding can be reduced in writing or without in writing the same. Thus, it is clear that it is not necessary to execute the deed of partnership in writing. However, in the current scenario, it is not possible to work under the module of the partnership without executing the same in writing. It is because to run the business one needs to have a bank account, PAN, etc. which is not possible to obtain without having the deed of partnership in writing. Thus, the deed of the partnership will reveal the understanding on the basis of which partners agreed to work between them.

From the above, it is clear that the clauses mentioned in the partnership deed are not mandatory but made to avoid any ambiguity and misunderstanding. As such, there is no dispute among the partners for not claiming the remuneration/interest of on capital in the profit and loss account of the firm. Therefore, in our considered view the conduct of the partners of the firm suggests that it was agreed not to claim any remuneration/interest on the capital account. In holding so, we find support and guidance from the order of Amritsar Tribunal in the case of ITO vs. Mala Tondon in ITA No.319/ASR/2010 vide order dated 14.06.2011 wherein it was held as under:

> *"6. We have heard both the parties and given our thoughtful consideration to the rival submissions, examined the facts of the case, evidence and material placed on record and also gone through the*

orders of the authorities below. A careful perusal of the impugned appellate order clearly reveals that the Ld. CIT(A), has considered and adjudicated the issue, in question, in greater detail, after appreciation of the evidences and material on record, as also the legal and factual position of the case. Needless to say that the impugned appellate order is well reasoned and based on the cogent and credible material and facts of the case. However, it would pertinent to reproduce the relevant part of the decision of the CIT(A), for the purpose of proper appreciation of the same:

"3.4. I have considered the rival submissions carefully. An identical issue has been decided in the case of Rohit Tandon, husband of the appellant, the other partner in M/s. Dynamech holding 50% share in the partnership firm for the assessment year 2006-07. In that case also, the AO had added the interest payable on the capital of Sh. Rohit Tandon and remuneration payable to Sh. Rohit Tandon to the total income of the assessee, I have adjudicated that appeal vide order dated 14.7.2009 in appeal No.591/08-09/CIT(A)/Jal and have deleted similar additions as under:
"9.5 I have considered the rival submissions carefully. Clause 4 and 5 of the partnership deed providing for interest on capital and salary are as under:
"4. The capital of the partners is as per their respective accounts in the books of the partnership. The partners shall be entitled to interest on their capital @ 18% per annum or at such other rate or rates as the partners may at the end of each financial year mutually settled subject to the maximum amount admissible under the Income-tax Act, 1961.
5. Both the partners shall diligently attend to the business of the partnership and carry on the same for their greatest common advantage. Both the working partners shall be entitled to a remuneration of Rs.48,000/- per annum each or at such other rate or rates as the partners may at the end of each financial year, mutually settle subject to the maximum amount admissible under the Income-tax Act, 1961."
9.6. The aforesaid clauses of the partnership deed are clearly enabling clauses since the word used in both the clauses are "the partners shall be entitled...". This shows that the partners were entitled to get interest on the capital and to draw remuneration for their services without

binding them to do so. This, in my opinion, is not a mandatory provision in the partnership deed which would be worded like " the partners shall be provided/given....". Further, it is also mentioned in both these clauses, that the rate or rates of interest and the remuneration would be mutually settled by the partners at the end of each financial year. Now, a partnership, by its very name and as per the provisions of Partnership Act is by will of the partners. There are only two partners in this firm, both having equal shares. The accounts drawn up at the end of the year reveal that no interest on the capital or remuneration to the partners has been provided in the accounts of the firmM/s.Dynamech. This act by itself signifies that the partners have agreed not to provide interest on their capital or to charge remuneration for their services. In my opinion, the terms of the partnership deed do not signify that interest on capital and remuneration to partners had necessarily to be provided in the account of M/s. Dynamech..

9.7. The AO has drawn support from the provisions of section 80IA(10). This sub-section provides that where the affairs between the eligible business and any other person is so arranged that more than ordinary profits arise to the assessee, the AO shall, in computing the profit and gains of such an eligible profits for the purposes of deduction under this section, take the amount of profits as may be reasonably taken to have been derived therefrom. Thus sub-section has been made applicable to section 80IB by virtue of sub-section (13) of section 80IB. However, this sub-section only enables, the AO to effect the profit of the undertaking claiming deduction u/s 80IB, which is M/s. Dynamech in this case. This does not enable the AO to alter the profits or the income of the other person referred to in this sub-section. It is a fact that the assessee has not received interest and remuneration from M/s. Dynamech. As noted earlier, the terms of partnership deed are not so worded so as to make payment of interest on capital and remuneration to partners as mandatory. It is also not rebutted by the AO that no interest or remuneration has been received by the appellant in earlier years also. This income has not accrued or arisen to the assessee. I, therefore, hold that the AO was not justified in making the addition on account of interest on capital in M/s. Dynamech and remuneration receivable from M/s. Dynamech. This ground of appeal is allowed."

3.5. Following the decision in the case of Sh. Rohit Tandon (supra), ground No.3 of appeal is allowed."

6.1. In view of the above, we do not find any infirmity in the findings of the CIT(A), as the same are based on proper appreciation of the legal and factual position of the case. Accordingly, this appeal of the revenue is dismissed."

From the above order, we note that it is not compulsory to claim the remuneration/interest on partner's capital account despite the fact there was a specific clause in the deed of partnership.

8.3 The next controversy arises in the case before us from the directions given by the ld. CIT(A) to tax the amount of remuneration/interest on partner's capital account in the hands of the partners. It is a fact that the AO allowed the claim of the deduction for the remuneration/interest on partner's capital account in his computation of income. But the same was added back by the AO on the ground that it was not claimed as a deduction in the profit and loss account. However, the ld. CIT(A) directed to delete the addition made in the hands of the firm and further directed to tax the same in the hands of the partner of the firm.

8.4 From the preceding discussion, we note that there was no issue to tax the remuneration/interest on the capital in the hands of the partners. Thus, in our considered view ld. CIT(A) has exceeded his jurisdiction by giving direction to the AO for the dispute which is not arising from the order of the AO. In this regard, we find support and guidance from the

order of this Tribunal in the case of Income Tax Officer vs. Biotech Ophthalmic Pvt. Ltd. reported in ITA No.443/Ahd/2011 vide order dated 31.08.2014 wherein it was held as under:

> ***"9.*** *The assessee has also moved a cross objection which seeks to expunge CIT(A)'s directions to bring this deemed dividend to tax in the hands of Shri Mehul P Asnani, director in assessee's company.*
>
> ***10.*** *Learned counsel submits that while deciding appeal of the assessee before him, it was not open to the CIT(A) to give adjudication on taxability of this income in the hands of a person other than this assessee. He has clearly exceeded his jurisdiction in holding that the amount in question is taxable in the hands of Shri Mehul P Asnani. He urges us to expunge these observations. In support of his prayer, learned counsel for the assessee invites our attention to a decision of the coordinate bench in the case of Jagat Minerals (P.) Ltd. v. Dy. CIT [IT Appeal Nos 2110, 2403 and 2750/Ahd/11; dated 22.4.2015) whereby similar remarks made by the CIT(A) have been modified.*
>
> ***11.*** *Learned Departmental Representative, on the other hand, relies upon the stand taken by the CIT(A). He submits that when the impugned addition was deleted solely on the ground that it was required to be taxed in the hands of the director concerned, the CIT(A) was quite justified in directing the Assessing Officer to bring it to tax in the hands of that director.*
>
> ***12.*** *We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.*
>
> ***13.*** *In our considered view, it is important to first understand the role played by the findings or directions of this nature. We are dealing with the assessment year 2006-07 and the order of the CIT(A) was served on the Assessing Officer on 5th January 2011. Obviously, the assessment must have attained finality, by the time the Assessing Officer came to know of these directions, since in terms of Section 153(1) "no order of assessment shall be made under section 143 or section 144 at any time after the expiry of (a) two years from the end of the assessment year in which the income was first assessable; or (b) one year from the end of*

the financial year in which a return or a revised return relating to the assessment year commencing on the 1st day of April, 1988, or any earlier assessment year, is filed under sub-section (4) or sub-section (5) of section 139, whichever is later". No doubt, under section 153(2A), when an assessment is set aside or cancelled under section 250, 254, 263 or 264 a fresh assessment, as a result of such a cancellation, can be framed within one year from the end of the financial year in which the order under section 250 or section 254 is received by the Commissioner or the order under section 263 or section 264 is passed by the Commissioner. However, this provision comes into play only when the order passed under section 250, 254, 263 or 264 in the case of the assessee himself. That is not the situation that we are dealing with at present.

14. *Section 153(3), dealing with the impact of the findings or direction given by the revisionary, appellate or judicial authorities, prescribes that "the provisions of" inter alia section 151(1) "shall not apply to the ….. assessments, reassessments and recomputations which may, subject to the provisions of sub-section (2A) be completed at any time where the assessment, reassessment or recomputation is made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order, under sections 250, 254, 260, 262, 263 or 264 1535 or in an order of any court in a proceeding otherwise than by way of appeal or reference under this Act". In other words, when effect of a finding or direction of an revisionary, appellate or judicial authority is to be given, that exercise can be carried out any point of time de hors the time limits specified in section 153(1). However, even this relaxation of time limits is subject to certain riders, including rider contained in Explanation 3 to Section 153(3) which provides that, where by a revisionary, appellate or judicial order of the above nature, an income is excluded from the income of one assessee and held to be income of the other assessee, the assessment of such an income in the hands of another assessee "be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order, provided such other person was given an opportunity of being heard before the said order was passed (Emphasis by underling supplied by us)." Clearly, therefore, unless the person in whose hand income is directed to be added has been heard before such directions are issued, the directions issued by the revisionary, appellate or judicial*

authority are an exercise in futility. This rider is equally relevant in respect of reopening of an assessment under section 154, as a result of the findings or directions of the revisionary, appellate or judicial authorities.

15. *It is an undisputed position, on the facts of this case, that Shri Mehul P Asnani, in whose hands CIT(A) has directed this income to be added, has not been granted an opportunity of hearing by the CIT(A) before these directions were issued. Such being the admitted facts, it's beyond doubt that a completed assessment cannot be disturbed or reopened to give effect to such findings or directions.*

16. *There is, however, an even more fundamental issue, and that issue is whether the direction that the deemed dividend income being brought to tax in the hands of Shri Asnani is a direction necessary for the disposal of case. This issue assumes significance in view of the legal position that, as held by Hon'ble Supreme Court in the case of Rajinder Nath v. CIT [1979] 120 ITR 14/2 Taxman 204, "As regards the expression "direction" in s. 153(3)(ii) of the Act, it is now well settled that it must be an express direction necessary for the disposal of the case before the authority or Court. It must also be a direction which the authority or Court is empowered to give while deciding the case before it." Their Lordships then added that "The expressions "finding" and "direction" in s. 153(3)(ii) of the Act must be accordingly confined" and that "Sec. 153(3)(ii) is not a provision enlarging the jurisdiction of the authority or Court."*

17. *As to what constitutes "an express direction necessary for disposal of a case", we find the following guidance from Their Lordships:*

> *"To be a necessary finding, it must be directly involved in the disposal of the case. It is possible in certain cases that in order to render a finding in respect of A, a finding in respect of B may be called for. For instance, where the facts show that the income can belong either to A or B and no one else, a finding that it belongs to B or does not belong to B would be determinative of the issue whether it can be taxed as A's income. A finding respecting B is intimately involved as a step in the process of reaching the ultimate finding respecting A. If, however, the finding as to A's liability can be directly arrived at without necessitating a finding in respect of*

B, then a finding made in respect of B is an incidental finding only. It is not a finding necessary for the disposal of the case pertaining to A. The same principles seem to apply when the question is whether the income under enquiry is taxable in the assessment year under consideration or any other assessment year. As regards the expression "direction" in s. 153(3)(ii) of the Act, it is now well settled that it must be an express direction necessary for the disposal of the case before the authority or Court. It must also be a direction which the authority or Court is empowered to give while deciding the case before it."

18. *Let us now, in the above light, revert to the facts of the case before us. The authorities below were dealing with a deeming fiction, i.e. deemed dividend, about an income. The case of the assessee was that this deeming fiction of deemed dividend could not be invoked in the present case because the assessee did not hold the shareholdings in the company which had extended loan to the assessee. This plea has been accepted by the CIT(A), but, for accepting such a plea, it is not a condition precedent that this deeming fiction must come into play in the hands of some other assessee other than this assessee. Whether the loan received by the assessee is held to be deemed dividend in the case of some other person or not is wholly irrelevant for deciding whether or not this is deemed dividend in the hands of this assessee or not. Learned CIT(A) holds that since Mehul P Asanai is a shareholder in the said company, the receipt can be added as deemed dividend in the hands of Mehul P Asnani, but then what he overlooks is that all the conditions precedent for taxing a receipt as deemed dividend are to be satisfied qua the assessee in whose income is to be taxed, and being a shareholder is only one such precondition. Learned CIT(A) has, as noted earlier in this order, observed that "If the recipient of loan is not a shareholder and the transaction is covered by this provision, the addition is to be made in the hands of the shareholder", but then it is difficult to comprehend as to how one can come to a conclusion that a transaction is covered by this provision, i.e. deeming fiction of the deemed dividend, without examining the transaction between the shareholder of the company and the company in which such shares are held. Without even giving a finding about satisfaction of all these conditions, learned CIT(A) proceeds to hold that it is an income to be taxed in the hands of the shareholder i.e. Mehul P Asnani. It is a classic*

case of putting cart before the horse and is wholly based on fallacious logic. The direction is thus not only unnecessary but patently incorrect. Viewed thus, the direction given by the CIT(A), for taxability of this deemed dividend in the hands of Shri Asnani, does not constitute "an express direction necessary for disposal of a case". Nothing really turns on his direction, as such. Even if this direction was correct, learned CIT(A) had no business to give such a direction without affording an opportunity of hearing to the affected party and that too when it was absolutely necessary to decide the issue in appeal before him. There is a certain degree of restraint that is expected of the appellate authorities in discharge of their judicial functioning.

19. *As we part with our adjudication on this issue, we may also take note of learned Departmental Representative's contention that the assessee has no locus standi to raise any grievance against these directions as he is not the aggrieved party vis-à-vis these directions. We are unable to see any merits in this plea either. The manner in which the appeal has been decided by the CIT(A) gives an impression, which is a wholly inappropriate impression and which has also been reiterated before us by the learned Departmental Representative, that the impugned additions have been deleted in the hands of the assessee as these additions are required to be made in the hands of someone else. The deletion of the impugned addition in the hands of the assessee company has been thus projected to be, though perhaps at a somewhat subliminal level, dependent of the addition being confirmed in the hands of the director. The directions given by the CIT(A) do prejudice interests of the assessee inasmuch as these directions not being implemented may be viewed as detrimental to the interests of the assessee but then the directions suffer from legal infirmities, from glaring procedural flaws, and are incapable of being implemented anyway. In any case, since these directions are given in the case of this assessee and the appellate order by the CIT(A) in the case of this assessee cannot be challenged, in appeal before us, by a third party, the only way to prevent these directions reaching the finality is a challenge by this assessee himself, particularly because, as is the settled legal position, the statutory provisions are to be construed ut res magis valeat quam pereat i.e., in such a manner as to make it workable rather than redundant. The assessee before us, therefore, has, in our considered view, locus standi to challenge legality of these directions.*

> ***20.*** *In view of the above discussions, and bearing in mind entirety of the case, we vacate the directions in questions. The cross objection is thus allowed."*

In view of above, we hold that the ld. CIT(A) erred in directing the AO to tax the amount of remuneration and interest in the hands of the partner of the firm. Thus, we set aside the order of ld. CIT(A) and direct the AO to delete the addition in terms of the above. Thus, the ground of appeal of the assessee is allowed.

8. In the result, the appeal of the assessee is **allowed**.

This Order pronounced in Open Court on	**15/11/2018**

sd/-	Sd/-
(मधुमिता रॉय)	**(वसीम अहमद)**
न्यायिक सदस्य	**लेखा सदस्य**
(MADHUMITA ROY)	**(WASEEM AHMED)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Ahmedabad; Dated 15/11/2018

Príti Yadav, Sr.PS

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-Gandhinagar, Ahmedabad.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad.
6. गार्ड फाईल / Guard file.

आदेशानुसार/BY ORDER

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad