

IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH, MUMBAI

BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER &
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 908/Mum/2017

(A.Y: 2012-13)

Ace Property Developers 207, Kartik Complex, New Link Road, Andheri West, Mumbai.	Vs.	ACIT 24(1) R.No. 603, Piramal Chambers, Lalbaug, Parel, Mumbai.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AASFA3204E		
Appellant	..	Respondent

Appellant by :	Shri Yogesh Thar, AR
Respondent by :	Shri Brajendra Kumar, DR

Date of Hearing	09.02.2021
Date of Pronouncement	26.03.2021

आदेश / O R D E R

PER PAVAN KUMAR GADALE. JM:

The assessee has filed the appeal against the order of the Commissioner of Income Tax (Appeals) - 36, Mumbai, passed u/s. 143(3) and 250 of the Income Tax Act, 1961. The assessee has raised the only ground of appeal:

. The CIT(A) has erred in confirming the action of the AO by disallowing Rs.33,52,880 being remuneration to

partners not based on amended deed and not in accordance with law, after thought and hypothetical argument without fulfilling procedural requirement and law in vogue. The appellant prays it be held that above deduction are in accordance with law and thus addition be deleted and or appropriately reduced.

2. The Brief facts of the case are that, the assessee is partnership firm engaged in the business of builders and property developers and filed the return of income electronically for the A.Y 2012-13 disclosing a total income of Rs.43,20,507/-and the return of income was accompanied with audited profit and loss account, balance sheet and tax audit report under Form 3CB & 3CD. The return of income was processed u/s 143(1) of the Act. Subsequently, the case was selected for scrutiny under the CASS and notice u/s 143(2) and 142(1) of the Act along with questionnaire was issued. In compliance to the notices, the Ld. AR of the assessee appeared from time to time and submitted the details supporting the return of income. The AO on verification of the return of income found that the assessee firm in the profit and loss account has claimed partners remuneration to the extent of Rs.67,05,760/- and

required the assessee to produce the copy of the partnership deed. Whereas, the assessee has furnished the copy of partnership deed dated 08.10.2010 and subsequent amended deeds. The A.O observed that there are only two working partners in the original deed and the quantum of remuneration was specifically mentioned in the deed. But in the revised amended partnership deed there is no such clause which specify the amount of remuneration payable to partners. The A.O observed that the remuneration provided has to be admissible/quantified and placed reliance on the CBDT circular No. 739 dated 25.03.1996. Whereas for the claim of deduction u/s 40(b)(v) of the Act the partnership deed should specify the amount of remuneration payable to each individual working partner or laid down the manner of such quantifying remuneration to working partners. The A.O observed that since in the revised deed of partnership there is no such clause which specify the amount of remuneration payable to each individual working partner and the assessee has not complied with the conditions laid by the CBDT circular. The A.O. finally

has disallowed the partners remuneration claimed u/s 40(b)(v) of the Act of Rs. 67,05,760/-and assessed the total income of Rs.1,10,26,270/-and passed order u/s 143(3) of the Act dated 29.03.2015.

3. Aggrieved by the A.O. order, the assessee has filed an appeal before the CIT(A). The Ld.CIT(A) on perusal of the facts and findings of the A.O has dealt on the provisions of the Sec.40(b)(v) of the Act. Whereas out of the six partners where the remuneration is payable, the CIT(A) has allowed the claim of two partners remuneration as per the original partnership deed to extent of Rs.33,52,880/- and the balance disallowance is sustained and partly allowed the assessee appeal. Aggrieved by the CIT(A) order the assessee has filed an appeal with Hon'ble Tribunal.

4. At the time of hearing, the Ld.AR submitted that the original partnership deed and subsequent revised deed was brought to the knowledge of the A.O. The CIT(A) has granted relief in respect of two partners and disallowed the remuneration of other partners.

The Ld.AR contentions are that the assessee firm has specifically made it clear in the partnership deed with respect to remuneration and only nomenclature is changed. The partners who received the salary from the partnership firm have offered the remuneration in their individual assessments and were subjected to income tax. The Ld. AR relied on the judicial decisions and supported his arguments with the paper book and prayed for allowing the appeal.

5. Contra, the Ld. DR supported the order of the CIT(A) and further mentioned that the partnership deed is not clear in respect of calculation of salaries payable to working partners and prayed for dismissal the assessee appeal.

6. We heard the rival submissions and perused material on record. The sole crux of the disputed issue as envisaged by the Ld.AR is with respect to disallowance of remuneration in respect of the four partners sustained by the Ld.CIT(A). Whereas, the Ld.CIT(A) considering the CBDT Circular has

granted the relief in respect of remuneration of two partners. The Ld. AR's contentions are that, in the revised /supplementary partnership deed it was made clear that the partners who are joining the partnership firm are eligible for the salaries/remuneration. Further the assessee firm has calculated the book profits as per provisions of Sec. 40(b)(v) of the Act and the partnership deed is clear on disclosing the facts but the assessee firm has not specifically made quantification as the salaries/remuneration differ due to increase or decrease in the book profits. We find that the assessee firm has clearly mentioned in the supplementary deed of partnership that the terms and conditions set out in the original partnership deed and the amendments shall deemed to have come in force with effect from 01/01/2012. Further, the assessee firm has debited the remuneration and the same amount was considered as income in the hands of the partners and subjected to income tax. The partners have filed the return of income offering the remuneration from the partnership firm. Since the A.O. has disallowed the

remuneration in the partnership firm assessment and such addition tantamount to double taxation as the same income cannot be taxed twice, once in the hands of the firm and again in hands of partners. We find the Hon'ble Tribunal of Jaipur Bench in the case of ACIT Vs. Associate Engineers and Allied Products, [2017] 81 taxmann.com 451 has dealt on the disputed issues. The contentions put forth before the Hon'ble Tribunal that where the disallowance was made in the hands of the firm and the partners have offered the income in their hands, it is subject to double taxation. We considered it appropriate to refer to the observations of the Hon'ble Tribunal at para 2.1 to 2.6 of the order as under:

"2.1 Apropos Ground No. 1 of the Revenue wherein the AO observed that the assessee had claimed as deduction on account of remuneration / salary u/s 40(b)(v) of the Act at Rs. 25,94,176/- in the profit and loss account. The AO on perusal of the record and partnership deed dated 15- 04-2008 of the firm found that the sum of Rs. 12,97,088/- each was paid to two partners i.e. Shri Ram Niwas Sharma (50% share) and Shri Rajeev Sharma (50% share). The AO observed from clause 6 of the partnership deed as to remuneration paid to two partners, as under:-

"That all the partners referred to above shall be working partners and also entitled to salary at the end of each year as per Section 40(b) of the I.T. Act.

However, the partners may be their mutual consent add, amend modify, reduce and cancel this clause in any manner as may be mutually decided between them from time to time.”

The AO thus observed that it is clear that the firm neither specified the amount of remuneration / salary to each working partner nor laid down the manner of quantifying such remuneration / salary. The AO observed that in such cases where neither the amount had been quantified nor even the limit of total remuneration had been specified but the same had been left to be determined by the parties at the end of the accounting period and in such cases payment of remuneration/ salary as per Section 40(b) to partners cannot be allowed as deduction in the computation of firm's income. The AO observed that as per CBDT Circular No. 739 dated 25- 03-1996, for the assessment year, subsequent to assessment year 1996-97, no deduction u/s 40(b)(v) will be admissible unless the partnership deed either specifies the amount of remuneration payable to each individual working partner or lays down the manner of quantifying such remuneration. The AO to this effect issued a letter to assessee firm on 21- 12-2012 and show caused as to why the said sum of Rs. 25,94,176/- should not be disallowed as deducted on account of salary/ remuneration working partners as per Section 40(b)(v) from the firms income. The ld. AR of the assessee vide letter dated 9-01-2013 replied as under:-

“Central Board of Direct taxes cannot issue a circular which goes against the provisions of the Act. The CBDT can only clarify issues but cannot insert terms and conditions which are not part of the main statute. It is not necessary that the deed shall provide for manner of quantification of the remuneration paid to each individual partner. The Himachal Pradesh High Court in the case of Durga Das Devki Nandan held that the CBDT circular to be invalid being inconstant with the terms of Section 40(b). A reading of Section 40(b) would entail that the statutory requirement is that the remuneration to partners shall be authorized by, and in accordance with, the terms of the partnership deed. Therefore, if the deed provides that the remuneration to partners shall be in accordance with the limits laid down in Section 40(b) of the Act then it shall be taken as sufficient compliance with the provision.

Further in case of Eqbal Ahmed &Co. vs. ITO (2005) 3(II), ITCL (Kol.'A'-Tribunal) held that the remuneration to working partners could not be disallowed simply on the ground that its quantification was not mentioned in deed of partnership and it simply stated therein that the same will not be beyond the permissible limit as specified under the Act.'

The AO by considering the facts and reply of the ld. AR observed that it is proved that the assessee firm admitted that they did not satisfy the amount of remuneration payable to their individual working partner or lay down the manner of quantifying such remuneration. The AO further observed that even the assessee firm had mentioned in their partnership deed that each working partner also entitled to salary at the end of each year as per Section 40(b) of the Act. On the other hand, the remuneration payable was left to future mutual agreement between the partners who are entitled to decide and quantify the quantum. The AO observed that the remuneration can be any amount or figure but not more than the maximum amount stated in Section 40(b)(v) of the Act. The AO thus observed that the requirements of Section 40(b)(v) are not satisfied. The The ACIT, Circle- 1, Kota vs. M/s. Associated Engineers & Allied Products . 5 AO relied on the case of Sood Brij & Associates vs. CIT -XIII, New Delhi 15 Taxman.co.76(2011) (Del) in this facts of the case. Ultimately, the AO disallowed a sum of Rs. 25,94,176/- and added to the total income of the assessee.

2.2 Being aggrieved, the assessee carried the matter before the ld. CIT(A) who deleted the addition made by the AO by observing as under:-

'In my opinion, it was sufficient to mention that remuneration would be computed as per Section 40(b) of the I.T. Act. The assessee computed the remuneration as per Section 40(b) of the I.T. Act and credited 50% each to both the partners. The assessee did not dispute the fact that remuneration was paid to the partners. Secondly this amount was taxable in the hands of partners and if the same is disallowed in the hands of assessee firm then it would result in double taxation. Considering the above, the AO is directed to delete the addition of Rs. 25,94,176/-.'

2.3 Now the Revenue is before us against the order of the ld. CIT(A)

2.4 During the course of hearing, the ld. DR relied on the order of the AO and prayed that the ld. CIT(A) has wrongly allowed the claim of the assessee amounting to Rs. 25,94,176/- which has been disallowed by the AO on account of remuneration to partners.

2.5 During the course of hearing, the ld. AR of the assessee relied on the order of the ld. CIT(A) and submitted that the ld. CIT(A) has rightly deleted the addition made by the AO. The ld. AR of the assessee relied on following case laws to this effect.

(i) *Eqbal Ahmed & Company vs. ITO (2005) 1 SOT 202 (Kol-Tribunal)*

(ii) *Durga Das Devki Nandan vs. ITO (2011) 200 Taxman 318 (H.P.)*

(iii) *ACIT vs. Suman Construction (2009) 121 TTJ 847 (Pune)*

(iv) *CIT vs. Asian Marketing (2012) 254 CTR 453 (Raj.)*

(v) *Medicare Investments Ltd. vs. JCIT , 14 ITD 34 (Del.)*

2.6 We have heard the rival contentions and perused the materials available on record. We find that the assessee computed the remuneration as per Section 40(b) of the Act and credited 50% each to both the partners. The AO did not dispute the fact that remuneration was paid to the partners. Secondly, this amount was taxable in the hands of partners and if the same is disallowed in the hands of assessee firm then it would result in double taxation. In view of the above facts and circumstances of the case and the case laws cited by the ld. AR of the assessee, we feel that the ld. CIT(A) has rightly directed the AO to delete the addition. Hence, we find no infirmity in the order of the ld. CIT(A) which is sustained. Thus Ground No. 1 of the Revenue is dismissed.

7. In the present case, the A.O has disallowed the claim of the assessee firm because it has not quantified the remuneration but the partners have offered the remuneration in their individual assessments for income tax. We observed that the

assessee firm cannot be taxed for the same income twice. In the present case the A.O has disallowed the remuneration of six partners, whereas the Ld.CIT(A) has granted relief in respect of two partners and remaining was disallowed as it was not specified/ quantified in the deed of partnership. We cannot appreciate the basis for sustaining the addition as the assessee has already debited profit and loss account and the partners have offered the remuneration to tax in their hands and rely on the ratio of decision in the case of ACIT Vs. Associate Engineers & Allied Products (supra).Accordingly, we set aside the order of the CIT(A) and direct the A.O to delete the addition and allow the grounds of appeal of the assessee.

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

Order pronounced in the open court on 26.03.2021

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Mumbai, Dated 26.03.2021

KRK, PS

आदेश की प्रतिलिपि अग्रहित/Copy of the Order forwarded to :

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

1.

(Asst. Registrar)
ITAT, Mumbai