

आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH, CHENNAI

श्री महावीर सिंह, उपाध्यक्ष एवं श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष

**BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT AND
SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER**

आयकर अपील सं./ITA Nos.:**562, 563, 564, 565 & 566/CHNY/2021**

निर्धारण वर्ष /Assessment Years:2008-09, 2008-09, 2010-11, 2010-11 &
2013-14

M/s. Texmo Industries,

PB No.5303, Mettupalayam Road,
G N Mills Post,
Coimbatore – 641 029.

The ACIT,

v. Non-Corporate Circle-4,
Coimbatore.

PAN: AABFT 1899B

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by

: Shri K. Vignesh, Advocate

प्रत्यर्थी की ओर से/Respondent by

: Shri AR.V. Sreenivasan, JCIT

सुनवाई की तारीख/Date of Hearing

: 19.05.2022

घोषणा की तारीख/Date of Pronouncement

: 08.06.2022

आदेश /O R D E R

PER MAHAVIR SINGH, VP:

These five appeals by the assessee are arising out of different orders of Commissioner of Income Tax (Appeals), Coimbatore passed u/s.143(3) r.w.s. 154 of the Income Tax Act, 1961 (hereinafter the 'Act') for the assessment years 2008-09 & 2010-11 vide orders dated 23.09.2020 & 24.09.2020 respectively and u/s.143(3) r.w.s 254 of the Act, for the assessment years 2008-09, 2010-11 & 2013-14 vide orders dated 03.08.2020, 04.08.2020 &

04.08.2020 respectively. The rectification orders u/s.154 of the Act were passed by the ACIT, Non-Corporate Circle-4, Coimbatore for the assessment years 2008-09 & 2010-11, both dated 23.02.2018 and the orders giving effect for the assessment years 2008-09, 2010-11 & 2013-14 were passed by the ACIT, Non-Corporate Circle-4, Coimbatore u/s.143(3) r.w.s. 254 of the Act vide orders of even date 31.12.2018.

2. First, we will deal with **ITA Nos. 562 & 564/CHNY/2021** for the assessment year 2008-09 & 2010-11.

3. The first common issue in these two appeals of assessee is as regards to the order of CIT(A) confirming the action of AO in rejecting the assessee's application u/s.154 of the Act for rectification of mistake while computing the short term capital gain in respect of depreciable assets in accordance with section 50 of the Act.

4. Brief facts are that the assessee filed its return of income electronically for assessment years 2008-09 & 2010-11 on 24.09.2008 & 26.09.2010 respectively. The assessments for both the years were framed by the AO u/s.143(3) vide orders dated

26.04.2010 & 27.03.2013 making disallowance u/s.14A of the Act. Subsequently, the assessment was reopened for assessment year 2008-09 and for assessment year 2010-11, the CIT(A) passed revision order u/s.263 of the Act with direction to the AO to complete the assessment after considering the issue of Short Term Capital Gain on sale of land and building. Even in the reopening of assessment for assessment year 2008-09, the issue was only in regard to sale of land and building and addition of Short Term Capital Gain on the same. For both the assessment years, the assessee went in appeal before CIT(A) and the CIT(A) for the assessment year 2008-09 reversed the order of AO and for assessment year 2010-11, the CIT(A) again deleted the addition made by AO, in both the years the additions made by AO on account of Short Term Capital Gain on sale of land and building was deleted by CIT(A). Subsequently, the Tribunal by combined order for assessment years 2008-09, 2010-11 & 2013-14 in ITA Nos.3145, 3146 & 3147/Mds/2016 dated 22.03.2017 reversed the order of CIT(A) and confirmed the order of AO by following the decision of Hon'ble Kerala High Court in the case of CIT vs. Sakthi Metal Depot, [2011] 333 ITR 492, wherein the Tribunal allowed the appeals filed by Revenue by observing as under:-

22. We have heard both the sides and perused the material on record. Similar issue can be considered by the Kerala High Court in the case of CIT Vs. Sakthi Metal Depot reported in [2011] 333 ITR 492 (Ker) wherein held that:

“allowing the appeal, that the building which was acquired by the assessee in 1974 and was a business asset for 21 years, that was up to the assessment year 1995-96, still continued to be part of the business assets and a depreciable asset, no matter that the non-user disentitled the assessee for depreciation for two years prior to the date of sale. The depreciable asset forming a part of block of assets within the meaning section 2(11) of the Act would not cease to be part of the block of assets. The description of the asset by the assessee in the balance-sheet as an investment asset was meaningless and was only to avoid payment of tax on short-term capital gains on sale of the building. So long as the assessee continued business, the building forming part of the block of assets would retain its character as such, no matter that one or two of the assets in one or two years not used for business purposes disentitled the assessee for depreciation for those years. If the assessee, instead of selling the building, started using the building after two years for business purposes the assessee could continue to claim depreciation based on the written down value available as on the date of ending of the previous year in which depreciation was allowed last. The order of the Tribunal was to be set aside and the assessment on the profit on sale of the building as short-term capital gains was to be confirmed.”

Accordingly, we reverse the order of Ld.CIT(A) and restore the order of AO. The ground raised by the Revenue is allowed.

4.1 In lieu of this Tribunal order for all these three assessment years, the AO gave appeal effect and assessee challenged the appeal effect order u/s.154 of the Act before the CIT(A). The CIT(A) noted this fact that this ground of depreciation u/s.50 of the Act was never before the Tribunal and there is no such direction of the Tribunal rather Tribunal allowed the grounds raised by Revenue in regard to the issue of Short Term Capital Gain on sale of land and building. The CIT(A) noted this fact as under:-

“There is no such ground before the ITAT on the issue of applicability of sec 50, but the CIT(A) being empowered to look into matters brought up before it for the 1st time, this is within its jurisdiction. The brief for the assessing officer was only to give effect to the ITAT order. Since there was clear direction from ITAT, the AO carried it out. This matter i.e the grounds raised now, on the applicability of sec 50 was taken up before me and the same is adjudicated here.”

4.2 But, subsequently after discussing the issue on merits dismissed the claim of assessee while acting u/s.154 of the Act. Aggrieved assessee came in appeal before the Tribunal.

5. Now, the Id.counsel for the assessee before us stated that in these two years i.e., 2008-09 & 2010-11, the assessee carried the matter before Hon'ble Madras High Court and the Hon'ble Madras High Court admitted this issue and pending adjudication after admission.

6. On the other hand, the Id. Senior DR stated that once the Tribunal has allowed the revised appeal and owes that the assessee's capital gain arising out of sale of land and building being depreciable asset be assessed as Short Term Capital Gain and not Long Term Capital Gain, this has attained finality and the matter reached before Hon'ble High Court and which is pending adjudication. He stated that now u/s.154 of the Act, in second route the assessee cannot raise this issue because this is a highly debatable issue and he want to rewrite or review the order of the Tribunal, which is not permissible.

7. We have heard rival contentions and noted this issue arising out of Tribunal's order in ITA Nos. 3145, 3146 & 3147/Mds/2016 dated 22.03.2017 is now the subject matter of appeal before the Hon'ble Madras High Court u/s.260A of the Act and the new issue cannot be raised while acting u/s.154 of the Act for reviewing the order of Tribunal. This issue of assessee's appeal is dismissed.

8. Another common issue raised is as regards to charging of interest u/s.234D of the Act and according to us, charging of interest u/s.234D of the Act is consequential and hence, dismissed. Therefore, these two appeals of the assessee are dismissed.

ITA Nos. 563, 565 & 566/Chny/2019

9. The first issue in these three appeals of assessee is as regards to the order of CIT(A) confirming the action of AO in disallowing the interest and remuneration paid to partners u/s.40(ba) of the Act. For this assessee has raised identically worded grounds in three appeals and the relevant ground Nos. 2& 3 as raised in assessment year 2008-09 in ITA No.563/CHNY/2019 reads as under:-

2. The AO has failed to comply with the principles of natural justice by re-characterizing the Firm as an AOP without issuing a valid show-cause notice and providing a reasonable opportunity of being hearing. The action of the AO lacks jurisdiction and hence is bad in law.

3. The learned CIT(A) erred in disallowing the interest and remuneration paid to partners amounting to 36,00,000/ u/s.40(ba).

10. At the outset, the Id.counsel for the assessee as well as Id. Senior DR agreed that this issue is squarely covered by Tribunal's decision in assessee's own case in ITA Nos. 3145, 3146 & 3147/Mds/2016 dated 22.03.2017, wherein the Tribunal has remitted the matter back to the file of the AO exactly on same facts by observing in para 6 as under:-

6. We have heard both the parties, perused the material on record and have also carefully gone through the Partnership Deed. Admittedly, the assessee was assessed under the status of the "Firm". However, the AO made observations in the assessment order that assessee to be assessed as a "AOP", thereby he disallowed the payment of interest and salary to the partners observing that there is no natural person in the firm and these partners have joined the firm as a representative of HUF or Trust. In the preamble portion of the Partnership Deed, the name of the partners are

mentioned in the individual capacity as such Id.A.R took a plea that the firm is having a natural persons as partners. However, when you have perused the Partnership Deed, clauses mentioned therein duly demonstrated that the partnership was formed by these persons as a representative of HUF/Trust. The capital also contributed to the firm from the assets, funds and income of HUF/Trust. When this is the case, it cannot be said that partners are entitled for interest in terms of provisions of the section 40(b) of the Act, which strictly prohibits the interest payments made to these persons, cannot be allowed while computing the business income of assessee firm. To take a different stand, the assessee has to show that capital was introduced by individual partners from their individual source. However, there is nothing on record in this regard. Hence, any payment or remuneration paid to partners in their individual capacity to be allowed as deduction in terms of provisions of the section 40(b) of the Act. However, the interest paid for capital which is contributed by the HUF/Trust cannot be allowed as deduction in terms of sec.40(b) of the Act. In the case of Brij Mohan Das Laxman Das reported in [1997] 223 ITR 825 (SC) wherein held that:-

““Explns. 1,2 and 3 to the above clause were added by the Taxation Laws (Amendment) Act, 1984 w.e.f. 1st April, 1985. Explan. 2 expressly provides that where an individual is a partner in a firm on behalf of or for the benefit of any other person, any interest paid by the firm to such individual otherwise than as partner in representative capacity, shall not be taken into account for the purpose of cl. (b). It is, therefore, clear that w.e.f. 1st April, 1985, the question of the nature involved herein would not arise. Where a person is a partner in a representative capacity, i.e., as representing HUF, any interest paid to him in his individual capacity will not be hit by cl. (b). The only question is what is the position earlier to 1st April, 1985' which is the case here. Explan. 2 to s.40(b) is the legislative recognition of the theory of different capacities an individual may hold' -no doubt confined to cl. (b) of s. 40. Once this is so, we see no reason to hold that this theory of different capacities is not valid or available for the period anterior to 1st April, 1985. Accordingly, even for the period anterior to 1st April, 1985, any interest paid to a partner, who is a partner representing his HUF, on the deposit of his personal/individual funds, does not fall within the mischief of cl. (b) of

s. 40. Expln. 2, in the context of cl. (b) of s. 40, is declaratory in nature. Gajanand Poonam Chand vs. CIT (1988) 73 CTR (Raj) 255 : (1984) 174 ITR 346 (Raj) : TC 33R.300 approved; CIT vs. London Mac hinery Company (1979) 10 CTR (All) 301: (1979) 117 ITR 111 (All) : TC 33R.288 impliedly overruled; CIT vs. Brijmohn Das Laxman Das (1979) 11 CTR (All) 243 : CTR (All) 243 : (1979) 117 ITR 121 (All) : TC 33R.289 set aside”

Accordingly, we remit the issue in dispute to the file of AO to examine these facts and decide accordingly. This common ground in all these appeals is partly allowed for statistical purposes.

11. When a query was put to Id.counsel for the assessee, he stated that the AO has given appeal effect to the order of Tribunal but again additions are made. As the Tribunal in other three years in the above order has remitted the matter back, we also remit the matter back to the file of the AO for deciding afresh in term of the directions of the Tribunal in ITA Nos. 3145, 3146 & 3147/Mds/2016 dated 22.03.2017. Accordingly, these three appeals of assessee are allowed for statistical purposes.

12. Another common issue raised is as regards to charging of interest u/s.234D of the Act and according to us, charging of interest u/s.234D of the Act is consequential and hence, dismissed. Therefore, these two appeals of the assessee are dismissed.

13. In the result, the appeals filed by the assessee in ITA Nos. 562 & 564/CHNY/2021 are dismissed and in ITA Nos. 563, 565 & 566/CHNY/2021 are partly-allowed for statistical purposes.

Order pronounced in the open court on 8th June, 2022 at Chennai.

Sd/-

(मनोज कुमार अग्रवाल)

(MANOJ KUMAR AGGARWAL)

लेखा सदस्य /ACCOUNTANT MEMBER

Sd/-

(महावीर सिंह)

(MAHAVIR SINGH)

उपाध्यक्ष /VICE PRESIDENT

चेन्नई/Chennai,

दिनांक/Dated, the 8th June, 2022

RSR

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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