

IN THE INCOME TAX APPELLATE TRIBUNAL
PANAJI BENCH, PANAJI – VIRTUAL COURT

BEFORE SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER
AND
SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.227/PAN/2018
निर्धारण वर्ष / Assessment Year : 2014-15

ACIT, Circle-2(1), Panaji, Goa.	Vs.	M/s. Jay Ram Ore Carriers, 2 nd Floor, Sunflower Appts, Opp. St. Andrew Church, Vasco, Goa. PAN : AAFFJ0752R
Appellant		Respondent

Revenue by : Shri N. Shrikanth
Assessee by : Shri R. D. Onkar

Date of hearing : 16.08.2023
Date of pronouncement : 29.08.2023

आदेश / ORDER

PER INTURI RAMA RAO, AM:

This is an appeal filed by the Revenue directed against the order of Id. Commissioner of Income Tax (Appeals)-2, Panaji [‘the CIT(A)’] dated 30.03.2018 for the assessment year 2014-15.

2. Briefly, the facts of the case are that the respondent-assessee is a partnership firm engaged in the business of operation of barge of contract. The Return of Income for the assessment year 2014-15 was filed by the appellant firm on 29.07.2014 declaring total income

of Rs.87,63,190/-. Against the said return of income, the assessment was completed by the Income Tax Officer, Ward-1 Margao ('the Assessing Officer') vide order dated 09.12.2016 passed u/s 143(3) of the Income Tax Act, 1961 ('the Act') at a total income of Rs.2,61,00,560/-. While doing so, the Assessing Officer disallowed the excess remuneration paid to the partners of Rs.1,38,95,958/- by holding that the remuneration is in excess of amount laid down under the provisions of section 40(b)(v) of the Act. The Assessing Officer also denied the set-off of the brought forward losses against the current income by holding that there was no business income for the current assessment year.

3. Being aggrieved by the above disallowances, the appellant firm had filed an appeal before the Id. CIT(A) contending that the quantum of remuneration allowable u/s 40(b)(v) read with Explanation 3 thereto should be computed based on the net profit as disclosed in Profit & Loss Account, irrespective of under which head of income is to be taxed.

As regards to the set-off of the brought forward business losses, it is contended that the brought forward business losses can be set-off against the current year's income, which were in the

nature of business profits, even if those profits are liable to the taxed under the other heads of income. On due consideration of the submissions, the Id. CIT(A) placing reliance on the decision of the Hon'ble Calcutta High Court in the case of Md. Serajuddin & Bros. vs. CIT, 210 Taxman 84 (Cal.) held that for the purpose of computing book profits for the purpose of section 40(b)(v) read with Explanation 3 thereto, the income as disclosed in the Profits & Loss Account alone has to be considered, accordingly, directed the Assessing Officer to delete the addition made on account of excess partners' remuneration of Rs.1,38,95,958/-.

As regards to the set-off of the brought forward business loses against the capital gains arising on sale of barge, the Id. CIT(A) placing reliance on the decision of the Hon'ble Supreme Court in the case of CIT vs. Cocanada Radhaswami Bank Ltd., 57 ITR 306 (SC) held that the gains arising on sale of barge though assessable under the head "capital gains" and the loss brought forward can be set-off against profits arising on sale of barge.

4. Being aggrieved by the order of the Id. CIT(A), the Revenue is in appeal before us in the present appeal.

5. The ld. Sr. DR submits that the ld. CIT(A) without proper appreciating the facts of the case had simply granted the relief in respect of addition made on account of excess remuneration paid to the partners placing reliance on the decision of the Hon'ble Calcutta High Court in the case of Md. Serajuddin & Bros. (supra).

As regards to the set-off of the brought forward business losses against the gains arising on sale of barge, ld. Sr. DR submits that the reliance placed by the ld. CIT(A) on the decision of the Hon'ble Supreme Court in the case of Cocanada Radhaswami Bank Ltd. (supra) is misplaced.

6. On the other hand, ld. AR submits that the order of the ld. CIT(A) is sound in law, inasmuch as, the ld. CIT(A) granted relief in respect of addition u/s 40(b)(v) placing reliance on the decision of the Hon'ble Calcutta High Court in the case of Md. Serajuddin & Bros. (supra). Similarly, he submits that the ld. CIT(A) had rightly allowed set-off of the brought forward business losses against the profits arising on sale of barge placing reliance on the decision of the Hon'ble Supreme Court in the case of Cocanada Radhaswami Bank Ltd. (supra). Thus, he submits that the order of the ld. CIT(A)

is well reasoned and based on the proper appreciation of facts of the case, cannot be interfered with.

7. We heard the rival submissions and perused the material on record. The ground of appeal nos.1 and 2 challenges the decision of the ld. CIT(A) deleting the addition made on account of excess remuneration paid to the partners u/s 40(b)(v) of the Act. On perusal of the assessment order, it would be clear that the Assessing Officer restricted the deduction u/s 40(b)(v) in respect of excess remuneration paid to the partners by computing the book profits for the purpose of section 40(b)(v) by considering the profits of the business under Chapter IV-D i.e. by ignoring the capital gains arising on sale of barge, which were assessed to tax under the head “capital gains”. However, the ld. CIT(A) placing reliance on the decision of the Hon’ble Calcutta High Court in the case of Md. Serajuddin & Bros. (supra) held that for the purpose of computing the book profits for the purpose of section 40(b)(v) read with Explanation 3 thereto, the net profits as disclosed in Profit & Loss Account alone to be considered including the income assessed under the head “other income”. This finding of the ld. CIT(A) is under challenge before us in the present grounds of appeal. The

provisions of section 40(b)(v) provide that in the case of payment of remuneration made to any working partners should be in accordance with the terms of the partnership deed and shall not exceed the aggregate amount as laid down u/s 40(b)(v) of the Act. The Explanation 3 to section 40(b)(v) provides that for the purpose of book profits means net profit as shown in the Profit & Loss Account for the relevant previous year computed in the manner laid down in the Chapter IV-D as increased by the amount of remuneration payable to the partnership firm, if such amount had been deducted to compute the net profit. Needless to mention, that the Chapter IV-D deals with the computation of business income. On the conjoint reading of section 40(b)(v) read with Explanation 3 thereto, the Legislative intention is very clear that for the purpose of computing the quantum of remuneration payable to the working partners, the business profits as computed in the manner laid down in Chapter IV-D are alone, which means that the income assessed under the head “other income” cannot be considered for the purpose of computing the books profits for the purpose of section 40(b)(v) of the Act. The Hon’ble Rajasthan High Court in the case of CIT vs. Allen Career Institute, 403 ITR 375 (Rajasthan) after making a

reference to the decision of the Hon'ble Calcutta High Court in the case of Md. Serajuddin & Bros. (supra) had also taken the similar view. Even otherwise on reading of the decision of the Hon'ble Calcutta High Court in the case of Md. Serajuddin & Bros. (supra), the issue that had come up for consideration before the Hon'ble High Court is that the book profits for the purpose of computation of allowable remuneration to partners cannot be the subject matter of rectification u/s 154 of the Act, as it is a debatable provisions, therefore, have no application to the facts of the present case, as the addition was made under assessment u/s 143(3) and, therefore, no application to the facts of the present case. Therefore, we are of the considered opinion that the business profits computed in the Chapter IV-D alone has to be taken into consideration for the purpose of computing the allowable remuneration to the working partners under the provisions of section 40(b)(v), therefore, the view taken by the Assessing Officer is correct in law and the order of the Id. CIT(A) is vacated as it is bereft of any reasoning and legal position. Thus, the ground of appeal nos.1 and 2 filed by the Revenue stands allowed.

8. Ground of appeal no.3 challenges the decision of the ld. CIT(A) allowing the benefit of set-off of brought forward business losses against the income assessed under the head “capital gains”. The Assessing Officer assessed the profits and gains arising on sale of barge under the head “income under capital gains”. The Assessing Officer had denied the set-off of brought forward business losses against the capital gains of the current year placing reliance on the plain provisions of section 72 which provided that the brought forward business losses can be set-off only against the business profits of the current year. However, on appeal before the ld. CIT(A), the ld. CIT(A) granted the benefit of set-off of the business losses against the capital gains following the decision of the Hon’ble Supreme Court in the case of Cocanada Radhaswami Bank Ltd. (supra).

9. Being aggrieved, the Revenue is in appeal vide this ground of appeal no.3 challenging the decision of the ld. CIT(A).

10. It is undisputed position that the gains arising on sale of barge are assessable under the head “capital gains”. Equally, it is the undisputed position that barge constitutes a capital asset in the hands of the respondent-assessee and it is not stock-in-trade. The

gains arising on the sale of barge are assessable under the capital gains. On plain reading of the provisions of section 72, it would be clear that the brought forward business losses can be set-off only against the current year business losses, if any. Therefore, in the absence of any taxable income under the head “income from business” for the current year, the brought forward business losses can be set-off against any other income assessable under either “income from other sources” or “capital gains” etc. Therefore, the Assessing Officer had rightly denied the benefit of set-off of the brought forward business losses against the capital gains. The ratio of the decision of the Hon’ble Supreme Court in the case of Cocanada Radhaswami Bank Ltd. (supra) have no application to the facts of the present case, inasmuch as, the barge gains arising on sale of which does not form part of the business asset or stock-in-trade in the hands of the respondent-assessee firm. Whereas, in the case of Cocanada Radhaswami Bank Ltd. (supra), the shares were held as stock-in-trade though the dividend income earned on such shares were assessable under the head “income from other sources” by virtue of the specific provisions of section 8 of the Act. The equity shares were forming part of the stock-in-trade. Thus, the ld.

CIT(A) wrongly applied the ratio of the decision of the Hon'ble Supreme Court in the case of Cocanada Radhaswami Bank Ltd. (supra) to the facts of the present case. Thus, the order of the Id. CIT(A) is reversed and the ground of appeal no.3 filed by the Revenue stands allowed.

11. In the result, the appeal filed by the Revenue stands allowed.

Order pronounced on this 29th day of August, 2023.

Sd/-
(PARTHA SARATHI CHAUDHURY)
JUDICIAL MEMBER

Sd/-
(INTURI RAMA RAO)
ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 29th August, 2023.

Sujeet

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-2, Panaji.
4. The Pr. CIT, Panaji.
5. DR, ITAT, Panaji.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.