IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri Sanjay Arora, Accountant Member and
Shri Manomohan Das, Judicial Member

ITA Nos. 623 to 627/Coch/2022
(Assessment Years: 2004-05 to 2007-08 & 2009-10)
ITA No. 937/Coch/2022
(Assessment Year: 2015-16)

Sulaikha Clay Mines New Bunglow, Karamoodu Thonnakkal P.O. Thiruvananthapuram 695317 [PAN: AAIFS6276N]	vs.	Asst. CIT, Circle 1(2), Aayakar Bhawan, Kowdiar Thiruvananthapuram 695003
(Appellant)		**(Respondent)**

Appellant by: Shri Muhammad Shafeeq A., CA
Respondent by: Smt. J.M. Jamuna Devi, Sr. D.R.

Date of Hearing: 09.08.2023
Date of Pronouncement: 31.08.2023

O R D E R

Per Bench

This is a set of six Appeals by the Assessee raising common issues pursuant to it's reassessment (for Assessment Years (AYs.) 2004-05 to 2007-08) and regular assessments for the subsequent two years, challenging the same on confirmation in first appeal vide orders dated 28.12.2021 (AYs 2004-05 to 2006-07), 27.3.2022 (for AYs 2007-08 & 2009-10) and 31.8.2022 (for AY 2015-16), by the National Faceless Appeal Centre, Delhi (NFAC) or the First Appellate Authority (FAA). The appeals for the first two years, filed along with that for the subsequent two years, are delayed by 85 days. The period of delay is covered by the blanket saving by the Hon'ble Apex Court per it's decision in *suomotu* Writ Petition (WP)(C) No.3/2020 dated 10.01.2022. The same were accordingly admitted and the hearing proceeded with.

2.1 The assessee, a partnership firm, mining china clay at Thonnakkal, near Thiruvananthapuram, Kerala, was found to have claimed expenditure to a substantial extent, i.e.,over 50% of the total expenditure, by way of payment to partners and relatives, covered under section 40A(2)(b) of the Income Tax Act, 1961 (hereinafter 'the Act'). Four (4) of the nine (9) major partners – the firm also admitting 7 minor partners to the benefits of the partnership, were ladies, who were not residing either in the proximity or vicinity of the mining site, or at a place where the assessee had business transactions. They were, in the view of the Revenue, not working partners in terms of section 40(b)(i) of the Act r/w *Explanation 4* thereto, reading as under:

Amounts not deductible

"**40.** Notwithstanding anything to the contrary in sections 30 to [53][38], the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession",—

(*a*) in the case of any assessee—

(*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.."

Explanation 4.—For the purposes of this clause, "working partner" means an individual who is actively engaged in conducting the affairs of the business or profession of the firm of which he is a partner;

2.2 Assessment on the same basis, i.e., disallowing the salary allowed thereto, for AY 2002-03, had been confirmed by the Hon'ble jurisdictional High Court (in ITA No. 33/2022, dated 26.03.2009/copy on record), which had attained finality. The matter, as explained to us, though carried by the assessee before the Hon'ble Apex Court, was declined adjudication by it due to low tax-effect. The disallowance was accordingly made for all the years upto AY 2009-10, save AY 2005-06, as no claim was preferred for that year:

AY	Claimed	Disallowed	Allowed
2004-05	2,52,900	1,40,067	1,12,833

2005-06	No Claim preferred		
2006-07	25,000	25,000	Nil
2007-08	13,98,000	9,24,000	4,74,000
2009-10	27,96,588	15,24,000	12,72,558

The same being confirmed in first appeal, the assessee is in second appeal.

3. Before us, the Revenue's case is the similarity in the facts and circumstances, which had found approval of the Hon'ble jurisdictional High Court, whose order in relevant part, also relied upon by the FAA, is as under: -

> "3. So far as the first question is concerned we find from the order of the CIT (Appeal) that the only ground based on which he allowed the claim is *that in the minutes recorded* work have been assigned to partners. Similarly, the partnership deed provides that every partner will take part in business. We do not think these are the *tests* to find out whether a person is engaged as a working partner in the business of the firm. *A partner can take part in business only at the place of business or where partnership has business transactions*. The assessee has no case that it has any business operations or dealings in the place where all these four lady partners are residing at Alleppey which is 150 kms away from the place of business. *No evidence whatsoever* is produced to establish the nature of operation or control or administrative or other work done by these ladies for the firm. We do not find any justification of the CIT (Appeal) to allow the claim and the Tribunal to confirm it. However, since the assessment pertains to the year 2002-03 and since the partners' assessments have also become final we do not think we should interfere with the orders of these authorities on this issue. However, we declare that these orders will not bind the Department for any case pending before any authority either in appeal or otherwise. Even though we disapprove the findings of the authorities below, we do not wish to interfere with the order in appeal only for the sake of finality of the assessments that got settled in the case of the partners."

The assessee's case, on the other hand, was that the physical presence of the partner at site is not necessary and the distance from Alappuzha is merely 150 kms. The inference of the lady partners being not working partners is therefore flawed.

4. We have considered the rival contentions and perused the material of record.

4.1 Each year is an independent unit of assessment. It was therefore open for the assessee to, despite the adverse findings by the Hon'ble Court, lead evidence, making out a case as to the lady partners undertaking partnership work, and being in fact working partners, a term clearly defined in the statute. The matter, it may be appreciated, is principally factual, with the Hon'ble Court observing a complete absence of any evidence led in support of the contention, as is the case for the current year/s. Theexpenditure thus stands to be disallowed u/s.37(1) of the Act itself, as indeed was for the earlier year, and recourse to section 40(b), which is only upon an expenditure being otherwise admissible, may not be necessary. For each of the years for which the disallowance has been made, the Assessing Officer (AO) has recorded a categorical finding that no proof has been adduced for the claim that these partners were working partners within the meaning of *Explanation 4* to section 40(b)(i) of the Act. Even the FAA does not state of any additional evidence furnished before it nor, in fact, any claim in its respect was made before us. It is, therefore, wrong to say, as the assessee projects, that the disallowance arises *only* on account of the physical distance – which was not the case even for AY 2002-03, even as the same, no doubt, was the starting point of the enquiry in the matter, and a relevant factor in the conspectus of the case. No material has at any stage been brought on record to exhibit that the lady partners were working partners, i.e., actually involved in the conduct of affairs of the firm, including M. Subara Beevi, stated before us – again, without any material, to be technically qualified. Why, one wonders, does the firm, with a modest turnover, being able to manage it's affairs with 5 workers, require 9 working partners, i.e., all the adult members. The Revenue, by implication, admits the balance 4 partners as being working partners. The operations are limited to a single mine, with a working period of no more than 200 days a year. As explained, it has 5 workers, i.e., 2 excavators with a helper each, and one clerk. That it has been able to, despite

appreciable increase in turnover over the years, manage it's operations with the same labour strength, shows the same as not labour intensive; the removal of overburden and it's transportation, as well as of the ore, etc., being outsourced. Administrative work, in which the working partners are admittedly engaged, is even more inflexible *qua* the volume of work.

The assessee-firm was, under the circumstances, required to, as a minimum, and before the AO itself, furnish the nature of work and responsibilities of all the working partners, including the five ladies, with reference to which only an inquiry or verification could be undertaken by the assessing authority, the person charged by law for administering the Act. Why, the actual working would itself generate its footprints, rendering the said distance as of, as claimed, no consequence. As we see – it being a recurring feature in it's case, the assessee ought to have rather offered cross-examination by him of the lady partners in respect of the nature of their work, in which they would have, where so, become very proficient in over the years, while even the statement thereof and, rather, *qua* all the 9 partners, has not been furnished. In fact, also quizzical in the matter is the wide variations in the claim of salary for each of them over the years, as under, an aspect not explained at all:

(Amount in Rs. lacs)

Name of Partner/AY	**2004-05**	**2005-06**	**2006-07**	**2007-08**	**2009-10**
M. Subara Beevi	0.37	-	0.25	7.08	3.24
A. Sheeja	0.27	-	-	0.54	3.00
Sebi A.B.	0.27	-	-	0.54	3.00
Meena M.	0.27	-	-	0.54	3.00
Feroz A.	0.27	-	-	0.54	3.00
Total	**1.40**	**-**	**0.25**	**9.2425**	**15.24**
Remuneration claimed	2.53	-	0,25	13.98	27.97
Remuneration allowed	1.13	-	-	4.74	12.73

If a partner/s is indeed compensated for his efforts, how could the same vary so significantly from year to year, unless of course the increase or decrease in remuneration is to be uniform across all the partners, i.e., vary to the same extent in percentage terms, which is not the case. The remuneration is, thus, decided, inferably, not on the basis of their work, but on the basis of the firm's profit that is to be absorbed thus. This is, of course, except where it is otherwise shown that the nature of work and extent of responsibilities have been substantially increased or decreased on their transfer from or, as the case may be, to, another working partner – both conspicuous by their absence. The distance of the site from Alappuzha, where only two ladies are said to reside, may be more or less w.r.t. their places of residence for the other three ladies. It is the nature of work, duly exhibited, that would the lead one to determine if their physical presence at the site (or at any other place of business), would be required or not and, if so, to what extent. As afore-noted, no case has been made out; the onus in law to prove it's claims per the return of income, and establish it's case, being on the assessee. In response to an argument advanced before us as to the distance of 150 kms. – without though stating the said distance for the other 3 lady 'working partners', being a 'short' distance, the Bench queried if the working partners had claimed conveyance expenditure against remuneration in their tax returns, to an answer in the negative by the ld. counsel for the assessee, Sh. Shafeeq. Why, all the 4 male members have been accepted as working partners, all or some of whom may be visiting the site, or conducting its affairs from other place/s.

4.2 The claim being wholly unsubstantiated, we have no hesitation in approving the impugned disallowance, which we clarify as being both under section 37(1), as well as, without prejudice, u/s. 40(b)(i) r/w *Explanation 4* thereto.

As it appears to us, being in fact apparent, as also admitted, the claim for remuneration to partners is calibrated to the profits of the firm and, thus, determined only after the close of the year, i.e., is an afterthought, with a view to absorb the profit

thus to the extent permissible. An actual arrangement would witness such changes in salary only in response to changes in management. In the instant case, however, the partners being related, it is all in the family, so that any salary could be provided to any, or is perhaps distributed along family lines of the two brothers, or any other arrangement, i.e., without reference to the work, if any, performed by the partner, with a view to lower the overall tax burden. The salary to M. Subara Beevi, wife of Sh. Abdul Rahim, for instance, increases 28 times in a year, and then again reduced to half for the following year. There is no explanation for such wide swings in salary; the coefficient of variation for that paid to the other 4 ladies being over 6. This explains the inference afore-said, even as the burden of proof *qua* a claim u/s. 37(1), wholly undischarged, is on the assessee.

Finally, the assessee's contention of the claim being revenue neutral is also without basis. *If so, why should it contest the same*! We may though add that it is only the salary deductible in the hands of the firm that would stand to be assessed in the hands of the respective partners (sec. 28(v)). The partners, where our order is not contested, so that it attains finality, shall be assessed for the relevant years only for the salary actually allowed in the hands of the firm.

We decide accordingly.

5.1 The assessee's second ground is *qua* disallowance u/s. 40A(2)(a) of the Act. The AO's order, nearly identically worded for all the years, is as under:

> '4. While examining the books of account it was seen that the assessee has made the following payment to partners or close relatives of the partners:
>
> | (Figures being for AY 2004-05) | (Amount (Rs.) |
> |---|---|
> | Leave compensation | 3,00,000/- |
> | Development expenses | 13,22,400/- |
> | Pit filling expense | 5,88,000/- |
> | Transportation charges | 2,95,186/- |
> | Sales promotion expense | 29,675/- |
> | | 25,35,261/- |

This forms a substantial portion of the expenses claimed. Out of this Rs.25,05,586/- was seen paid to either partners themselves or close relatives of the partners namely Abdul Rahim. Arshad J. M., Nishad J.M., Khurshid J. M., Zeenath beevi, Jalaluddin, Jabee. This forms 56% of the expenditure debited to P&L account after depreciation, royalty etc. This expenditure is excessive in view of its proportion to the total expenditure debited. Therefore, 25% of Rs. 25,05,586/- ie. Rs. 6,26,396/-is disallowed u/s.40A(2)(a), treating it as excessive within the meaning of section mentioned. It is also to be noted that similar disallowance was made in the A.Y.2002-03 by the then Assessing Officer. The same was confirmed by the Hon'ble Kerala High Court vide its order in ITA No.33 of 2007 dated 26.03.2009. Hence, the same is added to total income of the assessee.

Addition Rs. 6,26,396"

5.2 We tabulate the relevant expenditure, being operative expenditure, for all the years, for ready reference, as under: (Rs. in lakhs)

Expenditure/AY	**2004-05**	**2005-06**	**2006-07**	**2007-08**	**2009-10**	**2015-16**
Lease compensation	3.0	8.40	-	20.00	20.00	-
Development Expenses	13.24	7.32	4.10	15.72	22.00	79.83
Pit Filling	5.88	3.14	-	1.78	-	-
Transportation	2.95	2.52	-	4.30	9.39	27.37
De-watering	-	-	-	-	10.64	23.96
Back Filling	-	-	-	-	5.97	-
Sales Promotion	0.30					
Total	25.35	21.38	4.10	41.80	68.00	131.16
Percentage of						
(a) Total Expenditure	56.00	-	-	55.00	66.00	-
(b) Sales	-	46.00	-	-	-	-

5.3 We are appalled at the manner in which the AO has gone about making the disallowance, i.e., in complete disregard of the mandate of law and the established principles of adjudication. To begin with, the very fact of invocation of section 40A(2)(a), reading as under, implies the expenditure under reference as otherwise admissible as a business expenditure:

Expenses or payments not deductible in certain circumstances.

40A. (1) The provisions of this section shall have effect notwithstanding anything to the contrary contained in any other provision of this Act relating to the computation of income under the head "Profits and gains of business or profession".

(2)(*a*) Where the assessee incurs any expenditure in respect of which payment has been or is to be made to any person referred to in clause (*b*) of this sub-section, and the Assessing Officer is of opinion that such expenditure is excessive or unreasonable having regard to the fair market value of the goods, services or facilities for which the payment is made or the legitimate needs of the business or profession of the assessee or the benefit derived by or accruing to him therefrom, so much of the expenditure as is so considered by him to be excessive or unreasonable shall not be allowed as a deduction:

Provided that…..

(*b*) The persons referred to in clause (*a*) are the following, namely :—

(*i*)	where the assessee is an individual	any relative of the assessee;
(*ii*)	where the assessee is a company, firm, association of persons or Hindu undivided family	any director of the company, partner of the firm, member of the association or family, or any relative of such director, partner or member;

It is thus only on a specific finding that the rate of the relevant goods or services is excessive or unreasonable having regard to the fair market value thereof, or the legitimate needs of the assessee's business, or the benefit derived by or accruing to it therefrom, that the same could be disallowed. Further, the same would only be upon confronting the assessee with the material gathered. No such exercise has been undertaken by the AO for any of the years. The assessee, on the other hand, contends that it had called for open bids and chosen the lowest bid. This, again, seems to have been disregarded by the AO inasmuch as there is nothing to suggest, much less a finding as to the same having been examined by him. Whether, what the assessee says is true or correct – which may well not be the case, can only be ascertained by the assessing authority on examining the material adduced or called for in substantiation, determining the truth and issuing a finding in its respect. The onus in law, fora disallowance u/s.40A(2)(a) of the Act, it may be appreciated, is on the Revenue, which has not been discharged. There is nothing in the order by the Hon'ble High

Court to even remotely suggest of it being not so. Rather, it clarifies that the reasonableness of the expenditure is to be tested with reference to the prevailing market rate of the relevant goods or services. And, further, conscious of that, states that even if it were to remand the matter back, *the AO shall have to undertake the exercise*, examining each and every bill/voucher pertaining to the payments to the partners or their relatives, and compare it with the market rate, so as to be able to disallow the excess. Contrast this with the *ad hoc* manner in which the AO proceeds. Rather than assisting the Revenue's case, the said decision does that of the assessee.

The ld. CIT(A), has, again, merely endorsed the assessment order. Further, that the same constitutes, in aggregate, a substantial part of the total expenditure, i.e., as stated, is neither here nor there. The same being operational expenditure, is bound to constitute a substantial part of the total expenditure. There is no comparison made by the AO with the ratio obtaining for other similarly placed firms. The disallowance in fact is u/s.40A(2)(a), which itself implies of it being deductible u/s.37(1) of the Act in the first place. The impugned disallowance is therefore unsustainable in law. We direct its deletion in the absence of a complete non-substantiation of it's case by the Revenue as to the satisfaction of the conditions of sec. 40A(2)(a). (see para 5.4)

5.4 An exception, however, for the reason/s that follows, is being made for the expenditure on 'lease compensation' and 'development', to be considered separately. The reason is that the expenditure thereon stand on a different footing. It is not an article or thing, or even service, the fair market price of which could be ascertained with reference to the obtaining market rate, representing a balance of the demand and supply forces, yielding an equilibrium price. True, the Revenue has acted mechanically in the matter, which explains the deletion of the disallowance by us, i.e., in principle. However, while for the other expenditure the AO could and, rather, ought to have procured the material to justify the invocation of the provision, for this expenditure all the relevant material is in possession of the assessee. It is only it who

could furnish, for each year, the expected quantity of china clay to be excavated, i.e.,given the depth for which permission stands allowed to it; the extent to which it estimatesit to be mined during the year/s, and other relevant data. This is as this would have a direct bearing on the lease compensation. On the other hand, regarding it from the stand-point of an arm's length transaction, as indeed it ought to be, being in fact the purport of the provision, so that the extent of mining is not the lessor–payee's concern, it would charge a uniform rate across all the years, which though can be subject to minor variations, which are again liable to be explained. *This is as for all the years it is the same land that is being leased*. Nothing, however, is forthcoming from the assessee. Even if there were certain changes across different years, it is the assessee to convey the same and demonstrate it's case, which is wholly unexplained and unsubstantiated. That position continues even before us. Sh. Shafeeq,on being specifically questioned in the matter, would submit that it depends on the part of the mine which is to be mined for the relevant year. There is no indication thereof, even as the same, where pertinent, would find mention in the lease agreement. Again, the same does not explain its bearing on the quantum of the lease rent for the year. Why, for instance, land, fetching a lease rent of Rs. 3 lakh per annum, should suddenly increase to Rs.8.4 lakhs, i.e., nearly three times, within a year, followed by Rs.20 lakhs for the year following the following year, yielding an increase of 6.67 times over a three-year period? Adopting Rs.8.40 lacs as the base rate, we consider Rs.10 lakh as a reasonable sum, so that the balance Rs.10 lakhs, charged for AYs. 2007-08 and2009-10, would stand to be disallowed u/s. 40A(2)(a). The Revenue, however, having restricted it to 25% of the sum charged, i.e., at Rs.5 lakhs, the same would prevail. In sum, the said disallowance would obtain only for AYs. 2007-08 and 2009-10,and at Rs.5 lakhs each.

The other expenditure for which we consider the assessee as equally responsible and contributory for the completely indeterminate and inchoate state of

affairs, so that the Revenue cannot be held as solely culpable, for us to direct deletion of its disallowance for want of satisfaction of the condition of s. 40A(2)(a), is the expenditure on development. What does it mean? The same belies understanding, as indeed the variation therein across the years. There is no explanation at any stage. Just as the wide variation in lease rent became unfathomable, it is even more so for this expenditure – varying from as low as rs.4.10 lacs to as high as rs. 79.83 lacs, with even the nature of the expenditure being not clear. It is only where the same, or at least its elements are known, could the Revenue undertake the exercise of assessing if the same is in excess or unreasonable in terms of its fair market value or the needs of the assessee's business. The matter, under the circumstances, would have to go back to the AO for consideration afresh. The assessee shall provide the necessary details, including the manner in which the same is incurred. Whether the same, for instance, is w.r.t. some operational parameter/s or otherwise. The burden, as afore-stated, in case of a disallowance u/s. 40A(2)(a) is on the Revenue, which it shall discharge by issuing definite findings of fact, making an objective assessment of the matter.

5.5 We decide accordingly.

6. The next issue is the disallowance of lease compensation u/s. 40(a)(ia) – which obtains only for AY 2009-10,inasmuch as no tax, as required under section 194I, had been deducted at source. As, however, 25% of the claim had already been disallowed u/s.40A(2)(a), the AO restricted the disallowance u/s. 40(a)(ia) to the balance 75%, i.e.,at Rs.15 lakhs. The assessee's case; the non-deduction of tax at source being admitted, is that the same is not in the nature of rent, so as to be liable fortax deduction at source, but compensation to the land owners, being Sh. M.K. Abdul Hameed, Managing Partner, and his brother, Sh. Abdul Rahim, for depletion in the value of land. As explained to us during hearing, the land shall, on being mined for china clay, become value-less; in fact, being an open mine, get converted into an open

lake after being mined up to the depth allowed. The compensation is therefore toward depletion of value and not for the user of the land, implying it's value being maintained and not eroded. The same is thus in the nature of a capital allowance, i.e., on capital account, not liable to tax deduction at source. The same did not find favour with the Revenue as the payment, whatever be the impact of the user of land thereon, is still for it's use, and would qualify as rent u/s. 194I, which is widely worded. Aggrieved, the assessee is in second appeal.

7. We have considered the rival contentions, and perused the material of record. Section 194-I defines rent per *Explanation (i)* thereto as any payment, by whatever name called, under any lease, sub-lease, tenancy or other agreement or arrangement for the use of land (either separately or alongwith other assets) and, further, irrespective of whether the payee is the owner of the subject property. Whether, therefore, the user of land leads to depreciation in it's value and, to whatever extent, is not relevant, and is something that concerns the payee. In fact, any use leads to depreciation of the subject property, and cannot therefore, for that reason, be said to be not rent. The same may though be relevant for determining the quantum of rent, which is not in question here. This, therefore, should oust the assessee's case, as by the Revenue, at the threshold.

The plea, however, raises an issue and, therefore, warrants a closer examination. The land in question is a mine, a wasting asset, which gets depleted on being excavated. The right of user of any property, consideration for which, by whatever name, is 'rent' by definition, could be allowed only to the extent the granter of said right – the land owner in the instant case, himself has it, and no further. The land owner's right in land, however, extends only to the top soil. Mineral wealth, or for that matter any valuable, beneath the earth, belongs to the Government of India, representing the Nation or the people of the country. This also explains mining activity being subject to regulation by the State, and only upon being licensed by it, to

the extent and for the period specified therein. *How could, then, the land owner grant user rights for excavation, capitalising on and trading on the ore below*? Sh. Shafeeq, on being so questioned during hearing, could furnish no answer, conceding to it being so.Sure, excavation involves access to and removal of the top-soil, which can be allowed only by the land-owner. The same, however, is only for the purpose of mining and none other. In fact, the land, after mining, is required by law to be back-filled. The land owner has no right in law to excavate, much less grant the said right to another, which can only be by the GoI, as in fact is the case; it granting licence for a royalty, specifying the parameters to be observed and, besides, monitors the mining through it's appropriate Department. The argument advanced is, thus, legally invalid. It is, however, open for the land owner to allow another to excavate his land for a consideration upon following the due process. The arrangement in such a case is legal; he allowing another to legally exploit his property for a consideration. *How is the same, then, not rent by definition*? As afore-stated, the nature of the user may form the reason for giving the property (land) on rent and, further, may have implications *qua* the quantum thereof. The character of the consideration, despite it including an element toward recovery of capital cost, would though still be 'rent'.

It is thus difficult to see as to how would the same not stand to be regarded as 'rent' within the meaning of the term u/s. 194-I. As afore-noted, every asset, save land (other than a wasting asset), depreciates on user, if not with the lapse of time as well. The same is not to be confused with a transaction having an element of transfer. Accordingly, nothing turns on the argument – which surely has an element of truth to it inasmuch as being in relation to a wasting asset, includes, apart from return on investment, return of investment as well, to which extent it may be factually correct.

The disallowance u/s. 40(a)(i)r/ws. 194I of the Act is therefore apposite. Inasmuch as, however, we have confirmed the disallowance u/s.40A(2)(a) of the Act at Rs.5 lakhs, the same shall stand restricted to Rs.15 lakhs. Needless to add, our

order being appealable, in case of reversal, in whole or in part, of the disallowance u/s.40A(2)(a), disallowance u/s. 40(a)(ia) would stand increased to that extent.

8. The only other disallowance is in respect of motor car repair and maintenance expense, claimed in the following sums for the relevant years:

AY	Amount (Rs.)
2004-05	17,039/-
2005-06	8,341/-
2006-07	14,257/-
2007-08	29,782/-

The disallowance, since confirmed, is for the reason that the same is admittedly in respect of the motor car of Shri Abdul Hameed and, thus, not a vehicle of the assessee-firm. We consider this as of no relevance. It is only *qua* depreciation, a capital allowance, that the ownership of the relevant asset is a pre-condition for its allowance. The very fact of Sh. Hameed being the managing partner of the assesse-firm, and the car, in respect of which the expenditure stands claimed, belongs to him, should rather justify the claim. It is not the Revenue's case that the expenditure has not been incurred, doubting its genuineness, or of it being covered u/s. 40A(2)(a), i.e., is in excess. We, therefore, see no reason for its disallowance. Reference to the personal user by the ld. CIT(A) would be of no consequence. This is as the AO has not disallowed it for that reason. A disallowance for personal element in user, it may be appreciated, extend to a part of the expenditure claimed, while here the disallowance is of the entire sum claimed. No case toward personal user has been made by the Revenue, which has to be based on some objective basis. We accordingly direct its deletion in full. We decide accordingly.

9. Before parting with the order, we may consider Gd. 1 of the assessee's appeals for AYs. 2004-05 to 2006-07, i.e., *qua* reassessments, the assessment for other years being u/s.143(3) of the Act. Inasmuch as notice u/s. 148(1) is stated to be beyond 4

years from the end of the relevant assessment year, the same is claimed as bad in law as there is no concealment of facts material to the computation of income for the relevant years. Though not pressed before us, we yet take-up this Ground inasmuch as the question raised thereby is legal, going to the root of the matter, while the relevant facts are not in dispute. The returns for the relevant years were not subject to assessment, but only processed u/s.143(1) of the Act. The pre-requisite of a failure to disclose fully and truly material facts necessary for assessment for the relevant year, where a reassessment is initiated beyond 4 years, is applicable only in the case of reopening of a regular assessment. Law in the matter is well-settled, for which the Revenue has relied on the decision in *Asst. CIT vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd*. [2007] 291 ITR 500 (SC)and, following it, on *Indu Lata Rangwala v. Dy. CIT*[2017] 384 ITR 337 (Del), taking stock of the judicial precedents. The Gd. fails.

10. In the result, the appeals for all the years are partly allowed and partly allowed for statistical purposes.

Order pronounced on August 31, 2023 under Rule 34 of The Income Tax(Appellate Tribunal) Rules, 1963.

Sd/-	Sd/-
(Manomohan Das)	(Sanjay Arora)
Judicial Member	Accountant Member

Cochin, Dated: August 31, 2023

Copy to:

1. The Appellant
2. The Respondent
3. The Pr. CIT concerned
4. The DR, ITAT, Cochin
5. Guard File

By Order

n.p.

Assistant Registrar
ITAT, Cochin Bench