

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH, 'A' PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND
SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.284/PUN/2021

निर्धारण वर्ष / Assessment Year : 2016-17

Bharatnagar Buildcon LLP (Formerly known as ABIL Buildcon LLP), 2, Abil House, Ganesh Khind Road, Range Hill Corner, Pune 411 007 Maharashtra PAN : AASFA9667R	Vs.	Pr.CIT-2, Pune
Appellant		Respondent

Assessee by Shri Sanket Joshi
Revenue by Shri Keyur Patel

Date of hearing 05-09-2023
Date of pronouncement 07-09-2023

आदेश / ORDER

PER R.S. SYAL, VP :

This appeal by the assessee is directed against the order dated 17-03-2021 passed by the Chief Commissioner of income-tax (CCIT) u/s.263 of the Income-tax Act, 1961 (hereinafter also called 'the Act') Act in relation to the assessment year 2016-17.

2. This appeal is time barred by about 45 days. The assessee has filed an affidavit stating the reasons of corona infection, which led to the late filing. The ld. DR did not seriously object to the delay. Therefore, the delay is condoned and the instant appeal is admitted for disposal on merits.

3. Briefly stated, the facts of the case are that the assessee e-filed its return declaring total income at Rs.78,29,61,960/-. The return was selected for *Limited scrutiny* through Computer Aided Scrutiny Selection (CASS). After certain notices and compliance by the assessee, the Assessing Officer (AO) completed the assessment u/s.143(3) of the Act at the returned income vide his order dated 26-12-2018. On perusal of the assessment record, the Id. CCIT held the assessment order to be erroneous and prejudicial to the interest of the Revenue on two scores viz., (1) the issue of cost of acquisition of the debentures transferred by the assessee was not looked into by the AO and (2) that the assessee wrongly claimed deduction towards the Remuneration to partners anent to its income from long term capital gain. Eventually, he set-aside the assessment order and directed the AO to make the assessment afresh. Aggrieved thereby, the assessee has come up in appeal before the Tribunal.

4. We have heard the rival submissions and gone through the relevant material on record. The first point taken note of by the Id. CCIT is that the assessee wrongly computed the income under the head "Capital gains" by considering the cost of acquisition of debentures at Rs.56.00 crore. He noticed that the debentures were acquired only for Rs.50.00 crore but the assessee capitalized a sum

of Rs.6.00 crore towards interest paid on loans. The act of the AO in accepting the cost of acquisition at Rs.56.00 crore was held to be a *raison d'etre* for the revision.

5. The assessee acquired debentures in the financial year ending 31-03-2012 and depicted the amount of Rs.50.00 crore as 'Investment' in its balance sheet. The position remained as such for the next year as well. However, in the financial year ending 31-03-2014, the assessee increased the cost of acquisition of debentures to Rs.56.00 crore from the original Rs.50.00 crore by capitalizing the amount of interest of Rs.6.00 crore paid. The money required for purchasing the debentures was originally introduced by one of the partners in the partnership firm. However, in the financial year ending 31-03-2014, the said partner wanted his money back. The assessee firm borrowed funds for repaying Rs.50.00 crore to the partner. It is on such borrowing, that the assessee had to pay interest of Rs.6.00 crore, which was capitalized to the debenture account in its balance sheet dated 31-03-2014 and not claimed as deduction. The same position continued in the balance sheet as on 31-03-2015. It is during the year under consideration, namely, financial year ending 31-03-2016, that the assessee sold the debentures and reduced the amount of investments shown in the balance sheet at Rs.56.00 crore from the full amount of

consideration for computing the amount of long term capital gain. It is ostensible that the assessee never claimed deduction towards interest of Rs.6.00 crore in the past, but capitalized it to the value of investment initially acquired at Rs.50.00 crore. Naturally, when the debentures were sold in the year under consideration, the amount of interest capitalized along with the purchase cost, was also liable to be deducted from the full value of consideration for computing the amount of long term capital gain. It is this principle of law which was followed by the AO in the computation of capital gain. In fact, the interest cost was capitalized in an earlier year and represented a part of the opening balance of debentures for the year under consideration. Ergo, the opinion canvassed by the Id. CCIT that the interest of Rs.6.00 crore could not have been added to the cost of debentures, in our considered opinion, is not tenable. We, therefore, set-aside the impugned order on this score.

6. The next issue espoused by the Id. CCIT is that the assessee wrongly claimed deduction towards remuneration to partners amounting to Rs.22.50 crore with reference to Long term capital gain offered on sale of debentures, which was not allowable in terms of section 40(b)(v) of the Act.

7. At this stage, it is relevant to note that the case of the assessee was selected for *Limited scrutiny* (CASS) and the reason assigned

for such scrutiny, as reproduced in notice dated 11-07-2017 u/s.143(2) by the AO, is: *“Whether capital gains/loss is genuine and has been correctly shown in the return of income”*. We have gone through the computation of income furnished by the assessee along with the return of income. In this computation, income under the head “Profits and gains of business or profession” has been depicted at a loss of Rs.22,51,06,820/- by starting the computation with the ‘Net profit before tax as per the Profit and loss account’ at Rs.78,48,93,180/-. The Profit and loss account shows gross income at Rs.101.00 crore. Thereafter, deductions towards Operating and other expenses at Rs.1,06,820/- and Remuneration to partners at Rs.22.50 crore have been made, thereby computing the amount of Net profit at Rs.78.48 lakh. It is this figure, which is the starting point for calculating the income under the head “Profits and gains of business or profession”. Coming back to the computation of income, the second head is “Capital gains”, under which Long term capital gain has been computed at Rs.101.00 crore. It is this figure of Rs.101.00 crore which has been taken to the Profit and loss account as the only income item. Schedule-2 to the computation of income deciphers the determination of income under the head “Long term capital gain” by showing the sale consideration of unlisted debentures/bonds at Rs.157.00 crore with the cost of

acquisition at Rs.56.00 crore, giving net figure of taxable capital gain at Rs.101.00 crore. The AO accepted the returned income as such. The Id. CCIT, too, has not disputed the correctness or genuineness of the income from “Long term capital gain” at Rs.101.00 crore. His entire focus has been on the grant of deduction towards remuneration to partners at Rs.22.50 crore, which, in his opinion, was not deductible in view of income under the head “Profits and gains of business or profession” being Nil.

8. Reverting to the reasons for *Limited scrutiny* (CASS), the solitary issue identified for examination can be divided into two limbs. The first, whether capital gains/loss is genuine and the second, whether it has been correctly shown in the return of income. The Id. CCIT has not disputed the genuineness of capital gain shown by the assessee at Rs.101.00 crore. Thus, the first limb of the reason for limited scrutiny is through. The second limb is as to whether the capital gain “*has been correctly shown in the return of income*”. Again, it is seen from the computation of income and is not disputed that the assessee did correctly show income of Rs.101.00 crore under the head “Capital gains”. It, therefore, clearly brings out that both the limbs of the reason for the *limited scrutiny*, viz., whether the capital gains/loss is genuine and whether such capital gain has been correctly shown in the return of income,

have successfully passed the scrutiny by the Id. CCIT as well, who chose not to offer any adverse comment thereon.

9. The Id. CCIT has opined that the assessee was not entitled to remuneration to partners at Rs.22.50 crore because there was Nil income from operations. The Id. DR meticulously pointed out that since inception from A.Y. 2012-13, the assessee did not carry out any business activity till the assessment year under consideration. This decodes that the assessee was not engaged into any business activity and claimed remuneration to partners with reference to the income shown as “Long term capital gains”.

10. At this stage, it would be pertinent to take stock of section 40, with the heading ‘Amounts not deductible’ opening with a non-obstinate clause anent to sections 30 to 38. It provides that the amounts covered under this section shall not be deducted in the computation of income chargeable under the head “Profits and gains of business or profession”. Clause (b) to section 40 deals with the firms assessable as such. Sub-clause (v) of clause (b) of section 40 provides that “any payment of remuneration to any partner who is working partner, which is authorized by, and is in accordance with the terms of the partnership deed and relates to any period falling after the date of such partnership deed insofar as the amount of such payment to all the partners during the previous year exceeds the

aggregate amount computed as hereunder.”. As per the command of this provision, the remuneration allowable to partners is to be computed with reference to the “book-profit”. Explanation 3 to section 40(b) defines the term “book profit” to mean ‘the net profit, as shown in the profit and loss account for the relevant previous year, *computed in the manner laid down in Chapter IV-D* as increased by the aggregate amount of the remuneration paid or payable to all the partners of the firm if such amount has been deducted while computing the net profit’. On a consideration of the relevant parts of section 40(b), it is manifested that the remuneration to the partners is allowable with reference to book-profit and the term book-profit means the net profit shown in the Profit and loss account computed in the manner laid down in Chapter IV-D. The Chapter exclusively deals with the income under the head “Profits and gains of business or profession”. Since the opening part of section 40 provides that the amounts enumerated herein shall not be deducted in computing the income chargeable under the head “Profits and gains of business or profession” and sub-clause (b) (iv) read with Explanation 3 to section 40 provides for deduction of remuneration only with reference to the book-profits computed in the manner laid down in Chapter IV-D, the sequitur which follows is that remuneration allowable to partners is to be computed with

reference to the income chargeable under the head “Profits and gains of business or profession” and not other incomes falling under other heads, such as, Capital gains or Income from other sources.

11. At this juncture, it is relevant to mention the judgment of Hon’ble Calcutta High Court, relied by the Id. AR, in *Md. Serajuddin & Brothers Vs. CIT (2012) 210 Taxman 84 (Calcutta)* providing that for purpose of computation of allowable remuneration to partners, book-profits should be ascertained not only with reference to income from business but also under other heads, such as, Income from other sources. This judgment lays down that the remuneration to partners should be computed with reference to the income under all the heads and should not be confined only to “Profits and gains of business or profession”. The issue of remuneration to partners again cropped up before the Hon’ble Rajasthan High Court in *CIT Vs. Allen Career Institute (2018) 403 ITR 375 (Rajasthan)*. In this later judgment, the Hon’ble Rajasthan High Court took a view contrary from the one taken by the Hon’ble Calcutta High Court and held that the remuneration to partners should be computed only with reference to the income falling under the head “Profits and gains of business or profession” and no other head. This shows that when the assessment order was passed u/s.143(3), there existed two views,

one in favour and the other against the assessee. None of the two judgments is from the Hon'ble jurisdictional High Court. Out of the two possible views, the AO followed the one in favour of the assessee and allowed deduction towards remuneration to partners with reference to the book-profits computed by considering the income chargeable under the head "Capital gains".

12. The Hon'ble Supreme Court in *Malabar Industrial Company Limited Vs. CIT (2000) 243 ITR 83 (SC)* has held that if two legally sustainable views exist on a point and the AO adopts one of such views, the CIT cannot revise the order on such a debatable issue.

We have noticed above that the case of the assessee was selected for *Limited scrutiny (CASS)* and the scope of verification was confined only to the genuineness of capital gain and its correct reflection in the return of income. In that view of the matter, it is palpable that the scope of the AO's verification did not cover the issue of remuneration to partners. Notwithstanding the fact that the AO did not examine the issue of deduction towards remuneration to partners in the assessment order because the same was not covered within the scope of limited scrutiny, it is vivid that the issue of remuneration to partners, being, confined only to the income under the head 'Profits and gains of business or profession' is debatable

and hence falls outside the ambit of the scope of revision u/s.263 of the Act.

13. The Id. DR strenuously argued that the AO ought to have converted 'limited scrutiny' into 'complete scrutiny' to cover the aspect of remuneration to partners and this act of non-conversion *per se* made the assessment order erroneous and prejudicial to the interest of the Revenue. On a specific query, it was conceded that the Id. CCIT in his order u/s.263, did not touch upon the issue of converting 'limited scrutiny' into 'complete scrutiny'. In our considered opinion, the scope of arguments by the DR is restricted to the issues decided in the impugned order. He cannot travel beyond such issues and step into the shoes of the authority(ies) which passed the order(s). Coming to the revision, the DR cannot characterize the assessment order to be erroneous and prejudicial to the interest of the Revenue on a new count other than those taken note of in the revisionary order. Such an attempt, if allowed, would clothe the DR with the power of revision, which obviously, is not feasible. As the Id. CCIT did not make out any case of converting 'limited scrutiny' into 'complete scrutiny' as a ground for revision, we are afraid that the contention of the Id. DR on this score cannot be entertained. It is, therefore, held that the Id. CCIT was not

justified in branding the assessment order erroneous and prejudicial to the interest of the Revenue on this ground as well.

14. In the result, the appeal is allowed.

Order pronounced in the Open Court on 07th September, 2023.

Sd/-	Sd/-
(PARTHA SARATHI CHAUDHURY)	(R.S.SYAL)
JUDICIAL MEMBER	VICE PRESIDENT

पुणे Pune; दिनांक Dated : 07th September, 2023
सतीश

आदेश की प्रतिलिपि □ प्रेषित/Copy of the Order is forwarded to:

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The respondent
3. DR, ITAT, 'A' Bench, Pune
4. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

// True Copy //

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

		Date	
1.	Draft dictated on	05-09-2023	Sr.PS
2.	Draft placed before author	06-09-2023	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

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