

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'SMC-I' : NEW DELHI)**

BEFORE SHRI P.K. BANSAL, ACCOUNTANT MEMBER

**ITA Nos.3777 & 3778/Del./2015
(ASSESSMENT YEARS : 2008-09 & 2010-11)**

Shri Ranvir Singh & Co.,
C/o N.C. Garg CA,
M.G. Road,
Rohtak.

vs. ITO, Ward 3,
Rohtak.

(PAN : AABFR3757N)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Gautam Jain, Advocate
REVENUE BY : Shri Robin Rawal, Senior DR

Date of Hearing : 18.02.2016

Date of Pronouncement : 19.02.2016

ORDER

The assessee agreed that in both the appeals, the issue involved is common, therefore, both these appeals be decided on the basis of the facts involved in the assessment year 2008-09.

2. The only issue involved in both the appeals relates to where there is a mistake apparent on record or not in the order of the AO passed u/s 143(3) by allowing the salary to the partners in accordance with Clause 10 read with section 40B(5) of the Income-tax Act, 1961 (hereinafter 'the Act').

3. I heard the rival submissions and carefully considered the same. I noted that in this case, the assessee firm came into existence on 01.04.1994 by virtue of the Partnership Deed executed mentioned the partners on 02.04.1994. Clause 10 of the Partnership Deed which deals with the remuneration paid to the partners read as under :-

“10. That all the partners are working partners and they shall be entitled to salary of Rs.25,000/- P.A. each.

However, the parties reserve the right to enhance or reduce the amount of salary at any time by their mutual consent oral or written. The salary will be credited in the accounts of the party at the close of the year. Further the salary payable to partners shall not exceed the amount allowable u/s40-B of the I.T. Act. The reduction in salary, if need be, shall proportionate.”

The AO in accordance with the Partnership Deed the remuneration to be paid each of the partner @ Rs.25,000/- per annum. The remuneration paid amounting to Rs.3,24,000/- as detailed below in accordance with section 40(b) :-

Shri Ranvir Singh	Rs.90,000/-
Shri Rajinder Singh	Rs.30,000/-
Shri Vijender Singh	Rs.30,000/-
Shri Rajesh Kumar	Rs.30,000/-
Shri Naresh	Rs.48,000/-
Shri Parvesh	Rs.48,000/-
Shri Ram Kishan	<u>Rs.48,000/-</u>
Total :	<u>Rs.3,24,000/-</u>

As per section 40(b), as this remuneration was allowable the AO, therefore, allowed the same. Subsequently, the AO initiated the

proceedings u/s 154 by taking a view on the basis of the decision in the case of Sood Brij & Associates vs. CIT – (2011) 203 Taxman 188 (Delhi) that a mistake apparent on record has crept into the assessment order and accordingly, he took the view that each of the partner is entitled for remuneration @ Rs.25,000/- per annum and accordingly, he after giving the show cause notice to the assessee disallowed a sum of Rs.1,49,000/- by passing the impugned order dated 22.11.2013 by holding that a mistake apparent on record has crept into the order of the AO. The assessee went in appeal before the CIT (A) and the CIT (A) confirmed the action of the AO.

4. Before me, the Id. AR submitted the copy of the order of the Hon'ble Delhi High Court (cited supra) and contended that the assessee does not fall within the jurisdiction of Hon'ble Delhi High Court. The clauses in the decision regarding the remuneration to the partners are entirely different from Clause 10 as mentioned in the Partnership Deed of the assessee. The order of the Hon'ble Delhi High Court is dated 04.11.2011 while the assessment order in the case of the assessee has been passed on 10.12.2010. He also relied before me on the order of the Hon'ble Rajasthan High Court in the case of CIT vs. Asian Marketing reported in 254 CTR 453, a copy of which is available at pages 56 & 57 of the paper book, and draw my attention that the similar clause for the payment of the remuneration was there as was in the case of the assessee.

In any case, the interpretation of section 40B was debatable. I have gone through the decision of the Hon'ble Delhi High Court in the case of Sood Brij & Associates (supra). I noted that in that case, the clauses which deals with the remuneration paid to the partners read as under :-

“8. Clauses 1 and 2 of the supplementary partnership deed dated 1st April, 1992 read :

“1. That subject to mutual consent of the partners, and subject to the provisions of the Income Tax Act, 1961, the working partner or partners shall be paid such remuneration as may be mutually agreed between themselves, from time to time, and such remuneration shall be deductible expense before arriving at the share of the partners as allocable from the net profits.

2. That both the partners (hereinafter referred as working partners), shall devote their time and attention in the conduct of the affairs of the partnership firm, as the circumstances and need of the firms business may require. The total remuneration payable to the working partners shall be an amount permissible as remuneration to the working partners under the Income Tax Act, 1961 and as applicable from time to time.”

Clause 10 of the Partnership Deed in the case of the assessee read as under:-

“10. That all the partners are working partners and they shall be entitled to salary of Rs.25,000/- P.A. each.

However, the parties reserve the right to enhance or reduce the amount of salary at any time by their mutual consent oral or written. The salary will be credited in the accounts of the party at the close of the year. Further the salary payable to partners shall not exceed the amount allowable u/s40-B of the I.T. Act. The reduction in salary, if need be, shall proportionate.”

If we look to both the clauses which is in the case of the assessee and in the case of Hon'ble Delhi High Court are entirely different. In the case before Hon'ble Delhi High Court, the Partnership Deed does not specify the remuneration paid to the partners while in the case of the assessee

Partnership Deed specified the remuneration payable to the partners. The Partnership Deed in the case of the assessee given the powers to the partners to enhance or reduce the salary at any time but no such clause was there in the case before Hon'ble Delhi High Court. The remuneration has to be determined as mutually agreed between the partners from time to time. Even I noted that the case of the assessee is duly covered by the decision of Hon'ble Rajasthan High Court in the case of CIT vs. Asian Marketing reported in 254 CTR 453 in which also the similar clause regarding the payment of the remuneration to the partners was there as is in the case of the assessee. Since there are two decisions of the Hon'ble High Court, none of which is Hon'ble jurisdictional High Court, therefore, in the case of the assessee, it cannot be a case of mistake apparent on record. It is a case where two conceivable opinions can be there. Therefore, I quash the order passed by the AO u/s 154 of the Act.

5. In the result, both the appeals of the assessee are allowed.

Order pronounced in open court on this 19th day of February, 2016.

**Sd/-
(P.K. BANSAL)
ACCOUNTANT MEMBER**

Dated the 19th day of February, 2016

TS

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A), Rohtak.
- 5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.