

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH 'D' : MUMBAI

**BEFORE SHRI D. MANMOHAN, (VICE PRESIDENT) AND
SHRI RAJENDRA SINGH,(ACCOUNTANT MEMBER)**

ITA No.663/Mum2010
Assessment Year : 2006-07

A.F. Ferguson & Co.
Allahabad Bank Bldg.
Bombay Samachar Marg
Mumbai-400 001.
P.A. No.(**AABFA 5846 M**)

.....(*Appellant*)

Vs.

The Asstt. Commissioner of Income tax
Range-11(2), Aayakar Bhavan
Mumbai.

.....(*Respondent*)

Appellant by : Shri Milin Thakre and
Shri Jayesh Desai

Respondent by : Shri V.V. Shastri

Date of hearing : 27.7.2011

Date of pronouncement : August, 2011

ORDER

Per RAJENDRA SINGH (AM).

This appeal by the assessee is directed against the order dated 25.11.2009 of CIT(A) for the assessment year 2006-07. The assessee in this appeal has raised disputes on three different grounds.

2. The first dispute is regarding addition on account of sundry creditors. The AO noted that the assessee had shown sundry creditors and other liabilities to the tune of Rs.74,96,201/- in the balance sheet which could not be accepted as assessee was following cash method of

accounting. The AO further noted that similar dispute had arisen in assessment year 2001-02 in which the Tribunal had upheld the additions being increase in sundry creditors during the year in respect of certain items. He, therefore, computed the difference in terms of such items based on order of Tribunal in assessment year 2001-02, which was as under:-

Particulars	Bal. as at 31.3.05	Add to 31.3.06	Payments/W. back to 31.3.06	Bal. as on 31.3.06	Net figures of items for A.Y. 06-07 as per the order of ITAT confirmed in A.Y. 01-02
Unpaid cheques	17500	15088	Nil	32588	15088
Professional Tax	8758	15533	8758	15333	6775
Sundry Creditors	158688	317700	90000	386388	227700
Professional Tax	2410	4590	2410	4590	2182
					268564

The AO thus made addition of Rs.2,68,564/-. In appeal the CIT(A) confirmed the addition, aggrieved by which the assessee is in appeal.

2.3 We have heard both the parties in the matter. It is not in dispute that the assessee was following cash method of accounting and therefore, the sundry creditors in balance sheet could not be justified. Similar addition has already been upheld by the Tribunal in assessment year 2001-02 in assessee's own case and addition in this year has been made on the same basis. We, therefore, see no

infirmary in the order of CIT(A) confirming the addition of Rs.2,68,564/- and the same is therefore, upheld.

3. The second dispute is regarding additions amounting to Rs.59,07,500/- and Rs.8,75,471/- on account of payment to retired partners and wives of deceased partners under the provisions of partnership deed as diversion of income. During the assessment proceedings, the assessee submitted that retired partners/wives of deceased partners had overriding title on certain percentage of gross fees subject to certain limitation as provided in the partnership deed. The claims had been made under provisions of the deed and therefore, should be allowed as deduction. The AO however, did not accept the contention raised. It was observed by him that payment to ex-partners or their spouses on their death was not for rendering any professional services for the firm and, therefore, such expenses could be allowed as deduction against the professional fees of the assessee firm. The AO also observed that the income by way of professional fees otherwise had reached the assessee firm and therefore, payment made by it to the ex-partners and their spouses were only application of income and could not be allowed as deduction by way of overriding title. The AO therefore, disallowed the claim and added the same to the total income. In appeal the CIT(A) following the decision taken in assessment years 2003-04 and 2004-05 confirmed the addition made

by the AO, aggrieved by which the assessee is in appeal before the Tribunal.

3.1 Before us the Id. AR for the assessee submitted that the same issue had arisen in appeal in Assessment Year 2003-04 and Tribunal after detailed examination in ITA No.1113/M/2007 vide order dated 13.8.2010, after referring to various clauses of partnership deed agreed that it was nothing but diversion of income and accordingly allowed the claim. The same decision was followed in Assessment Year 2004-05 in which the Tribunal following the decision in Assessment Year 2003-04 allowed the claim that year also. Therefore, the issue was covered in favour of the assessee. The Id. DR on the other hand, supported the orders of the authorities below and placed reliance on the judgment of Hon'ble Bombay High Court in case of CIT vs. V.G. Bhuta (203 ITR 249).

3.2 We have perused the records and considered the rival contentions carefully. The dispute is regarding allowability of deductions on account of payments made by the assessee to the retired partners and wives of deceased partners while computing the total income. The payments had been made under the provisions of partnership deed. The same issue had been examined by the Tribunal in assessee's own case for assessment year 2003-04 in ITA

No.1113/M/2007. The Tribunal after examination of various clauses of partnership deed noted that retired partners and spouses of deceased partners had an overriding title up to certain percentage of gross fees collected by the firm subject to certain conditions. Thus the provisions of partnership deed created overriding title in favour of these persons on certain percentage of receipts irrespective of the fact whether there was profit or not. The Tribunal observed that the case of the assessee was covered by the decision of the Tribunal in case of C.C. Chokshi & Co. in ITA No.492 to 495/M/2003 in which a similar claim had been allowed. The Tribunal after detailed discussion and after referring to the judgment of Hon'ble Supreme Court in case of CIT vs. Sitaldas Tirathdas (41 ITR 367) and the judgment of Hon'ble Supreme Court in case of Prince Khandelrao Gaikwar vs. CIT (16 ITR 294) and several other judgments held that it was a case of diversion of income and not application of Income. The facts in this year are identical. The Id. DR has placed reliance on the judgment of Hon'ble Bombay High Court in the case CIT vs. V.G. Bhuta (supra), which had also been cited by the Department before the Tribunal. We have also gone through the said judgment and find that the said case is distinguishable. In that case, the clause 18 of the partnership deed provided that the firm would not stand dissolved on the death of the partner but the surviving partner or partners would succeed to the share of the

deceased partner in the partnership deed. The clause required that the surviving partners had to pay to the legal representative of the deceased partners certain amounts as price of such shares. The Hon'ble Court noted that the partnership deed did not make it obligatory on the part of the surviving partners to pay the amounts. It was to be paid only if they wanted to take over share of the deceased partner and continue partnership business. This clearly indicated that what was paid was by way of price of share of the deceased partner in the partnership deed. The Hon'ble High Court accordingly held that at the most it was application of income that had accrued to the assessee and the disallowance of the claim had accordingly been upheld. The facts in case of the assessee are obviously distinguishable and therefore, the said judgment will have no application in the present case. We, therefore, respectfully following the decision of the Tribunal in assessee's own case for assessment years 2003-04 and 2004-05 (supra) set aside the order of CIT(A) and allow the claim of the assessee.

4. The third dispute is regarding disallowance of Rs.5.00 lacs being payment made to Mr. E.A. Kshirsagar, a retired employee. The AO noted on detailed examination of expenses that the sum of Rs.5.00 lacs being payment to Shri Kshirsagar a retired employee had been included under the head "payment to retired person or widows of ex-

partner". The assessee had claimed deduction under section 37(1). The claim had been disallowed by the AO. The CIT(A) noted that the assessee had provided copy of some inter-office correspondence dated 13.5.2004 signed by Shri A.K. Mahindra and stating that Mr. Kshirsagar would be entitled to pension of Rs.4.00 lacs w.e.f. 1.4.2004. Subsequently it was submitted that the amount was raised to Rs.5.00 lacs with the consent of all the partners. The CIT(A) observed that there was no evidence of agreement of all the partners. It was also observed by him that it was not regular practice for making payment of pension to retired employees of the firm. He, therefore, confirmed the disallowance, aggrieved by which the assessee is in appeal before the Tribunal.

4.1 Before us the Id. AR for the assessee submitted that the assessee had been allowed pension of Rs.4.00 lacs w.e.f. 1.4.2004 and in the earlier year the same amount had already been allowed as deduction. In the current year, only amount has been increased to Rs.5.00 lacs on which tax has already been deducted at source. It was also submitted that no amount can be paid to employee or ex-partner without agreement of partners. It was accordingly urged that the claim should be allowed. The Id. DR placed reliance on the order of the CIT(A).

4.2 We have perused the records and considered the matter carefully. The dispute is regarding allowability of Rs.5.00 lacs paid to ex-employee as pension. We find that ex-employee Shri Kshirsagar had been sanctioned pension of Rs.4.00 lacs w.e.f. 1.4.2004 which had been increased to Rs.5.00 lacs during the year. The sum of Rs.4.00 lacs has already been allowed as deduction in Assessment Year 2005-06. Therefore, allowability of claim is not in dispute. The CIT(A) disallowed the claim on the ground that there was no evidence of agreement of partners to pay increased amount. In our view the claim should not be disallowed on such ground. No amount can be paid to employee or ex-partner without the consent of the partners. The claim is otherwise allowable and there is no dispute on the amount paid. We, therefore, set aside the order of CIT(A) and allow the claim.

5. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 10.8.2011.

Sd/-
(D. MANMOHAN)
VICE PRESIDENT

Sd/-
(RAJENDRA SINGH)
ACCOUNTANT MEMBER

Mumbai, Dated: 10.8.2011.
Jv.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT(A) Concerned, Mumbai
The DR " " Bench

True Copy

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.