

IN THE INCOME TAX APPELLATE TRIBUNAL

“D” BENCH, CHENNAI

BEFORE SHRI ABRAHAM P. GEORGE, ACCOUNTANT MEMBER
AND SHRI V. DURGA RAO, JUDICIAL MEMBER

I.T.A. No. 1164/Mds/2012
(Assessment Year : 2008-09)

M/s Deloitte Haskins & Sells,
ASVN Ramana Towers, 7th floor,
No.52, Venkatanarayana Road,
T. Nagar, Chennai - 600 017.

v. The Deputy Commissioner of
Income Tax,
Range – I,
Chennai - 600 034.

PAN : AACFD 3711 D
(Appellant)

(Respondent)

Appellant by : Shri Girish Dave, CA
Respondent by : Shri R.B. Naik, CIT-DR

Date of Hearing : 18.06.2013
Date of Pronouncement : 04.07.2013

O R D E R

PER ABRAHAM P. GEORGE, ACCOUNTANT MEMBER :

Through this appeal, assessee assails an order passed by Commissioner of Income Tax-IV, Chennai, on 26.3.2012, under Section 263 of Income-tax Act, 1961 (in short 'the Act').

2. Facts apropos are that assessee, a firm of Chartered Accountants, filed its return for impugned assessment year on 30th September, 2008, declaring a total income of ₹ 17,70,69,972/-. The assessment was completed on 31st December, 2010 under Section 143(3) of the Act, accepting the income returned. Thereafter, on 29.2.2012, CIT issued a show cause notice under Section 263 of the Act, inter alia, stating that the number of partners in the firm had gone above 20, during the relevant previous year. As per Id. CIT, there were some amendments in the partnership deed on 1st May, 2007, whereby one Shri Mukund Dharmadhikari, already a partner of the firm, was added once again as partner in a representative capacity, representing M/s Deloitte Haskins & Sells, Mumbai. Ld. CIT noted that Shri Mukund Dharmadhikari had right to share of profit, both in the representative capacity as well as in his individual capacity. Thus, according to him, the number of partners exceeded 20, maximum allowed under Indian Partnership Act, 1932. Assessee therefore had to be treated as an Association of Persons. Assessment order under Section 143(3), passed on 31.12.2010, as per CIT, did not consider this aspect, but had accepted the claim of the assessee that it was a firm and on account of this, assessee was

allowed deduction under Section 40(b) of the Act on salaries paid to its partners.

3. To the above notice, reply of the assessee was that the number of partners did not exceed 20, but remained at 20. According to assessee, amendment dated 1.5.2007 clearly mentioned that the number of partners was 20 only. Relying on the decision of Hon'ble Apex Court in the case of CIT v. Bagyalakshmi & Co (55 ITR 660), assessee argued that an individual could represent group of persons as well as himself thereby occupying a dual position. Qua the partnership, he functioned in his individual capacity only. Qua the third parties, he functioned in a representative capacity also. As per assessee, the right of Shri Mukund Dharmadhikari was only to share the profits of the assessee-firm and nothing more. Reliance was also placed on the decision of Hon'ble Apex Court in the case of Rashik Lal and Co. v. CIT (229 ITR 458). As per assessee, through this decision, it was clarified by the Hon'ble Apex Court that only individuals could become partners of the firm and even if a person joined the firm in his capacity as representative of a body or association, vis-à-vis the firm, his position was still that of an

individual only. Agreement which an individual had with a third party to divide the profits received from the firm did not bind the firm nor did it alter the position of the firm under the Partnership Act or Income-tax Act. Assessee argued that a 'person' mentioned in Section 4 of Indian Partnership Act, 1932 could only be a natural person or a juristic or legal person. A firm or Association of Persons was not a legal person. Thus, according to assessee, though Shri Mukund Dharmadhikari was acting in a dual capacity, the total number of partners never exceeded 20 during the relevant previous year. In any case, as per assessee, the view taken by Assessing Officer was a possible one and therefore, CIT did not have a jurisdiction to interfere by exercising power under Section 263 of the Act. For this, reliance was placed by the assessee on the decision of Hon'ble Punjab & Haryana High Court in the case of CIT v. Max (India) Ltd. (268 ITR 128).

4. However, the CIT was not impressed by any of the above contentions taken by the assessee. According to him, the amendment deed dated 1.5.2007 clearly showed that M/s Deloitte Haskins & Sells, Mumbai, participating in the firm became a partner through its representative Shri Mukund Dharmadhikari. Sharing of

the profits among the parties, mentioned in the deed included M/s Deloitte Haskins & Sells, Mumbai. A sum of ₹ 267 lakhs was to be paid to Shri Mukund Dharmadhikari in his representative position and after that he was entitled to a percentage share in the balance profits. Ld. CIT noted that the cases relied on by the assessee, namely, Bagyalakshmi & Co. (supra) and Rashik Lal & Co. (supra) were concerned with Hindu Undivided Family and rights of a karta, when a karta entered into a partnership. As per Ld. CIT, these decisions only dealt with the position of a karta of a HUF and his right to share in the profits of a firm in which he was a partner. Whereas in assessee's case, the partnership deed clearly mentioned that Shri Mukund Dharmadhikari was a partner, who was to account to M/s Deloitte Haskins & Sells, Mumbai, in his representative capacity. In addition, he also got a share of 20.0530% in the profits in his individual capacity. He was thus of the opinion that the amendment to the partnership deed on 1st May, 2007 resulted in the membership exceeding 20, the maximum limit prescribed under law. Since Assessing Officer had not considered this aspect, but allowed the claim of the assessee with regard to the salaries paid to its members under Section 40(b) of the Act, he directed the Assessing Officer to

modify his assessment order and enhance the assessment by disallowing the claim made by the assessee under Section 40(b) of the Act.

5. Now before us, learned A.R., strongly assailing the order of CIT, submitted that both partnership deed dated 1.4.2007 and amended deed dated 1.5.2007 were before the Assessing Officer while he was finalizing the original assessment. As per learned A.R., Assessing Officer had considered such partnership deeds before completing the assessment under Section 143(3) of the Act. Relying once again on the decision of Hon'ble Apex Court in the case of Rashik Lal & Co. (supra), learned A.R. submitted that even if Shri Mukund Dharmadhikari was considered as a representative of M/s Deloitte Haskins & Sells, Mumbai, he still remained an individual qua the assessee-firm. For the purpose of count, what mattered was number of individuals. Section 4 of Indian Partnership Act, 1932 was clear that there had to be a relation between partners agreeing to share the profits for a partnership to come into existence. According to him, when a person was treated as a partner in his representative capacity, it could not be stated that the firm was bound to the person whom he was representing. 'Person' mentioned in Section 4

of the Indian Partnership Act, 1932, could either be a natural person or juristic or legal person. Once again relying on the decision of Hon'ble Apex Court in the case of Bagyalakshmi & Co. (supra), learned A.R. submitted that a partner could be a trustee, could enter into partnership with others, could be a representative of group of persons or could be a benamidar. Even if he occupied a dual position, qua the partnership, he functioned in his personal capacity only. Here, Shri Mukund Dharmadhikari was a partner both in his individual capacity as well as in a representative capacity, but, qua the assessee-firm, Shri Mukund Dharmadhikari was only one person. Rights and obligations of Shri Mukund Dharmadhikari vis-à-vis the firm were regulated by the partnership deed. The firm M/s Deloitte Haskins & Sells, Mumbai, which was being represented by Shri Mukund Dharmadhikari, could never raise any legal claim against assessee. They could not pursue any legal action against the assessee for violation of any clause of partnership deed. Assessee had nothing to do with the contract Shri Mukund Dharmadhikari had with M/s Deloitte Haskins & Sells, Mumbai. As far as assessee was concerned, Shri Mukund Dharmadhikari was only a single person. Thus, as per the original partnership deed as well as amended deed,

only 20 partners were there in the firm. Hence, number of partners never exceeded 20. Assessing Officer had taken a lawful view. CIT could not substitute a lawful view with his own view. Relying on the decision of Hon'ble Apex Court in the case of Malabar Industrial Co. Ltd. v. CIT (243 ITR 83), learned A.R. submitted that twin conditions viz. existence of an error and such error being prejudicial to the interests of Revenue, which were necessary for invoking revisionary powers under Section 263 of the Act were absent here. In any case, as per the learned A.R., the CIT fell in error when he directed the Assessing Officer to modify the assessment considering assessee as an Association of Persons and deny its claim of remuneration paid to its partners. This had completely tied up the hands of the Assessing Officer and such directions, according to learned A.R., were beyond the scope of the revisionary powers under Section 263 of the Act.

6. Per contra, learned D.R., strongly supporting the order of CIT, submitted that the Assessing Officer had committed gross error in not verifying the supplementary deed. Assessing Officer, according to learned D.R., had never gone into the aspect of number of partners in the assessee-firm. Assessing Officer had without applying his mind, accepted the claim of the assessee that it was a partnership firm and

also allowed its claim of remuneration under Section 40(b) of the Act. Thus, non-application of mind was an error and such error was definitely prejudicial to the interests of Revenue. Hence, according to him, CIT was justified in invoking his revisionary power under Section 263 of the Act.

7. We have perused the orders and heard the rival submissions. There is no dispute that partnership deed dated 1.4.2007 and amendment deed dated 1.5.2007 were before the Assessing Officer when he completed the assessment under Section 143(3) of the Act originally. The amendments made through the latter deed, which has given rise to this dispute, are reproduced hereunder:-

IN THE PRINCIPAL DEED THE FOLLOWING CLAUSES SHALL BE AMENDED AS STATED BELOW:

Partner is Representative Capacity	1	the following shall be added as a part of the recitation under the first paragraph "PARTIES" SHRI MUKUND DHARMADHIKARI, a Party of the Fourth Part, is a Partner in the said Firm on his own behalf. In addition with effect from the first day of May, 2007, he shall be also be a Partner in a representative capacity,
--	---	---

representing Deloitte Haskins & Sells, Mumbai, a Participating Firm.

PARTNERS' 2
REMUNERATION AND
SHARE OF PROFITS

clause 9 of the Principal Deed shall be substituted by the following:

Remuneration

- a. Each Active Partner shall be paid out of Partnership moneys each month, remuneration as set out in Annexure 1, and such payment shall be deemed to be an expense of the Partnership.
- b. With effect from the first day of May, 2007 the net Profits or Losses for the year of the said Firm shall be shared by the Parties hereto in the following manner:
 - i. First, ₹ 267 lakhs (Rupees Two hundred and sixty seven lakhs) being a share of profits (net of tax) shall be paid to SHRI MUKUND DHARMADHIKARI, A PARTY of the Fourth part in his capacity as a Representative Partner of Deloitte Haskins & Sells, Mumbai, a Participating Firm.
 - ii. Thereafter, the

divisible profits or losses, as the case may be, of the said Firm shall be calculated and the shares therein of the parties of the First to the Twentieth Parts shall be divisible in the manner set out in Annexure II.

8. Mode of division of profits, mentioned in Annexure II of the amendment deed reads as under:-

ANNEXURE II

PARTNER'S REMUNERATION AND SHARE OF PROFITS AND LOSSES

DELOITTE BASKINS & SELLS, CHENNAI

No.	Name	Share of Profits and Losses (%)
1.	M.K. Ananthanarayanan	7.0923
2.	V. Balaji	2.6481
3.	Bhavani Balasubramanian	4.4459
4.	Mukund Dharmadhikari	20.0530
5.	Anil Gupta	9.2697
6.	M. Lakshminarayanan	8.0450
7.	B. Mala	6.1396
8.	C.R. Rajagopal	3.0698
9.	K. Rajasekhar	5.1923
10.	B. Ramaratnam	2.9354
11.	M. Ramchandran	4.2577
12.	P.R. Ramesh	0.0005
13.	K. Sai Ram	6.6461
14.	K.R. Sekar	3.4932

15.	V. Srikumar	6.6461
16.	S. Sundaresan	0.0046
17.	Geetha Suryanarayanan	3.3873
18.	Ganesh Swaminathan	2.7522
19.	S. Thirumalai	0.0046
20.	Ravi Veeraraghavan	3.9166
	TOTAL	100.0000

9. Shri Mukund Dharmadhikari had a share of 20.0530% in the total profits left, after paying ₹ 267 lakhs to him in his capacity as representative partner of M/s Deloitte Haskins & Sells, Mumbai. M/s Deloitte Haskins & Sells, Mumbai is mentioned as a “Participating firm” in the original partnership deed dated 1st day of April, 2007.

“Participating Firm” has been defined in the said deed as under:-

““Participating Firms” shall mean the group of Firms comprising, in alphabetical order, A.F. Ferguson & Co., A.F. Ferguson Associates, C.C. Chokshi & Co., Ahmedabad, C.C. Chokshi & Co., Baroda, C.C. Chokshi & Co., (Mafatlal House) Mumbai, C.C. Chokshi & Co., (Worli) Mumbai, C.C. Chokshi & Co., New Delhi, Deloitte Haskins & Sells, Ahmedabad, Deloitte Haskins & Sells, Baroda, Deloitte Haskins & Sells, Chennai, Deloitte Haskins & Sells, Kolkata, Deloitte Haskins & Sells, (National Firm), Deloitte Haskins & Sells, Mumbai, Deloitte Haskins & Sells, New Delhi, Fraser & Ross, Fraser & Ross Associates, P.C. Hansotia & Co., S.B. Billimoria & Co., Touche Ross & Co., Chennai, Touche Ross & Co., Mumbai, and such other Firms as may be decided from time to time.”

There is a specific provision again in the very same deed which harps on the policy making powers that have an effect on “Participating Firm”. This provision reads as under:-

Certain decisions
by the
Participating Firms

- n. Notwithstanding anything contained in any of the clauses the following shall prevail upto 30th September 2007.

All policy decisions affecting the Participating Firms will need the approval of the majority of the members of the National Firm.

Provided however that in respect of the following matters, the decision shall require approval of 75% affirmative vote of the total votes cast, any fraction being rounded off to the next higher number:

- (i) Change in the name of the Firm
- (ii) Merger with any other Firm
- (iii) Admission of a Partner
- (iv) Exit of a Partner

“National Firm” mentioned in the above clause is defined in the very same deed as under:-

““National Firm” shall mean the Partnership Firm Deloitte Haskins & Sells which is the Indian member Firm of Deloitte Touche Tohmatsu.”

10. Thus two aspects are very clear. One is that M/s Deloitte Haskins & Sells, Mumbai, which is a participating firm, is not a stranger

to the assessee. Assessee can take policy decisions, which have a policy bearing on such firm, once there is an approval of the majority of the members of the “National Firm”. Shri Mukund Dharmadhikari was representing M/s Deloitte Haskins & Sells, Mumbai, which was a participating firm. What can easily be construed from the above is that endeavour of the assessee through the amendment deed, was to bring on board the participating firm, on which it had powers to make policy decision, so that they became entitled for a share of profit. In other words, the effort of the assessee was to bring indirectly into the partnership M/s Deloitte Haskins & Sells, Mumbai, which was already a participating firm. Assessee was a renowned partnership firm and was well aware that number of partners cannot exceed 20. It is a well settled principle of law that what is permissible is tax planning, but not evasion. When an attempt is made by a concern to evade tax using subtle camouflages, bounden duty of the authorities is to find out the real intention. It is the duty of the Court in every case, where ingenuity is expended to avoid taxing and welfare legislations, to get behind the smoke screen and discover the true state of affairs, as held by Hon'ble jurisdictional High Court in the case of Indo Tech Electric Co. v. DCIT in TC(A) No.2209 & 2210 of

2006 dated 16.12.2010 at para 15.1 of its order. The Court has to go into substance and not to be satisfied with the form. No doubt, as pointed out by the learned A.R., Hon'ble Apex Court in the case of Rashik Lal & Co. (supra) has clearly held that a partner may be a trustee or may enter into a sub-partnership with others, or can be a representative of a group of persons. Qua the partnership, he functions in his personal capacity. But, in our opinion, the above decision as well as decision in the case of Bagyalakshmi & Co. of Hon'ble Apex Court (supra) will not have any applicability here, since assessee was indirectly trying to bring in M/s Deloitte Haskins & Sells, Mumbai, another firm, which was already a participating firm, as its partner, circumventing the limit of maximum 20 members. It is also obvious that Assessing Officer despite having the amendment deed with him, had not gone into these aspects. Assessment order is a crisp one accepting the income returned by the assessee. Assessee has not been able to place any record to show that Assessing Officer had called for any details regarding the number of partners during the course of assessment. A crisp order by itself might not show that Assessing Officer had not applied his mind. But, when the circumstances show that despite availability of materials,

aspects vital to the assessment were missed out, then the normal inference that can be drawn is that Assessing Officer had not looked into such aspects nor applied his mind. Assessee had claimed substantial amount as remuneration to its partners under Section 40(b) of the Act and this was allowed as such without considering the crucial aspect of the legality of its claim of status as a firm. In our opinion the circumstances would show that Assessing Officer had not applied his mind and such assessment order by virtue of this, became an erroneous one which was prejudicial to the interests of Revenue.

11. No doubt, the CIT went over board when he directed the Assessing Officer to modify the assessment order by treating the assessee as an AOP and disallow the claim of remuneration to its partners. The CIT ought have simply set aside the order of A.O. for consideration of issue afresh, since it was erroneous insofar as it was prejudicial to the interests of Revenue and to this extent, order of Id. CIT required modification.

12. Thus, while confirming the order of CIT(Appeals) insofar as invocation of his powers under Section 263 of the Act is concerned,

we find it necessary to modify his order. Assessing Officer shall be free to consider the claim of the assessee afresh and will not be constrained by the direction of the CIT that assessment has to be done disallowing the claim of remuneration to partners. Assessing Officer shall be free to proceed in accordance with law. Ordered accordingly.

13. In the result, appeal filed by the assessee is partly allowed.

Order was pronounced in the Court on Thursday, the 4th of July, 2013, at Chennai.

sd/-
(V.Durga Rao)
Judicial Member

sd/-
(Abraham P. George)
Accountant Member

Chennai,
Dated the 4th July, 2013.

Kri.

Copy to: (1) Appellant
(2) Respondent
(3) CIT-IV, Chennai
(4) D.R.
(5) Guard file