

IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH, AHMEDABAD

BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT &
Ms. MADHUMITA ROY, JUDICIAL MEMBER

I.T.A. No.277/Ahd/2016
(Assessment Year : 2012-13)

The Asstt. Commissioner of
Income Tax,
Kheda Circle,
Nadiad -387 002.

Vs. M/s. Asian Food Industries,
Opp. Escort Tractors,
N.H.No.8, Dabhan, Nadiad,
Dist. Kheda – 387 320.

[PAN No. AA EFA 1288 Q]

(Appellant)

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(Respondent)

Appellant by : Shri S. K. Dev, Sr. D. R.
Respondent by : Shri D. K. Parikh, A. R.

Date of Hearing 07/01/2019
Date of Pronouncement 28/01/2019

ORDER

PER Ms. MADHUMITA ROY - JM:

The instant appeal filed by the revenue is against the order dated 30.11.2015 passed by the Commissioner of Income Tax (Appeals)-1, Vadodara arising out of the assessment order dated 13.03.2015 issued by the ACIT, Kheda Circle, Nadiad passed under section 143(3) of the Income Tax Act, 1961 (hereinafter referred as to “The Act”) for the Assessment Year 2012-13 with the following grounds:

- “1. Whether on the facts and circumstances of the case and in law the Ld. C.I.T. (A) was justified in directing the A.O. to consider these incomes for the purpose of computation of book profit, without appreciating that A.O. correctly worked out disallowance of remuneration to partners after re-computing book profit on the basis of adjusted net profit and loss representing profit and gains of business/profession, in accordance with the provision of explanation 3 below section 40(b)(v) of the Act
2. Whether on the facts and circumstances of the case and in law justified in directing the A.O. to consider these incomes for the purpose of computation

of book profit, without appreciating that interest income not forming part of business/profession and shed rent are not included in the definition of business income, as defined in clause (i) to (vii) of section 28 of the Act.

3. *Whether on the facts and circumstances of the case and in law justified in directing the A.O. to consider these incomes for the purpose of computation of book profit, without appreciating that the A.O. had correctly worked out income from business/profession for computing book profit for determination of disallowance of partner's remuneration in accordance with the provision of section 29 of the Act, wherein the procedure for determination of profit & gain of business referred to in section 28 of the Act by applying the various provisions contained in section 30 to 43D of the Act has been laid down.*

Relief claimed in appeal.

The order of the CIT(A) on the issues raised in the aforesaid Grounds be set aside and that of the Assessing Officer be restored.”

2. The assessee engaged mainly in exporting of processed spices and food stuff filed its return of income declaring total income at Rs.3,52,51,270/- on 17.09.2012. Upon scrutiny notice u/s 143(2) dated 07.08.2013 was served upon the assessee followed by a further notice u/s 142(1) of the Act dated 12.11.2013 due to change of incumbent of the office. The copies of Trading, P&L Account and Balance Sheet with annexures, Computation of total income, Tax Audit Report and acknowledgement of e-return filed was duly submitted by the assessee as asked for.

3. During the assessment proceeding, the assessee was to explain as to how the income of Rs.1,20,000/- from shed rent which is income from house property and credit to P&L Account qualifies to be included for claim of remuneration to partners u/s 40b(v). In reply to that the assessee submitted that the partners are eligible as per law on such amount received as shed rent remuneration. However, the said explanation was not accepted and rejected by the Learned AO. Accordingly, the shed rent towards Rs.1,20,000/- was disallowed from the computation of remuneration to the partners. Further that, the assessee firm since credited interest income of Rs.79,11,386/- and Bank Interest of Rs.1,40,97,130/- in his P&L Account, the assessee was asked to explain the

nature of the interest income and to justify its claim for computation of remuneration to partners u/s 40(b)(v) of the Act. The assessee submitted that book profit means the net profit, as shown in the profit and loss account of the relevant previous year, computed in the manner laid down in Chapter-IV and as increased by aggregate amount of remuneration paid or payable to all the partners of the firm if such amount has been deducted while computing net profit. Therefore, the book profit is computed on the basis of the net profit as per profit and loss account and such net profit being the basis of computing book profit, amount of income including interest income which is credited in the profit and loss account cannot be reduced from net profit as no such reduction is provided in the provisions under Explanation: 3 to Section 40(b)(v). Further that, the firm has deposited Bank FDR with various banks for export business and to avail various credit limits with banks. Copy of ledger account of interest account were also furnished by the assessee. It was contended by the assessee that without fulfilling this conditions, business cannot be run and export will not be eligible. Therefore, there are direct nexus of Bank FDR with export business and as a result, interest income earn on this Bank deposit is nothing but a business income. Therefore the income which is embedded in the net profit and shown as income in the profit and loss account of the firm can be taken into consideration for allowing deduction of remuneration to partner u/s 40(b) of the Act without excluding the interest income and that the profit so calculated shall form part of the book profit. In support of his claim, the assessee also relied upon the judgment passed by the Co-ordinate Bench. However, the contention made by the assessee was not found suitable and ultimately shed rent & interest income amounting to Rs.2,21,28,516/- is disallowed from the computation of remuneration of the partners against which the appeal was preferred by the assessee but without success. In appeal before the Learned CIT(A), ultimately deleted such addition made by the Learned AO with the following observation:

“3.1 The AO has stated in his order that the appellant had credited is from Shed rent at Rs.1,20,000/-, interest income of Rs. 79,11,386/- and interest of Rs.1,40,97,130/- in its Profit & Loss A/c. The AO show caused the appellant to

explain the nature of the interest income and justify its claim for computation of remuneration to partners u/s.40(b)(v) of the Act. The appellant in its reply claimed that the "Book Profit" for the purposes of such computation includes such interest also. It was also claimed that the interest income was in the nature of business income. Besides, by relying upon certain decisions, it was claimed that even if income from other sources is included in the P & L A/c, to ascertain the "Book Profit" for computation of remuneration of the partners, the same cannot be discarded. The AO did not accept this contention by holding that the interest earned by the appellant and Shed rent are in the nature of income from other sources and hence do not form of the business income as defined u/s.28 of the Act. He also stated that in section 40(b)(iii), an exclusive definition has been provided which mandates that only profit computed as per Chapter-IVD and not any other profit is to be considered for the purpose of computation of such remuneration. Accordingly, the AO recomputed the book profit excluding these incomes and determined the remuneration to partners to be allowed at Rs.3,97,02,742/- as against claim of Rs.5,31,01,895/-. Accordingly, excess remuneration of Rs.1,33,99,153/- was disallowed.

3.1.2. During the course of appellate proceedings, the appellant's AR has filed detailed submission in this regard. He has placed reliance upon the decision of ITAT, Ahmedabad Bench in the case of Akshar Associates Vs. ACIT ITA No.2583/Ahd/2011. This decision of the jurisdictional Tribunal is based upon the decision of Hon'ble High Court of Gujarat in the case of CIT Vs. J.J. Industries 358 ITR 531 Gujarat. In this decision, the High Court had held that interest from fixed deposit of spare fund cannot be excluded from book profit for purpose of determining allowable deduction of remuneration paid to partners. Thus, the jurisdictional High Court had clearly held that interest earned from FDR made out of surplus fund available with the assessee is also be considered as part of the book profit for the purposes of computation of remuneration to be paid to partners. Thus, the issue in the current appeal is covered in favour of the appellant by this decision of jurisdictional High court. Following the same, the AO is directed to consider these incomes for the purposes of computation of book profit and accordingly the disallowance made out of remuneration to partners is directed to be deleted."

Hence, the instant appeal before us.

4. At the time of hearing of the instant appeal, the Learned Counsel appearing for the assessee submitted before us that the issue is duly covered by the order passed by the Co-

ordinate Bench in a similar set of facts being ITA No. 2853/Ahd/2011 for A.Y. 2008-09 copy whereof is also attached as “Exhibit-A” before us. The Learned DR, however, relied upon the order passed by the authorities below.

5. Heard the respective parties, perused the relevant materials available on record. This is a settled principle of law that the interest income for the purpose of ascertaining ceiling on the basis of book profit, the profit shall be in the profit and loss account. The interest income, thus, cannot be notionally be excluded for the purpose of determining the allowable of deduction of remuneration paid to the partners u/s 40(b) of the Act. In the case in hand both the shed rent and the interest income assessed as business income for the purpose of computing admissible deduction u/s 40(b). The Learned AO took a different view by not allowing the said deduction. However, in a similar set of facts, the Co-ordinate Bench in ITA No. 2853/Ahd/2011 for A.Y. 2008-09, decided the matter in favour of the assessee relying upon the judgment passed by the Jurisdictional High Court with the following observations:

“5. We find that the issue in appeal is now squarely covered by the judgment of Hon’ble Jurisdictional High Court in the case of CIT vs. J.J. Industries (358 ITR 531) wherein their Lordships have upheld the Tribunal's stand to the effect that for the purpose of ascertaining ceiling on the basis of book profit, the profit shall be in the profit and loss account. The interest income, therefore, cannot notionally be excluded for the purpose of determining the allowable deduction of remuneration paid to the partners under Section 40b of the Act. As in the present case, in this case also interest was assessed as business income, and yet, for the purpose of computing admissible deduction under section 40(b), a different path was followed. On these facts, Their Lordships have held a follows :-

“4. Section 40 of the Act pertains to amounts which are not deductible. Relevant portion of Section 40 reads as under:

“Notwithstanding anything to the contrary in [sections 30 to 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*
- (ii) *any payment of remuneration to any partner who is a working partner, or of interest to any partner, which, in either case, is not authorized by, or is not in accordance with, the terms of the partnership deed; or*
- (iii) *any payment of remuneration to any partner who is a working partner, or of interest to any partner, which, in either case, is authorized by, and is in accordance with, the terms of the partnership deed, but which relates to any period (falling prior to the date of such partnership deed) for which such payment was not authorized by, or is not in accordance with, any earlier partnership deed, so, however, that the period of authorization for such payment by any earlier partnership deed does not cover any period prior to the date of such earlier partnership deed; or*
- (iv) *any payment of interest to any 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 in so far as such amount exceeds the amount calculated at the rate of [twelve] per cent simple interest per annum; or*
- (v) *any payment of remuneration to any partner who is a 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 in so far as the amount of such payment to all the partners during the previous year exceeds the aggregate amount computed as hereunder:-*

(a)	<i>On the first Rs.3,00,000 of the book-profit or in case of a loss</i>	<i>Rs.1,50,000/- or at the rate of 90 per cent of the book-</i>
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		profit, whichever is more;
(b)	On the balance of the book-profit	At the rate of 60 per cent

5. From the above provision it can be seen that where an assessee is a partnership firm, any payment of salary, bonus, commission or remuneration to its partners under certain circumstances, if it exceeds the limits set out in Clause B, deduction to the extent of excess cannot be claimed. In the present case, such ceiling is prescribed in two slabs. On the first Rs. 30 lacs on the book profit or in case of loss such ceiling is Rs. 1,50,000/- or 90% of the book profit whichever is more. On the balance of the book profit such ceiling prescribed is @ 60%.

6. The question, therefore, arises whether the interest income earned by the assessee-firm from the fixed deposit receipts should be ignored for the purpose of working-out the book profit to ascertain the ceiling of the partners' remuneration.

7. The Tribunal has proceeded on the basis that for the purpose of ascertaining such ceiling on the basis of book profit, the profit shall be in the profit and loss account and is not to be classified in the different heads of income under Section 40 of the Act. The interest income, therefore, cannot be excluded for the purposes of determining the allowable deduction of remuneration paid to the partners under Section 40B of the Act.

8. Counsel for the revenue vehemently contended that for the purpose of ascertaining the limit, only business income would be relevant and not any other income. In the present case, however, we need not enter into such controversy. The assessee had held out that it is in the business of purchasing raw cotton and ginning the same. It is a seasonal business. The interest income was generated out of spare funds invested in the fixed deposit. Such income was declared as part of the business income and that is how even the Assessing Officer had accepted the same. That being the position, and the Assessing Officer in the assessment taxed such income as business income, we do not see any question of law arising.”

7. We see no reasons to take any other view of the matter than the view so taken by the Hon'ble jurisdictional High Court.

8. Respectfully following the esteemed views of Their Lordships, we uphold the grievance of the assessee. The disallowance of Rs.7,03,921/- thus stands deleted.”

6. We, therefore, find no infirmity in the order passed by the Learned CIT(A) taking into consideration the order passed by the Co-ordinate Bench and also judgment passed

by the Hon'ble Jurisdictional High Court as mentioned therein. Hence, having no infirmity found in the order passed by the Learned CIT(A), we confirm the same.

7. In the result, revenue's appeal is dismissed.

This Order pronounced in Open Court on

28/01/2019

Sd/-
(PRAMOD KUMAR)
VICE PRESIDENT

Sd/-
(Ms. MADHUMITA ROY)
JUDICIAL MEMBER

Ahmedabad; Dated 28/01/2019

Priti Yadav, Sr.PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-1, Vadodara.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad