IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC-C" BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT

ITA No.681/Bang/2020
Assessment Year : 2014-15

M/s. R. K. Associates, 106, 11th Cross, 8th Main Malleshwaram, Bengaluru-560 003. **Pan: AAHFR 6544 B**	Vs.	Income Tax Officer, Ward -2(2)(3), Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Shri.B. R. Sudheendra, Advocate
Respondent by	:	Shri. Ganesh R. Ghale, Standing Counsel for Department

Date of hearing	:	11.02.2021
Date of Pronouncement	:	11.02.2021

O R D E R

PER N.V.VASUDEVAN, VICE-PRESIDENT:

This is an appeal by the assessee is against the order dated 02.09.2020 of the CIT(A)-2, Bengaluru, relating to assessment year 2014-15.

2. The only issue that arises for consideration in this appeal is as to whether the Revenue authorities were justified in disallowing a sum of Rs.15,12,056/- by invoking the provisions of section 40(a)(ia) of the Income Tax Act, 1961 (hereinafter called 'the Act'), while computing income under the head "Capital Gain".

3. The assessee is a partnership firm. The assessee filed the return of income declaring loss of Rs.1,47,535/-. The computation of the total income of the assessee was as follows:

Details		Rs.	Rs.	Rs.
[A]	INCOME FROM BUSINESS OR PROFESSION			
	Excess of expenditure over income as per the income & expenditure account			24,869,023
	Less : Income considered under capital gain head			25,013,605
	Add: Depreciation debited in the profit/loss account			1,909
	Less: Depreciation as per income tax act			6,862
	Profit or loss from business or profession			(147,535)
[B]	LONG TERM CAPITAL GAIN FROM SALE OF IMMOVABLE PROPERTY			
	Long term capital loss from sale of Hotel as per Annexure - I			(54,327,112)
	ABSTRACT			
[A]	Income from business or profession			(147,535)
[A]	Long term capital loss			(54,327,112)
	Gross Total Income			(147,535)
Less :	Deduction under Chapter VIA			-
	Total Income			(147,535)
	Total Income rounded off			(147,540)

4. The computation of income under the head “Capital Gain” as given by the assessee was as follows:

Computation of Long Term Capital Gains For the Assessment Year 2014/15

			Amount
Sale Consideration			276,155,852
Commission			7,699,056
Net Sale consideration			267,496,796
Date of Purchase	01/04/2004		
Land Cost		2,000,000	
CII for FY 2004/05	480		
CII for FY 2014/15	939		
Indexed Cost of acquisition of Land			3,912,500
Cost of Improvements up to 31.03.2009		126,227,514	
CII for FY 2008/09	582		
CII for FY 2014/15	939		
Indexed Cost of improvement			203,655,731
Cost of Improvement from 01.04.2009 to 02.07.2013			114,255,677
Long Term Capital Loss			(54,327,112)

5. It can be seen from the computation of income under the head “Capital Gains” that the assessee had deducted a sum of Rs.76,99,056/- on account of commission while computing income under the head “Long

Term Capital Gain". The assessee had sold a property and declared Long Term Capital Gain (LTCG) on sale of property. In the course of assessment proceedings, the AO found that on the total commission of Rs.76,99,056/- paid in connection with the sale of the property, the assessee had deducted tax at source only on a sum of Rs.61,86,988/-. In respect of difference viz., Rs.15,12,056/- no TDS had been done by the assessee. The AO invoked the provisions of section 40(a)(ia) of the Act and made the addition of Rs.15,12,056/- to the total income returned by the assessee.

6. Before CIT(A), the assessee submitted that the provisions of section 40(a)(ia) of the Act are not applicable while computing income under the head "Capital Gain" and therefore the disallowance made by the AO cannot be sustained. On perusal of the order of CIT(A), it appears that in para 7.4, he has proceeded on the basis that the assessee can be treated as the assessee in default under section 201 of the Act and accordingly he confirmed the order of the AO. A reading of the conclusions of the CIT(A) in paras 7.4 and 8 of the impugned order can only lead to the above conclusion. These paragraphs reads as follows:

> *"7.4 In the instant case, the appellant has paid commission of Rs.76,99.05&- for the sale of immovable property but has deducted tax at source only in respect of Rs 61.86.988/-. Accordingly in view of the provisions of section 194H of the act, the appellant has failed to comply with the provisions of the act of deducting tax at source in regard to the balance amount of Rs.15,12,056/- and accordingly the appellant is assessee in default in respect of such tax as per the provisions of section 201 of the Act.*
>
> *8. As discussed above, since the provisions of section 40 (a) (ia) of the Act are not applicable thus the alternative contention of the appellant that the disallowance will be restricted to 30% of expenditure as per the provisions of this section applicable in the year under consideration, doesn't have any relevance."*

7. Aggrieved by the order of the CIT(A), assessee is in appeal before the Tribunal. I have heard the rival submissions. The learned DR relied on the order of the CIT(A). The learned counsel for the Assessee reiterated the stand of the Assessee as put forth before the CIT(A).

8. I have considered the rival submissions. The provisions of Sec.40(a)(ia) of the Act reads thus:

> **Amounts not deductible.**
>
> **40.** 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",—**
>
> (ia) *any interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work)***]**, on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid on or before the due date[23a] specified in sub-section (1) of section 139 :
>
> **Provided** that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, *thirty per cent of* such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid :
>
> **Provided further** that where an assessee fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVII-B on any such sum but is not deemed to be an assessee in default under the first proviso to sub-section (1) of section 201, then, for the purpose of this sub-clause, it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the resident payee referred to in the said proviso.]
>
> Explanation.—For the purposes of this sub-clause,—
>
> (*i*) "commission or brokerage" shall have the same meaning as in clause (i) of the Explanation to section 194H;

(*ii*) "fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (1) of section 9;

(*iii*) "professional services" shall have the same meaning as in clause (a) of the Explanation to section 194J;

(*iv*) "work" shall have the same meaning as in Explanation III to section 194C;

(*v*) "rent" shall have the same meaning as in clause (*i*) to the *Explanation* to section 194-I;

(*vi*) "royalty" shall have the same meaning as in *Explanation 2* to clause (*vi*) of sub-section (1) of section 9;]

9. The question for consideration is as to whether the provisions of Section 40(a)(ia) is applicable for computing the income chargeable under the head "Profits and gains of business or profession" or computation of income under any other heads of income also. Section 40 clearly stipulates that "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". Hence it is evident that the provisions of Section 40(a)(ia) is applicable while computing income chargeable under the head "Profits and gains of business or profession" and it is not applicable to any other heads of income. In the case of Mrs. Sushila Mallick vs. ITO reported in 19 taxmann.com 233, the Hon'ble Lucknow ITAT has held that the brokerage had been paid on account of sale of the properties, the income of which had been shown under the head 'short-term capital gain'. The selling of properties was not the business of the assessee and, as such, the amount involved in the transaction relating to the selling of properties was not the part of turnover of the assessee. In view of same the Hon'ble ITAT held that in facts of the case the provisions of Section 40(a)(ia) of the Act is not applicable. This decision was affirmed by the Hon'ble Allahabad High court in the case of CIT Vs. Sushila Mallick (2013) 36 taxmann.com 537 (All). In the case of

Mahatma Gandhi Seva Mandir vs. DDIT(Exemp) reported in (2012) 21 taxmann. com 321 the Hon'ble ITAT Mumbai has held that the exception in Section 40 is carved out, only for the purpose of Section 28 and not for computing the exemption of income of a charitable trust under Section 11. The disallowance made under Section 40(a) will only go to enhance the business profit of an assessee whose income is assessable under Section 28 and not otherwise. Hence, provisions of Section 40(a) are not applicable in case of charitable trust or institution where income and expenditure is computed in terms of Section 11.

10. In view of the clear language of the relevant statutory provisions and in the light of decisions referred to in the earlier paragraphs, I am of the view that the disallowance u/s.40(a)(ia) of the Act made by the revenue authorities cannot be sustained and I direct the said addition to be deleted and allow the appeal of the Assessee.

11. In the result, appeal of the assessee is allowed. .

Pronounced in the open court on the date mentioned on the caption page.

Sd/-
(N.V VASUDEVAN)
Vice President

Bangalore,
Dated : 11.02.2021
/NS/*

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.