

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'सी' अहमदाबाद ।
IN THE INCOME TAX APPELLATE TRIBUNAL
“ C ” BENCH, AHMEDABAD

स्वश्री वसीम अहमद, लेखा सदस्य एवं महावीर प्रसाद, न्यायिक सदस्य के समक्ष ।
BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And SHRI MAHAVIR PRASAD, JUDICIAL MEMBER

आयकर अपील सं./I.T.A. No.2515/Ahd/2016

(निर्धारण वर्ष / Assessment Year : 2013-14)

M/s. S. K. Diamonds, 12, Saryu Flats, Mithakhali Six Road, Navrangpura, Ahmedabad.	बनाम/ Vs.	DCIT, Circle – 5(2), Ahmedabad.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : ABFFS 3397 A		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से / Appellant by :	Shri M. K. Patel, A.R.
प्रत्यर्थी की ओर से/Respondent by :	Shri T. Sankar, Sr. D.R.

सुनवाई की तारीख / Date of Hearing	10/05/2018
घोषणा की तारीख /Date of Pronouncement	31/05/2018

आदेश / O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the assessee against the appellate order of the Commissioner of Income Tax(Appeals)-5, Ahmedabad [CIT(A) in short] vide appeal no.CIT(A)-5/DCIT Cir.5(2)/323/2015-16 dated 24/08/2016 arising in the assessment order passed under s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") dated 31/12/2015 relevant to Assessment Year (AY) 2013-14.

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2. The grounds of appeal raised by the assessee are as under:-

“(1) That on facts and in law, the learned CIT(A) has grievously erred in confirming the addition of Rs.12,58,800/- made u/s.40(b) of the Act, by treating it as excessive remuneration paid to partners.

(2) That on facts, evidence on record, and in law, the learned CIT(A) ought to have deleted the entire disallowance as prayed for.”

3. The solitary issue raised by the assessee in this appeal is that the learned CIT(A) erred in confirming the order of AO by sustaining the disallowance of Rs.12,58,800/- on account of remuneration paid to the partners in excess to the amount eligible as specified u/s 40(b) of the Act.

4. Briefly stated facts of the case are that the assessee in the present case is a partnership firm and engaged in the manufacturing business of diamond studded designer jewellery and trading in loose diamonds. The assessee during the year has incurred an expense of Rs.65,96,302/- on account of remuneration paid to the partners of the firm. However, the AO observed that the partnership deed was formed dated 10-04-2006 and there was no clause of remuneration to the partners of the firm. It was also observed that the supplementary partnership deed was made dated 18-10-2013 mentioning the clause for remuneration to be paid to the partners. In the supplementary partnership, deed was made on 18-10-2013 and the same was effective from 01-04-2013. Therefore, the same cannot be applied to the year under consideration i.e. F.Y. 2012-13.

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Accordingly, the assessee was show-caused vide note sheet entry dated 11-12-2015 for the disallowance of remuneration paid to the partners.

5. In compliance thereof, the assessee vide letter dated 29-12-2015 submitted that a supplementary partnership deed was made immediately after the formation of partnership deed dated 18-05-2006 authorizing the payment of remuneration to the partners as per the provisions of Section 40(b) of the Act.

6. The assessee also submitted that the remuneration paid to the partners in the A.Y. 2009-10 was allowed by the AO in the assessment framed u/s 143(3) of the Act vide order dated 24-08-2015.

7. The assessee in support of his claim has also relied on the judgment of Hon'ble High Court of Himachal Pradesh, in the case of CIT vs. Anil Hardware Store reported in 323 ITR 368.

8. However, the AO referred the supplementary partnership deed made on 18-05-2006, which reads as under:

“Remuneration to Partners:-

Mr. Parag Dineshbhai Shah shall devote his full time and Ms. Rupali Tushar Kothori shall devote her time for the business of Partnership firm and in consideration, both partners are entitled to the amount of remuneration on the basis of "Book Profit" calculated as provided under section 40(b)(v)(2) of Income Tax Act read with explanation 3 to Section 40(b)(v) of Income Tax Act, 05 under:

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<i>On the first Rs.75,000/- of the Book Profit</i>	<i>At the rate of 90% of the Book Profit</i>
<i>On the next Rs.75,000/- of the Book Profit</i>	<i>At the rate of 60% of the Book Profit</i>
<i>On the balance of the Book Profit</i>	<i>At the rate of 40% of the Book</i>

Working partners shall be paid remuneration in the following proportion:-

	<i>% of Book Profit</i>
1. Mr. Parag Dineshbhai Shah	50%
2. Mr. Rupali Tusharbhai Kothari	50%
	100%

The remuneration to the working partner shall be credited to his/her respective account at the end of the account year on the ascertainment of "book profit" as defined in Section 40(b) of the Income Tax Act or any statutory modification or re-enactment, thereof for the time being in force.

the partners are entitled to withdraw the amount against remuneration payable to them from time to time and difference of remuneration payable and actual payment made to partners during the year towards remuneration shall be adjusted at the end of the year.

The remuneration shall be payable to partners with effect from 1st April, 2006..."

From the above clause mentioned in the supplementary partnership deed the AO observed that the above clause relates to the determination of Book Profit and it is silent for determining the remuneration payable to the partners. Moreover, the partnership deeds refers to determine the book profit in specific manner i.e. 90% of the Book Profit on the first Rs.75,000/- of the Book Profit, 60% of the Book Profit on the next Rs.75,000/- of the Book Profit and 40% of the Book Profit on the remaining amount. Thus, the assessee is entitled for the remuneration in the following manner:

Book Profit	1,32,12,505		Rate
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First	75,000	67,500	90%
Next	75,000	45,000	60%
Balance	1,30,62,505	52,25,002	40%
Remuneration		53,37,502	

Thus, the AO worked out the allowable amount of remuneration for Rs.53,37,502/- and disallowed the excess amount of Rs.12,58,800/- (65,96,302-53,37,502) and added to the total income of the assessee.

9. Aggrieved, assessee preferred an appeal to Ld. CIT(A). The assessee before the Ld. CIT(A) submitted that it was clearly mentioned in the supplementary deed of partnership dated 18-05-2006 that the working partners shall draw the remuneration as per the provisions of Section 40(b) of the Act, after considering the statutory modification or re-enactment thereto for the time being in force. Therefore, the assessee has worked out the remuneration on the basis of revised limits mentioned in the amended provision of Section 40(b) of the Act. However, the Ld. CIT(A) disregarded the contention of the assessee and confirmed the order of the AO by observing as under:

“3.3. The AO has disallowed excessive remuneration claimed by the assessee u/s.40(b) of the Act on the ground that no remuneration over and above the quantum of the remuneration has already specified by the assessee in the supplementary partnership deed can be allowed to the assessee.

3.4. During the course of appellate proceedings, the appellant has contended that initially the deed of partnership did not provide for giving remuneration to the working partners but the partners immediately thereafter mutually decided and agreed to provide for such remuneration and executed a supplementary deed of partnership on

18.05.2006. It is further contended that when the supplementary deed was executed manner of the computation of book profit as then prescribed u/s.40(b) of the Act was initially described but immediately in the next paragraphs it was distinctly provided that the book profit of the firm shall be calculated as per the provisions of Section 40(b) of the Act in force at the end of the accounting period. It is also contended that in the assessment order for A.Y. 2009-10 framed u/s.143(3) of the Act the remuneration was allowed.

3.5. The facts of the case and the submission are considered. The case of the appellant is that the remuneration paid to working partners and claimed by the assessee in the instant case was supported by the supplementary deed executed by the firm and was also within the limits prescribed u/s.40(b) of the Act. On the other hand the case of the AO is that the assessee has specified the amount of remuneration payable to the partners and it has further inserted a clause that the remuneration to the working partner shall be credited to his respective account at the end of the accounting year on the ascertainment of book profit as defined u/s.40(b) of the Act or any statutory modification or reenactment thereof for the time being in force. It is the view of the AO that the above clause relates to ascertainment of book profit and not the remuneration payable to the partners. A perusal of supplementary deed shows that amount of remuneration was specified in the deed therefore the view taken by the AO is justified. Accordingly the addition made by the AO is confirmed. Thus the ground of appeal is dismissed”

10. Being aggrieved by the order of Ld. CIT(A), assessee is in second appeal before us. The Ld.AR before us submitted that remuneration was credited in the accounts of working partners as per the clause of partnership deed, which *inter alia* contains the clause that profit shall be determined as per the amended provisions of Section 40(b) of the Act. On the other hand, the Ld. DR submitted that the supplementary partnership deed does not authorize the assessee to determine the remuneration to the partners in accordance with the amended provisions

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of Section 40(b) of the Act. Ld. DR vehemently supported the order of authorities below.

11. We have heard the rival contentions and perused the material available on record. The issue in the present case relates to the amount of remuneration determined by the assessee payable to the partners. As per the AO, the assessee is entitled to determine the remuneration as per the clause of supplementary partnership deed dated 18-05-2006, which reads as under:

“Remuneration to partners:-

Mr. Parag Dineshbhai Shah shall devote his full time and Ms. Rupali Tushar Kothari shall devote her time for the business of Partnership firm and in consideration, both partners are entitled to the amount of remuneration on the basis of "Book Profit" calculated as provided under section 40(b)(v)(2) of Income Tax Act read with explanation -3 to Section 40(b)(v) of Income Tax Act., as under:

<i>On the first Rs.75,000/- of the Book Profit</i>	<i>At the rate of 90% of the Book Profit</i>
<i>On the next Rs.75,000/- of the Book Profit</i>	<i>At the rate of 60% of the Book Profit</i>
<i>On the balance of the Book Profit</i>	<i>At the rate of 40% of the Book Profit”</i>

Whereas, the assessee claims that the limit for the remuneration to the partners under clause 40(b) has been enhanced from Rs.75,000 to Rs.3,00,000 w.e.f. 01-04-2010 and the firm was authorized to determine the remuneration payable to the partners in pursuance to the amended provisions of Section 40(b) of the Act. The assessee, in support of his claim has relied on the clause of the partnership deed which reads as under:

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“The remuneration to the working partners shall be credited to his/her respective account to the end of the accounting year on the ascertainment of “book profit” as defined in Section 40(b) of the Income Tax Act or any statutory modification or re-enactment, thereof for the time being in force.”

From the foregoing discussion, the dispute before us arises our adjudication is whether the assessee is entitled to determine the remuneration payable to the partners as per the amended provision of Section 40(b) of the Act. In this regard, we note that the assessee in its supplementary partnership deed has clearly mentioned that the amended provisions of Section 40(b) will be applied as applicable for the year under consideration. Thus, we hold that the assessee has determined the remuneration in the instant case as per the Provision of Section 40(b) of the Act.

12. In holding so we also find support and guidance from the judgment of Hon’ble High Court of Himachal Pradesh in the case of CIT vs. Anil Hardware Store reported in 323 ITR 368 wherein it was held as under :

“7. We are not in agreement with this submission. The Central Board of Direct Taxes circular referred to above lays down two conditions. Either the amount of remuneration payable should be specified or the manner of quantifying the remuneration should be specified. In the present case, the manner of fixing the remuneration of the partners has been specified. In a given year, the partners may decide to invest certain amounts of the profits into other venture and receive less remuneration than that which is permissible under the partnership deed, but there is nothing which debars them from claiming the maximum amount of remuneration payable in terms of the partnership deed. The method of remuneration having been laid down, the assessee-firm is entitled to deduct the remuneration paid to the partners under

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section 40(b)(v) of the Income-tax Act. Question No. 2 is accordingly answered in favour of the assessee and against the Revenue.”

13. Thus, we hold that the assessee has determined the remuneration payable to the partners as per the provisions of Section 40(b) of the Act. Hence, we reverse the order of the lower authorities accordingly, the ground of appeal of the assessee is allowed.

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

This Order pronounced in Open Court on	31/05/2018
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Sd/-
(महावीर प्रसाद)
न्यायिक सदस्य
(MAHAVIR PRASAD)
JUDICIAL MEMBER

Ahmedabad; Dated 31/05/2018
Priti Yadav, Sr.PS

Sd/-
(वसीम अहमद)
लेखा सदस्य
(WASEEM AHMED)
ACCOUNTANT MEMBER

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)-5, Ahmedabad.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad