IN THE INCOME TAX APPELLATE TRIBUNAL "F" BENCH, MUMBAI

BEFORE SHRI AMARJIT SINGH, AM AND MS. KAVITHA RAJAGOPAL, JM

ITA No. 2596/Mum/2022
(Assessment Year: 2018-19)

Jetkool Exports India I-602, Vardhman Nagar, Dr. R. P. Road, Mulund (W), Mumbai-400 080	Vs.	National E-Assessment Centre, Delhi -110 000
PAN/GIR No. AAFFJ 1216 L		
(**Appellant**)	:	(**Respondent**)

Assessee by	:	Dr. K. Shivram
Revenue by	:	Ms. Vranda U Matkarni

Date of Hearing	:	13.12.2022
Date of Pronouncement	:	09.03.2023

O R D E R

Per Kavitha Rajagopal, J M:

This appeal has been filed by the assessee, challenging the order of the learned Commissioner of Income Tax (Appeals) ('ld.CIT(A) for short), National Faceless Appeal Centre ('NFAC' for short) u/s.250 of the Income Tax Act, 1961 ('the Act'), pertaining to the Assessment Year ('A.Y.' for short) 2018-19.

2. The assessee has challenged the addition made u/s. 40(b)(v) of the Act, amounting to Rs.90,27,721/- towards remuneration paid to partners. The assessee has also challenged the grounds of violation of principle of natural justice.

3. The brief facts of the case are that the assessee being a partnership firm is engaged in the business of trading, exports and job work related to textiles and other items. The

assessee filed its return of income for the impugned year dated 31.10.2018, declaring total income of Rs.1,78,90,440/-. The assessee's case was selected for complete scrutiny and the assessment order dated 19.03.2021 was passed u/s. 143(3) r.w.s. 143(3A) and 143(3B) of the Act where the A.O. made additions/disallowances and determined the total income at Rs.2,69,18,161/-.

4. The assessee was in appeal before the ld. CIT(A) who confirmed the addition made by the A.O.

5. The assessee is in appeal before us, challenging the order of the ld. CIT(A).

6. Ground no. 1 raised by the assessee is on the addition u/s. 40(b)(ii) of the Act. It is observed that the assessee had paid a remuneration amount of Rs.2,70,60,662/- to both the partners of the assessee firm during the impugned year and had furnished the deed of partnership in support of its claim. The A.O. relied on clause 7 of the partnership deed and calculated the remuneration payable to the partners which according to the A.O. was not in accordance with the terms of deed of partnership dated 01.08.2005 and held that the same was in violation to the provision of section 40(b)(ii) of the Act.

7. During the assessment proceeding, the assessee in its submission has stated that the remuneration of the partnership was in accordance to the supplementary deed dated 16.03.2021, which was made within the ambit of clause 9 of original partnership deed dated 01.08.2005. The assessee further submitted that the supplementary deed was w.e.f. 01.04.2010 which had calculated the remuneration of the partners in accordance with the amended provision of section 40(b)(v) of the Act vide Finance Act (No.2) 2009 314 ITR

(St) 57 which came into effect from 01.04.2010 as per which higher remuneration pay out for the partnership firms were allowed. The A.O. failed to consider the submission made by the assessee for the fact that there was no supplementary deed executed as on the date of filing of the returns for the impugned year and also that the assessee has not submitted any such deed until date of issuance of final show cause notice dated 09.03.2021 by the A.O. The A.O. held that the execution of supplementary deed after the issuance of final show cause notice dated 09.03.2021 was only an afterthought and was merely a self serving document filed by the assessee. The A.O. distinguished the cases relied upon by the assessee and has also controverted the assessee's contention that Circular No. 12/2019 dated 19.06.2019 was only for guidance and clarification for the A.O.'s. The assessee's contention that the remuneration for partners as per the amended law was considered in the earlier years was also controverted by the A.O. that there was no assessment proceeding u/s. 143(3) of the Act for those years relied upon by the assessee and only section 143(1) adjustments was done for the earlier years. The A.O. disallowed the impugned amount of Rs.90,27,721/- u/s. 40(b)(ii) of the act and added the same to the total income of the assessee. The A.O. calculated the remuneration payable to the partners as per the deed of partnership deed dated 01.08.2005 as under:

	Book Profit on the assessee firm	*Rs.4,49,51,104/-*
(i)	*On Firm of Rs.75,000/- of book profit*	*Rs.67,500/-*
(ii)	*On the book profit exceeding Rs.75,000/- but not exceeding Rs.1,50,000/- for the year*	*Rs.45,000/-*
(iii)	*On the book profit exceeding Rs.1,50,000/- for the year*	*Rs.1,79,20,411/-*
	Total remuneration payable to partners	*Rs.1,80,32,941/-*

8. The ld. CIT(A) confirmed the addition/disallowance made by the AO. by rejecting the claim of the assessee based on the alleged self serving documents viz. the supplementary deed filed by the assessee. The ld. CIT(A) further held that the assessee's

contention that the excess claim over the years was allowed, was not to be considered for the fact that the *res judicata* is not applicable to the income proceedings, thereby confirming the addition made by the A.O.

9. The learned Authorized Representative (ld. AR for short) for the assessee contended that the lower authorities have failed to consider the submission of the assessee wherein the supplementary deed dated 16.03.2021 was produced during the pendency of the assessment proceedings and not an afterthought as alleged by the A.O./ld. CIT(A). The ld. AR further stated that the lower authorities have failed to consider the retrospective effect given to the supplementary deed, whereby the assessee firm was entitled to pay remuneration to its partner as per the amended provision of section 40(b)(v) of the Act. The ld. AR brought our attention to the supplementary deed filed at page no. 38 of the paper book and took us through the various clauses which facilitate for higher remuneration to the partners. The ld. AR also stated that the assessee's case for A.Y. 2014-15 was assessed u/s. 143(3) of the Act wherein the A.O. had accepted the modification in the working of the remuneration. The ld. AR relied on the decision of the Hon'ble High Court of Himachal Pradesh in the case of *Durgadas Devkinandan vs. ITO* [2012] 342 ITR 17 (HP), which held that the remuneration of partners should be in accordance with the terms of the partnership deed and the same should not exceed the aggregate amount as laid down in the provisions of the Act. The ld. AR relied on the decision of the Hon'ble Supreme Court in the case of *Radhasoami Satsang vs. CIT* [1992] 193 ITR 321 (SC), which held that the view taken in one assessment year, if not, challenged could be allowed in the subsequent years without

being changed. The ld. AR also stated that the partners have duly paid the taxes towards the remuneration received and that, in any case, there is no case of loss of revenue. The ld. AR prayed that the impugned addition may be deleted.

10. The learned Departmental Representative (ld. DR for short) for the Revenue controverted the contention of the ld. AR and stated that the assessee was entitled to deduction with respect to remuneration to partner as per the original partnership deed dated 01.08.2005. The ld. DR further stated that the supplementary deed furnished by the assessee at the fag end of the assessment proceeding was only to camouflage the mistake of the assessee in not amending the partnership deed immediately after the amendment of section 40(b)(v) of the Act, vide Finance Act, No.2 of 2009. The ld. DR contended that the remuneration to partners ought to be computed as per the existing partnership deed that was prevalent during the impugned year. The ld. DR relied on the order of the lower authorities.

11. We have heard the parties and perused the materials available on record. It is an admitted fact that the assessee being a partnership firm was entitled to deduction in respect of the remuneration payable to the partners as per clause 7 of the Partnership Deed. This in turn depends on the provision of Income Tax Act, 1961 which facilitate remuneration pay out allowable for partnership firms. The assessee vide registered partnership deed dated 01.08.2005 was entitled to deduction with regard to the remuneration payable to partners. Since inception, the assessee was bound by the old provisions of section 40(b)(v) of the Act, which subsequently was amended vide Finance Act No.2, 2009 which came into effect from 01.04.2010. The amended provision provide

for higher remuneration pay out in case of partnership firms. It is an undisputed fact that the assessee would get the benefit of the amended provision for higher remuneration from 01.04.2010. The only lacuna in the assessee's claim is that the assessee has failed to execute the supplementary partnership deed immediately after the enactment of the amended provision. It is only on 16.03.2021 that the assessee has executed the supplementary deed of partnership where the modified remuneration payable to working partners was specified. Nevertheless the assessee vide its supplementary deed gave retrospective effect to the modified remuneration as on 01.04.2010, when the amended provision of section 40(b)(v) came into effect. This action of the assessee was not convincing to the A.O. as the lower authorities have alleged it to be a self serving document which was an afterthought subsequent to the issuance of the show cause notice. The moot question here is whether the assessee was entitled to modify remuneration as per the amended provision based on the supplementary deed giving effect retrospectively. For this proposition, we would be placing our reliance on the decision of the Hon'ble Allahabad High Court in the case of *CIT vs. Alison Singh & Co.* [2013] 358 ITR 458 (All), which was though on a different facts has upheld the validity of the retrospective effect given to a partnership deed based on a subsequent rectification deed. It has held that as the subsequent deed is executed in accordance with the primary deed, there would be no objection in giving retrospective effect to the subsequent deed. From this, it is evident that the supplementary deed executed by the assessee firm was in accordance with the provisions of the original partnership deed dated 30.07.2005in which clause 9 of the deed of partnership read as under:

The clause (9) of the deed of partnership read as under:

"MODIFICATION OF REMUNERATION

The partners shall be entitled to modify the above terms relating to remuneration payable to working partners by executing a supplementary Deed and any such deed payable to working partners by executing a supplementary Deed and any such deed when executed shall have effect, unless otherwise provided, from the first day of the accounting period in which such supplementary Deed is executed and the same shall form part of this Deed of partnership."

12. This clause of the partnership deed facilitates the partners to execute supplementary deed which shall have effect either on the date of the accounting period in which such supplementary deed is executed unless otherwise provided. This clause elaborates that the supplementary deed will come into effect on the date as provided in the said deed. Though the A.O. has made addition u/s.40(b)(ii) of the Act, it is pertinent to point out either u/s.40(b)(ii) or as per section 40(b)(v) the partners were entitled to remuneration as per the partnership deed. A conjoined reading of the provision of the partnership deed makes it clear that the partners are entitled to modification of remuneration as per the terms and condition under the law. In this case, no doubt the amended provisions provided for higher remuneration to the partners and that the said remuneration is computed as in accordance with the provisions of the Income Tax Act. The claim of the assessee is also supported by the case laws relied upon by the assessee in the case of *Durgadas Devkinandan* (supra), wherein it was held that the remuneration to partners should be calculated as per the partnership deed subject to the provisions of the Act where the said remuneration should not exceed the maximum amount provided under the Act. We would also like to place our reliance on the decision Hon'ble Allahabad High Court in the case of *CIT vs. Great City Manufacturing Co.* [2013] 33 taxmann.com 258 (All), wherein it was held that the A.O. has to see if the conditions of the partnership deed provided for remuneration to working partners and that the same is

within the limit prescribed u/s. 40(b)(v) of the Act. The relevant extract of the said order is cited hereunder for ease of reference:

> *5. …….. The Parliament in its wisdom had fixed a limit on allowing the remuneration to the working partners and if the remuneration are within the ceiling limit provided then recourse to provision of Section 40A(2)(a) of the Act cannot be taken. The assessing officer is only required to see as to whether the partners are the working partners mentioned in the partnership deed, the terms and conditions of the partnership deed provide for payment of remuneration to the working partners and whether the remuneration provided is within the limits prescribed under Section 40(6)(V) or not. If all the aforementioned conditions are fulfilled then he cannot disallow any part of the remuneration on the ground that it is excessive. Since in the present case, all the conditions required has been fulfilled the question of disallowance does not arise.*

13. When we are already convinced of the fact that the supplementary partnership deed operates retrospectively, the calculation of the remuneration paid to partners if in accordance with the provisions of the Act is to be allowed. We would also like to draw our support to the contention of the assessee that in the earlier years that the said claim was not disputed by the lower authorities for which we would like to place our reliance on the decision of Hon'ble Apex Court in the case of *Radhasoami Satsang* (supra) for the proposition that when there are no change in facts and when the claim has been allowed in the earlier years without being in dispute, the same may be considered for the impugned year also. As it is observed that the assessee has been claiming the modified remuneration since the amendment of the provisions for which there was no dispute, we are of the considered opinion that the assessee's claim for the impugned year should also be granted.

14. From the above observation and by respectfully following the decision cited above, we hereby delete the impugned addition and allow the assessee's claim of remuneration to partners as per the amended provision of the Act. Hence, ground no.1 of the assessee is allowed.

15. Ground no. 2 is on violation of principle of natural justice, which requires no adjudication, as the assessee has been given a relief as prayed for in the previous ground.

16. Ground no.3 is general in nature and needs no adjudication.

17. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 09.03.2023

Sd/-	Sd/-
(Amarjit Singh)	(Kavitha Rajagopal)
Accountant Member	Judicial Member

Mumbai; Dated : 09.03.2023
Roshani, Sr. PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT - concerned
5. DR, ITAT, Mumbai
6. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai