

आयकर अपीलीय अधिकरण, 'GAUHATI पीठ, कोलकाता

आभासी माध्यम से

IN THE INCOME TAX APPELLATE TRIBUNAL
GAUHATI BENCH
VIRTUAL HEARING AT KOLKATA

Before: **SHRI SANJAY GARG, JUDICIAL MEMBER &
SHRI MANISH BORAD, ACCOUNTANT MEMBER**

आयकर अपील सं.य/
ITA No.181/GAU/2020
निर्धारण वर्ष/
Assessment Year:2017-18

The ACIT, Cir-Shillong, Aaykar Bhawan, M.G Road, Shillong-793001., Meghalaya	बनाम / V/s.	M/s. Dhar Construction Company K.L Complex, Maccabe Road, Demseiniong, Near Assam Rifles Signal, Unit-Polo, Shillong- 793011, Meghalaya
PAN: AAIFD2658K		
अपीलार्थी /Appellant	..	प्रत्यर्थी /Respondent

अपीलार्थी की ओर से/By Appellant	Shri Gaurav Chandak, FCA, Ld.AR
प्रत्यर्थी की ओर से/By Respondent	Shri I. Gyaneshori Devi, JCIT, Ld.SR-DR
सुनवाई की तारीख/Date of Hearing	09-11-2022
घोषणा की तारीख/ Date of Pronouncement	02/01/2023

आदेश /O R D E R

PER MANISH BORAD, AM.

The present appeal has been preferred by the revenue against the order dated 23-03-2020 of the Ld. Commissioner of Income-tax (Appeals), [hereinafter referred to as 'CIT(A)'], Shillong [hereinafter referred to as 'CIT(A)'] for the assessment year 2017-18.

2. The revenue has raised the following grounds:-

1. *That the Ld. Commissioner of Income Tax (Appeals) erred in deducting that the assessee rightfully claimed commission of Rs. 1.15 Cr. which is undisputedly with the permissible limit u/s. 40(b) (v) of the Income Tax Act, 1961.*
2. *That the Ld. Commissioner of Income-tax (Appeals) while noting that the profit sharing ratio of the three partners being 38:1:1 allowed commission to the 1st partner @ 89.09% which was way excess by 51.08% as noted by the Assessing Officer.*
3. *That the Ld. Commissioner of Income Tax (Appeals) erred in deducting the fact that the remuneration/commission was correctly distributed/divided amongst the working partners as per partnership deed while ignoring the fact that excessive payment of commission of Rs.51.08% above the profit sharing ratio of 38% is not in consonance with the Partnership Deed*

Non-deduction of TDS

1. *That the Ld. Commissioner of Income Tax(Appeals) erred in holding that the commission paid to partners shall not be regarded as Salary under Explanation to section 15 of the Act and that provision of Section 192 related to Salary would not be applicable in this case.*
2. *That the Ld. Commissioner of Income Tax(Appeals) ignored the fact that payment of commission is covered u/s 194H of the Act and as such the assessee was liable to deduct TDS under that Section and as per provisions of section 197(2).*

Other Expenses-Material consumed, labour Charge etc.

1. *That the Ld. Commissioner of Income Tax(Appeals) erred in deleting Construction expenses, labour charges/Salary, store and spare expenses, other direct expenses, other expenses such as office expenses, travel & conveyance etc. disallowed expenses of Rs.3,62,37,711/- as being based on conjectures & surmises. In doing so, the Ld. Commissioner of Income Tax(Appeals) failed to appreciate that fact that at the time of assessment proceedings the assessee could not produce any evidence/bills, vouchers for such huge expenses claimed. The Assessing Officer while accepting that such expenses are accordable while executing any contract works was not satisfactorily convinced by the assessee who failed to*

produce any material evidence to substantiate such large claims of expenses of about Rs.70.81 Cr.

2. That the Ld. Commissioner of Income Tax(Appeals) claims that the additions are high pitched in erroneous so much so that the Assessing Officer allowed 96% of such expenses and disallowed only Additions are high pitched in erroneous so much so that the Assessing Officer allowed 96% of such expenses and disallowed only 4% of such expenses as being unsubstantiated.

3. Brief facts of the case are that the assessee is a partnership firm, engaged in construction business. Income of Rs.1,21,98,600/- declared in e-return filed on 16-10-2017 for the AY 2017-18. Case selected for scrutiny through CASS for high ratio of refund to TDS, large value claim of refund and large increase in capital in a year. Valid notices u/s. 143(2) & 142(1) of the Act were issued. Various details were called for by the Ld. AO, which the assessee has filed. Income assessed at Rs.4,84,36,311/- after making following disallowances :-

<i>Returned Income :</i>	<i>Rs. 1,21,98,600</i>
<i>ADD: Disallowance u/s 40(b)(v) [paras 3]</i>	<i>Rs. 66,43,474</i>
<i>Disallowance u/s 40(a)(ia) [paras 4.]</i>	<i>Rs. 14,82,595</i>
<i>Disallowance of material consumed for construction</i>	<i>Rs.2,47,85,407</i>
<i>Disallowance of Labour Charges/ Salary</i>	<i>Rs. 56,97,135</i>
<i>Disallowance of Store & Spare</i>	<i>Rs. 38,63,007</i>
<i>Disallowance of Direct expenses</i>	<i>Rs.1 2,03,411</i>
<i>Disallowance of Office expenses</i>	<i>Rs. 1,24,771</i>
<i>Disallowance of Travel & Conveyance</i>	<i>Rs. 5,63,980</i>
<i>Assessed income:</i>	<i>Rs. 4,84,36,311</i>

4. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A) and succeeded.
5. Aggrieved, now the Revenue is in appeal before this Tribunal.
6. The Ld. Departmental Representative vehemently argued supporting the order of the Ld. AO.

7. Per contra, Ld. Counsel for the assessee heavily relied on the findings of the Ld. CIT(A).

8. We have heard the rival contentions and perused the records placed before us. The Revenue has challenged before us the findings of the Ld. CIT(A) deleting the various disallowances made by the Ld. AO.

9. Ground no. 1 relates to disallowance of excess commission paid u/s. 40(b)(v) of the Act. The Ld. AO noted that the profit sharing ratio of the three partners is 38:1:1 but commission to the first partner was allowed @ 89.09%, which was excess by 51.08%.

10. The Ld. CIT(A) dealt with the issue observing as follows:-

..... as per the partnership deed, all the three continuing partners were the working partners, eligible for remuneration and commission. It was also contended that as per the partnership deed 50% of the Net Profit, after allowing interest and remuneration to working partners' would be the commission payable to the said 'working partners'. Further the assessee appellant submitted a detailed calculation for the amount of commission payable to the 'working partners' as computed hereunder:-

Particulars	Amount (Rs.)
<i>Net Profit during the year</i>	<i>8,24,78,261.67</i>
<i>Less: Remuneration & Interest Attributed to Partners</i>	<i>5,80,87,828.00</i>
<i>Net Profit after Partner's Remuneration</i>	<i>2,43,90,433.67</i>
<i>Commission to be Distributed between Continuing partners (50% of Net Profit after Partner's Remuneration)</i>	<i>1,21,95,216.00</i>

It was further contended that the profit sharing ratio between the three 'working partners' was 38:1:1. Accordingly, the commission payable to the said 'working partners' out of the aggregate commission payable of Rs. 1,21,95,216/- was computed as under:-

Name of Partner	Profit Sharing Ratio	Calculation	Commission
<i>Sri Dasakhiat Lamare</i>	<i>38%</i>	<i>(12195216*0.5/0.4)*3</i> <i>8%</i>	<i>1,15,85,456.00</i>

Sri Evarist Poshna	1%	$(12195216 * 0.5 / 0.4) * 1\%$	3,04,880.00
Sri Banehkupar Soihkhlet	1%	$(12195216 * 0.5 / 0.4) * 1\%$	3,04,880.00
<i>Total Commission paid</i>			1,21,95,216.00

In view of the above computations, the aggregate remuneration/commission paid to the 'working partners' as under:

Partner's Name	Salary/Remuneration	Commission
1) Sri Dasakhiat Lamare	2,70,000/-	1,15,85,456/-
2) Sri Evarist Poshna	2,70,000/-	3,04,880/-
3) Sri Banehkupar Soihkhlet	2,70,000	3,04,880/-
<i>Total</i>	8,10,000/-	1,21,95,216/-

It is noted from a perusal of the para 3.4 of the assessment order that as per the AO also, commission forms part of the remuneration. Even otherwise, this aspect is governed by the provisions of Section 40(b) of the Income Tax Act, 1961, which is being reproduced hereunder for reference:

"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:-

(a)

(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 authorised 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 authorised 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 authorised by, or is not in accordance with, any earlier partnership deed, so, however, that the period of authorisation 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 authorised 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 authorised 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 :-

<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 percent of the book-profit, whichever is more;</i>
<i>on the balance of the book-profit</i>	<i>at the rate of 60 per cent</i>

Provided that in relation to any payment under this clause to the partner during the previous year relevant to the assessment year commencing on the 1st day of April, 1998, the terms of the partnership deed may, at any time during the said previous year, provide for such payment.

Explanation 1. - Where an individual is a partner in a firm on behalf, or for the benefit, of any other person (such partner and the other person being hereinafter referred to as "partner in a representative capacity" and "person so represented", respectively),-

(i) interest paid by the firm to such individual otherwise than as partner in a representative capacity, shall not be taken into account for the purposes of this clause;

(ii) interest paid by the firm to such individual as partner in a representative capacity and interest paid by the firm to the person so represented shall be taken into account for the purposes of this clause.

Explanation 2.-Where an individual is a partner in a firm otherwise than as partner in a representative capacity, interest paid by the firm to such individual shall not be taken into account for the purposes of this clause, if such interest is received by him on behalf, or for the benefit, of any other person.

Explanation 3. -For the purposes of this clause, "book-profit" means the net profit, as shown in the profit and loss account for the relevant previous year, computed in the manner laid down in Chapter IV-D as increased by the aggregate amount of the remuneration paid or

payable to all the partners of the firm if such amount has been deducted while computing the net profit.

Explanation 4.-For the purposes of this clause, "working partner" means an individual who is actively engaged in conducting the affairs of the business or profession of the firm of which he is a partner;" From a perusal of above, it is evident that any payment of salary, bonus, commission or remuneration, is collectively termed as "remuneration". The AO, at para 3.4 of the assessment order, noted that the aggregate remuneration allowable under section 40(b)(v) of the Act was Rs. 1,52,12,290.60 out of which, the Appellant Firm had claimed the aggregate remuneration paid for Rs. 1,30,05,216/-, which amount was well within the permissible limits as per AO also. As per the submissions of the Appellant also, the total remuneration/ commission paid was Rs. 1,30,05,216/- (Rs. 80,000/- plus Rs. 1,21,95,216/-). Further, it is noted that the aggregate remuneration/ commission paid to the 'working partners' was as under:

Name of the Working Partner	Remuneration/Commission
Sri Dasakhiat Lamare	1,18,55,456/-
Sri Evarist Poshna	5,74,880/-
Sri Banehkupar Soikhkhet	5,74,880/-
Total Remuneration/Commission	1,30,05,216/-

In view of the above discussion, it is noted that an aggregate of Rs. 1,30,05,216/- was paid to 'working partner' of the Appellant Firm in the form of remuneration and commission which was undisputedly within the permissible limit under section 40(b)(v) of the Act and duly authorized by the partnership deed. It is further noted that out of the aggregate amount of Rs. 1,30,05,216/- (Rs. 80,000/- for salary and Rs. 1,21,95,216/- for commission) paid as remuneration/ commission, an aggregate amount of Rs. 1,18,55,456/- was paid to Sh. Dasakhiat Lamare out of which Rs. 1,15,85,456/- was on account of commission and Rs. 2,70,000/- was for salary. It is further noted that the commission of Rs. 1,15,85,456/- was paid to Sh. Dasakhiat Lamare out of total commission of Rs. 1,21,95,216/- to be paid to all the three partners, which was computed on the basis of profit sharing ratio of 38:1:1 amongst the three partners collectively known as 'working partners'. As such, it is evident that the amount payable to all the three working partners was not only within the permissible limits and authorized by the partnership deed but the same was correctly distributed/ divided amongst the working partners according to the partnership deed only. In view of the same, the disallowance of

Rs. 66,43,474/- made by the AO on this account, deserves to be deleted. This ground of appeal is, accordingly, allowed."

11. The above findings of the Id. CIT(A) remains uncontroverted before us by the Id. DR. Considering the fact that since salary, bonus, remuneration or commission are collectively termed as "remuneration" and the remuneration paid during the year is within the permissible limit provided u/s.40(b)(v) of the Act, therefore, we fail to find any infirmity in the findings of the Id. CIT(A). Thus, ground no. 1 is dismissed.

12. Ground no. 2 is regarding non deduction of TDS on commission paid to partners. The Id. AO has alleged that the assessee failed to deduct tax at source on the commission paid to its partners. The Id. CIT(A) dealt with the case placing reliance on the decision of *ITAT Chandigarh in the case of Assam Tea House, Chandigarh Vs. Department of Income Tax in ITA No.759/Chd/2011* observed as follows:-

"It is noted from a perusal of the submissions of the Appellant that any payment of salary, bonus, commission or remuneration, is collectively termed as "remuneration" as per section 40(b)(i) of the Act. As such, the contention of the AO that the provisions of section 194H of the Act, which is otherwise applicable in case any commission or brokerage (not being insurance commission referred to in section 194D of the Act) is paid, is also applicable in cases, where commission is paid by a partnership firm to its partners, authorized by the partnership deed, is incorrect.

It is further noted that Explanation 2 to Section 15 of the Act specifically provides that salary, bonus, commission, remuneration etc by whatever name called due to or received by a partner of a firm from the firm shall not be regarded as "salary" the purposes of this section. Accordingly, provisions of Section 192 related to salary would also not be applicable in cases where remuneration has been paid by partnership firm to its partners. In view of the above stated facts, the disallowance of Rs. 14,82,595/- made by the AO under section 40(a)(ia) of the Act is liable to be deleted.

I further gets strength from ratio of judgement delivered by Hon'ble ITAT, Chandigarh in the case of Assam Tea House, Chandigarh Vs. Department of Income Tax [in ITA No. 759/Chd/2011] where it was held as under:

"In view of the proposition laid down by various courts including Hon'ble Supreme Court that firm is only a unit of assessment and not a legal person, there cannot be a contract of service between a firm and any of its partners. In the facts of the present case, the commission was paid to the partners of the assessee firm as per the covenants in the partnership deed i.e. an agreement between the partnership firm and its partners, which are not two distinct persons. The invoking of provisions of section 194H of the Act in a case where the partnership firm had paid commission to its partners, by way of remuneration, is not valid, as the said provisions are attracted wherein, any person pays commission to the payee, who is a distinct identity. However, in the case of a firm and its partners, the said distinction in the identities does not exist. In the absence of a contract between two entities, the provisions of section 194H are not attracted. Accordingly, we hold that where the assessee firm had paid commission as remuneration to its partner/s in terms of the partnership deed, allowability of which is regulated under the provision of section 40(b) of the Act, there is no merit in holding that the said commission payment is regulated by the provisions of section 194H of the Act, as there is no requirement to deduct tax out of such payments of commission by the assessee firm to its partners. The non deduction of tax in such cases would not attract the provisions of section 40(a)(ia) of the Act, which in any case are applicable to the deduction claimed u/s 30 to 38 of the Act. In the instant case before us, the deduction on account of commission paid to the partners by the assessee firm is governed by the provisions of section 40(b) of the Act in the hands of the firm and the same is includable as income in the hands of the partner in view of provisions of section 28 (v) of the Act. We uphold the order of CIT(A) in this regard and dismiss the grounds of appeal raised by the Revenue."

In the light of above discussion and also by humbly following the judicial precedent referred above, the disallowance of Rs. 14,82,595/- made by the AO under section 40(a)(ia) of the Act is, hereby, deleted. This ground of appeal is accordingly allowed.

14. The above finding of the Id.CIT(A) on fact and considering the judicial precedence remains uncontested by the Id. DR placing any other binding precedent in its favour. Therefore, considering the provisions of Explanation 2 to Section 15 of the Act which includes salary, bonus, commission or remuneration received by partner under the head 'salary' and considering the provisions of section 192 of the Act which talks about the salary given u/s. 15 of the Act, thus, we are inclined to confirm the findings of the Id. CIT(A) that there is no requirement under the provisions of the Act for deduction of tax at source by the partnership firm on salary, bonus, commission or remuneration etc or whatever name called given or credited to a partner of a firm. Thus, we fail to find any infirmity in the findings of the Id. CIT(A). Ground no. 2 is dismissed.

15. Ground no. 3 is the disallowance of Rs. 3,62,37,711/- towards various expenses claimed by the assessee.

16. The Id. AO made the said disallowance since the assessee failed to file necessary evidence in the course of the hearing. The Id. AO also observed that it cannot be denied that major expenses were incurred in cash. In this regard at the same time full reliance cannot be placed without any documents i.e bills/vouchers etc. The Id. AO made the disallowance @ 3.5% of the material consumed for construction work, 3% of the expenses incurred labour charges, 3% of stores and spares expenses and 10% of other direct expenses and travel and conveyance. However, the Id. CIT(A) deleted the said disallowance observing that a high-pitched assessment has been concluded by the Id. AO in the present 'non-adversial tax regime'. Neither any deficiency has been pointed out nor any specific defect has been brought on record by the Id. AO in the audited books of the assessee.

Therefore, such disallowances is made on account of conjectures and surmises, which are definitely not permissible.

17. We, however, on facts of the case observe that no proper documents to support such claim were filed by the assessee before the Id. AO and looking to quantum of expenses and lack of sufficient evidence filed before the lower authorities, we sustain disallowance of expenses at Rs. 15,00,000/- as against of Rs.3,62,37,711/- made by the Id. AO under various heads of expenses. Thus, ground no. 3 raised by the revenue is partly allowed.

18. Ground no. 4 is general in nature, which requires no adjudication.

19. In the result, the appeal of revenue is partly allowed.

Order pronounced in open court on 02/01/2023
आदेश खुले न्यायपीठ में दिनांक 02/01/2023 को उद्घोषित।

Sd/-
(SANJAY GARG)
JUDICIAL MEMBER

Sd/-
(MANISH BORAD)
ACCOUNTANT MEMBER

Dated/दिनांक:- 02/01/2023

**PP/Sr.PS

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant- The ACIT, Cir-Shillong, Aaykar Bhawan, M.G Road, Shillong-793001., Meghalaya
2. प्रत्यर्थी/Respondent-M/s. Dhar Construction Company
K.L Complex, Maccabe Road, Demseiniong, Near Assam Rifles Signal, Unit-Polo, Shillong-793011, Meghalaya
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण / DR, ITAT, Guwahati
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

सहायक पंजीकार

आयकर अपीलीय अधिकरण, कोलकाता।