IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'A' : NEW DELHI)

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No.451/Del./2020
(Assessment Year : 2015-16)

M/s. Altmash Exports, C/o Shri Akhilesh Kumar, Advocate 206 – 207, Ansal Satyam, RDC, Ghaziabad – 201 002 (Uttar Pradesh).	vs.	Pr.CIT, Ghaziabad.
(PAN : AALFA6025E)		
(APPELLANT)		(RESPONDENT)

ASSESSEE BY : Shri Akhilesh Kumar, Advocate
REVENUE BY : Shri Satpal Gulati, CIT DR

Date of Hearing : 04.03.2021
Date of Order : 23.03.2021

O R D E R

PER KULDIP SINGH, JUDICIAL MEMBER :

Appellant, M/s. Altmash Exports (hereinafter referred to as 'the assessee') by filing the present appeal sought to set aside the impugned order dated 14.01.2020 passed by the Pr. Commissioner of Income-tax, Ghaziabad under section 263 of the Income-tax Act, 1961 (for short 'the Act') qua the assessment year 2015-16 on the grounds inter alia that :-

> **"1. That, the order of learned Pr. Commissioner of Income Tax u/s 263 of the I.T. Act is bad in law and is against the facts and circumstances of the case.**

2. That, ld. PCIT grossly erred in invoking provisions of S.263 and directing AO to disallow remuneration to working partners on merits against the ratio of cases of jurisdictional courts/hon'ble tribunals in Vaish Associates [2015] 63 taxmann.com 90/235 Taxman 308 (Delhi), M/S Great City Manufacturing Co. ITA No.461/20019 (ALL) and JRA associates ITA 571/2015 etc. deciding issue in favour of assessee with identical facts/circumstances on merits.

3. That, view of ld. PCIT is also against the principle of consistency as remuneration to partners is always allowed in the earlier years after enquiry u/s 143(3) of IT Act, 1961.

4. That, without prejudice to above, order of ld. PCIT is against the provisions of section 263 itself in as much as neither order is erroneous being issue is covered by court cases in favour of assessee nor even it is prejudici l to the interest of revenue as even after such disallowance no extra tax will accrue to deptt. as partners has already paid tax @ 30% on the amount under question and issue of tax is neutral.

5. That, ld. PCIT further erred in observing that AO has not made enquiry on the issue in as much as during the assessment proceedings assessee has provided details of computation of remuneration which only demonstrate the allowance after due application of mind.

6. That, ld. PCIT further erred in issuing show cause notice only on the basis of audit objection with a borrowed erroneous view on a legal issue."

2. Briefly stated the facts necessary for adjudication of the controversy at hand are : Assessee is into the business of sale of fresh and frozen buffalo food products suitable for human consumption. Assessing Officer (AO) framed assessment in this case on 28.09.2017 at the total income of Rs.78,59,871/- against the returned income of Rs.64,18,780/- shown in the return of income. However, ld. Pr.CIT noticed that the assessee firm has claimed remuneration to its partners amounting to Rs.98,53,166/-

whereas as per partnership deed, the remuneration is neither quantified nor the same is quantifiable as per partnership deed. ld. Pr.CIT by invoking the CBDT Circular No.739 dated 25.03.1996 observed that no deduction u/s 40(b)(v) will be admissible unless the partnership deed either specified the amount of remuneration payable to each individual working partner or lays down the manner of quantifying such remuneration. Consequently, ld. Pr.CIT issued show-cause notice as to why remuneration wrongly claimed by the assessee and wrongly allowed by the AO and consequent assessment order passed by the AO may not be held to be erroneous and prejudicial to the interest of Revenue or cancelled or modified u/s 263 of the Act as the AO could have made disallowance of Rs 98,53,166/- on account of inadmissible remuneration.

3. Assessee filed reply and written submissions to the show-cause notice, which could not find favour with ld. Pr.CIT who reached the conclusion that the assessment order dated 28.09.2017 passed by the AO is erroneous as well as prejudicial to the interest of Revenue and thereby directed the AO to enhance the assessed income of the assessee to the tune of Rs.98,53,166/- being remuneration claimed by the assessee but not allowable as deduction.

4. Feeling aggrieved by the order passed by the ld. Pr.CIT u/s 263 of the Act, the assessee has come up before the Tribunal by way of filing the present appeal.

5. We have heard the ld. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

6. Ld. AR for the assessee challenging the impugned order contended inter alia that ld. Pr.CIT has erred in invoking the provisions contained u/s 263 of the Act as the assessment framed by the AO is neither erroneous nor prejudicial to the interest of the Revenue; that remun ration paid to the partners is quantifiable as per partnership deed in which it is clearly mentioned that the amount of remuneration will be determined as per the provisions of sub-clause (v) of clause (b) of section 40 of the Act and will be distributed among the partners equally; that the remuneration received by the partners was also taxed @ 30% in individual hands and even if remuneration was not paid by the firm to its partners, then also the tax @ 30% was payable on it; that the Revenue Department is consistently allowing the remuneration in the preceding years while framing assessment u/s 143 (3) of the Act, so the rule of consistency is required to be followed and as such is

not prejudicial to the interest of the Revenue and relied upon the judgments rendered by **Hon'ble Supreme Court in CIT, Gujarat-II vs. Kwality Steel Suppliers Complex (2017) 395 ITR 1 9SC), Hon'ble Allahabad High Court in CIT vs. Great City Manufacturing Co. (2013) 251 ITR 156 (All.), Hon'ble High Court of Delhi in CIT vs. Vaish Associates (2015) 63 taxmann.com 90 (Delhi) and order of the coordinate Bench of the Tribunal in JRA & Associates vs. ACIT in ITA No.5571/Del/2015 order dated 11.07 2018**

7. However, on the other hand ld. DR for the Revenue in order to repel the arguments addressed by the ld. AR for the assessee contended inter alia that as per clause 5 of partnership deed, remuneration is neither quantified nor the same is quantifiable; that every year of assessment is to be examined independently and separately and relied upon the order passed by the ld. Pr.CIT.

8. In the backdrop of the aforesaid facts and circumstances of the case and arguments addressed by the ld. Authorized Representatives of the parties to the appeal, the sole question arises for determination in this case is :-

> **"as to whether ld. Pr.CIT has erred in invoking the provisions contained u/s 263 of the Act by directing the AO to disallow the remuneration to working partners as the assessment framed u/s 143 (3) of the Act is neither erroneous nor prejudicial to the interest of the Revenue?"**

9. It is settled principle of law that in order to invoke the provisions contained u/s 263 of the Act, twin conditions are required to be fulfilled :

(i) that the assessment order framed by the AO is erroneous; and

(ii) that the assessment order is prejudicial to the interest of the Revenue.

10. In order to proceed further, relevant clause 5 of the partnership deed under which remuneration has been paid by the assessee firm to its working partners s extracted for ready perusal as under :-

> **"5. That after making provision of interest of partners as specified in clause 5 above both the partners, who are the working partners would be entitle to Remuneration as per the provision of sub- clause (v) of clause (b) of section 40 of the Income Tax Act, 1961 or under any other provision as may be applicable in the Income Tax Assessment of the firm in the relevant assessment year, out of the total Income Tax Assessment of the firm in the relevant assessment year, out of the to al income of remuneration so calculated shall be allowed to the partners in equal proportions.**
>
> **A. The Remuneration worked out on the above basis would be credited to the account of the respective partners at the end of the accounting year.**
>
> **B. However the partners may by mutual consent vary the quantum of remuneration payable to the working partners from year to year." (emphasis provided)**

11. Bare perusal of clause 5, extracted above, goes to prove that remuneration has been paid by the assessee firm to its working partners is in consonance with the provisions contained u/s

40(b)(v) of the Act, out of the total income tax assessment of the firm in the relevant assessment year, out of the total income of remuneration so calculated shall be allowed to the partners in equal proportions.

12. Hon'ble High Court of Delhi in case cited as **Vaish Associates** (supra) dealt with the identical issue as to invoking the provisions of section 40(b)(v) of the Act and decided the same in favour of the assessee by returning following findings :-

> ***"8. Having heard the submissions of Ms. Suruchi Aggarwal, learned Senior Standing counsel for the Revenue and Ms. Kavita Jha, learned counsel for the Respondent Assessee, the Court finds no reason to take a view different from the one taken by the ITAT in the facts and circumstances of the case. Clause 6(a) of the partnership deed dated 20th June 2008 clearly indicates the methodology and the manner of computing the remuneration of partners. The remuneration of the partners has been computed in terms thereof. The Court additionally notes that under Section 28(v) of the Act, any salary or remuneration by whatever name called received by partners of a firm would be chargeable to tax under the head profits and gains of business or profession. The provi o to Section 28 (v) states that where such salary has been allowed to be deducted under Section 40(b)(v), the income shall be adjusted to the extent of the amount not so allowed to be deducted. Further Section 155 (1A) of the Act states that where in respect of a completed assessment of a partner in a firm, it is found on the assessment or reassessment of the firm that any remuneration to any partner is not deductible under Section 40(b), the AO may amend the order of the assessment of the partner with a view to adjusting the income of the partner to the extent of the amount not so deductible. A conspectus of these provisions makes the opinion the ITAT consistent with the legal position.***
>
> ***9. Consequently, the Court finds no legal infirmity in the interpretation placed by the ITAT on Clause 6(a) of the partnership deed dated 22nd June 2008 to conclude that the salary paid to the partners was in accordance with Section 40(b)(v) of the Act and ought not to have been disallowed.***

Consequently, as regards this issue, no substantial question of law arises."

13. Hon'ble jurisdictional High Court of Allahabad in case of **CIT vs. Great City Manufacturing Co.** (supra) also dealt with the provisions contained u/s 40(b) read with section 40A(2) of the Act and decided the issue in favour of the assessee by returning following findings :-

"5. Sri Chopra submitted that in the partnership deed the terms and nature of the duties of each of the partners is not specified and therefore, if the Assessing Officer has found that they have been paid excessive remuneration even though the partnership deed provided such payment he could have disallowed the same. He placed reliance upon Section 40A(2)(a) of the Act. He submitted that when the total payment of salary to all its employee was only Rs. 4,86,918/- then there was no justification for payment of Rs. 39,31,165/- as remuneration to the partners. The submission is wholly misconceived. It is not in dispute that all the three partners are working partners in the assessee opp. par y firm and the Assessing Officer has himself allowed the remuneration of Rs.4,00,000/- per annum to each of the partners. It i also not in dispute that the terms of the partnership deed specifically provided the payment of remuneration to the working partners. Section 40(b) (v) of the Act p escribed limit of remuneration which can be allowed to its partner as deduction while computing the business income. It is not in dispute that the remuneration paid to the working partners was within the provision of clause (v) of subsection (b) of Section 40 of the Act. 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(b)(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."

14. Following the decisions rendered by the Hon'ble High Courts discussed in the preceding paras, we are of the considered view that when Revenue has not disputed the fact that partners are working partners as per partnership deed and as per clause 5, they are entitled for payment of remuneration which are to be determined as per provisions contained u/s 40(b)(v) of the Act, then Revenue has no business to disallow the same. In these circumstances, we are of the considered view hat assessment order framed by the AO is not erroneous.

15. So far as question of fulfilling the second condition that, *"assessment framed is prejudicial to the interest of the Revenue is concerned",* again w are of the considered view that when it is undisputed fact that remuneration paid to the individual partners has been taxed @ 30%, the same rate to which income of the assessee firm was to be taxed, the assessment order is not prejudicial to the interest of the Revenue.

16. Apart from non-fulfilling twin conditions to invoke the provisions contained u/s 263 of the Act by ld. Pr.CIT, it is a matter of record that in the preceding years i.e. AYs 2013-14 & 2014-15, the same remuneration as per clause 5 of the partnership deed and in consonance with section 40(b)(v) of the Act has been paid to the working partners by the assessee firm and has been accepted by the

Revenue. No distinguishing facts have been brought on record by the Revenue to take a divergent view. So, in the ordinary course of circumstances, Revenue is required to follow the "rule of consistency" though every assessment year is to be assessed separately and independently.

17. In view of what has been discussed above, question framed is answered in affirmative and the ld. Pr.CIT is held to have erred in invoking the provisions contained u/s 263 of the Act directing the AO to disallow the remuneration to the working partners. Consequently order passed by the ld. Pr.CIT is not sustainable in the eyes of law, hence the appeal filed by the assessee is hereby allowed.

Order pronounced in open court on this 23rd day of March, 2021.

Sd/-	**sd/-**
(R.K. PANDA)	**(KULDIP SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated the 23rd day of March, 2021.
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Copy forwarded to:
1.Appellant
2.Respondent
3.CIT
4.CIT, Ghaziabad.
5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.