

\$~

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
10& 11.

+ **W.P.(C) 3072/2015 &CM APPL 5490/2015**

VAISH ASSOCIATES ADVOCATES Petitioner
Through: Ms. Kavita Jha, Advocate with
Mr. Vaibhav Kulkarni, Advocate.

versus

ASSISTANT COMMISSIONER OF
INCOME-TAX, Respondent
Through: Ms. Vibhooti Malhotra, Junior Standing
Counsel.

And

W.P.(C) 3073/2015 & CM APPL 5491/2015

VAISH ASSOCIATES ADVOCATES Petitioner
Through: Ms. Kavita Jha, Advocate with
Mr. Vaibhav Kulkarni, Advocate.

versus

ASSISTANT COMMISSIONER OF
INCOME-TAX, Respondent
Through: Ms. Vibhooti Malhotra, Junior Standing
Counsel.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE VIBHU BAKHRU

ORDER
% **14.01.2016**

1. These are two writ petitions by M/s Vaish Associates Advocates under Article 226/227 of the Constitution of India. The prayer in W.P.(C) No. 3072 of 2015 is for quashing of notice dated 21st March 2014 issued by the Assistant Commissioner of Income Tax ('ACIT') under Section 148 of the Income Tax Act, 1961 ('Act'), seeking to re-open the assessment for the Assessment Year (AY) 2007-08 and the consequent proceedings initiated thereto including the order dated 11th March 2015 passed by the ACIT, dismissing the objections filed by the Petitioner.

2. In W.P.(C) No. 3073 of 2015, the prayer is for quashing of notice dated 12th June 2014, issued by the ACIT under Section 148 of the Act seeking to re-open the assessment for the AY 2008-09 and the proceedings initiated pursuant thereto including the order dated 11th March 2015 passed by the ACIT, dismissing the objections of the Petitioner.

3. The reasons for re-opening of the assessment as communicated to the Petitioner by the ACIT for both the AYs are similar. The relevant portions of the letter dated 16th October 2014, written by the ACIT to the Petitioner reads as under:

“2. During the assessment proceedings of A.Y. 2007-08, assessee had submitted a deed dated 22.06.2008 effective from 01.04.2006. The fact that the deed dated 22.06.2008 w.e.f. 01.04.2006 being retrospective effect is not relevant for A.Y. 2007-08 was neither disclosed by the assessee nor examined. As per section 40(b)(iii) any payment of remuneration to a partner which relates to any period falling prior to the date of the such partnership deed is not deductible in the computing the income chargeable under the head of Profit and Gains of Business or Profession.

3. Additionally, during year under consideration, assessee firm had paid salary of Rs. 2,90,83,000/- to the partners. The information was gathered from the scrutiny proceedings u/s. 143(3) for A.Y. 2009-10 that partnership deed does specify neither the quantum of Salary / remuneration nor the method of their computation.

.....

Circular No. 739 dated 25.03.1996 further clarifies the position in the respect of the salary/ remuneration paid to the partners.

Above Circular makes it clear that either the amount of the remuneration has to be specified or manner of quantifying such remuneration has to be specified. If it is not so, remuneration cannot be allowed as deduction u/s 40(b). In the present case also, salaries/ remuneration to the partners cannot be allowed as deduction u/s 40(b)(v) since, the partnership deed in this case neither specifies the amount of salaries required to be paid to each of the working partners nor has laid down the specific method of quantification thereof. Further, in the case of Sood Brij & Associates for AY 2007-08, the Hon'ble High Court of Delhi held that if the quantum of salary/remuneration or the method of computing the remuneration is not specified in the partnership deed, deduction of salary/remuneration cannot be allowed to the firm.”

4. The order passed by the Assessing Officer (‘AO’) in respect of the Petitioner for AY 2009-10 on 30th December 2011, disallowing the remuneration paid to the partners on the ground that it was not in terms of Section 40 (b) (v) of the Act was carried in appeal by the Petitioner to the Commissioner of Income Tax (Appeals) who by an order dated 4th January 2013 upheld the order of the AO. The further appeal by the Assessee being ITA No. 1382/Del/2012 was allowed by the Income Tax Appellate Tribunal (‘ITAT’) by order dated 5th July 2013. The ITAT interpreted Clause 6(a) of the partnership deed dated 22nd June 2008 and held that allocable profits

would be “total surplus/book profit prior to calculation of partner’s remuneration”. The disallowance by the AO was held to be bad in law.

5. The aforementioned order of the ITAT was subject matter of the Revenue's appeal before this Court being ITA No. 50 of 2014. By its decision dated 11th August 2015 in ***Commissioner of Income Tax-III v. Vaish Associates [2015] 63 taxmann. com 90 (Del.)*** the Court upheld the order of the ITAT overturning the order of the CIT (A) and *inter alia* observed as under:

“8..... 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 proviso 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 of 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.”

6. It is, therefore, seen that the very basis for re-opening of the assessment for the earlier AYs i.e. 2007-08 and 2008-09 has been rendered non-existent as a result of the above order of this Court interpreting clause 6 (a) of the partnership deed in question.

7. Consequently, the re-opening of the assessment for the aforementioned AYs 2007-08 and 2008-09 on the above basis cannot be sustained in law.

8. The orders dated 21st March 2014 and 12th June 2014 issued by the ACIT under Section 148 of the Act for AYs 2007-08 and 2008-09 and the consequential orders dated 11th March 2015 rejecting the objections of the Petitioner, and all further proceedings consequent thereto, are hereby quashed.

9. The writ petitions are allowed and the applications are disposed of in the above terms but with no order as to costs.

S.MURALIDHAR, J

VIBHU BAKHRU, J

JANUARY 14, 2016

mg