IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.12.2022

CORAM :

THE HON'BLE MR. JUSTICE S.VAIDYANATHAN
AND
THE HON'BLE MR. JUSTICE MOHAMMED SHAFFIQ

T.C.A.No.1212 of 2010

M/s.Kandasamy and Company,
182, Sankari Main Road,
Pallipalayam – 638 006. ... Appellant

-vs-

The Assistant Commissioner of Income-Tax,
Circle II, Salem. ... Respondent

Prayer: Tax Case Appeal filed under Section 260-A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, 'B' Bench, Chennai dated 10.07.2009 passed in I.T.A.No.121/Mds/2009.

For Appellant : Mr.D.G.Hari Prasath
for M/s.G.R.Associates

For Respondent : Mr.M.Swaminathan
Senior Standing Counsel

J U D G M E N T

This Appeal has been filed challenging the order passed by the Income Tax Appellate Tribunal, 'B' Bench, Chennai dated 10.07.2009 passed in I.T.A.No.121/Mds/2009, for the Assessment Year 2004-2005.

2. On 23.12.2010, this Appeal was admitted on the following substantial questions of law:

> *"Whether on the facts and circumstances of the case and in law, the Tribunal was justified in saying that no claim has been made that the payment was in accordance with Section 40 (b)(v) of the Income Tax Act, 1961, when there was an admitted fact that the appellant had claimed through the return which itself amounts to disclosure of the amount and therefore the same was clearly the business income and eligible for allowance under Section 40 (b) of the Income Tax Act, 1961?"*

3. The Appellant is a firm carrying on business in manufacturing of cloth and a survey was conducted on 30.01.2004 in Assessee's group concerns, in which it was found that books of accounts were not written upto date and the trade creditors were shown in the following group concerns as under:

M/s. Sree Muthumani Textiles, Pallipalayam:	Rs.25,92,809/-
M/s.S.Kandasamy & Co., Pallipalayam	Rs.36,27,261/-
M/s.P.Radhakrishnan & Co., Pallipalayam	Rs. 7,74,527/-

4. The Assessee at the time of Survey admitted to offer voluntarily an income of Rs.50 lakhs in all the above three cases apart from regular income as under:

Sl.No.	***Name of the assessee***	***Income offered at the time of Survey***	***Income admitted in the return of Income***	***Shortfall which are stated to be settled creditors***
1	M/s.Muthumani Textiles	Rs.23.85 lakhs	Rs.15.96 lakhs	Rs.4.89 lakhs
2	M/s.Kandasamy & Co.,	Rs.18.35 lakhs	Rs.15.80 lakhs	Rs.2.55 lakhs
3	M/s.P.Radhakrishnan & Co.,	Rs.4.70 lakhs	Rs.2.30 lakhs	Rs.2.31 lakhs

5. The Appellants after voluntarily agreeing these incomes for assesment had claimed deduction of a sum of Rs.3,00,000/- each to the two partners as salary under Section 40 (b) (v) of the Income Tax Act, 1961 (in short 'the Act'). In this context, it is relevant to extract Section 40 (b)(v) of the Act and the same is extracted hereunder:

"<u>*Section 40 (b)*</u>

....

(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 partnership deed and relates to any period falling after the date or 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:-

(a) On the first of Rs.3,00,000 of the book-profit or in case of a loss.	*Rs.1,50,000 or at the rate of 90 per cent of the book-profit, whichever is more;*
(b) on the balance of the book-profit	*at the rate of*

60 per cent:]

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 1993, the terms of partnership deed may, at any time during the said previous year, provide for such payment."

6. It is submitted that a reading of the above provision would reveal that to claim the aforesaid benefit it must be in accordance with the terms of Partnership deed and on the basis of books of account. Admittedly, the Books of Accounts has not been maintained by the Petitioner apart from the admission during survey. It has been found by both the authorities below viz., Appellate Authority as well as the Tribunal as under:

i) Relevant finding of Appellate Authority:

"*........ Section 40 (b) clearly stipulate the deductibles out of the regular income of the firm and in the appellant's case, the income was not a regular income but unaccounted income disclosed as additional income after considering all possible deductions. This fact is also evidenced by the sworn statement recorded from Sri.P.Palanimuthu. The present case is on a different footing as the income admitted consequent to survey is not business income after giving allowance for all deductions. Section 40 (b) impose absolute prohibition, it does not limit the operation of the Act to a remuneration or interest paid to a partner as per the agreement. It takes within its scope remuneration or salary or interest paid to the partner in any capacity. The only test that is relevant is whether the payment to a partner is in accordance with the provisions* *of Section 40 (b) and if the same is not in accordance with Section 40 (b), the payments cannot be considered as deduction. I do not think that the proposition of the appellant could be acceded in respect of the payment of remuneration/salary or interest to partners which was done to reduce the liability of the firm. Section 40 (b) also speaks of the payment out of the profits of the business and limits have been laid out on the book profit. This would mean that only the regular income to be considered for the purpose of payment of salary/or interest to partners. The income declared consequent to search/survey cannot be construed as income of the firm. In view of the above, the disallowance made by the AO is confirmed."*

ii) Relevant finding of the Tribunal is extracted hereunder:

" 2.6. Now, examining the present cases on the anvil of aforesaid case laws, we find that assessee has not at all maintained any books of accounts and no claim has been made that the payment is in accordance with Section 40(b)(v). Neither any evidence to that effect has been produced before us. Under the circumstances, following the precedent as above, we dismiss the issue raised by the assessee."

7. The above finding of the appellate authorities would show that the claim by the assessee was rejected for want of evidence. We are thus of the opinion that there is no question of law much less substantial question of law which arises from the order of the Tribunal. Accordingly, Tax Case Appeal stands dismissed. No costs.

[S.V.N., J.] [M.S.Q., J.]
15.12.2022

Internet : Yes

Index : Yes / No
arr/mka

S.VAIDYANATHAN, J.
and
MOHAMMED SHAFFIQ, J.

arr/mka

To:
1. The Income Tax Appellate Tribunal,
   Chennai 'b' Bench, Chennai.

2. The Assistant Commissioner of Income-Tax,
Circle II, Salem.

T.C.A.No.1212 of 2010

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