IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 31.07.2023	**Pronounced on:** .10.2023

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.21515 of 2023
and
W.M.P.Nos.20886 & 20887 of 2023

S.Raja .. Petitioner

Vs.

1.The Principal Commissioner of Income Tax-8,
2nd floor, Tower-II, BSNL Building,
No.16, Greams Road,
Chennai – 600 006.

2.Assistant Commissioner of Income Tax,
Circle -1,
Vellore. .. Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari, calling for the records of the 1st respondent in Order C.No.264/PCIT-8/264/2021-22/08 vide DIN: ITBA/REV/M/REV7/2022-23/1051470555(1) dated 28.03.2023 for the Assessment Year 2014-15 and quash the same.

For Petitioner : Mr.T.Vasudevan

For Respondents : Dr.B.Ramaswamy
Senior Standing Counsel

ORDER

The petitioner is aggrieved by the impugned order dated 28.03.2023 bearing C.No.264/PCIT-8/264/2021-22/08, passed by the 1st respondent - Principal Commissioner of Income Tax-8, Chennai – 600 006 under Section 264 of the Income Tax Act, 1961. (Hereinafter referred to as 'the Act').

2. By the impugned order, the 1st respondent has rejected the request of the petitioner with the following observations:-

> ***"3.1.It is a fact that the firm M/s. Selvam Motors has paid interest to the tune of Rs.23,80,631/- to the assessee on his capital contribution being one of the partners. The payment of interest on capital contribution is in excess of 12% as specified under section 40(b)(iv) of the Act and therefore, the Assessing Officer has rightly disallowed a sum of Rs.11,90,315/-, in assessment order u/s.143(3) r.w.s 147 of the Act in the case of M/s. Selvam Motors on 13.12.2019. Here, it is pertinent to mention that the disallowance made in the case of Firm is on account of violation of provision of section 40(b)(iv) of the Act and, therefore the act of violation committed by the firm cannot alter the nature of income received by the assessee.***

> ***3.2.Under the Income Tax Act, the firm and the individual partners are different entities. The disallowance of expenditure in the case of one entity does not entitle the other entity (recipient) to claim deduction of the disallowed expenditure. In this case assessee has actually received interest of Rs.23,80,631/- and obtained benefit to that extent. In view of the above, the petition u/s.264 of the assessee considered devoid of any merit and hereby rejected.***
>
> ***4.The petitioner petition u/s.264 is dismissed."***

3.The specific case of the petitioner is that in terms of proviso to Section 28 (v) of the Act, if any interest, salary, bonus, commission or remuneration by whatever name called or any part thereof has not been allowed to be deducted under clause (b) of Section 40, the income under this clause has to be adjusted to the extent of the amount not so allowed to be deducted.

4.In other words, it is the contention of the petitioner that the amount of Rs.11,90,315/- out of Rs.23,80,631/- which was added to the income of the petitioner in the re-assessment order dated 30.12.2019 has to be deleted and therefore, the re-assessment made has to be revised under Section 264 of the Income Tax Act, 1961.

5.It is submitted that the very purpose of the providing the proviso to Sub-Clause (v) to Section 28 of the Income Tax Act, 1961 has been defeated vide impugned order and prayed for allowing the Writ Petition.

6.On the other hand, the learned Senior Standing Counsel for the respondents would submit that the impugned order is well reasoned and does not require any interference.

7.It is submitted that payment of interest on capital contribution in excess of 12% as specified in Section 41(4) of the Act, was disallowed vide Assessment Order dated 13.12.2019 in the hands of the Partnership firm namely, M/s.Selvam Motors. Hence, the income in the hands of the petitioner towards interest on capital cannot be disturbed or revised and therefore prayed for dismissal of the Writ Petition.

8.In this connection, the learned Senior Standing Counsel for respondents has drawn attention to the following decisions of High Courts of Karnataka, Bombay, Allahabad, Delhi and Kerala:-

i. ***Nataraju (HUF) Vs. Principal Commissioner of Income Tax, Mysuru**, [2018] 406 ITR 342 (Karnataka);*
ii. ***Aditya Marine Ltd., Vs. Deputy Commissioner of Income-Tax, (International Taxation)**, [2020] 268 Taxman 230 (Bombay);*
iii. ***Commissioner of Income-Tax Vs. Great City Manufacturing Co.**, [2013] 351 ITR 156 (Allahabad);*
iv. ***Jindal Metal Co. Vs. Principal Commissioner of Income Tax, Delhi**, [2019] 260 Taxman 220 (Delhi) and*
v. ***Novel Distrubuting Enterprises Vs. Deputy Commissioner of Income Tax**, [2001] 251 ITR 704 (Kerala).*

9. I have considered the arguments advanced by the learned counsel for the petitioner and the learned Senior Standing Counsel for the respondents.

10. The petitioner is a proprietor of M/s.Raja & Co. and the partner of M/s.Selvam Motors. The petitioner had received a sum of Rs.3,60,000/- as salary from the said firm and a sum of Rs.23,80,631/- as interest on capital ploughed by the petitioner in the said firm.

11. As per Section 28(v) of the Income Tax Act, 1961 any interest, salary, bonus, commission or remuneration, by whatever name called, due to, or received by, a partner of a firm from such firm shall be chargeable to income-tax under Profits and Gains of Business or Profession.

12. Section 28(v) of the Income Tax Act, 1961 reads as under:-

> *"any interest, salary, bonus, commission or remuneration, by whatever name called, due to, or received by, a partner of a firm from such firm :*
>
> ***Provided** that where any interest, salary, bonus, commission or remuneration, by whatever name called, or any part thereof has not been allowed to be deducted under clause (b) of section 40, the income under this clause shall be adjusted to the extent of the amount not so allowed to be deducted "*

13. An exception has been provided to Sub-Clause (v) to Section 28 of the Income Tax Act, 1961. Proviso to Sub-Clause (v) to Section 28 of the Income Tax Act, 1961 reads as under:-

> ***Provided** that where any interest, salary, bonus, commission or remuneration, by whatever name*

called, or any part thereof has not been allowed to be deducted under clause (b) of Section 40, the income under this clause shall be adjusted to the extent of the amount not so allowed to be deducted"

14.Section 40 (b) of the Income Tax Act, 1961 reads as under:-

"Amounts not deductible:-

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:-

(a)on the first 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 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 the partnership deed may, at any time during the said previous year, provide for such payment.

15. The deduction that was claimed by the Partnership firm namely, M/s.Selvam Motors for the same Assessment Order was disallowed. In the Return of Income dated 30.11.2014, the petitioner had declared a gross income of Rs.51,26,155/-. While computing the "net

taxable income”, the petitioner claimed a deduction of Rs.23,80,631/- being the interest paid on capital by the said Partnership firm namely M/s.Selvam Motors, purportedly under proviso to Sub-Clause (v) to Section 28 of the Income Tax Act, 1961.

16. The assessment of the petitioner was completed on 30.11.2016 by accepting Return of Income filed by the petitioner on 30.11.2014. The assessment was however reopened under Section 148 of the Income Tax Act, 1961 for the purpose of Section 147 of the Income Tax Act, 1961.

17. The said proceedings culminated in an assessment order dated 13.12.2019 under Section 147 read with 143(3) of the Income Tax Act, 1961, whereby part of the amount which was claimed as interest on capital received by the petitioner from the Partnership Firm M/s.Selvam Motors was partly allowed and partly disallowed to the extent of Rs.11,90,315/- out of Rs.23,80,631/-.

18. The petitioner appears to have filed an appeal against the re-assessment order dated 30.12.2019 before the Commissioner of Income Tax (Appeals). Meanwhile, the petitioner opted to settle the

dispute under the Vivad Se Vishwas Scheme (VSVS). Therefore, the appeal filed by the petitioner was dismissed as infructuous on 16.11.2021 by the Commissioner of Income Tax (Appeals).

19. It is in this background the petitioner has filed an application on 13.12.2021 under Section 264 of the Income Tax Act, 1961 to revise the assessment order without specifying whether order dated 30.11.2016 passed under Section 143(3) read with Section 147 of the Income Tax Act, 1961 to be revised or the re-assessment order dated 13.12.2019 passed under Section 147 of the Income Tax Act, 1961.

20. The Impugned Order however indicates the petitioner wanted to revise assessment order dated 30.11.2016 under Section 143(3) read with Section 147 of the Income Tax Act, 1961.

21. As the assessment order dated 30.11.2016 was revised vide order passed dated 30.12.2019 under Section 143(3) read with Section 147 of the Act, question of revising the said assessment order passed cannot be continued as the order stood revised by order dated 30.12.2019 passed under Section 143(3) read with 147 of the Act.

22. The appeal of the petitioner before the Commissioner of Income Tax (Appeals) against order dated 30.12.2019 passed under Section 143(3) read with 147 of the Act was also dismissed as infructuous on 16.11.2021 as the petitioner has settled the dispute under the Vivad Se Vishwas Scheme (VSVS).

23. Under the Income Tax Act, the firm and the individual partners are different entities. The disallowance of expenditure in the case of one entity does not entitle the other entity (recipient) to claim deduction of the disallowed expenditure. In this case assessee has actually received interest of Rs.23,80,631/- and obtained benefit to that extent. In view of the above, the petition u/s.264 of the assessee considered devoid of any merit and hereby rejected.

24. Therefore, there is no scope for interfering with the Impugned Order in the present writ petition. Therefore, the present writ petition is liable to be dismissed. Accordingly dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

.10.2023

Index:Yes/No
Neutral Citation:Yes/No
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C.SARAVANAN, J.

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