(1988) 04 GUJ CK 0022

In the Gujarat High Court

Case No : IT Reference No. 54 of 1979

Commissioner of Income Tax	APPELLANT
Vs	
Rajesh Textile Mills Ltd.	RESPONDENT

Date of Decision : 26-04-1988

Acts Referred:

Companies Act, 1956 — Section 198, 309
Estate Duty Act, 1953 — Section 36(1)
Evidence Act, 1872 — Section 105
Income Tax Act, 1961 — Section 14, 15, 16, 17, 17(2)

Citation : (1988) 39 TAXMAN 170

Hon'ble Judges : S.B. Majmudar, J;R.C. Mankad, J

Bench : Division Bench

Advocate : K.N. Raval, for the Appellant; J.P. Shah, for the Respondent

Judgement

S.B. Majmudar, J.—At the instance of the revenue, the following questions have been referred by the Tribunal for our opinion:

1. Whether, on the facts and in the circumstances of the case, the income tax Appellate Tribunal was right in law in holding that the Appellate

Assistant Commissioner was justified in valuing car perquisites in respect of the car given by the assessee for use to its two Directors at Rs. 6,000

u/s 40A(5)(a)(ii) of the income tax Act, 1961 and in deleting the addition of Rs. 33,808, the total addition of Rs. 39,809 being the actual

expenditure incurred by the assessee on account of the motor-car given by the assessee for use to its two directors?

2. Whether, on the facts and in the circumstances of the case, the income tax Appellate Tribunal was right in law in holding that the perquisites in

respect of the furnished accommodation given by the assessee to its managing directors should be worked out on the basis of the relevant provisions of rule 3 of income tax Rules, 1962?

3. Whether, on the facts and in the circumstances of the case, the income tax Appellate Tribunal was right in law in disallowing the amount of Rs.

39,300 being the actual expenditure incurred by the assessee in maintenance of residential accommodation for managing director as perquisite u/s

40A(6) of the income tax Act, 1961?

4. Whether, the expenditure of Rs. 2,810 being the value of canteen compound for guests and technicians is disallowable u/s 37(25) of the income

tax Act, 1961?

The facts leading in this reference may be noted as follows. The assessee is a textile mill. Year of assessment is 1972-73. So far as question No. 1

is concerned, the ITO noted that the assessee-company had spent an amount of Rs. 39,000 towards expenditure of motor-cars given to its

managing directors for their use at Bombay. He had disallowed this amount under the provision of section 40A(5) of the Income- tax Act, 1961

(''the Act'') being the actual expenditure incurred by the assessee on motor-cars plus depreciation. On appeal, the AAC, following the decision of

the Tribunal in an earlier case, held that disallowance may be confined to Rs. 6,000 only. On appeal before the Tribunal at the instance of the

revenue, it was urged that the entire amount should be disallowed. The Tribunal, however, following a previous decision in the case of Rohit Mills

Co. Ltd. [IT Appeal No. 125 (Ahd.) of 1976-77, dated 24-5-1977], held that the AAC was justified in valuing the perquisites in the light of the

provision of rule 3 of the income tax Rules, 1962 (''the Rules'') in preference to the actual expenditure.

2. So far as referred question Nos. 2 and 3 are concerned, the relevant facts are as under. The assessee-company gave furnished accommodation

to the managing directors at Bombay. In the relevant year, actual expenditure of the assessee in that connection was Rs. 30,000. The ITO

considered this amount as perquisites and disallowed the case u/s 40A(5). On appeal, the AAC held that 12 1/2 per cent of the total remuneration

of the directors should be considered as perquisites for the purpose of disallowance u/s 40A(5). The Tribunal, On appeal, for the reasons

recorded in the order, held that the perquisites in response to the furnished accommodation should be worked out on the basis of the relevant provisions of rule 3 as applicable to the assessment year 1972-73.

3. We had not mentioned the facts relating to question No. 4 as the learned advocate for the revenue at the time of hearing of this reference stated

that he would not press the said question for our opinion. We, therefore, did not examine the said question treating it to be as not pressed.

4. The aforesaid resume of facts indicates that the main dispute between the parties revolves round the interpretation of the relevant provisions of

section 40A(5). The said provisions which held the field at the relevant time, therefore, are required to be noted at the out set. The said provisions

along with other relevant provisions read as under :

40A. Expenses or payments not deductible in certain circumstances. -- (1) The provisions of this section shall have effect notwithstanding anything

to the contrary contained in any other provision of this Act relating to the computation of income under the head ''Profits and gains of business or

profession''.

(2)(a) Where the assessee incurs any expenditure in respect of which payment has been or is to be made to any person referred to in clause (b) of

this sub-section, and the income tax officer is of opinion that such expenditure is excessive or unreasonable having regard to the fair market value

of the goods, services or facilities for which the payment is made or the legitimate needs of the business or profession of the assessee or the benefit

derived by or accruing to him therefore, so much of the expenditure as is so considered by him to be excessive or unreasonable shall not be

allowed as a deduction:

Provided that the provisions of this sub-section shall not apply in the case of an assessee being a company in respect of any expenditure to which

sub-clause (i) of clause (c) of section 40 applies.

(b) The persons referred to in clause (a) are the following, namely:--

(i) where the assessee is an any relative of the assessee;

individual

(ii) where the assessee is a any director of the company,

company, firm, association of partner of the firm, or

persons or Hindu undivided member of the association or family family, or any relative of such

director, partner or member;

(iii) any individual who has a substantial interest in the business or

profession of the assessee, or any relative of such individual;

(3) and (4) ******

(5)(a) Where the assessee--

(i) incurs any expenditure which results directly or indirectly in the payment of any salary to an employee or a former employee, or

(ii) incurs any expenditure which results directly or indirectly in the provision of any perquisite (whether convertible into money or not) to an

employee or incurs directly or indirectly any expenditure or is entitled to any allowance in respect of any assets of the assessee used by an

employee either wholly or partly for his own purposes or benefit,

then, subject to the provisions of clause (b), so much of such expenditure or allowance as is in excess of the limit specified in respect thereof in

clause (c) shall not be allowed as a deduction:

Provided that where the assessee is a company, so much of the aggregate of--

(a) the expenditure and allowance referred to in sub-clauses (i) and (ii) of this clause; and

(b) the expenditure and allowance referred to in sub-clauses (i) and (ii) of clause (c) of section 40,

in respect of an employee or a former employee, being a director or a person who has a substantial interest in the company or a relative of the

director or of such person, as is in excess of the sum of seventy-two thousand rupees, shall in no case be allowed as a deduction:

******

(c) The limits referred to in clause (a) are the following, namely :--

(i) ******

(ii) in respect of the aggregate of the expenditure and the allowance referred to in sub-clause (ii) of clause (a), one-fifth of the amount of the salary

payable to the employee or an amount calculated at the rate of one thousand rupees for each month or part thereof comprised in the period of

employment in India of the employee during the previous year, whichever is less.

Explanation 1 : The provisions of this sub-section shall apply notwithstanding that any amount not to be allowed under this sub-section is included

in the total income of the employee, or as the case may be, the former employee.

Explanation 2 : In this sub-section,--

(a) ''salary'' has the meaning assigned to it in clause (i) read with clause (3) of section 17 subject to the following modifications, namely :--

(1) in the said clause (i), the word ''perquisites'' occurring in sub-clause (iv) and the whole of sub-clause (vii) shall be omitted;

(2) in the said clause (3), the references to ''assessee'' shall be construed as references to ''employee or former employee'' and the references to

''his employer or former employer and an employer or a former employer'' shall be construed as references to ''the assessee'';

(b) ''perquisite'' means--

(i) rent-free accommodation provided to the employee by the assessee;

(ii) any concession in the matter of rent respecting any accommodation provided to the employee by the assessee;

(iii) any benefit or amenity granted or provided free of cost or at concessional rate to the employee by the assessee;

(iv) payment by the assessee of any sum in respect of any obligation which, but for such payment, would have been payable by the employee; and

(v) payment by the assessee of any sum, whether directly or through a fund, other than a recognised provident fund or an approved superannuation

fund, to effect an assurance on the life of the employee or to effect a contract for an annuity;

The other relevant provision which is required to be noted at this stage is found in section 40 which at the relevant time read as under :

40. Amounts not deductible.-- Notwithstanding anything to the contrary in sections 30 to 39, the following amounts shall not be deducted in

computing the income chargeable under the head ''Profits and gains of business or profession'';

(a) and (b) ******

(c) in the case of any company--

(i) any expenditure which results directly or indirectly in the provision of any remuneration or benefit or amenity to a director or to a person who has a substantial interest in the company or to a relative of the director or of such person, as the case may be,

(ii) any expenditure or allowance in respect of any assets of the company used by any person referred to in sub-clause (i) either wholly or partly for

his own purposes or benefit,

if in the opinion of the income tax Officer any such expenditure or allowance as is mentioned in sub-clauses (i) and (ii) is excessive or unreasonable

having regard to the legitimate business needs of the company and the benefit derived by or accruing to it therefrom, so, however, that the

deduction in respect of the aggregate of such expenditure and allowance in respect of any one person referred to in sub-clause (i) shall, in no case,

exceed--

(A) where such expenditure or allowance relates to a period exceeding eleven months comprised in the previous year, the amount of seventy-two

thousand rupees;

(B) where such expenditure or allowance relates to a period not exceeding eleven months comprised in the previous year, an amount calculated at

the rate of six thousand rupees for each month or part thereof comprised in that period:

Provided that in a case where such person is also an employee of the company for any period comprised in the previous year, expenditure of the

nature referred to in clauses (i), (ii), (iii) and (iv) of the second proviso to clause (a) of sub-section (5) of section 40A shall not be taken into

account for the purposes of sub-clause (A) or sub-clause (B), as the case may be,

When section 40 of the Act is read in juxtaposition with section 40A, it becomes clear that section 40 operates notwithstanding anything: contained

to the contrary in sections 30 to 39of the Act, meaning thereby, despite what might have been stated in the above referred sections, the amount

mentioned in section 40 shall not be deducted in computing the income chargeable under the head ''Profits and gains of business or profession''. So

far as section 40A is concerned, it clearly lays down that provisions of section 40A will have effect notwithstanding anything to the contrary

contained in any other provision of this Act relating to the computation of income under the head ''Profits and gains of business or profession''.

Thus, provisions of section 40A represent a special scheme of its own vis-a-vis computation of income, under the said head. Once this aspect of

the matter is kept in view, it becomes immediately apparent that provisions of section 40A and its various sub-clauses, will have to be given full

play while deciding the question whether certain expenses referred to in various clauses of section 40A have to be deducted or not while

computing income under the head ''Profits and gains of business or profession''.

5. Mr. J.P. Shah, for the assessee, vehemently submitted that the Tribunal was right in law in invoking provisions of rule 3 in computing deductible

amount of expenditure of perquisites in the light of provision of section 40A(5)(a). On the other hand, Mr. Raval, for the revenue, submitted that

operation of rule 3 is totally besides the point while considering the question of permissible expenditure which provided for no deduction while

computing income under the head ''Profits and gains of business or profession'' laid down by section 40A(5)(a) and that for deciding this question,

rule 3 would be totally extraneous.

6. In order to resolve this controversy, it will be necessary to have a look at the relevant provisions in Chapter IV of the Act which deals with

''Computation of total income''. Section 14 of the Act lays down various heads of income. Head ''A'' refers to ''salaries'', while head ''D'' refers to

''Profits and gains of business or profession''. So far as head ''A'' ''Salaries'' is concerned, section 15 of the Act catalogues the types of income

which can be chargeable to income tax under the head ''Salaries'', while section 16 of the Act deals with permissible deductions from salary for

computation of income under the head ''Salaries''. Section 17 of the Act lays down that for the purpose of sections 15 and 16 the word ''salary''

would include amongst others, any fees, commissions, perquisites or profits in lieu of or in addition to any salary or wages. Sub-section (2) of

section17 provides that ''perquisites'' includes--

Salary'', ''perquisite'' and ''profits in lieu of salary'' defined.-- (1) ******

(2) ''Perquisite'' includes--

(i) the value of rent-free accommodation provided to the assessee by his employer;

(ii) the value of any concession in the matter of rent respecting any accommodation provided to the assessee by his employer;

(iii) the value of any benefit or amenity granted or provided free of cost or at concessional rate in any of the following cases--

(a) by a company to an employee who is a director thereof;

(b) by a company to an employee being a person who has a substantial interest in the company;

(c) by any employer (including a company) to an employee to whom the provisions of paragraphs (a) and (b) of this sub-clause do not apply and

whose income under the head ''Salaries'' exclusive of the value of all benefits or amenities not provided for by way of monetary payment, exceeds

eighteen thousand rupees;

(iv) any sum paid by the employer in respect of any obligation which, but for such payment, would have been payable by the assessee; and

(v) any sum payable by the employer, whether directly or through a fund, other than a recognised provident fund or an approved superannuation

fund, to effect an assurance on the life of the assessee or to effect a contract for an annuity;

The CBR has promulgated the Rules in exercise of the power conferred by section 295 of the Act. Part II of the Rules deals with definition of

income and so far as head ''Salaries'' is concerned, it is dealt with in topic ''A''. Under that topic are found rules 2A, 2B and 3 of the Rules. Rule 3

provides for valuation of perquisites. It states that for the purpose of computing the income chargeable under the head ''Salaries'' the value of the

perquisites (not provided for by way of monetary payment to the assessee) mentioned below shall be determined in accordance with the following

clause, namely:--

3. Valuation of perquisites. --For the purpose of computing the income chargeable under the head ''Salaries'' the value of the perquisites (not

provided for by way of monetary payment to the assessee) mentioned below shall be determined in accordance with the following clauses,

namely:--

(a) The value of rent-free residential accommodation shall be determined on the basis provided hereunder, namely : --

(i) where the accommodation is provided--

(A) by Government to a person holding an office or post in connection with the affairs of the Union or of a State;

(B) By a body or undertaking under the control of Government to any officer of Government whose services have been lent to that body or

undertaking (the accommodation itself having been allotted to it by Government),

an amount equal to--

(1) if the accommodation is unfurnished, the rent which has been or would have been determined as payable by such person or officer in

accordance with the rules framed by Government for allotment of residences to its officers;

(2) if the accommodation is furnished, an amount calculated in accordance with sub-clause (i)(1) plus 15 per cent per annum of the original cost of

the furniture (including television sets, radio sets, refrigerators, other household appliances and air-conditioning plant or equipment) or if such

furniture is hired from a third party, the actual hire charges payable therefor;

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(c)(i) The value of a motor-car provided by the employer for use by the assessee exclusively for his private or personal purposes shall be

determined as the sum actually expended by the employer on the maintenance and running of the motor-car during: the relevant previous year

(including remuneration, if any, paid by the employer to the chauffeur) and where the motor-car is owned by the employer, as the aggregate of

such sum and the amount representing the normal wear and tear of the motorcar;

(ii) the value of a motor-car provided by the employer for use by the assessee partly in the performance of his duties and partly for his private or

personal purposes shall be determined to be a sum equal to that part of the amount actually expended by the employer on the maintenance and

running of the motor-car during the relevant previous year (including remuneration, if any, paid by the employer to the chauffeur) which can

reasonably be attributed to the user of the motor-car by the assessee for his private or personal purposes or, where the motor-car is owned by the

employer, the aggregate of such sum and of a sum equal to that part of the amount representing the normal wear and tear of the motor-car which

can reasonably be attributed to the user of the motor-car by the assessee for his private or personal purposes, so, however, that where a

determination on the basis mentioned above, presents difficulty, the value of the perquisite may be determined on the basis provided in the Table

below:--

Value of perquisites per calendar month

1 2 3

Rs. Rs.

1. Where the motor-car is

owned or hired by the

employer and all the

expenses on maintenance

and running are met of

reimbursed to the

assessee by the employer 300 400

2. Where the motor-car is

owned or hired by the

employer but the expenses

on maintenance and

running for the assessee''s

private or personal

purposes are met by the

assessee 100 150;

It is obvious that the said rule has to be pressed in service for computing income chargeable under the head ''Salaries''. We fail to appreciate how

this rule can be projected into the exercise contemplated by section 40A which deals with the topic ''Deductible expenses'' for computation of

income under the head ''Profits and gains of business or profession''. Thus, on the express language of the rule and in the settings in which it is

enacted and in the light of the purpose for which it is enacted, its applicability for the purpose of computing expenses contemplated by section 40A

is ruled out. As we have seen earlier, section 40A represents a complete scheme and it is to be enforced notwithstanding anything to the contrary

contained in any other provisions of the Act. Proviso would also include rules framed under the Act especially rule 3. Even that apart, it has to be visualised that for the purpose of computing perquisites in the hands of employee which has to bear the burden of income tax on the value thereof,

as being considered to be part and parcel of his income, monetary value of perquisites in the hands of the employee has to be ascertained. Section

17(2), while dealing with different topics of perquisites, in sub-clauses (i), (ii) and (iii) has clearly indicated that it is the value of benefits available to

the employee from the employer that has to be evaluated and it is in that context that rule 3 comes into operation and has to be pressed in service.

But as far as section 40A is concerned, the scheme is entirely different. Section 40A deals with the question of ascertainment of actual expenses

incurred by the assessee-employer for certain types of employees contemplated by the provision. Expenditure naturally means actual expenditure

on the concerned hands. In this provision, concept of value of perquisites is totally absent and rightly so because while finding out the expenses

actually incurred by the employer on amenities made available to the employees, cost of such amenities as incurred by the employer can be easily

ascertained on factual basis. The amount of these incurred expenses would naturally be within the personal knowledge of the employer. Even as

per section 105 of the Indian Evidence Act, 1872, burden will be on the employer to point out as to what amount of actual expenditure he had

incurred on the concerned benefits made available to the employee as contemplated by section 40A(5)(a). For ascertaining the same, focus of

attention is on employer-assessee and not on employee who is not an assessee so far as the aforesaid provision is concerned. It is for this reason

that rule 3 which deals with an entirely different topic and which focuses its attention not on the employer-assessee but on the employee-assessee

gets completely ruled out so far as applicability of section 40A(5) is concerned. Thus, on the scheme of the relevant provisions of the Act, it is not

possible to countenance the contention of Mr. J.P. Shah, for the assessee, that rule 3 can be pressed in service for computing the permissible

expenses while determining the income of the employer-assessee under the head ''Profits and gains of business or profession''. In our view, the

Tribunal was not justified in resorting to rule 3 in this connection.

7. However, Mr. Shah, for the assessee, laid great stress on the language of section 40A(5)(a)(ii) and submitted that from a practical point of view,

an analogue provision of rule 3 can be imported while computing deductible expenses in the said provision so far as employer-assessee is

concerned. Let us, therefore, have a close look at the said provision. The said provision, as seen above, lays down that where the assessee incurs

any expenditure which results directly or indirectly in the provision of any perquisite (whether convertible into money or not) to an employee or

incurs directly or indirectly any expenditure or is entitled to any allowance in respect of any assets of the assessee used by an employee either

wholly or partly for his own purposes or benefit, then, subject to the provisions of clause (b), so much of such expenditure or allowance as is in

excess of the limit specified in respect thereof in clause (c) shall not be allowed as a deduction. We are not very much concerned with the provision

of clause (b) and, therefore, we need not dilate on the same. Mr. Shah submitted that the term ''perquisite'' has been defined by Explanation 2(b)

to this sub-section. He submitted that in a given case, exact money value of perquisites may not be capable of being clearly evaluated and if it

cannot be clearly evaluated in the hands of the employee-assessee and for evaluating the same, the formula adopted by rule 3 can be pressed in

service qua him, there is no reason why the same rule on the principle of comity cannot be pressed in service for computing expenses incurred by

employer-assessee on the very same ''perquisite'' so far as employer''s liability to pay income tax under the head ''Profits and gains of business or

profession'' is concerned and that value of the perquisites in the hands of the employee would get reflected automatically in the actual expenditure

incurred by the assessee-employer for providing those concerned perquisites. It is a mirror image of those very perquisites in the hands of the

employee. It is not, therefore, possible to accept the contention of Mr. Shah. It is true that in the hands of the employee, value of the perquisites

will have to be found out for bringing the same to tax as part of his salary so far as employee-assessee is concerned, but expenditure actually

incurred by employer for providing these perquisites may not necessarily be of the same magnitude and may not necessarily be circumscribed by

the same scope and ambit of the value of perquisites in the hands of the employee-assessee. It is to be kept in view that the term ''Perquisites'' is

especially defined in Explanation 2(b) of section 40A(5) for the purpose of this sub-section and the definition given in section 17(2) is not to be referred to. The reason is that for the purpose of computing permissible deductions from the income of the employer under the head ''Profits and

gains of business or profession'', what is taken into account by this sub-section is the actual expenditure incurred by the employer-assessee on

providing the perquisites which may be different from, and would be higher in several cases than the value of the perquisites as defined in section

17(2) and computed under the Rules for the purpose of inclusion in the employee''s total income. For instance, where an employer takes on lease a

flat to provide rent-free accommodation to his employee, the amount of the actual rent paid by employer, which is to be taken into account for the

purpose of disallowance under this subsection, may be higher than the value of the accommodation and will be included as a perquisite in the

employee''s assessment.

8. It is, therefore, not possible to agree with the submission of Mr. Shah that expenditure incurred by employer-assessee on providing concerned

perquisites to the employee-assessee is a mirror image of the evaluation of the said perquisites in the hands of the employee. We have already

discussed earlier how computation of monetary benefit of the perquisites in the hands of the employees stands entirely on a different footing and

concerns entirely different topic and head of income as compared to computation of expenses actually incurred by the employer-assessee from the

point of view of their deductibility from the income of the employer under the head ''Profits and gains of business or profession''. Mr. Shah,

however, is right when he contends that perquisites as contemplated by section 40A(5)(a)(ii) will be as defined by Explanation 2(b) of the said

sub-section. They will be quite independent of the type of expenses contemplated by later part of section 40A(5)(a)(ii), viz., direct or indirect

incurring of any expenditure by employer-assessee and his entitlement to any allowance in respect of any assets of the assessee used by an

employee either wholly or partly for his own purpose or benefit. Mr. Shah is also right when he contends that so far as later part of this clause is

concerned, it deals with whole or part user of such assets of the employer-assessee by his employee and that such user is independent of the

nature of perquisites contemplated by the first part of sub-clause (ii) of section 40A(5)(a). For example, if employee is given rent-free accommodation, it would be a perquisite as contemplated by section 40A(5)(a) read with Explanation 2(b)(i), but if an employee is provided

residential accommodation on payment of full rental charges, it would not be a perquisite. Still, it would amount to user by the employee of asset of

the assessee for his own purpose. If he uses the entire house, it would be user wholly for the purpose of the employee, but if the employee uses

one room out of the bungalow of 10 rooms belonging to the employer-assessee, then the user of such bungalow for the own use of the employee

would be part use of such asset. In such a case, later part of clause (ii) of section 40A(5)(a) would apply, so far as this part is concerned, in order

to be covered by section 40A(5)(a)(ii) it will have to be found out as to what is the actual expenditure which the employer has incurred or what is

the actual allowance which he is entitled to get in respect of that part of the asset which is actually used by the employee for his own purpose. But

in either case, whether it is ascertainment of actual expenditure incurred by employer-assessee on the perquisites made available to the employee

or actual expenditure incurred by the employer-assessee on the maintenance of asset which is partly or fully used by the employee for his own

purpose, it is for the employer-assessee who is in personal know of such matter to point out the actual break-up figures. In case the employee is

using one room in a bungalow of 10 rooms belonging to the employer for his residential purpose and if 9 rooms are utilised by the employer-

assessee for the purpose of business, it is for the employer-assessee to submit details of break-up figures of such expenses and it is the expenditure

actually incurred by the employer-assessee on the part of the asset actually used by the employee for his own purpose, that would be covered by

section 40A(5)(a)(ii). Similar is the situation so far as ascertainment of actual expenditure incurred by the employer-assessee on perquisites being

provided to the employee as contemplated by first part of clause (ii) of section 40A(5)(a) is concerned. In either case, it is for the employer-

assessee to furnish these details. If no break-up figures are given and if it is found that the entire asset is used by the employee for his own purpose

or if entire expenditure is laid for making available given perquisites to the employee, the whole expenditure would get included for the purposes of

computation of permissible deductions u/s 40A(5)(a). In that view of the matter, it is not possible to agree with the submission of Mr. Shah, for the assessee, that when assets of the employer are partly used by the employee for his own purpose and partly used for the business purpose of the

employer, the break-up figures of actual expenditure incurred by the employer-assessee on the benefits made available to the employee, on the

one hand, and the expenses incurred for maintaining that part of the asset which is used for business purposes, on the other, would not be available

and, therefore, the rule of thumb laid down by rule 3 can be projected and can be pressed in service for the purposes of computing expenditure in

such cases even in user covered u/s 40A(5)(a). It is easy to visualise that figures of actual expenditure would always be available to the employer

with the necessary break-up. If the employer chooses to make available break-up figure for the scrutiny of the taxing authority, the taxing authority

can always, after due scrutiny, accept those figures with due modifications. But those figures will always remain as figures of actual expenditure laid

by employer-assessee on the concerned amenities made available to the employee and they can be brought to account for the provision of section

40A(5)(a). If any such break-up figures are not given, the whole of the expenditure for providing such perquisites or for maintaining such assets

which might have been used wholly or partly by the employee for his own purpose would get covered by section 40A(5)(a)(ii) on the assumption

that entire expenditure was laid out by the employer for providing those amenities to the employee. For such a situation the employer has to thank

himself as he chooses to keep back from the scrutiny of taxing authorities the facts and figures on relevant heads of expenditure. In either of those

eventualities, operation of rule 3 would be out of question and even from the point of view of. property, such rule cannot be brought in, as if by the

back door, by the employer-assessee, on the one hand, sitting tight on the details of the figures of expenditure which would be incurred by him for

diverse purposes and, on the other hand, insiding that as break-up figures of relevant expenditure are not available on record, provision of rule 3

should be brought to his aid, for the purpose of computing permissible deductions of expenses u/s 40A(5)(a). In fact, such a stand on the part of

the assessee-employer would amount to taking advantage of his own wrong. That cannot be countenanced and is contradicted by the statutory

scheme under consideration.

9. Mr. Shah submitted an abstract argument for convincing us about the need to bring in the operation of rule 3 even for such purpose. He posed a

question that supposing the employer is having a palace as his asset and one of the rooms of the palace is made available to the employee to stay

therein, should the entire expenditure for maintaining such big palace be disallowed because of the sweep of section 40A(5)(a) ? In our view, this

hypothetical question really poses no difficulty. It is for the employer to point out to the taxing authority as to what is the actual expenditure which

he has incurred for maintaining one room in the palace which was actually utilised by the employee for his own purpose. From the figure of

expenditure for maintaining entire palace, expenses for one room can easily be ascertained and submitted for scrutiny. If it is found that this break-

up is proper, the taxing authority would accept the same and it is that break-up figure which would enter computation of deductions u/s 40A(6)(e)

for deciding disallowable expenditure while computing the income under the head ''Profits and gains of business or profession'' of the employer.

But if the employer does not choose to lead proper evidence, the taxing authority will have to make its own assessment of the situation and if this

assessment goes against the employer, he has to thank himself. But it does not mean that rule 3, which is miles away from the scope and ambit of

section 40A, can be dragged in, in such cases.

10. Mr. Shah, for the assessee, next submitted that on the express language of section 40A(5)(a)(ii) read with the proviso, operation of the limit of

allowable deduction of expenditure as contemplated by clause (c) of section 40A(5), gets excluded. He submitted that the only limit is Rs. 2,000

qua such, director-employee as contemplated by the proviso and, hence, further limit in clause (c) of one-fifth of salary of the employee or any

amount calculated at the rate of Rs. 1,000 per month or part thereof gets excluded. It is not possible to agree with this contention of Mr. Shah for

the obvious reason that proviso to section 40A(5)(a) in terms lays down an upper limit or ceiling on the permissible expenditure and makes

reference to four sub-heads, namely, (i) and (ii) of clause (c) of section 40 and the expenditure and allowance mentioned in sub-clauses (i) and (ii)

of section 40A(5)(a) qua such director or person who has a substantial interest in the company or to a relative of the director or of such person.

As per this provision, total ceiling of allowable deductions of expenditure on those four heads was Rs. 72,000 at the relevant time. The last words

of the proviso to the effect that ''so much of the aggregate of the expenditure as is in excess of Rs. 72.000 shall in no case be allowed as a

deduction, clearly indicate that it projected a ceiling or outer limit of allowable deduction on the expenditure on such employee-director or his

relatives. So far as clause (c)(ii) of section 40A(5) is concerned, it deals with an inner limit so far as only one head is concerned, vis., head

''Salaries'' contemplated by section 40A(5)(a)(i). A conjoint reading of section 40A, proviso and the proviso to section 40A(5)(a) projects the

following picture: If the assessee-company claims any deduction from its income under the head ''Profits and gains of business or profession'' on

the ground that it has expended or is entitled to allowances in connection with employment of director or a person who has a substantial interest in

the company or a relative of the director or of person, its aggregate of allowable expenditure for such employee would consist of the following

subheads:

(i) Expenditure and allowance covered by section 40A(5)(a)(ii). Expenditure and allowances referred to in clause (i) of section 40A(5)(a) will get

ruled out with reference to section 40A(5)(a)(sic).

(ii) Expenditure and allowance referred to in sub-clause (i) of clause (c) of section 40.

(iii) Expenditure and allowances referred to in sub-clause (ii) of clause (c) of section 40.

Expenditure and allowances on those three sub-heads would be totalled up and to such a total, outer ceiling of Rs. 72,000 will be applied. This

does not mean that inner ceiling for computing permissible expenditure and allowances as contemplated by sub-section (c) of section 40A(5)

cannot be pressed in service or gets ruled out. It will apply to the 1st subhead. Thus, both these ceilings--inner ceiling and outer ceiling--can

harmoniously co-exist. For example, if the employer-company in a given year has spent Rs. 1,50,000 on his employee-director by providing him

with salary and perquisites as under :

Rs. 1 lakh by way of salary for year; Rs. 50,000 by way of perquisites.

Then, so far as perquisites are concerned, inner ceiling of Rs. 12,000 per year will operate by mandate of section 40A(5)(e)(ii) read with section

40A(5)(a)(ii), for the simple reason that one-fifth of the salary would be Rs. 20,000 and would be in excess of permissible limit of Rs. 12,000 as

per the provision of section 40A(5)(e)(ii) read with section 40A(5)(e)(ii). Outer limit as laid down by proviso to section 40A(5)(a) will be Rs.

72,000. Deducting Rs. 12,000 from outer limit of Rs. 72,000 balance of only Rs. 60,000 will be covered by the permissible expenditure under

sub-head (ii). Even there, if the ITO in his discretion holds that the salary is excessive, the permissible expenditure on salary of director may get still

reduced below Rs. 60,000. Thus, permissible expenditure by way of salary of such director would be at the highest at Rs. 60,000 under sub-head

(ii) and the permissible expenditure of perquisites would be Rs. 12,000 as per sub-head (ii) and that is how total of Rs. 72,000 would be worked

out as total permissible expenditure on such director-employee, on the combined operation of the aforesaid various provisions of section 40A. In

the light of this statutory scheme, therefore, we cannot accept the contention of Mr. Shah, for the assessee, that the taxing authority should consider

only the outer limit of Rs. 72,000 as permissible expenditure on salary and perquisites of the director-employee and should totally ignore the inner

limit of the ceiling of perquisites as provided by section 40A(5)(a)(ii) as both those ceilings cannot be reconciled or cannot co-exist.

11. The aforesaid discussion, therefore, clearly shows that the Tribunal was in error in invoking operation of rule 3 for the purposes of tackling the

problem posed for consideration in the present case.

12. Mr. Shah, for the assessee, placed for our consideration three decisions--one of this Court, another of the Calcutta High Court and the third of

the Mysore High Court. So far as decision of the Mysore High Court in Controller of Estate Duty, Mysore Vs. J. Krishna Murthy, is concerned, in

our view, that decision is totally besides the point. The question before the Mysore High Court was as to how value of unquoted shares can be

determined for the purpose of computing estate duty u/s 36(1) of the Estate Duty Act, 1953 (''the 1953 Act''). It was noted that no rules were

made under the Act prescribing the manner in which the value of unquoted shares may be determined for purposes of computing estate duty u/s

36(1). It was noted that no rules were made under the Act prescribing the manner in which the value of unquoted shares may be determined for

purposes of estate duty. In the absence of rules, valuation for purposes of the Act had to be made in accordance with well recognised methods of

valuation followed in India. The method of valuation prescribed by rule 10 of the Wealth-tax Rules, 1957, being the only statutorily recognised

method of valuation of unquoted equity shares in this country, was pressed in service by the Mysore High Court. In the present case, rule 3 which

has been pressed in service gets squarely excluded while computing permissible expenditure by way of deductions u/s 40A, especially section

40A(5) as already seen earlier. If statutory scheme excludes it, there is no question of again falling back upon the same. In the Estate Duty Act,

there was no contradictory statutory scheme as far as computation of estate duty u/s 36(1) by considering the value of unquoted shares was

concerned.

13. The other decision relied upon is of the Calcutta High Court in the case of Commissioner of Income Tax Vs. Britannia Industries Co. Ltd., .

This decision cannot be of any avail to the learned advocate for the assessee for the simple reason that the Calcutta High Court was considering

the scheme of section 40(c)(iii) which existed at the relevant time. In that case, for the assessment year 1966-67, the assessee-company claimed

before the ITO that the value of the perquisite of free car provided to its employees should be worked out under rule 60. The ITO, however, held

that the value of the perquisite of the free car provided to the employees should be 50 per cent of the expenditure on running and maintenance of

the car and on that basis worked out the addition in excess of the ceiling laid down u/s 40(c)(iii). On appeal, the AAC held that the value of the

perquisite should be taken at Rs. 150 per month per employee and the disallowance u/s 40(c)(iii) should be worked out accordingly. On further

appeal, the Tribunal found that there was no material in support of the department''s contention that cars were allotted to the employees for their

full time use and that the ITO himself had estimated only half of the expenses on maintenance and running of the car as perquisite of the employee

which negativated the contention that the cars were used for business purposes and not used by the assessee-company''s employees. The Tribunal

also found that the ITO had not considered what was the total use of the cars and what was the use of the cars relating to the personal work of the

employee and, therefore, there was no material in support of the ITO''s estimate that 50 per cent of the expenses relating to the maintenance and

running of the cars were for personal use of the employees. The Tribunal, therefore, held that since under rule 3, the value of the perquisite of the

free car provided to the employees for the purpose of assessment under the ''Salaries'' would be Rs. 150 per month, the value of the perquisite in

the hands of the employer, that is, the assessee-company, for the purpose of the ceiling u/s 40(c)(iii) should also be taken at the same amount that

is Rs. 150 per month per employee. It is this approach of the Tribunal which was confirmed by the Calcutta High Court. While confirming the said

approach, the following observations were made by the Calcutta High Court, speaking through Sudhindra Mohan Guja, J., on which great reliance

was placed by Mr. Shah for the assessee:

... We are fully in agreement with the view of the Tribunal that there cannot be any two different standards for assessment in respect of the

employee and the employer. It is also equitable that what the payer gives is what the receiver receives...."" (p. 38)

It has to be appreciated that those observations are based on the scheme of section 40(c)(iii) The Calcutta High Court had no occasion in that

decision to consider the scheme of section 40A and especially section 40A(5)(a). We have already shown earlier how the scheme of section 40A

represents an entirely different and complete code by itself. Therefore, the observations of the Calcutta High Court on different provisions of the

Act cannot be of much use to Mr. Shah, for the assessee. He, however, submitted placing reliance on the above observations, that there cannot be

two different standards for assessment of perquisites in respect of employee and employer. We do not agree. General observations on an entirely

different statutory scheme as compared to the one with which we are concerned, cannot be automatically pressed in service. We have already

discussed how computation of value of perquisites in the hands of the employee may be different from the calculation of actual expenditure incurred

by the employer-assessee on such perquisites. In any case, when section 40A(1) mentions that it has to be given affect despite anything to the

contrary contained in other provisions of the Act, a different standard of assessment of perquisites in respect of employer can certainly be

visualised. The aforesaid decision, therefore, cannot be of any assistance to Mr. Shah, for the assessee.

14. Mr. Shah lastly invited our attention to a Division Bench judgment of this Court in the case of Additional Commissioner of Income Tax, Gujarat

Vs. Tarun Commercial Mills Ltd., . In that case, B.J. Divan, CJ. and B.K. Mehta, J. were concerned with an entirely different problem. This Court

in the said decision was concerned with the ambit and scope of section 40(a)(v) and section 40(c) as were in force in the relevant assessment year

1969-70.

In those days, there was no such provision like section 40A(5). Section 40(a)(v) dealt with expenditures incurred by the assessee which was to be

deducted while computing his income under the head ''Profits and gains of business or profession'' and prescribed the permissible limits in the case

of any assessee of any expenditure which results directly or indirectly in the provision of any benefit or amenity or perquisites, whether convertible

into money or not to an employee while so far as clause (c) was concerned, it provided permissible limits of expenditure ''in the case of any

company...'' It becomes obvious on a conjoint reading of those two sub-clauses of section 40 and section 40(a)(v) referred to cases of assessee in

general while sub-clause (c) of section 40 contemplated cases of a company-assessee and, that sub-clause (c) indicated a special scheme as

contradistinguished with clause (a) of section 40 with its various sub-clauses which reflected a general scheme and it is in the background of this

statutory setting of section 40 that the Division Bench speaking through B.K. Mehta, J. held that the special scheme of clause (c) of section 40

excluded general scheme of section 40(a)(v). The decision of this Court in that case, therefore, will have to be read in the light of this peculiar

statutory scheme with which the Division Bench was concerned. In the present case, it is not as if that section 40A represents a general scheme

and section 40(c) represents special scheme so that latter can exclude the former. Here, both the schemes are different and special sub-clause (c)

of section 40 represents a statutory scheme of special type applicable to the assessee-companies. Similarly, section 40A(5)(a) also reflects entirely

different and separate special scheme which has made its own provision regarding computation of permissible deductible expenses when the

assessee-company spends on its director-employee and other employees contemplated by the said scheme. Both these schemes reflect a clear cut

independent legislative intention and as we have discussed above, both can be concealed and can harmoniously co-exist. In that view of the matter,

the decision of the Court in Tarun Commercial Mills Ltd.''s case (supra) based on an entirely different scheme cannot advance the case of Mr.

Shah, for the assessee.

14. As a result of the aforesaid discussion, therefore, it is not possible for us to agree with the reasoning of the Tribunal that in such cases, even for

computing permissible deductible expenditure u/s 40A(5), value of perquisite can be computed by taking recourse to rule 3.

15. So far as the facts of the present case are concerned, they clearly rule out applicability of rule 3. Mr. J.P. Shah has produced, at the time of

hearing of this reference, a bunch of papers relevant to the question and it has been taken on record by consent of parties. Amongst others, this

bunch contain a letter dated 6-5-1972 written by the Government of India, Department of Company Affairs, New Delhi, to the assessee-

company. The letter conveys approval of the Central Government under sections 198 and 309 of the Companies Act, 1956, so far as minimum

remuneration to each of the two managing directors, viz., Rohitbhai Chinubhai and Arvindbhai Chinubhai is concerned. So far as perquisites

permissible to them are concerned, the letter receipts that Rohitbhai Chinabhai and Arvindbhai Chinubhai managing directors shall be entitled to the

following perquisites subject to the condition that any excess expenditure on the above perquisites and the limit specified against each of them

together with the expenditure on the perquisites shall not exceed one-third of the salary:

(vi) Furnished residential accommodation at Bombay with all facilities and amenities the money value of which may be valued as per rule 3.

(vii) Car/free use of car. The monetary value of which may be valued as per the Rules.

It is thus clear that so far as these facilities are concerned, as per the letter of the Central Government, these perquisites has to be valued as per the

income tax Rules, meaning thereby, perquisites in the hands of the managing director-employee has to be so valued for deciding their liability to pay

income tax on these perquisites But that does not mean that the Central Government had taken a decision that even for the purpose of income tax

payable by the assessee company on its income on the head of ''Profits and gains of business or profession'' rule 3 had to be applied, while

considering the question of permissible deductions of expenses u/s 40A. This has to be done independently by the taking authority in the light of the

statutory scheme as discussed by us in the earlier part of this judgment. Mr. Shah offered to spell not a binding rule of conduct for the taking

authority under the Act on the basis of the view point expressed by the Government of India in the said letter under the Companies Act, therefore,

cannot be countenanced. if has to be kept in view that there is no circular issued by the Board in that connection. However, the fact remains that

from the aforesaid letter, it is clearly established that the managing director were given free furnished residential accommodation at Bombay and it

is not the case of the assessee-company at any stage before the authorities in the hierarchy of proceedings under the Act that part of the residential

premises at Bombay was used for business purpose or that the premises made available at Bombay during director-employees'' business residence

at Bombay were ever utilised for company''s purpose not has the assessee-company given any break-up figures of expenditures these two

separate types of sub-heads. On the contrary the ITO has noted at page 32 of the paper book in his judgment that the assessee had given the

following figures which have resulted into payment of salary and perquisites to the directors as under:

Rest.

Salary 1,20,000

Accommodation 39,300

Car expenses plus depreciation 39,809

Thus, the very figures supplied by the assessee-company to ITO show that as per the assessee the total expenditure was laid on providing relevant

perquisites to their managing directors at Bombay and the they were meant for their own purposes as contradistinguished with purposes of

business of the company either jointly or severally. In the light of what we have observed above, therefore, the entire expenses on the perquisites will have to be taken into consideration while computing permissible deductions from the income of the assessee-company as per section 40A(5)

(a).

Once this conclusion is reached, the result becomes obvious The referred questions got answered against the assessee and in favour of the

revenue. Our answers to the referred questions therefore are as under.

Question No. 1 : Answered in the negative, in favour of the revenue and against the assessee.

Question No. 2: Answered in the negative, in favour of the revenue and against the assessee.

Question No. 3: Answered in the affirmative, in favour of the revenue and against the assessee.

To recapitulate, question No. 4 is not answered as it is not pressed as noted earlier. Reference is accordingly disposed of with no order as to

costs.

Mr. J.P. Shah, the learned counsel for the respondent-assessee, made an oral request for certificate of leave to appeal to the Supreme Court u/s

261 of the Act. In our view, this is not a case fit for appeal to the Supreme Court u/s 261 for which certificate is requested for. Oral request is,

therefore, rejected.