

(1988) 04 GUJ CK 0005
In the Gujarat High Court

Case No : Income-tax Reference No. 54 of 1979

Commissioner of Income Tax

APPELLANT

Vs

Rajesh Textile Mills Ltd.

RESPONDENT

Date of Decision : 30-04-1988

Acts Referred:

Income Tax Act, 1961 — Section 14, 15, 16, 17, 17(2)
Income Tax Rules, 1962 — Rule 3

Citation : (1988) 71 CTR 65 : (1988) 173 ITR 179

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 Income Tax Appellate 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 40(5)(a)(ii) of the Income Tax Act, 1961, and in deleting the addition of Rs. 33,809 out of 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 directors as perquisites u/s 40A(5) of the Act ?

4. Whether the expenditure of Rs. 2,810 being the value of canteen coupons to guests and technicians is disallowable u/s 37(2B) of the Income Tax Act, 1961 ?"

2. The facts leading to this reference may be noted at the outset. The assessee is a textile mill. The year of assessment is 1972-73. So far as question No. 1 is concerned, the Income Tax Officer noted that the assessee - company had spent an amount of Rs. 39,809 towards expenditure on 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" for short), being the actual expenditure incurred by the assessee on this car plus depreciation. In appeal, the Appellate Assistant Commissioner, following the decision of the Tribunal in an earlier case, held that the disallowance may be confined to Rs. 6,000 only. In appeal, before the Income Tax Appellate 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 Company Ltd. in I. T. A. No. 125/Ahd/1976/77 decided on May 24, 1977, held that the Appellate Assistant Commissioner was justified in valuing the perquisites in the light of the provisions of rule 3 of the Income Tax Rules in preference to the actual expenditure.

3. So far as referred questions 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, the actual expenditure of the assessee in that connection was Rs. 39,300. The Income Tax Officer considered this amount as perquisite and disallowed the same u/s 40A(5) of the Act. In appeal, the Appellate Assistant Commissioner held that 12-1/2% of the total remuneration of the directors should be considered as perquisites for the purpose of disallowance u/s 40A(5) of the Act. The Tribunal, in appeal, for the reasons recorded in the order, held that the perquisites in respect of the furnished accommodation should be worked out on the basis of the relevant provisions of rule 3 of the Income Tax Rules as applicable to the assessment year 1972-73.

4. We need not mention 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 does not press the said question for our opinion. We, therefore, do not examine the said question treating it to be as not pressed.

5. The aforesaid resume of facts indicates that the main dispute between the parties centers round the interpretation of the relevant provisions of section 40A(5) of the Act. The said provisions which held the field at the relevant time, therefore, are required to be noted at the outset. The said provisions along with other relevant provisions read as under :

"40A(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 therefrom, 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) whether the assessee is any director of the company, a company, firm, association of per- partner of the firm, or member sons or Hindu undivided family of the association or 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;.....

(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 :- ...

(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 (1) read with clause (3) of section 17 subject to the following modifications, namely : -

(1) in the said clause (1), the word "perquisites" occurring in subclause (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."

6. 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. 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"....

(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."

7. When section 40 is read in juxtaposition with section 40A, it becomes clear that section 40 operates notwithstanding anything contained to the contrary in sections 30 to 39, meaning thereby, that 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 the provisions of s. 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, the 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 the provisions of section 40A and its various sub-sections, 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 the income under the head "Profits and gains of business or profession".

8. Mr. J. P. Shah, for the assessee, vehemently submitted that the Tribunal was right in law in invoking the provisions of rule 3 of the said Rules in computing the deductible amount of expenditure of perquisites in the light of the provisions of section 40A(5)(a) of the Act. On the other hand, Mr. Raval, for the Revenue, submitted that the operation of the rule is totally beside the point while considering the question of permissible expenses which can be deducted while computing the income under the head "Profits and gains of business or profession" as laid down by section 40A(5)(a) of the Act and that for deciding this question, rule 3 would be totally extraneous.

9. 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 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 catalogues types of income which shall be chargeable to Income Tax under the head "Salaries", while section 16 deals with permissible deductions from salary for computation of income under the head "Salary". Section 17 lays down that for the purposes 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 section 17 provides that "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."

10. The Central Board of Revenue has promulgated the Income Tax Rules, 1962,

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 the head "Salaries" is concerned, it is dealt with at topic "A". Under that topic are found rules 2A, 2B and 3. Rule 3 provides for valuation of perquisites. It states that "for the purposes 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. 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 residence 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;...

(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 motor car;

(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 perquisite per calendar month	1	2	3	Where the h. p. rating of the car does not exceed 16	Where the h. p. rating of the car exceeds 16	Where the cubic capacity of the engine does not exceed 1.88 litres.	Where the cubic capacity of the engine exceeds 1.88 litres.
Rs.	Rs.	Rs.	Rs.	1.	2.	3.	4.
300	400	500	600	Where the motor car is owned or hired by the employer and all the expenses on maintenance and running are met or reimbursed to the assessee by the employer	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."

11. It is obvious that the said rule 3 has to be pressed into service for computing the 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 setting 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 and especially rule 3 of the Rules. Even that apart, it has to be visualised that for the purpose of computing perquisites in the hands of the employee who has to bear the burden of Income Tax on the value thereof, as being considered to be part and parcel of his income, the 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 into service. But, so 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 under the concerned heads. In this provision, the concept of the value of perquisites is totally absent and rightly so because

while finding out the expenses actually incurred by the employer on certain amenities made available to the employees, the 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 106 of the Evidence Act, the 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, the focus of attention is on the employer-assessee and not on the employee who is not an assessee so far as the aforesaid provision is concerned. It is for this reason that rule 3 of the Rules 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 the 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 of the Rules can be pressed into 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.

12. 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 analogous provision of rule 3 can be imported while computing deductible expenses in the said provision so far as the 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 perquisites (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 employer whether 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 "perquisites" has been defined by Explanation 2(b) to this sub-section. He submitted that in a given case, the 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 into service for computing expenses incurred by an employer-assessee on the very same "perquisites" so far as the 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 these concerned perquisites. That is a mirror image of these very perquisites in the hands of the employee. It is not possible to accept the contention of Mr. Shah. It is true that in the hands of the employee, the value of the perquisites will have to be found out for bringing the same to tax as part of his salary so far as the employee - assessee is concerned. But expenditure actually incurred by the 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", 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 perquisite as defined in section 17(2) and computed under the Income Tax Rules, 1962, 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 the employer which is to be taken into account for the purpose of disallowance under this sub-section may be higher than the value of the accommodation included as a perquisite in the employee's assessment.

13. It is, therefore, not possible to agree with the submission of Mr. Shah that expenditure incurred by the 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 employee stands on an entirely different footing and concerns entirely a different topic and the head of income as compared to the 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 the latter part of section 40A(5)(a)(ii), viz., direct or indirect incurring of any expenditure by the 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 purposes or benefit. Mr. Shah is also right when he contends that so far as the latter 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 para. of sub-clause (ii) of section 40A(5)(a). For example, if an 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 perk. Still, it would amount to user by the employee of the 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 say out of a bungalow of 10 rooms belonging to the employer-assessee, then the user of such bungalow for the own use of the employee would be a part use of such asset. In such a case, latter part of clause (ii) of section 40A(5)(a) would apply. So far as this point 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 the employer-assessee on the perquisites made available to the employee or actual expenditure incurred by the employer-- assessee on the maintenance of the asset which is partly or fully used by the employee for his own purpose, it is for the employer-assessee who is in the personal know of such matters 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 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 and perquisites being provided to the employee as contemplated by the 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 purposes or if the entire expenditure is laid out 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 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 of the Income Tax Rules can be projected and can be pressed into service for the purpose of computing expenditure in such cases even in cases covered u/s 40A(5)(a). It is easy to visualise that figures of actual expenditure would always be available to the employer with necessary break-ups. If the employer chooses to make available the break-up figures for the scrutiny of the taxing authority, the taxing authority can always, after due scrutiny, accept these figures with due

modifications. But these figures will always remain as figures of actual expenditure laid out by the employer-assessee for the concerned amenities made available to the employee and they can be brought to account for the provision of section 40A(5)(a). If such break-up figures are not given, the whole of the expenditure for providing such perquisites or for maintaining such asset which might have been used wholly or partly by the employee for his own purpose would get covered by the sweep of section 40A(5)(a)(ii) on the assumption that entire expenditure was laid out by the employer for providing these amenities to the employee. For such a situation, the employer has to thank himself as he chooses to keep back from the scrutiny of the taxing authorities the facts and figures under the relevant heads of expenditure. In either of these eventualities, operation of rule 3 would be out of question and even from the point of view of propriety, 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 on diverse heads and on the other hand insisting that as break-up figures of relevant expenditure are not available on record, provision of rule 3 of the Rules 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 contra indicated by the statutory scheme under consideration.

14. Mr. Shah submitted an extreme argument for convincing us about the need to bring in the operation of rule 3 even for such purposes. 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 presents 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 the room in the palace which was actually utilised by the employee for his own purpose. From the figure of expenditure for maintaining the 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 into the computation of deductions u/s 40A(5)(a) 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 that 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.

15. Mr. Shah. for the assessee, next submitted that on the express language of section 40A(5)(a)(ii) read with the proviso, the operation of the limit of allowable deduction of expenditure as contemplated by clause (c) of section 40A(5), gets

excluded. He submitted that therein, the only limit is Rs. 12,000 per such director-employee as contemplated by the proviso and, hence, the further limit in clause (c) of 1/5th 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 the 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 clauses (i) and (ii) of section 40A(5)(a) qua such director or person who has substantial interest in the company or to a relative of the director or of such person. As per this provision, the total ceiling of allowable deductions of expenditure on these 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 their 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, viz., head "Salaries", contemplated by section 40A(5)(a)(i). A conjoint reading of section 40A(2)(a), 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 such person, its aggregate of allowable expenditure for such employee would consist of the following sub-heads :

(i) Expenditure and allowances covered by section 40A(5)(a)(ii). Expenditure and allowances referred to in clause (i) of section 40A(5)(a) will get ruled out because of the proviso to section 40A(2)(a).

(ii) Expenditure and allowances 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 these three sub-heads would be totalled up and to such a total, the outer ceiling of Rs. 72,000 will be applied. This does not mean that the inner ceiling for computing permissible expenditure and allowances as contemplated by clause (c) of section 40A(5) cannot be pressed into service or gets ruled out. It will apply to the last sub-head. 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. 1,00,000 by way of salary per year;

Rs. 50,000 by way of perquisites.

16. Then, as far as perquisites are concerned, the inner ceiling of Rs. 12,000 per year will operate by mandate of section 40A(5)(a)(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 the permissible limit of Rs. 12,000 as per the provision of section 40A(5)(a)(ii) read with section 40A(5)(a)(ii). The outer limit as laid down by the proviso to section 40A(5)(a)(ii) will be Rs. 72,000. Deducting Rs. 12,000 from the outer limit of Rs. 72,000, the balance of only Rs. 60,000 will be covered by the permissible expenditure under sub-head (i). Even there, if the Income Tax Officer 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 Rs. 60,000 under sub-head (i) 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) and that both these ceilings cannot be reconciled or cannot co-exist.

17. The aforesaid discussion, therefore, clearly shows that the Tribunal was in error in invoking the operation of rule 3 of the Income Tax Rules for the purpose of tackling the problem posed for consideration in the present case.

18. 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 the 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 beside the point. The question before the Mysore High Court was as to how the value of inquoted shares can be determined for the purpose of computing estate duty u/s 36(1) of the Estate Duty Act, 1953. 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 under rule 1D of the Wealth-tax Rules, 1957, being the only statutorily recognised method of valuation of unquoted equity shares in this country, was pressed into service by the Mysore High Court. In the present case, rule 3 which has been pressed into service gets squarely excluded while computing permissible expenditure by way of deductions u/s 40A, especially section 40A(5) as already seen earlier. If the statutory scheme excludes it, there is no question of again falling back upon the same. In the Estate Duty Act, there was no contra-

indicating statutory scheme so far as computation of estate duty u/s 36(1) by considering the value of unquoted shares was concerned.

19. 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 Income Tax Officer that the value of the perquisite of free car provided to its employees should be worked out under rule 60 of the Income Tax Rules, 1962. The Income Tax Officer, 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 Appellate Assistant Commissioner 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 the cars were allotted to the employees for their full time use and that the Income Tax Officer himself had estimated only half of the expenses on maintenance and running of the car as perquisite of the employees which negatived the contention that the cars were used for business purposes and not solely by the assessee-company's employees. The Tribunal also found that the Income Tax Officer 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 employees and, therefore, there was no material in support of the Income Tax Officer's estimate that 50 percent. of the expenses relating to the maintenance and running of the cars were for the personal use of the employees. The Tribunal, therefore, held that since under rule 3 of the Income Tax Rules, the value of the perquisite of the free car provided to the employees for the purpose of assessment under the head "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 Sudhindhra Mohan Guha J., on which great reliance was placed by Mr. Shah for the assessee (at p. 38) :

"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."

20. It has to be appreciated that these 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 the 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 the employee and the 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 into service. We have already discussed how the 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) mandates that it has to be given effect despite anything to the contrary contained in other provisions of the Act, a different standard of assessment of perquisites in respect of the employer can certainly be visualised. The aforesaid decision, therefore, cannot be of any assistance to Mr. Shah for the assessee.

21. 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 C.J. and R. K. Mehta J. (as they then were) 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) of the Income Tax Act, 1961, 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 perquisite, 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 these two sub-clauses of section 40 that section 40(a)(v) referred to cases of assessees 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 section 40A represents general scheme and section 40(c) represents a special scheme so that the latter can exclude the former. Here, both

the schemes are different and special. Sub-clause (c) of section 40 represents a statutory scheme of a special type applicable to the assessee-companies. Similarly, section 40A(5)(a) also reflects an 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. Then, both these schemes reflect clearcut independent legislative intention and as we have discussed above, both can be reconciled and can harmoniously co-exist. In that view of the matter, the decision of the court in Tarun Commercial Mills" case based on an entirely different scheme cannot advance the case of Mr. Shah for the assessee.

22. 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), the value of the perquisite can be computed by taking recourse to rule 3 of the Income Tax Rules.

23. So far as the facts of the present case are concerned, they clearly rule out the 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 contains a letter dated May 6, 1972, written by the Government of India, Department of Company Affairs, New Delhi, to the assessee-company. The letter conveys the approval of the Central Government under sections 196 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. The letter recites that Rohitbhai Chinubhai and Arvindbhai Chinubhai, managing directors, shall be entitled to the following perquisites subject to the condition that any excess expenditure on the above perquisites beyond the limit specified against each of them together with the expenditure on the perquisites shall not exceed 1/3rd of the salary :

" (vi) furnished residential accommodation at Bombay with all facilities and amenities, the money value of which may be evaluated as per rule 3 of the Income Tax Rules, 1962.

(vii) free use of car, the monetary value of which may be evaluated as per the Income Tax Rules, 1962"

24. It is thus clear that so far as these facilities are concerned, as per the letter of the Central Government, these perquisites had to be valued as per the Income Tax Rules, meaning thereby, that perquisites in the hands of the managing directors-employees had 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 under the head "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 taxing authority in the light of the statutory scheme as discussed by us in the earlier part of this judgment. Mr. Shah's effort to spell out a binding rule of conduct for the taxing authority under the Income Tax Act, 1961, on the basis of the view-point expressed by the Government of India in the said letter under the Companies Act, 1956, therefore, cannot be countenanced. It has to be kept in view that there is no circular issued by the Central Board of Direct Taxes in that connection. However, the fact remains that from the aforesaid letter, it is clearly established that the managing directors 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", residence at Bombay were ever utilised for the company's purposes nor has the assessee-company given any break-up figures of expenditure on these two separate types of sub-heads. On the contrary, the Income Tax Officer has noted at page 32 of the paper book in his judgment, that the assessee had given the following figures which have resulted in payment of salary and perquisites to the directors as under :

Rs. Salary 1,20,000 Accommodation 39,300 Car expenses plus depreciation 39,809

25. Thus, the very figures supplied by the assessee-company to the Income Tax Officer show that, as per the assessee, the total expenditure was laid on providing relevant perquisites to their managing directors at Bombay and they were meant for their own purposes as contradistinguished with purposes of the business of the company either jointly or severally. In the light of what we have observed above, therefore, the entire expenses on these 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).

26. 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.

27. 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.

28. Mr. J. P. Shah, 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.