

(2001) 08 DEL CK 0024

In the Delhi High Court

Case No : Income-tax Reference No's. 120 and 121 of 1983

Commissioner of Income Tax

APPELLANT

Vs

Siya Ram Kumar Engineering Works (P.) Ltd.

RESPONDENT

Date of Decision : 08-08-2001

Acts Referred:

Citation : (2001) 171 CTR 165 : (2002) 254 ITR 358 : (2001) 119 TAXMAN 461

Hon'ble Judges : Dr. Arijit Pasayat, C.J;D.K. Jain, J

Bench : Division Bench

Advocate : R.D. Jolly and Prem Lata Bansal, for the Appellant; None, for the Respondent

Judgement

1. On being moved for reference u/s 256(1) of the Income Tax Act 1961 (in short "the Act"), the Income Tax Appellate Tribunal Delhi Bench (in short "the Tribunal"), has referred the following question for the assessment years 1978-79 and 1979-80 for the opinion of this court:

"Whether, on the facts and in the circumstances of the case, the Income Tax Officer in the assessment of the assessed was justified in making the addition of Rs. 30,063 (assessment year 1978-79) and Rs. 96,681 (assessment year 1979-80) by invoking the provisions of Section 40A(5) of the Income Tax Act, 1961 ?"

2. The factual position is almost undisputed and is as follows :

The assessed is a company incorporated under the Companies Act, 1956. For the two assessment years 1978-79 and 1979-80, the previous years ended on September 30, 1977, and September 30, 1978, respectively. Out of the claim of deduction made in respect of the three directors of the company as salary, bonus, commission and house rent allowance, the Income Tax Officer (in short, "the ITO"), disallowed the claim for Rs. 30,063 for the first year and Rs. 96,681 in the second year. Such disallowance was made with reference to Section 40A(5) (c) of the Act. The matter was carried in appeals before the Commissioner of

Income Tax (Appeals) (in short "the CIT(A)"), who held that Section 40A(5)(c) had no application regarding remuneration of the three directors. The matter was carried in appeals before the Tribunal by the Revenue. Following its view in some other case the Tribunal was of the view that salary, bonus, commission and house rent allowance have to be restricted to the extent it exceeds Rs. 72,000 in each case. It was held that though Section 40A(5) had application, the aforesaid outer limit was to be followed.

3. On being moved for reference, the question as set out above has been referred for the opinion of this court.

4. We have heard counsel for the Revenue. There is no appearance on behalf of the assessed.

5. Learned counsel for the Revenue submitted that disallowance made by the Income Tax Officer was justified and the Tribunal should not have varied it.

6. We find that the Income Tax Officer had proceeded on the basis as if Section 40A(5)(c) was applicable to the facts of the case. In fact, the correct provision which was applicable was the proviso to Section 40A(5)(a). Section 40A(5)(c) applies to persons other than directors whereas Section 40A(5)(a) relates to directors. The proviso to Section 40A(5)(a)(i) applicable to employee directors at the relevant time read as under :

Section 40A(5) prior to its omission by the Direct Tax Laws (Amendment) Act, 1987 (4 of 1988), with effect from 1st April, 1989, stood as under : "40A. (5)(a) Where the assessed-

(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 assessed 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 assessed 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 :

Provided further that in computing the expenditure referred to in Sub-clause (i) or the expenditure or allowance referred to in Sub-clause (ii) of this clause or the aggregate referred to in the foregoing proviso, the following shall not be taken into account, namely :--

(i) the value of any travel concession or assistance referred to in Clause (5) of Section 10;

(ii) passage moneys or the value of any free or concessional passage referred to in Sub-clause (i) of Clause (6) of Section 10 ;

(iii) any payment referred to in Clause (iv) or Clause (v) of Sub-section (1) of Section 36 ;

(iv) any expenditure referred to in Clause (ix) of Sub-section (1) of Section 36."

7. As the Income Tax Officer proceeded on the erroneous basis that Section 40A(5)(c) was applicable, confusion arose. The Tribunal has applied the correct provision. In that view of the matter our answer is in the negative, in favor of the assessed and against the Revenue.