Income Tax Appellate Tribunal - Mumbai

Dr Frncis P. Candes, Mumbai vs Assessee on 6 July, 2012

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "F", MUMBAI

Before Shri R.S.Syal, AM and Shri Amit Shukla, JM
ITA No.2707/Mum/2012 : Asst. Year 2008-2009

Dr.Francis P Candes	The Income Tax Officer
Leo Villa, Mount Poinsur	Ward 11(2)(3)
I.C.Colony, Borivali (West)	Mumbai.
Vs.	
Mumbai - 400 103.	
PAN : AAAPC5694J.	
(Appellant)	(Respondent)

Appellant by : Shri Rajeev Khandelwal
Respondent by : Shri Subachan Ram (CIT-DR)

Date of Hearing : 02.07.2012 Date of Pronouncement : 06.07.2012

ORDER

Per R.S.Syal, AM :

This appeal by the assessee arises out of the order passed by the Commissioner of Income-tax (Appeals) on 06.02.2012 in relation to the assessment year 2008-2009.

2. First ground of the appeal is against the confirmation of disallowance of `42,00,000 made by the Assessing Officer u/s 40(a)(ia) being royalty paid to the Court Receiver by treating such amount as covered u/s 194J of the Act.

3. Briefly stated the facts of this ground are that the Assessing Officer observed from the Profit and loss account that the assessee debited royalty to Court Receiver amounting to `42 lakh. It was seen that similar deduction was claimed in the immediately preceding assessment year i.e. 2007-2008 which was treated as royalty by him and in the absence of any deduction. In the absence of assessee having deducted any tax at source on this amount, the said amount of `42 lakh was disallowed u/s 40(a)(ia). Following the same view as taken in the immediately preceding year, the Assessing Officer made disallowance for the current year as well on the same lines. The learned CIT(A) upheld the assessment order on this point.

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4. We have heard the rival submissions and perused the relevant material on record. It is observed that the immediately preceding assessment year came up for adjudication before the Tribunal. Vide its order dated 20.04.2011 in ITA No.5945/Mum/2010 for assessment year 2007-2008, a copy of which is available on record, the tribunal has held the nature of similar amount of `42 lakh paid as royalty under Explanation 2 to section 9(1)(vi). Further in the absence of the assessee having made any deduction of tax at source u/s 194J, the Tribunal upheld the disallowance u/s 40(a)(ia). The

learned Counsel for the assessee fairly admitted at the very outset that the facts of the current year are similar to those of preceding year. However, he submitted that the Tribunal was wrong in treating this amount as royalty and consequently making disallowance u/s 40(a)(ia). He argued that the order passed by the Tribunal was per incuriam and liable to be ignored. The main emphasis of his submissions was that the said amount could not be considered as royalty and consequently there was no question of deduction of tax at source or any disallowance u/s 40(a)(ia). On a pertinent query, it was stated that the assessee filed miscellaneous applications against the order passed by the Tribunal for the immediately preceding year, which also came to be dismissed.

5. In view of the fact that the identical issue has been decided by the Tribunal against the assessee in the immediately preceding year, we are not inclined to accept any contrary arguments now made before us, which in fact, have been considered and decided by the tribunal in such earlier year. Consistency is the hallmark of judicial discipline. It is impermissible for the parties to reargue the same matter time and again before the tribunal in an attempt to unsettle the settled position. The view taken by the tribunal in a preceding year deserves utmost respect in so far as the subsequent years involving the similar point before the tribunal are concerned, unless there is DrFrancis P.Candes.

some change in the factual or legal position. In a sense, the earlier view serves as a binding precedent for the subsequent co-ordinate benches of the tribunal, more so in the case of the same assessee with similar facts. The only exception is that where the subsequent co-ordinate bench is so much convinced with not following the said earlier view. In that case also, it is not for the subsequent co- ordinate bench to hold contrary to what was laid down earlier. It is expected of such later bench to make reference for the constitution of special bench on the point so that such point may get consideration by the higher wisdom of three of more members. Doubting the correctness of the earlier view is only an exception and not a rule. Adverting to the facts of the instant case we are not convinced with the submissions advanced on behalf of the learned AR in an attempt to persuade us to deviate from the view of the Tribunal in the preceding year. It is a case in which the tribunal originally decided the issue against the assessee. Thereafter, two miscellaneous applications filed by the assessee met with the fate of dismissal. Now if the assessee is still aggrieved against such order of the Tribunal, it has got legal remedies available with it to appeal to the Hon'ble High Court. In so far as the forum of the tribunal is concerned, this issue cannot be reviewed. In our considered opinion there is no justification whatsoever for observing departure from the view taken by the Tribunal in identical circumstances in the immediately preceding year. We, therefore, uphold the impugned order on this issue by holding that the amount in question is in the nature of royalty payment covered u/s 194J and resultantly disallowance u/s 40(a)(ia) is called for. However, it is noticed that recently the Special Bench of the tribunal in M/s Merilyn Shipping & Transports VS. ACIT (ITAT Vishakhapatnam)(SB) has held that disallowance section 40(a)(ia) applies only to amounts "payable" as at the close of the year and not to amounts already "paid" during the year. The ld. AR submitted that out of `.42.00 lacs, a sum of `.3.50 lacs was paid during the year thereby leaving the amount payable at `.38.50 lacs. We are unable to trace any such finding of payment of `.3.50 DrFrancis P.Candes.

lacs from the assessment order or the order of the first appellate authority. In such circumstances, we direct the AO to verify this contention w.r.t. the books of account and then take a view in accordance with law.

6. The second ground is against the confirmation of disallowance of interest of `72,963 out of total interest of `1,38,449 paid on loans. The facts apropos this ground, as taken from para 11 of the assessment order, are that the assessee disclosed income from profession at a net loss of `80,528. No details of profit and loss account or capital account was attached in respect of his personal practice with return of income. The assessee was called upon to file the copy of income and expenditure account, personal capital account and balance sheet, which the assessee failed to file. On the perusal of the return of income for assessment year 2007-2008, it was observed that the assessee had disclosed loan liability at `76.24 lakh and loans and deposits of `11.55 lakh to assessee's relatives. Such loan of `11.55 lakh was given without interest for non-business purposes. As no nexus between the interest bearing loans and its utilization for the purpose of profession was shown, the A.O. in the assessment order for assessment year 2007-2008 disallowed proportionate interest of `72,963 attributable to interest free deposit of loan as being not wholly and exclusively for profession. In the absence of any details forthcoming from the side of the assessee for the current year, the A.O. made similar disallowance of interest of `72,963 in the current year as well. The learned CIT(A) upheld the action of the A.O.

7. After considering the rival submissions and perusing the relevant material on record it is observed that no detail worth the name was filed either before the A.O. or the learned CIT(A) to justify that the interest free loan was advanced for business purposes or out of interest free funds available with the assessee. The addition so made for assessment year 2007-2008 was accepted DrFrancis P.Candes.

by the assessee and not appealed against before the Tribunal. As the facts continue to remain the same inasmuch as the assessee has failed to substantiate its claim, we are of the considered opinion that the disallowance of `72,963 made by the A.O. out of total interest payment of `1,38,449 in the current year, is in order. This ground is not allowed.

8. Ground no.3 is against the confirmation of disallowance of `76,461 being 20% of motor car expenses and `6,736 being 20% of telephone expenses. As the assessee did not produce log book for examination whether the motor car was used wholly and exclusively for the business purposes, the Assessing Officer, relying on his view taken for assessment year 2007-2008, made disallowance at 20% on motor car expenses. Similar disallowance was made for telephone expenses as well. The learned CIT(A) upheld the disallowance.

9. Having heard the rival submissions and perused the relevant material on record it is seen that similar disallowance was made in the preceding year as well which was accepted by the assessee. It is not a case as if the disallowance has been made without there being anything adverse against the assessee. It is an admitted position that the assessee did not maintain any log book to show that the car was used for business purposes. Similar position prevails in respect of telephone expenses as well. The contention of the learned AR that in no case 20% of depreciation on account of motor car

can be disallowed, is devoid of merit. Section 38(2) dealing with the disallowance of expenses etc. in respect of building, plant and machinery or furniture duly refers to the amount of depreciation u/s 32 as well. It, therefore, boils down that if car is not used wholly and exclusively for business purposes, there cannot be any embargo on the disallowance of proportionate depreciation for that purpose. In view of these reasons we are satisfied that the learned CIT(A) was justified in sustaining the disallowance to this extent. This ground is not allowed.

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10. Last ground is against the confirmation of disallowance of professional fees of `2,50,000 and security charges of `1,22,845 on the ground that the tax was not deducted at source on the aforesaid payment for the preceding year.

11. The assessee claimed deduction of `3,72,845 being professional fees paid at `2,50,000 and security charges at `1,22,845 in its computation of income on the ground that this amount was disallowed u/s 40(a) in computing the income for assessment year 2007-2008 and was now claimed as deduction in the current year. The Assessing Officer made the disallowance on the ground that the assessee did not produce any evidence to show that the tax was duly deducted and paid to the exchequer. The learned CIT(A) upheld the disallowance.

12. Having heard the rival submissions and perused the relevant material on record it is observed that the assessee has placed on record a copy of challan on page 34 of the paper book claiming it to be attributable to the payments in respect of which deduction has been claimed in the current year on the payment of tax. The claim of the assessee for deduction in the current year for the said amount of `2,50,000 and `1,22,845 is based on the fact that the same was disallowed for assessment year 2007-2008 because of the late deposit of tax u/s 40(a). In principle, we agree with the argument advanced that if in the preceding year these amounts were disallowed u/s 40(a) due to non deduction/payment of tax at source and in the current year the tax has been paid, the assessee should be entitled to deduction. However the challan now sought to be filed before us was not there before the AO or learned CIT(A). In our considered opinion, it will be just and fair if the impugned order on this issue is set aside and the matter is restored to the file of the AO. We order accordingly and direct the A.O. to verify the assessee's claim in this regard.

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13. In the result, the appeal is partly allowed for statistical purposes.

Order pronounced on this 06th day of July, 2012.

Sd/-	Sd/-
(Amit Shukla)	(R.S.Syal)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai : 06th July, 2012.
Devdas*

Copy to :
1. The Appellant.
2. The Respondent.
3. The CIT concerned
4. The CIT(A) - III, Mumbai.
5. The DR/ITAT, Mumbai.
6. Guard File.

TRUE COPY.

By Order

Assistant Registrar, ITAT, Mumbai.