

Before Gokal Chand Mital and S. S. Sodhi, JJ.

THE COMMISSIONER OF INCOME TAX, AMRITSAR,—Applicant.

versus

M/S. AMRITSAR RAYON AND SILK MILLS (P.) LTD., AMRITSAR,—Respondent.

Income Tax Reference No. 6 of 1982

March 2, 1989

Income Tax Act (XLIII of 1961)—Section 40-A (5)(c), 40-C—Director of the Company also its employee—Perquisites—Whether to be computed under section 40-A(5)(c) or Section 40-C.

Held, Section 40(c) of the Act applies when an expenditure is incurred by a company resulting 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 a director or of such a person, as the case may be, whereas section 40-A(5) of the Act is applicable where the assessee incurs expenditure which results directly or indirectly in the payment of any salary to an employee, and the proviso further provides that where the assessee is a company, so much of the aggregate of expenditures referred to in clauses (a) and (b) thereof 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 specified, shall in no case be allowed as a deduction. Clause (b) of the proviso is again significant. It refers to the expenditure and allowance referred to in sub-clauses (i) and (ii) of clause (c) of section 40 of the Act. Therefore, when we have a case of a director, who is also an employee of the company, section 40-A(5) of the Act would be applicable and this in turn makes reference to section 40(c) of the Act regarding expenditure and allowances referred to in sub-clauses of that provision. But *vice versa* is not true.

(Para 7).

Reference under section 256(1) of the Income-tax Act, 1961 by the Income Tax Appellate Tribunal Amritsar Bench, Amritsar, to the Hon'ble High Court of Punjab and Haryana for opinion of the following questions of law arising out of the Tribunal's order dated 5th January, 1981 in R.A. No. 12 (ASR)/1981 in I.T.A. No. 1184 (ASR)/1979, Assessment year 1978-79 :—

1. "Whether on the facts and in the circumstances of the case the Tribunal is right in law in holding that provisions of

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section 40(c) and not of 40-A(5) (c) are applicable for the purposes of disallowing expenditure incurred by the assessee company for the benefit of an employee who is also a director of the company ?”

2. *“Whether, on the facts and circumstances of the case, the Tribunal is right in law in upholding the order of the Commissioner of Income-tax (Appeals) deleting the disallowance of Rs. 6,000 made by the I.T.O. under section 40-A(5) (c) of the Income-tax Act ?”.*

L. K. Sood, Advocate, for the applicant.

Nemo, for the respondent.

JUDGMENT

Gokal Chand Mital, J.

(1) Director of the Company was also its employee. The total perks debited were valued at Rs. 9600 during the accounting year relevant to the assessment year and salary of Rs. 18,000.

(2) The Income Tax Officer applied the provision of Section 40A(5) (c) of the Income Tax Act, 1961 (for short ‘the Act’) and came to the conclusion that the allowance on account of perquisites was to be restricted to 20 per cent of the salary and allowed Rs. 3600 while disallowing the remaining Rs. 6000.

(3) On appeal, the Commissioner of Income Tax did not agree with the Income Tax Officer and held that Section 40(c) should apply and allowed the deduction of Rs. 9600. The Income Tax Appellate Tribunal, Amritsar, agreed with the Commissioner of Income Tax.

(4) At the instance of the Commissioner of Income Tax, the Tribunal has referred the following question for our opinion :

“Whether, on the facts and in the circumstances of the case, the Tribunal is right in law in holding that provisions of section 40(c) and not of section 40A(5) (c) are applicable for the purposes of disallowing expenditure incurred by the assessee company for the benefit of an employee who is also a director of the company ?”

(5) On behalf of the Revenue, reliance is placed on *Travancore Rayons Ltd v. C.I.T.* (1) a decision of the Kerala High Court for the proposition that if a director is also employee of the company, then section 40A(5) of the Act is applicable and section 40(c) of the Act would not apply. The Tribunal had relied upon a decision of the Gujarat High Court in *C.I.T. v. Tarun Commercial Mills Ltd.* (2). It also made reference to a decision of this Court in *C.I.T. v. Avon Cycles (P) Ltd* (3), and came to the conclusion that this decision further supported the decision of the Gujarat High Court in *Tarun Commercial Mill's case* (supra). Gujarat High Court has reiterated its stand in *C.I.T. v. Bharat Vijay Mills Ltd* (4).

(6) First we advert to the decision of this Court in *Avon Cycles (P) Ltd's case* (supra). On going through the decision, we find that the facts are distinguishable and the points decided therein are not applicable to the facts of the case. There, the assessee had appointed a sole selling agent and in the firm of the sole selling agent, some of the directors of the company or their relatives were the partners. It was not a case where the director of the company was an employee. To such facts, as were before this Court in *Avon Cycle (P) Ltd's case* (supra) section 40A(5) of the Act could not even remotely apply. The Tribunal fell in error in referring to the decision while deciding the matter.

(7) On a reading of judgments of the Kerala High Court in *Travancore Rayons Ltd's case* (supra) and of Gujarat High Court in *Tarun Commercial Mills's case* (supra), we are of the view that they are opposed to each other. Hence, we have to see as to which view is in consonance with the statute. On indepth study of the provisions, we have come to the conclusion that view taken by the Kerala High Court is correct. The reason is obvious. Section 40(c) of the Act applies when an expenditure is incurred by a company resulting 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 a director or of such a person, as the case may be, whereas section 40A(5) of the Act is applicable where the assessee incurs expenditure which results directly or indirectly in the payment of any salary to an employee,

- (1) (1986) 162 I.T.R. 737.
- (2) 113 I.T.R. 745.
- (3) 126 I.T.R. 448.
- (4) (1981) 128 I.T.R. 633.

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and the proviso further provides that where the assessee is a company, so much of the aggregate of expenditures referred to in clauses (a) and (b) thereof 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 specified, shall in no case be allowed as a deduction. Clause (b) of the proviso is again significant. It refers to the expenditure and allowance referred to in sub-clauses (i) and (ii) of clause (c) of Section 40 of the Act. Therefore, when we have a case of a director, who is also an employee of the company, section 40A(5) of the Act would be applicable and this in turn makes reference to section 40(c) of the Act regarding expenditure and allowances referred to in sub-clauses of that provision. But vice versa is not true. Accordingly, we are in agreement with the view taken by the Kerala High Court in *Travancore Rayons Ltd's case* (supra) and dissent from the view taken by the Gujarat High Court in *Tarun Commercial Mills's case* (supra), and hold that the Tribunal was not right in law in holding that the provisions of section 40A(5) of the Act and sub-section (c) thereof are not applicable for the purposes of disallowing expenditure incurred by the assessee company for the benefit of an employee, who is also director of the company. The correct provision applicable to the facts and in the circumstances of the case is Section 40A(5) of the Act. Accordingly the question is answered in favour of the Revenue, that is in the negative and since none had appeared on behalf of the assessee in spite of service, there will be no order as to costs.

P.C.G.

Before Gokal Chand Mital and S. S. Sodhi, JJ.

THE COMMISSIONER OF INCOME TAX, AMRITSAR,—Applicant.

versus

**M/S. PARTAP STEEL ROLLING MILLS (ASR) (P.) LTD.,
AMRITSAR,—Respondent.**

Income Tax Reference No. 114 of 1986

March 21, 1989.

Income Tax Act (XLIII of 1961) Section 32-A—Investment Allowance—Assessee engaged in Manufacture of Iron and Steel—Claim for deduction of amount spent on purchasing Oxygen plant—Oxygen used in manufacture of Iron and Steel—Such deduction—Whether can be claimed under Investment Allowance ?