IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT

BEFORE SHRI PAWAN SINGH, JM & DR. A. L. SAINI, AM

आयकरअपीलसं./ITA No.1036/AHD/2016

(निर्धारणवर्ष / Assessment Year: (2009-10)

M/s. Mac Industries, Plot No.1, 2407/2, GIDC, Sarigam, Ta- Umbergaon, Valsad-396230.	**Vs.**	Income Tax Officer, Ward-6, Vapi.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: **AAEFM2011M**		
(Assessee)		**(Respondent)**

Assessee by : Shri Hardik Vora - AR
Respondent by : Ms Anupama Singhla – Sr. DR

सुनवाईकीतारीख/ Date of Hearing : 22/09/2020

घोषणाकीतारीख/Date of Pronouncement: 19/10/2020

आदेश / O R D E R

PER Dr. A. L. SAINI, ACCOUNTANT MEMBER:

By way of this appeal, the assessee has challenged correctness of the order dated 02.03.2016 passed by the learned CIT(A), in the matter of assessment under section 143(3) r.w.s. 147 of the Income Tax Act 1961, [hereinafter refer to as the "Act"] for the assessment year 2009-10. Grievances raised by the assessee are as follows:-

> "*1. On the facts and in circumstances of the case as well as law on the subject, the learned CIT(A) has erred in confirming reopening u/s 147 of the Act.*
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> *2. On the facts and circumstances of the case as well as on the subject, the learned CIT(A)has erred in confirming disallowance of remuneration of partners to the extent of Rs.2,24,247/- by treating interest on FD and interest on income tax refund as income from other sources.*
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> *3. It is prayed that reopening u/s. 147 may please be quashed and/or above disallowance may please be deleted.*

4. Appellant craves leave to add, alter or delete any ground(s) either before or in the course of hearing of the appeal."

2. At the outset, the ld. counsel for the assessee informs the Bench that assessee does not want to press ground no. 1 and ground no. 3. Therefore, we dismiss the ground no.1 and ground no.3 raised by the assessee as not pressed. The only effective issue involved in this appeal is ground No. 2 raised by the assessee which relates to disallowance of remuneration of partners to the extent of Rs.2,24,247/- by treating interest on FD and interest on income tax refund as income from other sources.

3. The facts of the case which can be stated quite shortly are as follows: The assessee is engaged in the manufacturing of aromatic chemicals. During the course of assessment proceedings it was noticed by the assessing officer that the total income of the assessee included dividend income of Rs.377/-, interest on deposit of Rs.4,51,820/, interest on income tax refund of Rs.28,322/- and interest on recurring deposit account of Rs.42,602/-, which were covered under the head "Income from other sources". The assessing officer noted that these incomes were not directly related to business income of the assessee but derived from other sources, therefore these amounts, aggregating to Rs. 5,23,121/-, were required to be deducted from the net profit to compute book profit. Thus, the book profit was to be derived to Rs.7,89,025/- from which admissible remuneration as per u/s. 40(b)(v) of the Act would. be at Rs.3,68,110/-. However, assessing officer noticed that the remuneration paid to partner was Rs.5,92,357/-. So, there was an excess payment of remuneration amounting to Rs.2,24,247/- (Rs.5,92,357 – Rs.3,68,110). The assessee was asked to explain the said excess amount of Rs.2,24,247/-.

4. In response, the assessee submitted written submissions before the assessing officer which is reproduced below:

"1.In the letter filed on 21.11.2013, we have already mentioned our contention that interest income were derived from FDs in Canara bank which were

pledged with Canara bank against finance obtained from bank. A copy of sanction letter was also submitted to your office.

2.Thus, the interest income of Rs.4,51,820/- can be legally considered as income from business only and remuneration was correctly calculated on the same. Interest of Rs.28,322/- is also earned on income tax refund is also business income only and the same has also correctly treated as so in the computation.

3.In the light of the above, we hereby request your honor to kindly consider the above, not to make any addition and drop the proceedings under section 147.

4.The assessee has also quoted the decisions of various hon'ble courts."

5. Having gone through the submissions of the assessee, the Assessing Officer rejected the contention of the assessee and held. that as per explanation 3 of section 40(b)(v) of the Act, the book profit is computed in the manner laid down in Chapter IV-D and therefore, only the adjustment as specified under sections 28 to 44D will be made subsequently. Income chargeable to tax under other heads, such as, 'Income from house property', 'Income from capital gains', and 'Income from other sources' will not be part of book profit. Therefore, the excess payment of remuneration of Rs.2,24,247/- was added back to the total income of the assessee.

6. Aggrieved by the order of the Assessing Officer (AO), the assessee carried the matter in appeal before the ld. CIT(A) who has confirmed the addition made by the Assessing Officer. Aggrieved by the order of the ld. CIT(A), the assessee is in appeal before us.

7. We have heard both the parties and carefully gone through the submissions put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the facts of the case including the findings of the ld. CIT(A) and other material brought on record. Before us, learned Counsel for the assessee has reiterated the submissions made before the ld. CIT(A). On the other hand, the Ld. DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer,

which we have already noted in our earlier para and is not being repeated for the sake of brevity.

We note that during the scrutiny assessment, the assessing officer noticed that the total income of the assessee included the following:

(1) Dividend income Rs.377/-
(2) Interest on deposits Rs.4,51,820/-
(3) Interest on Income tax Refund Rs.28,322/-
(4) Interest on recurring deposit Rs.42,602/-

The assessing officer was of the view that above incomes were not directly related to the business income of the assessee therefore assessing officer treated the above incomes as income from other sources. Accordingly, the assessing officer had deducted the above amounts totaling Rs.5,23,119/- (Rs.377 + Rs.4,51,820 + Rs.28,322 + Rs. 42,602) from the net profit to compute the book profit for allowing the admissible remuneration as per Section 40(b)(v) of the Act. By doing this, he arrived at the figure of remuneration at Rs.3,68,110/- instead of Rs.5,92,357/- claimed by the assessee and the difference of these two figures at Rs. 2,24,247/- (Rs.5,92,357 - Rs.3,68,110) was added to the total income of the assessee.
On appeal, ld. CIT(A) held. that since assessee firm is not engaged in the business of money lending business. Therefore, these interest incomes earned from deployment of surplus funds of the firm in deposits with others and in Fixed Deposits will be income from other sources and not the business income because earning of interest is not the business of the assessee firm. This way, ld. CIT(A) has confirmed the action of the assessing officer.

8. Based on the facts narrated by us in above para, we are of the view that the issue raised by the assessee before us in no longer *res integra*. The assessee`s issue is covered by the judgment of the Jurisdictional Hon'ble Gujarat High in the case of CIT V/s J.J. Industries (2013) 358 ITR 531, wherein it was held. that interest on fixed

deposits held. by a firm for its business purpose is part of business income and it will be included in "Book Profit". The findings of the Hon`ble Court is reproduced below:

> *"The revenue is in appeal against the judgment of the Income Tax Appellate Tribunal dated 07.09.2012 raising following question for our consideration:*
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> *"Whether on the facts and in the circumstances of the case, the Tribunal was justified in taking view that whole income embedded in P & L account of assessee is to be taken into consideration for allowing deduction of remuneration paid to partners under section 40(b) without excluding interest income credited to P & L account even if it is not business income?"*
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> *2. The issue pertains to the ceiling of deduction on remuneration on a partnership firm which can be claimed in terms of Section 40 of the Income Tax Act, 1961 ('the Act' for short).*
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> *3. Brief facts are that:*
>
> ***"3.1** The respondent-assessee is a partnership firm and is engaged in the business of purchasing raw cotton, ginning the same, making cotton beds and selling such cotton beds and cotton seeds. For the assessment year 2004-05, the assessee filed the return of income on 27.10.2004 declaring total income of Rs. 20.35 lacs (rounded off). The Assessing Officer framed scrutiny assessment on 27.10.2006 determining the total income of Rs. 20.46 lacs (rounded off). Such assessment was subsequently reopened under Section 147 of the Act. During such reassessment proceedings, the Assessing Officer examined the question of remuneration paid by the firm to the partners. He was of the opinion that the ceiling of such remuneration for the purpose of claiming deduction had to be computed after ignoring the interest income of the assessee-firm earned on fixed deposits which came to Rs. 11.82 lacs (rounded off). He thus concluded that there was excess remuneration to the partners to the extent of Rs. 4.90 lacs (rounded off). He made disallowances accordingly.*
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> ***3.2** The assessee carried the matter in appeal. CIT(A) rejected the assessee's appeal and confirmed the view of the Assessing Officer upon which, the assessee approached the Tribunal. The Tribunal, by the impugned judgment, reversed the decision of the revenue- authorities and allowed the assessee's appeal making following observations:*
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> *"9. We have heard the rival submissions and perused the material on record. It is an undisputed fact that assessee has earned interest of Rs. 22,23,006/- on F.D.'s and paid interest of Rs. 10,40,234/- on money borrowed. The net interest income of Rs. 11,82,769/- has been credited to P & L account and included in the net profit and the same has been considered as business income while framing assessment order u/s. 143(3). The co-ordinate Bench in the case of S.P. Equipment & Services (supra) after considering the various decisions has held. as under:-*

4. *Section 40 of the Act pertains to amounts which are not deductible. Relevant portion of Section 40 reads as under:*

"Notwithstanding anything to the contrary in [sections 30 to 38], the following amounts shall not be deducted in computing the income chargeable under the head "Profits and
gains of business or profession",-

(a) in the case of any assessee-

(b) in the case of any firm assessable as such,-

(i) any payment of salary, bonus, commission or remuneration, by whatever name called (hereinafter referred to as "remuneration") to any partner who is not a working partner; or

(ii) any payment of remuneration to any partner who is a working partner, or of interest to any partner, which, in either case, is not authorized by, or is not in accordance with, the terms of the partnership deed; or

(iii) any payment of remuneration to any partner who is a working partner, or of interest to any partner, which, in either case, is authorized by, and is in accordance with, the terms of the partnership deed, but which relates to any period (falling prior to the date of such partnership deed) for which such payment was not authorized by, or is not in accordance with, any earlier partnership deed, so, however, that the period of authorization for such payment by any earlier partnership deed does not cover any period prior to the date of such earlier partnership deed; or

(iv) any payment of interest to any partner which is authorized by, and is in accordance with, the terms of the partnership deed and relates to any period falling after the date of such partnership deed in so far as such amount exceeds the amount calculated at the rate of [twelve] per cent simple interest per annum; or

(v) any payment of remuneration to any partner who is a working partner, which is authorized by, and is in accordance with, the terms of the partnership deed and relates to any period falling after the date of such partnership deed in so far as the amount of such payment to all the partners during the previous year exceeds the aggregate amount computed as hereunder:-

(a) On the first Rs.3,00,000 of the book-profit or in case of a loss	*Rs. 1,50,000 or at the rate of 90 per cent of the book-profit, whichever is more;*
(b) On the balance of the book-profit	*At the rate of 60 per cent*

> ***5.*** *From the above provision it can be seen that where an assessee is a partnership firm, any payment of salary, bonus, commission or remuneration to its partners under certain circumstances, if it exceeds the limits set out in Clause B, deduction to the extent of excess cannot be claimed. In the present case, such ceiling is prescribed in two slabs. On the first Rs. 3 lacs on the book profit or in case of loss such ceiling is Rs. 1,50,000/- or 90% of the book profit whichever is more. On the balance of the book profit such ceiling prescribed is @ 60%.*
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> ***6.*** *The question, therefore, arises whether the interest income earned by the assessee-firm from the fixed deposit receipts should. be ignored for the purpose of working-out the book profit to ascertain the ceiling of the partners' remuneration.*
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> ***7.*** *The Tribunal has proceeded on the basis that for the purpose of ascertaining such ceiling on the basis of book profit, the profit shall be in the profit and loss account and is not to be classified in the different heads of income under Section 40 of the Act. The interest income, therefore, cannot be excluded for the purposes of determining the allowable deduction of remuneration paid to the partners under Section 40B of the Act.*
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> ***8.*** *Counsel for the revenue vehemently contended that for the purpose of ascertaining the limit, only business income would. be relevant and not any other income. In the present case, however, we need not enter into such controversy. The assessee had held. out that it is in the business of purchasing raw cotton and ginning the same. It is a seasonal business. The interest income was generated out of spare funds invested in the fixed deposit. Such income was declared as part of the business income and that is how even the Assessing Officer had accepted the same. That being the position, and the Assessing Officer in the assessment taxed such income as business income, we do not see any question of law arising. The correctness of the Tribunal's view on the specific issue may be gone into in an appropriate case."*

9. On the same identical facts, the Hon'ble High Court of Calcutta in the case of Md. Serajuddin & Bros. vs. CIT (2012) 24 Taxman.com 46 (Calcutta), held. as follows:

> "4. *Mr. Khaitan, learned Senior Counsel appearing for the appellants submits that since it is an old. appeal this Court instead of remanding the matter for fresh hearing by the learned Tribunal on the ground of not giving opportunity of hearing should. be decided by this Court on its merit. He submits that for the purpose of Explanation 3 to Section 40(b)(v) the appellant took into consideration its net profit as shown in the profit and loss account which included granting consultancy fees, interest on bank and company deposit, profit on disposal of cars used in the business and interest on advance tax and*

those items of incomes were shown in the return under heading 'income from other sources'.

5. He submits that although the same was shown under different heading but the same was classified under the aforesaid heading as shown appearing in the matter of computation book profit in terms of Explanation 3 of Section 40(b)(v) as the said explanation provides for taking the net profit as shown in the profit and loss account and not the profit computed under the head 'profit and gains on business or profession'. Unlike Explanation (baa) to Section 80HHC and Section 33AB both of which mentioned profit as computed under the head 'profit and gains on business or profession', the Explanation 3 to Section 40(b)(v) does not refer to any head of income but maintains profit as shown in the profit and loss account however it was intended that for the purpose of Explanation 3 only profit computed under head 'profits and gains on business or professions' were to be considered, the expression used in Explanation 33A to Section 80HHC and Section 33AB would. have also found place in Explanation 3.

6. He contends that stipulation for the net profit should. be computed in the manner laid down in Chapter IV- D requires that computation provision of Chapter IV-D namely those contained in Sections 30 to 33D should. have been followed in computing the net profit. Section 29 of the Act contained in Chapter IV-D deals with computation of income under the head 'profits and gains on business or profession'. Sections 30 to 43D provide for various deductions. None of the said sections provide for exclusion of any item of income because it does not fall under the head of 'profits and gains of business or profession'. The reasons for making the computation provisions of Chapter IV-D applicable for computing the book profit is only to ensure that all deductions have been allowed as otherwise an assessee may compute the book profit and higher figure and thereby claim a higher amount by way of remuneration for the purpose of deduction. According to him the quantum of deduction liable in computing income assessed under the head 'profits and gains of business or profession' may be computed with reference to income falling under the heads of income such as income from other sources.

7. He referring to the decision of the Supreme Court in case of Apollo Tyres Ltd. v. CIT [2002] 255 ITR 273/ 122 Taxman 562 submits that as to which item of income should. be taken into account for computing the quantum of deduction depends upon the statutory provision allowing the deduction.

8. He submits further that the appellants in making its computation proceeded on the basis of Explanation 3 to Section 40(b)(v) which view, was correct one to take. He contends assuming another view is possible the Assessing Officer lacked the jurisdiction to act under Section 143(1)(a) or under Section 154 interpretation of Explanation 3 to Section 40(b)(v) requires decision on a debatable question of law which cannot be dealt with as a prima facie adjustment under Section 143(1)(a) or as mistake apparent from the records under Section 154.

9. He further submits that the procedure under Section 143(1)(a) as was in force during the material period, conferred a very limited power to an Assessing Officer to make an adjustment only in respect of what was obvious or deducible from the return as filed without doubt or debate. For making a prima facie adjustment under Section 143A(a), the deduction claimed had to be inadmissible on the face of the return and documents and accounts accompanying it. He while placing reliance on the decision of this Court in case of Modern Fibotex India Ltd. v. Dy. CIT [1995] 212 ITR 496 and in case of G.K.W. Ltd. v. CIT [2005] 273 ITR 380 (Cal.) and the case of Mintri Tea Co. (P.) Ltd. v. CIT [2009] 319 ITR 264 (Cal) submits that if any factual inquiry was necessary or any debatable question of law had to be decided, it could. not be made subject-matter of a prima facie adjustment under Section 143(1)(a) and issue which could. not have been dealt with as a prima facie adjustment under Section 143A(a) cannot be dealt with as a mistake apparent from the record within the meaning of Section 154 and logically, he submits if no prima facie adjustment could. be made on an issue under Section 143(1)(a) intimation issued under the said provision did not suffer from any mistake apparent from the record and there can be no question of exercising the power under Section 154 for rectifying such an intimation.

10. He reminds us referring to the decisions of the Supreme Court in case of CIT v. Hero Cycles (P.) Ltd. [1997] 228 ITR 463 / 94 Taxman 271 and Deva Metal Powders (P.) Ltd. v. Commissioner, Trade Tax [2008] 2 SCC 439 that rectification under Section 154 can only be made if there is a glaring mistake of fact and law but not if the question is debatable. A point which was not examined on fact or in law cannot be dealt with as a mistake apparent from the record within the meaning of Section 154.

11. Learned counsel for the respondent contends that in the returns filed by the assessee, the book profit for the purpose of computation of remuneration paid to partners has been taken as Rs. 9,79,081/- which includes income under the heads 'granting consultancy fees' and 'interest on bank deposit' totaling to Rs. 18,77,749/-. The assessee himself detailed income under the head income from other sources. From the plain reading of Section 40(b)(v) Explanation 3 of the Act it is manifestly clear that the book profit means only that net profit computed in the manner laid down in Chapter IV-D of the Act which deals with profit and gains on business or profession. It does not include profits chargeable in Chapter IV-F that dealt with income from other sources.

12. He further submits that in a taxing statue the words of the statue are to be interpreted strictly. Section 40(b)(v) Explanation 3 makes it abundantly clear that the net profit has to be computed in the manner laid down in Chapter IV-D and does not include profit referred to in Chapter IV-F of the Act. He urges that Section 154(1)(b) provides that with view to rectify any mistake apparent from the record an income-tax authority referred to under Section 110 may amend any intimation or deemed intimation under which of subsequent of Section 143 of Act, therefore, Section 154(1)(b) of the Act specifically includes amendment of any intimation under Section 143(1) of the Act. According to him, the action of the Assessing Officer is not at all a debatable issue which is

capable of two interpretations since the provisions of Section 40(b)(v) Explanation 3 of the Act is very clear and unambiguous and the only inescapable conclusion as that income falling under the head income from other sources under Chapter IV-F cannot be included under the term book profits the mistake in calculation by the appellant is a mistake apparent from the records and the Assessing Officer has rightly invoked the provisions of Section 154 of the Act and rectified the mistake. Hence there is no illegality and infirmity of the judgment and order of the learned Tribunal. Therefore, the appeal should. be dismissed.

13. After hearing the learned counsel for the parties and after going through the record carefully it appears to us neither the learned Tribunal nor the Commissioner of Income Tax (Appeals) being the two successive Appellate Authority below applied their mind nor examined the orders passed by the Assessing Officer in proceedings under Section 154 of the said Act. They have merely accepted what the Assessing Officer has held. The contention and submission of the assessee was not dealt with at all. Under these circumstances it would. have been ideal by this Court to remand the matter to the file of the learned Tribunal for fresh decision on the contention raised before us.

14. However, having regard to the age of the matter we refrained ourselves from remanding the matter and we decide the matter by ourselves.

15. As we have already observed learned two authorities below have not decided anything else, we therefore, examined the order passed by the Assessing Officer in relation to aforesaid two assessment years. Three several orders were passed with identical reasons and even language. It appears from the orders of the Assessing Officer when notice under Section 154 was issued replies in writing were given to the Assessing Officer explaining how the computation of remuneration of partners were determined and the same were shown in the audited accounts, the said explanation was not accepted. The Assessing Officer was of the view that the entire profit of the business of the assessee cannot be a book profit for the purpose of explanation 3 of Section 40(b)(v). It is better to quote the language used by the Assessing Officer in three assessment orders as follows:-

"Thus, clearly income from other sources is not to be included in the book profit for the purpose of computation of allowable remuneration to partners."

16. In the respective intimations under Section 143(1)(a) of the Income Tax Act, 1961, it was specifically conveyed that the while determining the net profit rather book profit as mentioned in the said Explanation 3 the income from other sources were accepted. But in the order it appears the Assessing Officer was of the view that for the purpose of computation of allowable remuneration to partners the book profit has to be ascertained from the income of the business alone and not from other sources.

17. Thus, it clearly appears on earlier occasion it was decided that income from other sources could. be taken into consideration for ascertaining book

profit for the purpose of computation of allowable remuneration to partners not the income from business alone.

18. Undoubtedly this is a debatable issue and such debatable issue cannot be a ground for rectification under Section 154 of the said Act. This has been well settled by plethora of decisions of the Supreme Court and also High Courts we, therefore, quote few decisions of the Supreme Court on this point.

19. In the case of Hero Cycles (P.) Ltd. (supra) at page 467-468 it is ruled as follows-

"Rectification under Section 154 can only be made when a glaring mistake of fact or law committed by the officer passing the order becomes apparent from the record. Rectification is not possible if the question is debatable. Moreover, the point which was not examined on fact or in law cannot be dealt with as a mistake apparent on the record. This dispute raised a mixed question of fact and law."

20. In the case of Deva Metal Powders (P.) Ltd. (supra) while examining the scope of Section 22 of U.P. Trade Tax Act, 1948 the language of which is almost pari materia of that of Section 154.The Supreme Court in paragraph 12 of the report held. as follows:-

"A bare look at Section 22 of the Act makes it clear that a mistake apparent from the record is rectifiable. In order to attract the application of Section 22, the mistake must exist and the same must be apparent from the record. The power to rectify the mistake, however, does not cover cases where a revision or review of the order is intended. "Mistake" means to take or understand wrongly or inaccurately; to make an error in interpreting; it is an error, a fault, a misunderstanding, a misconception. "Apparent" means visible; capable of being seen; obvious; plain. It means "open to view, visible, evident, appears, appearing as real and true, conspicuous, manifest, obvious, seeming". A mistake which can be rectified under Section 22 is one which is patent, which is obvious and whose discovery is not dependent on argument or elaboration."

21. It is appropriate to quote also paragraph 15 of the said report-

"15. "Mistake" is an ordinary word but in taxation laws, it has a special significance. It is not an arithmetical error which, after a judicious probe into the record from which it is supposed to emanate is discerned. The word "mistake" is inherently indefinite in scope, as to what may be a mistake for one may not be one for another. It is mostly subjective and the dividing line in border areas is thin and indiscernible. It is something which a duly and judiciously instructed mind can find out from the record. In order to attract the power to rectify under Section 22, it is not sufficient if there is merely a mistake in the order sought to be rectified. The mistake to be rectified must be one apparent from the record. A decision on a debatable point of law or a disputed question of fact is not a mistake apparent from the record. The plain meaning of the word "apparent" is that it must be something which appears to be so ex

facie and it is incapable or argument or debate. It, therefore, follows that a decision on a debatable point of law or fact or failure to apply the law to a set of facts which remains to be investigated cannot be corrected by way of rectifications." [Emphasis supplied]

22. It has been appropriately urged by Mr. Khaitan that in view of the aforesaid authoritative pronouncement of the Supreme Court and the observation recorded as above by us, it is not within the purview of Section 154 rather it could. have been an action either by way of revision or by appeal not by a authority of having concurrent jurisdiction exercising power under Section 154 of the said Act.

23. We are unable to accept the contention of the learned counsel for the Revenue that it is sheer computation mistake based on law. This submission has no force at all in view of the legal position of the Income Tax Act. Clause (v) of Section 40 at that point of time provided as follows:-

"(v) any payment of remuneration to any partner who is a working partner, which is authorised by, and is in accordance with, the terms of the partnership deed and relates to any period falling after the date of such partnership deed in so far as the amount of such payment to all the partners during the previous year exceeds the aggregate amount computed as hereunder:-

(1) in case of a firm carrying on a profession referred to in section 44AA or which is notified for the purpose of that section -

(a) on the first Rs.1,00,000 of the book-profit or in case of a loss

(b) on the next Rs.1,00,000 of the book-profit

(c) on the balance of the book-profit (2) in the case of any other firm -

(a) on the first Rs.75,000 of the book-profit, or in case of a loss

(b) on the next Rs.75,000 of the book-profit

(c) on the balance of the book-profit

Rs.50,000 or at the rate of 90 per cent of the book-profit, whichever is more;

at the rate of 60 per cent; at the rate of 40 per cent;

Rs.50,000 or at the rate of 90 per cent of the book-profit, whichever is more;

at the rate of 60 per cent; at the rate of 40 per cent;

Provided that in relation to any payment under this clause to the partner during the previous year relevant to the assessment year commencing on the

1st day of April, 1993, the terms of the partnership deed may, at any time during the said previous year, provide for such payment.

Explanation 1.- Where an individual is a partner in a firm on behalf, or for the benefit, of any other person (such partner and the other person being hereinafter referred to as "partner in a representative capacity" and "person so represented", respectively), -

(i) interest paid by the firm to such individual otherwise than a partner in a representative capacity, shall not be taken into account for the purposes of this clause;

(ii) interest paid by the firm to such individual as partner in a representative capacity and interest paid by the firm to the person so represented shall be taken into account for the purposes of this clause.

Explanation 2.- Where an individual is a partner in a firm otherwise than as partner in a representative capacity, interest paid by the firm to such individual shall not be taken into account for the purposes of this clause, if such interest is received by him on behalf, or for the benefit, of any other person.

Explanation 3.- For the purposes of this clause, "book-profit" means the net profit, as shown in the profit and loss account for the relevant previous year, computed in the manner laid down in Chapter IV- D as increased by the aggregate amount of the remuneration paid or payable to all the partners of the firm if such amount has been deducted while computing the net profit."

24. *The said chapter nowhere provides that method of accounting for the purpose of ascertaining net profit should. be the only income from business alone and not from other sources. Section 29 provides how the income from profits and gains of business or profession should. be computed and this has to be done as provided under Section 30 to 43D. By virtue of Section 5 of the said Act that total incomes of any previous years includes all income from whatever source derived. Thus for the purpose of Section 40(b)(v) read with Explanation there cannot be separate method of accounting for ascertaining net profit and/or book profit. The said section nowhere provides as rightly pointed by Mr. Khaitan, learned Senior Advocate that the net profit as shown in the profit and loss account not the profit computed under the head profit and gains of business or profession.*

25. *The decision of the Supreme Court in the case of Apollo Tyres Ltd. (supra) is an appropriate guidance of this point as to what should. be done in order to ascertain the net profit in case of this nature. At page 280 in the first paragraph of the report the Supreme Court observed as follows:-*

"Sub-section (1A) of section 115J does not empower the Assessing Officer to embark upon a fresh inquiry in regard to the entries made in the books of account of the company. The said sub-section, as a matter of fact, mandates the company to maintain its account in accordance with the requirements of the Companies Act which mandate, according to us, is bodily lifted from the Companies Act into the Income-tax Act for the limited purpose of making the said account so maintained as a basis for computing the company's income for levy of income-tax. Beyond that, we do not think that the said sub-section empowers the authority under the Income-tax Act to probe into the accounts accepted by the authorities under the Companies Act. If the statute mandates that income prepared in accordance with the Companies Act shall be deemed income for the purpose of section 115J of the Act, then it should. be that income which is acceptable to the authorities under the Companies Act. There cannot be two incomes one for the purpose of the Companies Act and another for the purpose of income-tax both maintained under the same Act. If the Legislature intended the Assessing Officer to reassess the company's income, then it would. have stated in section 115J that "income of the company as accepted by the Assessing Officer". In the absence of the same and on the language of section 115J, it will have to held. that view taken by the Tribunal is correct and the High Court has erred in reversing the said view of the Tribunal."

26. *At page 282 of the said report the Supreme Court has also observed amongst other-*

"The fact that it is shown under a different head of income would. not deprive the company of its benefit under section 32AB so long as it is held. that the investment in the units of the UTI by the assessee-company is in the course of its "eligible business". Therefore, in our opinion, the dividend income earned by the assessee-company from its investment in the UTI should. be included in computing the profits of eligible business under section 32AB of the Act."

27. *Thus it emerges as follows:*

Even if the income from other sources is included in the profit and loss accounts to ascertain the net profit qua book-profit for computation of the remuneration of the partners the same cannot be discarded.

28. *In view of the aforesaid discussion as above we, therefore, allow this appeal and we set aside all the orders passed by all authorities below. There will be no order as to costs."*

10. Thus, it is abundantly clear that for the purpose of Section 40(b)(v) read with Explanation there cannot be separate method of accounting for ascertaining net profit and/or book profit. Therefore, the interest income earned by the assessee-firm from the fixed deposit receipts should. not be ignored for the purpose of working-out the book

profit to ascertain the ceiling of the partners' remuneration. For the purpose of ascertaining such ceiling of the partners' remuneration on the basis of book profit, the profit shall be in the profit and loss account and is not to be classified in the different heads of income under Section 40 of the Act. The interest income, therefore, cannot be excluded for the purposes of determining the allowable deduction of remuneration paid to the partners under Section 40B of the Act.We note that for the purpose of Explanation 3 to Section 40(b)(v) the assessee took into consideration its net profit as shown in the profit and loss account which included followings:

(1) Dividend income Rs.377/-

(2) Interest on deposits Rs.4,51,820/-

(3) Interest on Income tax Refund Rs.28,322/-

(4) Interest on recurring deposit Rs.42,602/-

Although these incomes of the assessee under consideration, were shown under different heading but the same was classified under the heading as shown appearing in the matter of computation book profit in terms of Explanation 3 of Section 40(b)(v) as the said explanation provides for taking the net profit as shown in the profit and loss account and not the profit computed under the head 'profit and gains on business or profession'. Hence these items should. not be excluded while computing book profit for the purpose of partners` remuneration.

11. We note that a bare reading of the Explanation 3 of section 40(b) of the Act, make it evident that selection of the any head of income, more particularly of the head "Profit or gain of business or profession", is nowhere required or envisaged by the Legislature. That is, there is no warrant to select the head of income so far as the computation of the permissible amount of deduction of the remuneration under section 40(b) is concerned. As per Explanation 3 of section 40(b) of the Act, Assessing Officer does not get the jurisdiction to go behind the net profit shown in the Profit & Loss account except to the extent of the adjustments provided in the Explanation 3, nor he is empowered to decide under which head the income is to be taxed. The net profit as shown, is not to be allocated into different components.

As the issue is squarely covered in favour of the assessee by the judgment of the Jurisdictional High Court of Gujarat in the case of CIT V/s J.J. Industries (supra), and by the judgment of the Hon`ble High Court of Calcutta in the case of Md. Serajuddin & Bros (supra) and ld. DR for the Revenue is unable to produce any material to controvert the aforesaid findings of the above noted binding precedents. Respectfully following the above binding precedents, we uphold. the contention of the assessee and therefore we delete the addition of Rs. 2,24,247/-.

12. In the result, the appeal filed by the assessee is allowed.

Order is pronounced on 19/10/2020, as per Rule 34 of Income Tax Appellate Tribunal, Rule 1963.

Sd/-	**Sd/-**
(PAWAN SINGH)	**(Dr. A.L. SAINI)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

सूरत /Surat
दिनांक/ Date: 19/10/2020
Samanta, PS
Copy of the Order forwarded to

1. The Assessee
2. The Respondent
3. The CIT(A)
4. Pr.CIT
5. DR/AR, ITAT, Surat
6. Guard File

// True Copy //

By Order

Assistant Registrar/Sr. PS/PS
ITAT, Surat