

# **GEOFFREY MANNERS & CO. LTD. vs. COMMISSIONER OF INCOME TAX**

HIGH COURT OF BOMBAY

Dr. B.P. Saraf & M.L. Dudhat, JJ.

IT Ref. No. 433 of 1983

14th December, 1995

(1995) 63 CCH 0843 MumHC

(1996) 136 CTR 0169 : (1996) **221 ITR 0695** : (1996) 89 TAXMAN 0287

Legislation Referred to

S 35B, 40(c), 40A(5), RULE 3(c)(ii)

Case pertains to

Asst. Year 1977-78

Decision in favour of:

Revenue

***Business expenditure—Export market development allowance under s. 35B—Expenses on duty and clearing charges, delivery charges, insurance and freight charges, are not eligible for weighted deduction under s. 35B.—[Forbes Forbes Campbell & Co. Ltd. vs. CIT](#) (1994) 119 CTR (Bom) 319 : (1994) 206 **ITR** 495 (Bom) : TC 15R.512 followed***

(Para 2)

Conclusion :

*Expenses on duty and clearing charges, delivery charges, insurance and freight charges, are not eligible for weighted deduction under s. 35B.*

***Business expenditure—Disallowance under s. 40(c)—Remuneration to directors—The ceiling of Rs. 72,000 prescribed in s. 40(c) is absolute even though the payment over and above Rs. 72,000 is reasonable—However, the ITO is given further power, where remuneration paid is below Rs. 72,000 to make further disallowance to the extent it is considered unreasonable or excessive having regard to the legitimate business needs of the company—ITO was justified in restricting allowance of remuneration to directors to Rs. 72,000 each out of Rs. 1,08,643 and 1,00,986 paid***

Held :

*It is abundantly clear from a reading of s. 40(c) that it imposes an overall ceiling on the allowance of expenditure on remuneration paid or benefit or amenity provided, inter alia,*

to a director or a person having substantial interest in the company. The ceiling is absolute and independent of the provisions as to the excessiveness or unreasonableness of the payment. Any payment in excess of Rs. 72,000 in a particular year to a director or a person having a substantial interest has to be disallowed outright in all cases irrespective of whether the payment is excessive or unreasonable. The ITO has, however, been conferred with a further power to disallow the payment of remuneration to a director, etc., which is found to be excessive and unreasonable having regard to the legitimate business needs of the company even if it does not exceed Rs. 72,000. Such a determination is necessary for determining the amount of remuneration which would be allowable as a deduction. Even where the remuneration is found to be reasonable and not excessive, having regard to the legitimate business needs of the company, the overall ceiling of Rs. 72,000 per year will be applicable. In other words, s. 40(c) provides for deduction of any payment by way of remuneration to a director not exceeding Rs. 72,000 in any previous year if such payment is not found to be excessive and unreasonable. Sec. 40(c) thus lays down two conditions for allowability of deduction in respect of payment of remuneration to a director, etc. First, that the payment should not be excessive or unreasonable, having regard to the bona fide business needs of the company. Second, it should not exceed the ceiling of Rs. 72,000. If the amount paid by a company to a director is less than Rs. 72,000, only the first condition will apply and that part of the remuneration will be allowed as a deduction which is found to be reasonable and not excessive. If the payment exceeds Rs. 72,000, and the amount which is found to be reasonable exceeds Rs. 72,000, the allowance would have to be restricted to Rs. 72,000 under s. 40(c). Payment in excess of Rs. 72,000 will thus be disallowed outright in all cases covered by s. 40(c) irrespective of the fact whether such payment is excessive or unreasonable. This ceiling is absolute and applies to all payments by way of remuneration to a director, etc. The above construction of s. 40(c) also gets support from cl. (9) of the Notes on Clauses of the Finance (No. 2) Bill of 1971.—[Bilaspur Spg. Mills & Industries Ltd. vs. CIT](#) (1981) 25 CTR (Cal) 55 : (1982) 135 **ITR** 496 (Cal) : TC 18R.318 and [Union Carbide India Ltd. vs. CIT](#) (1994) 116 CTR (Cal) 596 : (1993) 203 **ITR** 584 (Cal) : TC 18R.319 **relied on**

(Paras 5 & 6)

Conclusion :

The ceiling of Rs. 72,000 prescribed in s. 40(c) is absolute even though the payment over and above Rs. 72,000 is reasonable and the ITO was justified in restricting allowance of remuneration to directors to Rs. 72,000 each out of Rs. 1,08,643 and 1,00,986 paid.

**Business expenditure—Disallowance under s. 40A(5)—Applicability of r. 3 — Where a fleet of six cars of the company was used by the employees for official as also personal use, and no separate accounts were maintained rendering it difficult to value the perquisite per employee, CIT(A) and Tribunal were justified in applying r. 3(c)(ii)—Though r. 3 has been framed for determination of the value of a motor car provided by the employer to the employee for the purpose of computing the income chargeable under the head "salaries", there is nothing wrong in applying the same for valuing the perquisites for the purpose of computing the disallowance under s. 40A(5) because it has been framed by the Central Board of Revenue with a view to getting over the difficulties that might arise in determining the value of perquisites in respect of the use of the car owned and maintained by the employer by the employee**

Held :

In the instant case, the assessee incurred expenditure on a fleet of six cars which were

used by the employee-directors of the assessee for the business purposes of the assessee as well as for their own personal or private purposes. In such a situation, the ceiling imposed by s. 40A(5)(a)(ii)(c) will apply in respect of that part of the expenditure which can be attributed to the use of the cars by employees or directors for their own purposes or benefit. There is no dispute about the fact that the ceiling in respect of such expenditure as specified in sub-cl. (ii) of cl. (c) is one-fifth of the amount of salary or an amount calculated at the rate of Rs. 1,000 for each month, whichever is less. There is also no controversy in regard to the fact that the fleet of six cars owned by the assessee was used by its employees and directors both for the business and their personal purposes. In such a case the first stage to find out the amount of disallowance would be to determine the amount of expenditure attributable to the use of such assets by the employee-directors for their personal purposes or benefit. There would have been no difficulty in finding out the same if any one or more cars would have been put at the disposal of a particular employee or director for his personal use and expenditure in respect thereof were recorded separately or if separate account were maintained to keep a record of the personal use thereof. But that is not the position in this case. Here, a fleet of six cars maintained by the assessee for its business purposes was also allowed to be used by its employees and directors for their personal or private purposes without any record of such personal or private user. In such a situation, it is for the ITO to determine that part of the amount actually expended by the assessee on the maintenance and running of the motor car during the relevant previous year which can be reasonably attributed to the user of the motor car by the employee for his private or personal purposes including the sum representing the wear and tear of the motor car which can be reasonably attributed to such user. However, in the absence of detailed record of the user by the employee for personal use, such determination often presents difficulty. In the instant case, the ITO attributed 75% of the aggregate expenditure incurred on these cars to the personal use of the employee-directors of the assessee. The assessee was aggrieved by the above determination because, according to it, it was arbitrary and without any basis or material. The CIT(A) found merit in this grievance of the assessee. To find out the portion of the expenditure which can be attributed to the personal or private use of the employee-directors for the purpose of s. 40A(5)(a)(ii), he took resort to r. 3(c) of IT Rules, 1962 which lays down the manner of determination of the value of perquisite in respect of motor cars provided by the employer for the use by its employees. The Tribunal found this action of the CIT(A) correct.

### **(Paras 12 & 13)**

The CIT(A) and the Tribunal were justified in the instant case in taking resort to r. 3 of the Rules for determining the amount attributable to the personal user of the car by the employees. It may be pertinent to mention that r. 3 has been framed to get over identical difficulties that arise in valuing the perquisites for the purpose of computing the income chargeable under the head "salaries". It lays down the manner of determining the value of perquisites in respect of user of the assets of the employer by the employee for his personal use. Clause (c) thereof lays down the manner of valuing the perquisite in respect of use of motor car. From the various sub-clauses of cl. (c) it is clear that it provides for the manner of valuation of the perquisite in respect of the use of the motor car by an employee for his personal use in all conceivable types of cases. Though the above rule has been framed for determination of the value of a motor car provided by the employer to the employee for the purpose of computing the income chargeable under the head "salaries", there is nothing wrong in applying the same for valuing the perquisites for the purpose of computing the disallowance under s. 40A(5) because it has been framed by the Central Board of Revenue with a view to getting over the difficulties that might arise in determining the value of perquisites in respect of the use of the car owned and maintained by the employer by the employee. In that view of the matter, the CIT(A) and the Tribunal were fully justified in taking resort to the manner of determination of the value of the perquisite in respect of the user of the car laid down in the said rule. There is no infirmity in the action of the Tribunal. In the absence of any

material on record, it would be appropriate on the part of the ITO to follow the manner laid down in this rule than to resort to arbitrary estimation of the expenditure without any basis or material. The method of valuation of perquisite in respect of motor car set out in the first part of sub-cl. (ii) of cl. (c) of r. 3 would be applicable in all cases where it is possible to do so. It is only in cases where determination of the value in the manner laid down in the first part of cl. (c)(ii) is found to be difficult that the valuation should be made on the basis set out in the second part thereof and the table appended thereto.— [CIT vs. Britannia Industries Co. Ltd.](#) (1981) 20 CTR (Cal) 272 : (1982) 135 **ITR** 35 (Cal) : TC 18R.323 and [CIT vs. Nuchem Plastics Ltd.](#) (1990) 82 CTR (P&H) 357 : (1989) 179 **ITR** 196 (P&H) : TC 18R.323 **relied on**; [CIT vs. Rajesh Textile Mills Ltd.](#) (1988) 71 CTR (Guj) 65 : (1988) 173 **ITR** 179 (Guj) : TC 18R.642 and [CIT vs. Electro Steel Castings Ltd.](#) (1991) 99 CTR (Ori) 184 : (1992) 193 **ITR** 103 (Ori) : TC 18R.628 **dissented from**

**(Paras 14, 15 & 18)**

Conclusion :

Where a fleet of six cars of the company was used by the employees for official as also personal use, and no separate accounts were maintained rendering it difficult to value the perquisite per employee, CIT(A) and Tribunal were justified in applying r. 3(c)(ii).

**Precedent—Decision of High Court—Decisions of a High Court are not binding precedents either for other High Courts or Tribunals outside the territorial jurisdiction of that High Court—**[CIT vs. Thana Electricity Supply Co. Ltd.](#) (1993) 112 CTR (Bom) 356 : (1994) 206 **ITR** 727 (Bom) and [Consolidated Pneumatic Tool Co. vs. CIT](#) (1994) 120 CTR (Bom) 22 : (1994) 209 **ITR** 277 (Bom) **followed**

**(Paras 19 & 20)**

Conclusion :

Decisions of a High Court are not binding precedents either for other High Courts or Tribunals outside the territorial jurisdiction of that High Court.

Counsel appeared:

J.D. Mistry i/b Dhru & Co., for the Applicant : T.U. Khatri with P.S. Jetly, for the Respondent

**DR. B.P. SARAF, C.J.**

By this reference, the Income-tax Appellate Tribunal (Tribunal) has referred the following questions of law to this Court under s. 256(1) of the IT Act, 1961, for our opinion :

At the instance of the assessee

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that expenses on duty and clearing charges, delivery charges, insurance and freight charges, aggregating to Rs. 63,769 were not eligible for weighted deduction under s. 35B ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that any payments in excess of Rs. 72,000 were disallowable under s. 40(c) even if the remuneration was not found to be excessive or unreasonable and accordingly

holding that Rs. 65,629 out of director's remuneration was disallowable ?"

At the instance of the Revenue

3. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the disallowance under s. 40A(5) is to be based on the value of the perquisite in the form of free use of cars by the employee-directors and not with reference to the extent of the expenditure which resulted in such perquisites as provided in s. 40A(5)(a)(ii) ?

4. Without prejudice to the above question if the value of the perquisite in the form of free use of cars by the employee-directors is to be made, whether the Tribunal was right in law in directing that the same should be done in accordance with the provisions of r. 3(c)(ii) of the IT Rules ?

5. Without prejudice to the above question, whether it was proper for the Tribunal to have directed the adoption of the valuation of the perquisites in the form of free use of cars by the employee-directors according to the provisions of r. 3(c)(ii) of the IT Rules meant for the valuation of perquisites for taxation in the hands of the employees instead of making or causing enquiries to be made or basing its estimate of the same on the material on record ?

6. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the observation of the Bombay High Court in the case of CIT vs. Smt. Godaveridevi Saraf (1978) 113 **ITR** 589 (Bom) : TC 8R.143, namely, that if there was a solitary decision on the subject by the High Court of any State until a contrary decision was given by another High Court such decision should invariably be followed in the present case when the issue under consideration was the disallowance under s. 40A(5) while the Calcutta High Court decision relied on by the Tribunal, namely, CIT vs. Britannia Industries Co. Ltd. (1981) 20 CTR (Cal) 272 : (1982) 135 **ITR** 35 (Cal) : TC 18R.323, dealt with the provisions of s. 40(c)(iii) ?"

The questions have been numbered by us consecutively for the sake of convenience.

2. So far as question No. 1, which is referred at the instance of the assessee, is concerned, the learned counsel for the assessee fairly stated before us that the controversy involved therein now stands concluded by the decision of this Court in Forbes Forbes Campbell & Co. Ltd. vs. CIT (1994) 119 CTR (Bom) 319 : (1994) 206 **ITR** 495 (Bom) : TC 15R.512 in favour of the Revenue and following the same this question should be answered in favour of the Revenue. In view of the above statement, we answer question No. 1 in the affirmative and in favour of the Revenue.

3. We then turn to question No. 2 which again has been referred to us by the Tribunal at the instance of the assessee. The controversy therein pertains to the disallowance of directors remuneration in excess of Rs. 72,000 under s. 40(c) of the IT Act, 1961 ("Act"). The facts relevant for determination of the above question are as follows :

During the previous year relevant to the asst. yr. 1977-78, the assessee-company paid salaries and perquisites to two of its directors, namely, Shri K.G. Maheshwari and Shri M.G. Maheshwari. The amounts paid to them during the relevant previous year amounted to Rs. 1,08,643 and Rs. 1,00,986 respectively. In the assessment of the assessee-company for the relevant assessment year, the ITO allowed deduction of a sum of Rs. 72,000 only in respect of each of the two directors being the maximum amount allowable under s. 40(c) of the Act and disallowed the balance. This resulted in disallowance of a sum of Rs. 62,629 under s. 40(c) of the Act. The assessee was aggrieved by the above disallowance as according to it, disallowance under s. 40 (c)

could be made only if such payments were found to be excessive or unreasonable. In other words, according to the assessee, the ceiling of Rs. 72,000 laid down in s. 40(c) would be attracted only to cases where the payments are found to be unreasonable or excessive. The assessee, therefore, appealed to the CIT(A) against the above disallowance. The CIT(A) did not find any merit in the construction sought to be put by the assessee on s. 40(c) of the Act. He, therefore, rejected the appeal of the assessee and upheld the disallowance made by the ITO under s. 40(c) of the Act. The assessee went in further appeal to the Tribunal. The Tribunal, following the decision of its Special Bench, also held that the overall ceiling of expenditure falling under s. 40(c) of the Act, which could be allowed, was Rs. 72,000 per annum in respect of each director, and rejected the appeal of the assessee. The assessee applied for reference under s. 256(1) of the Act of the question of law arising out of the above findings of the Tribunal, which according to the assessee, involved interpretation of s. 40(c) of the Act. The Tribunal has accordingly referred question No. 2 to this Court for opinion.

**4.** We have heard Mr. J.D. Mistry, learned counsel appearing for the assessee, who submits that s. 40(c) of the Act will be attracted only if the expenditure referred to therein which results directly or indirectly in the provision of any remuneration or benefit or amenity to a director, etc., is found to be excessive or unreasonable having regard to the legitimate business needs of the company and the benefit derived by or accruing to it therefrom. According to the learned counsel, only if such a finding is arrived at by the ITO, the question of applying the ceiling of Rs. 72,000 specified in the later part of the said provision would arise.

**5.** We have carefully considered the above submission. Sec. 40(c) of the Act, as it stood at the material time, reads :

"40. Amounts not deductible.—Notwithstanding anything to the contrary in ss. 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",

(a)

(b)

(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-cl. (i) either wholly or partly for his own purposes or benefit,

if in the opinion of the ITO any such expenditure or allowance as is mentioned in sub-cl. (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-cl. (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 Rs. 72,000;

(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 Rs. 6,000 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 cls. (i), (ii), (iii) and (iv) of the second proviso to cl. (a) of sub-s. (5) of s. 40A shall not be taken into account for the purposes of sub-cl. (A) or sub-cl. (B), as the case may be;

(iii)

Explanation.—The provisions of this clause shall not (?) apply notwithstanding that any amount not to be allowed under this clause is included in the total income of any person referred to in sub-cl. (i);"

It is abundantly clear from a reading of s. 40(c) of the Act, as set out above, that it imposes an overall ceiling on the allowance of expenditure on remuneration paid or benefit or amenity provided, inter alia, to a director or a person having substantial interest in the company. The ceiling is absolute and independent of the provisions as to the excessiveness or unreasonableness of the payment. Any payment in excess of Rs. 72,000 in a particular year to a director or a person having a substantial interest has to be disallowed outright in all cases irrespective of whether the payment is excessive or unreasonable. The ITO, has however, been conferred with a further power to disallow the payment of remuneration to a director, etc., which is found to be excessive and unreasonable having regard to the legitimate business needs of the company even if it does not exceed Rs. 72,000. Such a determination is necessary for determining the amount of remuneration which would be allowable as a deduction. But as stated above, even where the remuneration is found to be reasonable and not excessive, having regard to the legitimate business needs of the company, the overall ceiling of Rs. 72,000 per year will be applicable. In other words, s. 40(c) provides for deduction of any payment by way of remuneration to a director not exceeding Rs. 72,000 in any previous year if such payment is not found to be excessive and unreasonable. Sec. 40(c) thus lays down two conditions for allowability of deduction in respect of payment of remuneration to a director, etc. First, that the payment should not be excessive or unreasonable, having regard to the bona fide business needs of the company. Second, it should not exceed the ceiling of Rs. 72,000. If the amount paid by a company to a director is less than Rs. 72,000, only the first condition will apply and that part of the remuneration will be allowed as a deduction which is found to be reasonable and not excessive. If the payment exceeds Rs. 72,000, and the amount which is found to be reasonable exceeds Rs. 72,000, the allowance would have to be restricted to Rs. 72,000 under s. 40(c). Payment in excess of Rs. 72,000 will thus be disallowed outright in all cases covered by s. 40(c) irrespective of the fact whether such payment is excessive or unreasonable. This ceiling is absolute and applies to all payments by way of remuneration to a director, etc.

**6.** Our above construction of s. 40(c) also gets support from cl. (9) of the Notes on Clauses of the Finance Bill No. 2 of 1971. The clause which sets out the object of the amendment of s. 40(c) of the Act reads :

"Sub-cl. (b) seeks to amend s. 40(c) under which expenditure incurred by a company on the provisions of any remuneration or benefit or amenity to directors, persons who have a substantial interest in the company and their relatives and the expenditure or allowance in respect of any assets of the company which are used by such persons for their own purposes or benefit is not allowed as a deduction to the extent such expenditure or allowance is, in the opinion of the ITO, excessive or unreasonable. Under the amendment, the deduction on account of such expenditure or allowance will be further subject to an overall ceiling limit of Rs. 72,000 in respect of any one director or a person who has substantial interest in the company or relative of a director or of such

person...."

[Emphasis, italicised in print, supplied]

**7.** We are also supported in our above conclusion by the decision of the Calcutta High Court in *Bilaspur Spg. Mills & Industries Ltd. vs. CIT* (1981) 25 CTR (Cal) 55 : (1982) 135 **ITR** 496 (Cal) : TC 18R.318. Similar controversy arose in the above case. After elaborate discussion, speaking for the Bench, Sabyasachi Mukharji, J. (as His Lordship then was) held :

"...It appears to us that there were two conditions independently to be fulfilled, i.e., that the ITO might disallow if he found that the remuneration was excessive or unreasonable and further even in cases where he arrives at no such finding, if the expenditure or allowance exceeded Rs. 72,000, then no such expenditure or allowance was allowable."

**8.** The above decision was followed by the same Court in its later decision in *Union Carbide India Ltd. vs. CIT* (1994) 116 CTR (Cal) 596 : (1993) 203 **ITR** 584 (Cal) : TC 18R.319 where it was reiterated that the provisions as to the excessiveness or unreasonableness are to be judged as per the criteria formulated in the main limb of s. 40(c). But where the aggregate of the expenditure allowance as envisaged by s. 40(c) exceeds Rs. 72,000 for a particular year in relation to any director or a person having a substantial interest, etc., the excess is disallowable outright immaterial of whether the payment is excessive or unreasonable.

**9.** In view of the above, we answer question No. 2 in the affirmative and in favour of the Revenue.

**10.** Now we turn to question No. 3 which has been referred to us by the Tribunal at the instance of the Revenue. The controversy therein pertains to the method of calculation of the value of the perquisites in the form of free use of cars by the employee-directors of the company for the purpose of computing the disallowance under s. 40A(5) of the Act. The material facts relevant for determination of the above question are as follows :

The assessee-company had a fleet of six motor cars which were placed at the disposal of its directors and officers. The total expenditure incurred by the company in the relevant previous year in relation to these motor cars was Rs. 1,37,049. As no details were available in regard to the use of the motor cars by the directors for their personal use and for the purpose of assessee-company's business, the ITO attributed 75% of the total expenses in respect of all these cars to the personal use of the directors and disallowed the same in the assessment of the company. The assessee-company appealed to the CIT(A). The contention of the assessee before the CIT(A) was that the estimation of 75% of the total expenditure incurred on the fleet of the cars belonging to the assessee-company to the personal use of the directors was too high. The CIT(A) considered the contention of the assessee and observed that in the absence of detailed record regarding the use of the cars for the personal use of the directors and for the purpose of the assessee's business, it was not possible to make a reasonable estimate of the personal user of cars by the directors or officers. In the circumstances, the CIT(A) turned to r. 3(c)(ii) of the IT Rules which lays down the method of computing the value of perquisites in respect of the motor car provided by the employer for the use by the employees and directors partly in performance of their duties and partly for the private or personal use and applied the same for the purpose of valuing the perquisite in respect of the use of the cars by the directors. On valuing the perquisites in the manner laid down in the said rule, he found that the value of the perquisites was less than the ceiling imposed by s. 40A(5) of the Act. He therefore, held the same to be deductible and allowed the appeal of the assessee and set aside the disallowance of Rs. 73,990 made by the ITO under s. 40A(5) of the Act. Against the above order of the CIT(A), Revenue

appealed to the Tribunal. The Tribunal, following the decision of the Calcutta High Court in CIT vs. Britannia Industries Co. Ltd. (1981) 20 CTR (Cal) 272 : (1982) 135 ITR 35 (Cal) : TC 18R.323 confirmed the order of the CIT(A). Hence, reference of question No. 3 at the instance of the Revenue to this Court for opinion.

**11.** We have heard the learned counsel for the Revenue who submits that the CIT(A) was not justified in taking resort to the method of computation laid down in r. 3(c)(ii) of the IT Rules, 1962 ("Rules") for computing the value of the perquisites for the purposes of s. 40A(5) of the Act in respect of the use of the motor cars for the personal or private use by the directors. According to the learned counsel, on the failure of the assessee to file detailed particulars of the use of the vehicles for the personal or private use of the directors, it is open to the ITO to estimate value of the perquisites as such percentage of the total expenditure which he may deem fit and proper. Counsel submits that the CIT(A) as well as the Tribunal erred in law in determining the perquisites for the purposes of s. 40A(5) in respect of the user of the car by the directors for their personal/private use by taking resort to r. 3(c)(ii) of the Rules. Counsel for the assessee, on the other hand, supports the order of the Tribunal and submits that the only proper method to be followed in such a case is to apply r. 3(c)(ii) of the Rules.

**12.** To appreciate the rival submissions, it may be expedient to examine the provisions of s. 40A of the Act in the light of the scheme of the Act and object of the said section. Sec. 40A is an overriding provision which operates notwithstanding anything to the contrary contained in any other provision of the Act relating to the computation of the income under the head "profits and gains of business or profession". In various sub-sections, it sets out certain expenditure or payments, which are not deductible in computation of income under the head "profits and gains of the business or profession" in the circumstances set out therein. Sub-s. (5) thereof deals, inter alia, with expenditure incurred by the assessee, which results directly or indirectly in the provision of any perquisite to an employee. It provides that subject to the provisions of cl. (b) thereof, "so much of such expenditure or allowance as is in excess of the limit specified in respect thereof in cl. (c) shall not be allowed as a deduction". Sub-s. (5) of s. 40A, so far as relevant, as it stood at the material time, reads as under :

"40A. Expenses or payments not deductible in certain circumstances.—(1) The provisions of this section shall have effect notwithstanding anything to the contrary as contained in any other provision of this Act relating to the computation of income under the head "profits and gains of business or profession"

.....

(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 cl. (b) so much of such expenditure or allowance as is in excess of the limits specified in respect thereof in cl. (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-cl. (i) and (ii) of this clause; and

(b) the expenditure and allowance referred to in sub-cl. (i) and (ii) of cl. (c) of s. 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 Rs. 72,000, shall in no case be allowed as a deduction :

(c) The limits referred to in cl. (a) are the following, namely :

.....

(ii) in respect of the aggregate of the expenditure and the allowance referred to in sub-cl. (ii) of cl. (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.—.....

Explanation 2.—In this sub-section,—

.....

(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 an annuity."

(Emphasis, italicised in print, supplied)

A plain reading of sub-cl. (ii) of cl. (a) of sub-s. (5) of s. 40A, as set out above, makes it clear that this provision is intended to place certain ceiling on the deductible amount of expenditure incurred by the assessee on providing any perquisite to an employee and expenditure in respect of assets of the assessee used by an employee either wholly or partly for his own purposes or benefit. The ceiling is 20% of the amount of salary payable or an amount calculated at the rate of Rs. 1,000 for each month, whichever is less, subject, however, to a further overall ceiling of salary (including the above perquisites and benefits) of Rs. 72,000 per annum. In the instant case, the assessee incurred expenditure on a fleet of six cars which were used by the employee-directors of the assessee for the business purposes of the assessee as well as for their own personal

or private purposes. In such a situation, the ceiling imposed by s. 40A(5)(a)(ii)(c) will apply in respect of that part of the expenditure which can be attributed to the use of the cars by employees or directors for their own purposes or benefit. There is no dispute about the fact that the ceiling in respect of such expenditure as specified in sub-cl. (ii) of cl. (c) is one fifth of the amount of salary or an amount calculated at the rate of Rs. 1,000 for each month, whichever is less. There is also no controversy in regard to the fact that the fleet of six cars owned by the assessee was used by its employees and directors both for the business and their personal purposes. In such a case the first stage to find out the amount of disallowance would be to determine the amount of expenditure attributable to the use of such assets by the employee directors for their personal purposes or benefit. There would have been no difficulty in finding out the same if any one or more cars would have been put at the disposal of a particular employee or director for his personal use and expenditure in respect thereof were recorded separately or if separate account were maintained to keep a record of the personal use thereof. But that is not the position in the case before us. Here, a fleet of six cars maintained by the assessee for its business purposes was also allowed to be used by its employees and directors for their personal or private purposes without any record of such personal or private user. In such a situation, it is for the ITO to determine that part of the amount actually expended by the assessee on the maintenance and running of the motor car during the relevant previous year which can be reasonably attributed to the user of the motor car by the employee for his private or personal purposes including the sum representing the wear and tear of the motor car which can be reasonably attributed to such user. However, in the absence of detailed record of the user by the employee for personal use, such determination often presents difficulty.

**13.** In the instant case, the ITO attributed 75% of the aggregate expenditure incurred on these cars to the personal use of the employee directors of the assessee. The assessee was aggrieved by the above determination because, according to it, it was arbitrary and without any basis or material. The CIT(A) found merit in this grievance of the assessee. To find out the portion of the expenditure which can be attributed to the personal or private use of the employee-directors for the purpose of s. 40A(5)(a)(ii), he took resort to r. 3(c) of IT Rules, 1962 which lays down the manner of determination of the value of perquisite in respect of motor cars provided by the employer for the use by its employees. The Tribunal found this action of the CIT(A) correct. The Revenue is aggrieved by the finding of the Tribunal. Hence, it is before us in this reference.

**14.** We have carefully perused the orders of the CIT(A) and the Tribunal in the light of the provisions of s. 40A(5)(a)(ii) of the Act. We have also perused r. 3 of the IT Rules. On a careful consideration of the same, we are of the view that the CIT(A) and the Tribunal were justified in the instant case in taking resort to r. 3 of the Rules for determining the amount attributable to the personal user of the car by the employees. It may be pertinent at this stage to mention that r. 3 has been framed to get over identical difficulties that arise in valuing the perquisites for the purpose of computing the income chargeable under the head "salaries". It lays down the manner of determining the value of perquisites in respect of user of the assets of the employer by the employee for his personal use. Clause (c) thereof lays down the manner of valuing the perquisite in respect of use of motor car. Rule 3(c) so far as relevant, as it stood at the material time, reads as follows."3. Valuation of perquisites.—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) ..... ..

(b) ..... ..

(c) (i) The value of a motor car provided by the employer for use by the assessee exclusively for his private 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 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 calender month

1	2.	3.
	Where the h.p. rating of the car does not exceed 16 or the cubic capacity of the engine does not exceed 1.88 litres	Where the h.p. rating of the car exceeds 16 or the cubic capacity of the engine exceeds 1.88 litres.
1. 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	Rs. 300	Rs. 400
2. 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	Rs. 100	Rs. 150

Provided that where a chauffeur is also provided to run the motor car, the value of the perquisite as calculated in accordance with this Table shall be increased by a sum of Rs. 150.

(iii) Where one or more motor cars are owned or hired by the employer of the assessee and the assessee is allowed the use of such motor car or all or any of such motor cars (otherwise than wholly and exclusively in the performance of his duties), an amount calculated in accordance with the Table under sub-cl. (ii) and the proviso thereto as if the assessee had been provided one motor car for use partly in the performance of his duties and partly for his private or personal purposes:

Provided that where two or more motor cars are allowed to be so used and the h.p. rating of any one of such motor cars exceeds 16 or the cubic capacity of the engine of any one of such motor cars exceeds 1.88 litres, the assessee shall be deemed to have been provided by the employer with one motor car of h.p. rating exceeding 16:

Provided further that where two or more motor cars are allowed to be so used and a chauffeur is also provided to run any such motor car, the value of the perquisite as so calculated shall be increased by a sum of Rs. 150 per month....."

**15.** It is clear from cl. (c) of r. 3 of the Rules, as set out above, that the value of the user of the motor car by an employee for his personal purposes has to be determined to be a sum equal to that part of the actual amount expended by the employer on its maintenance or running during the relevant previous year (including remuneration if any paid by the employer to the chauffeur) which can be reasonably attributed to the use of the motor car by the employee for his private or personal purposes and also a sum equal to that part of the amount representing the normal wear and tear of the motor car which can be reasonably attributed to the user of the motor car by the employee for his personal or private purposes. The later part of sub-cl. (ii) of cl. (c) comes into play only in a case where "a determination on the basis mentioned above presents difficulty". In such cases, it provides for the valuation of the perquisite on the basis provided in the table given thereunder. The valuation in such cases is Rs. 300 or Rs. 400 per month depending upon the horse power rating of the car or the cubic capacity of the engine where the motor car is owned or hired by the employer and all the expenses on maintenance and running are met or reimbursed by the employer and Rs. 100 or Rs. 150 per month where the motor car, though owned or hired by the employer, is maintained by the employee. Care has also been taken, in sub-cl. (iii) of cl. (c) of cases where one or more cars are owned by the employer and the employee is allowed to use any of the said cars or all of the cars. From the various sub-clauses of cl. (c) it is clear that it provides for the manner of valuation of the perquisite in respect of the use of the motor car by an employee for his personal use in all conceivable types of cases. Though the above rule has been framed for determination of the value of a motor car provided by the employer to the employee for the purpose of computing the income chargeable under the head "salaries", we do not find anything wrong in applying the same for valuing the perquisites for the purpose of computing the disallowance under s. 40A(5) of the Act because it has been framed by the Central Board of Revenue with a view to getting over the difficulties that might arise in determining the value of perquisites in respect of the use of the car owned and maintained by the employer by the employee. In that view of the matter, in our opinion, the CIT(A) and the Tribunal were fully justified in taking resort to the manner of determination of the value of the perquisite in respect of the user of the car laid down in the said rule. We do not find any infirmity in the above action of the Tribunal. In our opinion, in the absence of any material on record, it would be appropriate on the part of the ITO to follow the manner laid down in this rule than to

resort to arbitrary estimation of the expenditure without any basis or material.

**16.** We are supported in our above opinion by the decision of the Calcutta High Court in CIT vs. Britannia Industries Co. Ltd. (supra), and the Punjab and Haryana High Court in CIT vs. Nuchem Plastics Ltd. (1990) 82 CTR(P&H) 357 : (1989) 179 **ITR** 196 (P&H) : TC 18R.323.

**17.** We have also considered the decision of the Gujarat High Court in CIT vs. Rajesh Textile Mills Ltd. (1988) 71 CTR (Guj) 65 : (1988) 173 **ITR** 179 (Guj) : TC 18R.642 and the decision of the Orissa High Court in CIT vs. Electro Steel Castings Ltd. (1991) 99 CTR (Ori) 184 : (1992) 193 **ITR** 103 (Ori) : TC 18R.628, which has followed the above Gujarat decision. With utmost respect, we find it difficult to agree with the view taken by the Gujarat and Orissa High Courts in the above cases. In view of the above, question No. 3 is answered in the affirmative and in favour of the assessee.

**18.** Having regard to the above answer to question No.3 it is not necessary to answer questions No. 4 and 5. Suffice it to say the method of valuation of perquisite in respect of motor car set out in the first part of sub-cl. (ii) of cl. (c) of r. 3 would be applicable in all cases where it is possible to do so. It is only in cases where determination of the value in the manner laid down in the first part of cl. (c)(ii) is found to be difficult that the valuation should be made on the basis set out in the second part thereof and the table appended thereto.

**19.** So far as the question No. 6 is concerned, it is agreed by the counsel for the parties that the controversy in the above question is covered by the decision of this Court in CIT vs. Thana Electricity Supply Co. Ltd. (1993) 112 CTR (Bom) 356 : (1994) 206 **ITR** 727 (Bom), where it has been held (at p. 366 of 112 CTR & 738 of 206 **ITR**)

"The decision of one High Court is neither binding precedent for another High Court nor for Courts or tribunals outside its own territorial jurisdiction. It is well-settled that the decision of a High Court will have the force of binding precedent only in the State or territories on which the Court has jurisdiction. In other States or outside the territorial jurisdiction of that High Court, it may, at best, have only persuasive effect. By no amount of stretching of the doctrine of stare decisis, can judgments of one High Court be given the status of a binding precedent so far as other High Courts or Courts or tribunals within their territorial jurisdiction are concerned. Any such attempt will go counter to the very doctrine of stare decisis and also the various decisions of the Supreme Court which have interpreted the scope and ambit thereof. The fact that there is only one decision of any one High Court on a particular point or that a number of different High Courts have taken identical views in that regard is not at all relevant for that purpose. Whatever may be the conclusion, the decisions cannot have the force of binding precedent on other High Courts or on any subordinate Courts or tribunals within their jurisdiction. That status is reserved only for the decisions of the Supreme Court which are binding on all Courts in the country by virtue of Art. 141 of the Constitution."

**20.** This decision was followed by this Court in Consolidated Pneumatic Tool Co. vs. CIT (1994) 120 CTR (Bom) 22 : (1994) 209 **ITR** 277 (Bom) and a number of other cases. Following the same, we answer question No. 6 in the negative and in favour of the Revenue.

**21.** This reference is disposed of accordingly. In the facts and circumstances of the case, there shall be no order as to costs.

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