(2003) 03 MAD CK 0191

In the Madras High Court

Case No : Tax Case No. 118 of 2000

Commissioner of Income Tax APPELLANT

Vs

Golden Touch RESPONDENT

Date of Decision : 26-03-2003

Acts Referred:
Income Tax Act, 1961 — Section 40

Citation : (2004) 186 CTR 207 : (2003) 263 ITR 261

Hon'ble Judges : R. Jayasimha Babu, J;K. Raviraja Pandian, J

Bench : Division Bench

Advocate : T. Ravikumar, for the Appellant; P. Janakiraman, for the Respondent

Final Decision : Dismissed

Judgement

R. Jayasimha Babu, J.—The question raised in this appeal filed by the Revenue is :

"Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that the remuneration paid by the assessee to its partner representing a Hindu undivided family can be disallowed u/s 40(b) of the Income Tax Act, 1961, in the light of the Explanation 4 to the section by the Amendment Act ?"

2. The assessment year is 1994-95.

3. Explanation 4 in Section 40(b) of the Act reads thus :

"For the. purposes of this clause, ''working partner'' means an individual who is actively engaged in conducting the affairs of the business or profession of the firm of which he is a partner."

4. The assessee is a firm which had paid remuneration to its working partners. The payments so made were disallowed by the Assessing Officer on the ground that those partners represented their respective Hindu undivided families, and therefore could not be treated as "individuals" for the purposes of Explanation 4

to Section 40(b). That view of the Assessing Officer though affirmed by the Commissioner, has been reversed by the Tribunal.

5. The Supreme Court in the case of Rashiklal and Co. Vs. Commissioner of Income Tax, Orissa, has held that (page 465): "There is no way that a Hindu undivided family can intrude into the relationship created by a contract between certain individuals. The only right of the Hindu undivided family is possibly to call upon its nominee partner to render accounts for the profits that he has made from the partnership business. But that is something between the nominee and the Hindu undivided family with which the partnership is not concerned".

6. After referring to Section 13 of the Partnership Act which permits a special contract for payment of remuneration to the partners, the court observed (page 466): "Section 40(b) of the Income Tax Act, 1961, will apply, even when there is such a special contract. Any commission paid by a firm to its partner will not be permitted as deduction from the business income of the firm. If a claim is made by a partner that he is representing a Hindu undivided family or any other body of persons, then the position in law will not be any different. The Hindu undivided family is not and cannot be a partner in a partnership firm. The remuneration or the commission that is paid to the partner cannot be claimed to be a remuneration or commission paid to the Hindu undivided family. The partner may be accountable to the family for the monies received by him from the partnership. But, in the assessment of the firm, the partner cannot be heard to say that he has not received the commission as a partner of the firm, but in a different capacity."

7. Having regard to that position in law, the remuneration paid to the individual partners who are working partners is not to be disallowed on the sole ground that such partners were nominees of their Hindu undivided families. Even as the Hindu undivided family cannot claim that remuneration paid to the partners representing it, is remuneration paid to the Hindu undivided family, so also the Assessing Officer cannot regard to the remuneration paid to such partner, who is also a working partner, as remuneration paid to the Hindu undivided family.

8. The question raised before us by the Revenue is required to be and is answered in favour of the assessee. The appeal is dismissed.