



THE HIGH COURT OF DELHI AT NEW DELHI

ITA 172/2001 & ITR 31/1999

Judgment delivered on: 14.12.2004

COMMISSIONER OF INCOME TAX

...Appellant

- versus -

M/S. KISHORI LAL & SONS

...Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. R.D.Jolly.

For Respondents : Mr. Prakash Kumar

CORAM:-

**HON'BLE MR JUSTICE B.C. PATEL, CHIEF JUSTICE
HON'BLE MR JUSTICE BADAR DURREZ-AHMED**

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in Digest?

B.C. PATEL, C.J (ORAL)

1. This appeal and reference have arisen out of the orders made by the Income Tax Appellate Tribunal for different assessment years.

ITR 31/1999

2. For the Assessment Year 1988-1989 (arising out of



the ITA No.6887/Del/1991), the Tribunal, at the instance of the revenue, has referred the following two questions:-

1. Whether on the facts and in the circumstances of the case, the I.T.A.T. was correct in law in allowing relief to the assessee firm in respect of salary under Section 40(b) of the Income-Tax Act, 1961?

2. Whether on the facts and in the circumstances of the case, the "assessee"(should be read as "Tribunal committed an error") by holding that the decision of Hon'ble Andhra Pradesh High Court reported in 157 I.T.R. 295 was applicable in this case as against the decision of jurisdictional Delhi High Court reported in 135 I.T.R. 359?"

3. The questions arose because a sum of Rs.1,86,626/- was paid by way of salary to a person representing the HUFs. It was disallowed by the assessing officer under Section 40(b) of the Income Tax Act, 1961. The appeal was allowed by the learned Commissioner of Income Tax and the addition was deleted. The said order was challenged before Income Tax Appellate Tribunal which dismissed the appeal preferred by Revenue. It is in view of this situation, the questions have been referred to this court.

4. So far as question no.1 is concerned, it is no longer required to be discussed in detail as the Supreme Court in

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the case of Rashik Lal And Co. Vs. Commissioner of Income

Tax 229 ITR (458) has pointed out that:-

"The language of the section is simple and clear. But to complicate the matter an argument was sought to be made that Rashiklal had not joined the firm as an individual but was really representing a Hindu undivided family. The real partner of the firm was the Hindu undivided family. The payment to Rashiklal did not amount to payment of commission to the Hindu undivided family which was the real partner. Therefore, the amount of commission paid by the firm to a non-partner or a partner who had joined the firm in a representative capacity, will not fall within the mischief of Section 40(b)."

We are unable to uphold this contention for a number of reasons. A firm is a compendious way of describing the individuals constituting the firm. A Hindu undivided family directly or indirectly cannot become a partner of a firm because the firm is an association of individuals."

5. The question before the Supreme Court was with regard to the amount of commission. In the instant case, the case is with regard to the salary but, as section 40(b) relates both to salary and commission, it makes no difference and hence, question no. 1 is required to be answered in favour of revenue and against the assessee.



6. So far as question no.2 is concerned, in view of answer to question 1, it has become redundant and it is returned unanswered.

ITA 172/2001

7. So far as ITA 172/2001 is concerned, two questions have been framed which are as follows:-

"1. Whether the CIT(A) and ITAT have erred in deleting the addition of Rs.1,44,900/- representing the disallowance u/s. 40(b) of the salary paid to the partners in their individual capacity who had joined the firm as Partners representing their respective HUFs?

2. Whether CIT(A) and ITAT have erred in deleting the addition of Rs.33,600/- representing disallowance of interest on borrowed funds to the extent of interest chargeable on interest for advances made to the partners?"

8. As regards question 1, we have already decided the same issue in ITR 31/1999 hereinabove in respect of the Assessment Year 1988-1989. This appeal is with regard to the assessment year 1990-91. As the question has been answered in favour of revenue and against the assessee in the earlier year, the same is required to be followed in this appeal also. Accordingly, we answer the question No.1 in favour of the revenue.

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9. So far as question no.2 is concerned, no actual interest is charged and upon hearing the counsel we feel that it does not require any answer in the context of notional interest.
10. The appeal and reference are disposed of accordingly.

Bhatti
CHIEF JUSTICE

Badar Durrez Ahmed
BADAR DURREZ AHMED, J

December 14, 2004

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