

आयकर अपीलीय अधिकरण , ' बी ' न्यायपीठ,चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, CHENNAI

श्री जॉर्जमाथन, न्यायिक सदस्यएवंश्री एस जयरामन, लेखा सदस्य केसमक्ष

BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER AND
SHRI S. JAYARAMAN, ACCOUNTANT MEMBER

आयकर अपील सं/.I.T.A. Nos. 1351, 1352, 1353 & 1354/Chny/2017

निर्धारण वर्ष/Assessment Years : 2009-10, 2011-12, 2013-14
& 2014-15

Assistant Commissioner of Income
Tax,
Non Corporate Circle -4,
Coimbatore.

M/s. Aqua Sub Engineering,
Vs. Thudiyalur Post,
Coimbatore – 641 034.

[PAN: AADFA 8028P]

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

Assessee by

: Shri Sailendra Mamidi, CIT

Revenue by

: Shri S. Subramanian, FCA

सुनवाईकीतारीख/Date of Hearing

: 26.03.2018

घोषणाकीतारीख/Date of Pronouncement

: 26.03.2018

आदेश / O R D E R

PER BENCH :

The Revenue filed these appeals against the orders of the Commissioner of Income Tax (Appeals)-3 (In-charge), Coimbatore in ITA Nos. 283, 282, 346 & 284/16-17 dated 29.03.2017 for assessment years 2009-10, 2010-11, 2013-14 & 2014-15, respectively.

2. M/s. Aqua Sub Engineering, the assessee, is a firm manufactures and sells pumps. While making the assessments for assessment years 2009-10, 2010-11, 2013-14 & 2014-15, the AO noticed that Shri R. Kumaravelu HUF, The Marigold Trust and the Chrysanthemum Trust were the partners of the firm. The AO was of the opinion that in this firm there was not even a single partner who was a natural person. As per the AO, all the partners were legal or artificial entities and a the partnership firm could not exist with the artificial persons alone. When this was put to the assessee, it replied that an individual could be a partner representing HUF, where he was a member and relied on the judgement of the Apex Court in the case of Rashik Lal & Co vs CIT (1998) 229 ITR 458. The AO was not impressed. Accordingly to him, by virtue of section 40(b) of the Act, only an individual could be a partner in a partnership firm and a entity like HUF could not be a partner. He, therefore, treated the assessee as an Association of Persons (AOP). Therefore, he disallowed the interest paid to the partners and the remunerations of the working partners and completed the assessments for all these assessment years. Aggrieved the assessee filed appeals before the CIT(A). The CIT(A) relying on this tribunal decision dated 03.02.2017 for assessment year 2012-13 allowed the appeals.

3. Aggrieved, the Revenue filed these appeals with the following common grounds:

"1. The order of the Learned CIT(A) is not acceptable on the facts and circumstances of the case.

2. The Learned CIT(A) has erred in law, in deleting the disallowance on claim made u/s. 40(b).

3. The Learned CIT(A) has erred in not considering the fact that the firm comprises or three partners. namely R.Kulliaravelu (HUF), the Marigold trust and The Chrysanthernurn Trust. wherein not a single partner is a natural person. As per the Partnership Act. a partnership firm cannot be formed between all artificial persons.

4. In the case of Rashik Lal & Co Vs CIT (998) 96 Taxmann 16 (SC). the Supreme Court has categorically held that a H F cannot be a partner in a firm. It , was further held that such individual, though being a karta of HUF can only be a partner in his individual capacity and cannot represent his HUF. Hence, the status of the firm has to be treated as Association of Persons and thus the claim of expenses on interest and remuneration to partners has to be disallowed, under the provisions of section 40(b).

5. For these and other grounds that may be adduced at the time of hearing. the order or the CIT(A) may be cancelled and that of the Assessing Officer restored."

4. We heard the rival submissions. The relevant portion of the CIT(A) order is extracted as under:

"11. Against the said order of the CIT(A) the Department filed appeal before the Hon'ble ITAT. The Hon'ble ITAT vide their order in ITA No.1959/Mds/2016 and C.O. No.112/Mds/2016 passed a combined order in both the cases [Appellants AQUAPUMP INDUSTRIES and AQUASUB ENGINEERING] dated 03.02.2017, the relevant portion of which is as under:

" 7. We have perused the orders and heard the rival contentions carefully. The question before us is whether the partnership was one formed between the HUF and two trustees or between three individuals. One more question also arises whether a valid partnership could be formed between three persons in representative capacity. Relevant clauses in partnership deed in the case of Aqua Sub Engineering read as under :-

'THIS DEED OF PARTNERSHIP entered this Twenty Fourth Day of May, one Thousand Nine Hundred and Ninety among :

(1) , Mr.R. KUMARA VELU, Son of Late Mr, R. Ramaswamy, aged about 37 years, residing at 703, A vanashi Road, Coimbatore, hereinafter called 'the party of the First Part:

(2) Mrs. HOMAI KUMARA VELU, Wife of Mr. R. Kumaravelu, aged about 28 years, residing at 703, Avanashi Road, Coimbatore, hereinafter called 'the party of the Second Part:

(3) Dr. H.S. ADENWALLA, son-or Late Sorab Hirji Adenwalla, aged about 59 years, residing at Jubilee Mission Hospital, Trichur, hereinafter called 'the party of Third Part:

AND

(4) Mrs. DAMAYANTI RAMACHANDRAN, Wife of Late Mr. R. Ramachandran, aged about 43 years, residing at 16, A TD Street, Race Course, Coimbatore, hereinafter called 'the party of the Fourth Part'.

8. Similar is the wordings in the case of Aqua Pump Industries else The Assessing Officer had considered these firms to have been formed between these parsons in their representative capacity and not in their individual capacity, considering the following clause appearing in page 2 of the partnership deed. The said clause is reproduced hereunder:

'WHEREAS the parties hereto of the Second and Third Parts are partners in a representative capacities .respectively, representing "THE CHRYSANTHEMUM TRUST"; and "THE MARIGOLD TRUST"; being trusts evidenced by two indentures of Trust dated the Twenty fifth day of February, One Thousand Nine Hundred and Ninety.

WHEREAS Mr. R. Kumaravelu the party hereto of the First Part represents the Hindu Undivided Family consisting of himself, his wife and minor daughter of which Hindu Undivided Family he is at present the kartha".

9. 'In our opinion, the above clause would not ipso facto convert partnership firm as one entered between two Trusts and an HUF. This is because of the reason that in the first part of partnership where the description of parties are given, it is never stated that the parties were representing any Trust or HUF. Even if we take that Shri R. Kumaravelu was representing an HUF, by virtue of judgment of Apex Court in the case of Rashik Lal & Co. (supra), he could also be considered as a partner in his

individual capacity. Para 13 of the judgment of Apex Court is reproduced hereunder:

"A Hindu Undivided Family cannot be in a better position than a firm in the scheme of the Partnership Act. The reasons that led this Court to hold that a firm cannot join a partnership with another 'individual' will apply with equal force to a Hindu Undivided Family. In law; a Hindu Undivided Family can never be a partner of a partnership firm. Even if a person nominated by the Hindu Undivided Family joins a partnership, the partnership will be between the nominated person and the other partners of the firm. Having regard to the definition of 'partnership' and 'partners' and in view of the principle laid down in Dulichand's case [1956] 29 ITR 535 (SC), it is not possible to hold that a Hindu Undivided Family being a fluctuating body of individuals, can enter into a partnership with other individual partners. It cannot do indirectly what it cannot do directly. If the karta or any other member of a Hindu Undivided Family joins a partnership, he can do so only as an individual. His rights and obligations vis-a-vis other partners are determined by the Partnership Act and not by Hindu Law".

10. What their Lordship held is that even if a person nominated by HUF joins a partnership, the partnership could be deemed as one between such nominated person and other partners of the firm. The Apex Court did not hold that such partnership would only be an Association of Persons. In any case, it is not in dispute that the assessee was granted the status of registered firm by virtue of provisions of Section 185(1) of the Act since assessment year 1991-92. The position continued for a period of twenty years and it was after such twenty years, the Assessing Officer attempted to disturb this. When a set of facts which permeates from earlier years, is consistency. the same, it would not be appropriate to disturb the conclusions reached based on such facts. No doubt, rule of res judicata may not be applicable to the Income Tax proceedings, but the rule of consistency demands that a position consistently taken shall not be disturbed unless there were significant change in facts. In so far as reliance placed on Section 40(b) of the Act by the Assessing Officer is concerned, there is nothing in that section to conclude that a partnership could not be formed by a karta of an HUF in his individual capacity with other persons. The same, in our opinion, would also apply where an individual who joins partnership in a representative capacity. " It can

always be considered that he was doing so in his individual capacity. This position has been reiterated by Hon'ble Apex court in the case of Bagyalakshmi & Co. (supra), which has also been relied on by the Ld. CIT (Appeals). Considering the facts of the case, we are inclined to uphold the orders of the CIT (Appeals). The appeals of the Revenue stand dismissed":

12. In View of the above order of the Hon'ble ITAT in the assessee's own case, the appeal of the assessee stands allowed in the hands of the appellant."

Since, the Revenue could not canvass either change in fact or in law, we do not find any reason to interfere with the impugned orders of the CIT(A) as he has applied the decision of this tribunal.

5. In the result, the Revenue's appeals in ITA Nos. 1351, 1352, 1353 & 1354/Chny/2017 are dismissed.

Order pronounced in Open Court on 26th March, 2018 at Chennai.

Sd/-
(जॉर्जमाथन)
(GEORGE MATHAN)
न्यायिकसदस्य/Judicial Member

Sd/-
(एसजयरामन)
(S. JAYARAMAN)
लेखासदस्य/Accountant Member

चेन्नई/Chennai,

दिनांक/Dated: 26th March, 2018

JPV

आदेशकीप्रतिलिपिअग्रेषित/Copy to:

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|------------------------|--------------------------|-----------------------------|
| 1. अपीलार्थी/Appellant | 2. प्रत्यर्थी/Respondent | 3. आयकरआयुक्त) अपील(/CIT(A) |
| 4. आयकरआयुक्त/CIT | 5. विभागीयप्रतिनिधि/DR | 6. गार्डफाईल/GF |