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**(1965) 11 KL CK 0015**

**In the High Court Of Kerala**

**Case No : Writ Appeals No's. 9 and 44 of 1964**

Additional Expenditure Tax Officer, Palghat

APPELLANT

Vs

Venugopala Ravi Varma Raja

RESPONDENT

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**Date of Decision : 05-11-1965**

**Acts Referred:**

Contract Act, 1872 — Section 69, 70

**Citation : (1967) 64 ITR 188**

**Hon'ble Judges : Velu Pillai, J**

**Bench : Single Bench**

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**Judgement**

Velu Pillai, J.—These appeals by the Additional Expenditure-tax Officer, Palghat, are directed against the orders of a learned judge of this court, allowing two writ petitions, O. P. No. 820 of 1962, for quashing the assessment for the assessment year 1958-59, and O. P. No. 1752 of 1962, for quashing the preliminary notices or assessment for the assessment years 1959-60, 1960-61 and 1961-62, under the Expenditure-tax Act (or shortly the Act) of the respondent, who was the Valia Raja of Kollengode, represents the assessee, a Hindu undivided family following the Marumakkathayam law. The respondents predecessor, the Valia Raja, filed a return of expenses incurred by him during account year ended the 31st March, 1958, for the assessment year 1958-59, according to which there was no taxable expenditure, the total expenditure not having exceeded the prescribed limit of exemption. But the appellant, by exhibit P-1 dated 21st March, 1962, included the aggregate of the expenditure incurred by four other members, and a unit, called the Kalari Unit, of the family, in the total expenditure of the assessee, and made an assessment. O. P. No. 820 of 1962 was by the respondent to quash exhibit P-1 O. P. No. 1752 of 1962, also by the respondent, was to quash the preliminary notices referred to and for a writ of prohibition against the appellant, from enforcing the Act, on the ground that section 3, the charging section of the Act, is discriminatory against the Hindu undivided family; the contention of the respondent has been repelled by the Full Bench which heard these writ appeals along with O. P. No. 674 of 1958 and O. P. No. 684 of 1959. The learned single

judge having, as stated, quashed the assessment and the notices, these writ appeals have now come before the Division Bench for final disposal.

2. The appellants learned counsel supported the assessment for the year 1958-59, relying on the provisions of section 4(i) and section 4(ii) of the Act, as they were before their amendment by the Finance Act of 1959. They read as follows:

Unless otherwise provided in section 5, the following amounts shall be included in computing the expenditure of an assessee liable to tax under this Act, namely:

(i) any expenditure incurred, whether directly or indirectly, by any person other than the assessee in respect of any obligation or personal requirement of the assessee or any of his dependents which, but for the expenditure having been incurred by that other person, would have been incurred by the assessee, to the extent to which the amount of all such expenditure in the aggregate exceeds Rs. 5,000 in any year;

(ii) any expenditure incurred by any dependent of the assessee for the benefit of the assessee or of any of his dependents out of any gift, donation or settlement on trust or out of any other source made or created by the assessee, whether directly or indirectly.

It is useful to set out the provisions as they have been amended in the year 1959, not only because they govern the assessments from the year 1959-60 to the year 1961-62, but also because they serve to illustrate the distinction between the two sets of provisions. The amended provisions read as follows:

Unless otherwise provided in section 5, the following amounts shall be included in computing the expenditure of an assessee liable to tax under this Act, namely:

(i) any expenditure incurred, whether directly or indirectly, by any person other than the assessee in respect of any obligation or personal requirement of the assessee or any of his dependents to the extent to which the amount of all such expenditure in the aggregate exceeds Rs. 5,000 in any year:

(ii) where the assessee is an individual, any expenditure incurred by any dependent of the assessee, and where the assessee is a Hindu undivided family, any expenditure incurred by any dependent from or out of any income or property transferred directly or indirectly to the dependent by the assessee.

3. In supporting the assessment, counsel for the appellant relied on both section 4(i) and section 4(ii) and more strongly on the latter. The disputed items of expenditure were incurred by five allottees of the family, that is, by four junior members and by the Kalari Unit stated, out of the income of the properties allotted to them under two karars, exhibit P-5 of the year 1909, and exhibit P-6 of the year 1943. Generally speaking, by exhibit P-5, a Kalari Unit composed of some of the female members of the family and their descendants was constituted, which was to enjoy the properties more or less as a tavazhi, and

under exhibits P-5 and P-6 separate allotments of properties were made to some of the junior members for meeting their expenses, by way of maintenance, education, etc. The appellant made the assessment for the year in question by including in the taxable expenditure of the assessee, the Hindu undivided family, the expenses incurred by them, subject to certain minor exclusions. The question to decide is whether such items fall within the scope of section 4(i) or section 4(ii) of the Act.

4. The conditions to be fulfilled u/s 4(i) so far as relevant are that, (i) the expenditure was incurred by any person other than the assessee, (ii) the expenditure was incurred in respect of any obligation or personal requirement of the assessee, and (iii) the expenditure was such that but for its having been incurred by that other person, would have been incurred by the assessee. Of the three conditions to be fulfilled for section 4(i) to apply, condition (i) presents no difficulty; but we think that in the context of exhibits P-5 and P-6, it has no more any obligation and would not have to incur expenses in that behalf. Thus, after exhibits P-5 and P-6, the expenses incurred by the five allottees do not satisfy conditions (ii) and (iii) in section 4(i), formulated. Section 4(i) is therefore inapplicable to the case.

5. Coming to section 4(ii), the conditions for its application are that, (i) the expenditure should have been incurred by a dependent of the assessee, (ii) it must have been incurred for the benefit of the assessee or of any of his dependents, and (iii) it must have been incurred out of any gift, donation, or settlement on trust, or out of any other source created by the assessee, whether directly or indirectly. A dependent of the assessee, in relation to Hindu undivided family, is defined in section 2(g)(ii) as follows:

2. (g) (ii) Where the assessee is a Hindu undivided family -

(a) every coparcener other than the karta; and

(b) any other member of the family who under any law or order or decree of a court, is entitled to maintenance from the joint family property.

Clearly, the five allottees, including the group members of the joint family constituting the Kalari Unit, must be held to be dependents of the assessee. We feel no difficulty in holding that the first and the third conditions above are satisfied, that is, that the expenditure was incurred by the dependents of the assessee, out of source created by the assessee directly, viz., the allotments under exhibits P-5 and P-6, it being unnecessary to decide whether they amount to a gift, donation, or settlement on trust. The term "any of his dependents" in section 4(ii) was constructed by the learned counsel for the appellant to include even the dependent who incurs the expenditure; in this sense, even the personal expenditure of whatever character, incurred by a dependent, would be within the scope of section 4(ii). Even on plain reading, it strikes us that, though the word "his" in the above term may, in relation to the Hindu undivided family-assessee, be read as "its", the term has reference to some other dependent than he who

incurs the expenditure. The same term occurs in section 4(i); but then the distinction between "any of his dependents" and the person incurring the expenditure is more clearly drawn, by referring to the latter as "that other person". Dealing with the interpretation and meaning of the term as it finds a place in section 4(i), the Gujarat High Court observed thus, in *Darshan Surendra Parekh v. Commissioner of Expenditure-tax*:

Clause (i) of section 4 contemplates an expenditure incurred by a person other than an assessee and that expenditure has to be in respect of an obligation or personal requirement of an assessee or and of his dependents. In other words, the clause contemplates that the person expending is a different person from the one for whom he spends, i.e., an assessee or any of his dependents. It would, therefore, appear that the expenditure incurred by a person other than an assessee as his expenditure for his personal requirement and not as an expenditure for the benefit of an assessee or any of his dependents is not includible under this clause in the expenditure of the assessee family.

The court further observed at page 607 of the report, with specific reference to section 4(ii) "therefore, it is clear that the expenditure contemplated under clause (ii) is one which ensures to the benefit of the person other than the one who spends." With respect we agree. The case of the appellant u/s 4(ii) is that the disputed expenditure was incurred by it, and not for the benefit of any other dependent of the assessee.

6. The next question is what constitutes "benefit of the assessee", within the meaning of section 4(ii) of the Act. The principle underlying section 4(ii) was explained thus by the Gujarat High Court in the case cited:

It would seem that the reason for including such expenditure in the family's taxable expenditure is that, though the assessee has made or created a gift, donation or trust, if the expenditure from out of such gifts is incurred by the dependent donee for the benefit of the assessee or any of his dependents, it is the assessee who derives the benefit of such expenditure and it is again but fair the assessee should bear the burden of the tax. It must also have been appreciated by the legislature that an assessee might desire to reduce his expenditure of the expenditure for his dependents by creating a trust or by making a gift in favour of his dependents and by spending from the income arising from such gift or trust for his benefit or his dependents and thus seek to reduce the incidence of tax upon him. Clause (ii), therefore, seems to have been enacted to prevent such a loophole..... If the dependent incurring an expenditure spends it on himself or for his personal requirement, there is obviously no saving of the expenditure by the family and, therefore, there is no valid reason why that expenditure should be included in the expenditure of the assessee.

In that case, three of the children of the karta incurred expenditure for their education, partly out of the income of certain trust properties. Advertising to this, the court remarked, "it is, therefore, possible to say that the children had

not spent that amount on their education, it would have been spent by the Hindu undivided family."

7. The term "benefit of the assessee" has to be construed in the light of principle underlying section 4(ii) and, in a larger sense, that the expenditure incurred has resulted in a saving of expenses for the assessee, and not in a narrow or pedantic way. The term is not to be limited to such a benefit as would generate a right to reimbursement by the assessee, say under sections 69 and 70 of the Contract Act. Being an expenditure-tax, a saving of expenditure for the assessee may be deemed to be a benefit of the assessee. The test is, whether by expenditure being incurred by a dependent out of a source created by the assessee, there has been a saving of expenditure for the assessee as such. A familiar case is where the ordinary expenses of maintenance of a member, which his joint family has to bear, are met by him out of the income of properties allotted to him by the joint family; this of course is an obvious case. The purchase of an aeroplane or a motor car by the allottee out of the income of the properties allotted may not be held to result in a saving of expenses or benefit to the joint family, unless such a venture was within the scope and intendment of the allotment.

8. In the case before the Gujarat High Court, one of the questions was, as noticed, whether a sum of Rs. 10,321 spent by the children of the karta of the family, out of the income of certain trust properties and of their separate properties, would fall within section 4(i) or section 4(ii) of the Act. Section 4(i) was held not to apply, "since the expenditure was incurred by them for their personal requirements from out of their own grounds, first, that the expenses incurred by the children were on their own behalf and not on behalf of any of the dependents of the family and, secondly, that there was no transfer by the Hindu undivided family in favour of the dependents who incurred the expenditure, the transfer being in favour of the trustee, who under the deed of trust had no power to spend but only to make over the income of the beneficiaries who alone had the power to spend. On the second ground, it did not become necessary for the court to consider whether the expenditure constituted a benefit to the assessee if not for its dependents.

9. We think we have indicated above the approach to be made in applying section 4(i) and 4(ii) to a given case. We think the appellant has not made the correct approach in making the assessment for the year 1958-59. We do not therefore consider it necessary to enumerate or to state which part or parts of the disputed expenditure incurred by the dependents of the respondent would fall within section 4(ii). We have by way of illustration indicated that expenditure on the maintenance of the dependents, within the intendment of exhibits P-5 and P-6, would fall within section 4(ii) of the Act; beyond this, we do not feel called upon to state anything, as it would be hypothetical to do so. Of course, different considerations arise on sections 4(i) and 4(ii) after they have been amended by the Finance Act of 1959. While, therefore, we come to the conclusion that the

order of the learned judge, which has given rise to Writ Appeal No. 9 of 1964, cannot be supported on the grounds on which it is based, we agree with him in quashing exhibit P-1, the assessment order, on the grounds indicated with law, and in the light of the observations made.

10. In Writ Appeal No. 44 of 1964, the provisions applicable are the amended provisions of section 4 which have been extracted above. In O. P. No. 1752 of 1962, out of which this appeal arises, the appellant had not proceeded beyond the stage of issuing notices calling for returns of expenditure. We do not, therefore, think it is necessary to deal with section 4(i) and 4(ii) as amended. The learned judge disposed of O. P. No. 1752 of 1962 on the basis of his order in O. P. 820 of 1962. As that constitutional objection raised to the validity of section 3 of the Act has been decided by the Full Bench, it remains only to set aside the order of the learned judge in O. P. No. 1752 of 1962 quashing exhibit P-1 notice and to direct the appellant to proceed with the assessment proceedings in due course of law, after issuing fresh notices to the respondent.

11. In the result, the orders on O. P. No. 82 of 1962 and O. P. No. 1752 of 1962 are set aside, and these writ appeals are allowed in the manner and to the extent indicated above; we do not order costs in either of the appeals.