

(1992) 01 OHC CK 0013
In the Orissa High Court
Case No : S.J.C. No. 59 of 1985

B.B. Sahu

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 21-01-1992

Acts Referred:

Income Tax Act, 1961 — Section 254, 64, 64(1)

Citation : (1993) 199 ITR 212 : (1992) 63 TAXMAN 462

Hon'ble Judges : S.K. Mohanty, J;A. Pasayat, J

Bench : Division Bench

Advocate : B.K. Mahanti, Bibek Mahanti and G.N. Padhi, for the Appellant; A.K. Ray, for the Respondent

Judgement

A. Pasayat, J.—At the instance of the Revenue, the following questions have been referred to this court for adjudication u/s 256(1) of the Income Tax Act, 1961 (in short "the Act"), by the Income Tax Appellate Tribunal, Cuttack Bench (in short "the Tribunal") :

" (1) Whether, under the facts and circumstances of the case, the learned authorities below are correct in law in including the salary income of the assessee in his hands in place of his wife?

(2) Whether, under the facts and circumstances of the case, the amended provision of Explanation 1 in inserting Clause (ii) by the Finance Act, 1979, coming into effect from April 1, 1980, will apply to the facts of this case, whose accounting year has ended prior to March 31, 1980 ? "

2. From the statement of case, we find that Sri B.B. Sahu thereafter referred to as " the assessee") filed his return of income for the assessment year 1980-81, wherein it was indicated that a sum of Rs. 16,725 received by him as managing director of M/s Sahu Minerals (P) Ltd., had been shown in the hands of his wife, Smt Shila Sahu, and, therefore, was not reflected in his return. Reference was made to Section 64(1)(ii) of the Act to state that since Smt. Shila Sahu had

substantial interest in the company, the salary income was to be included in her hands. This contention was not accepted by the Assessing Officer who was of the view that the salary was earned because of professional knowledge and experience of the assessee and, therefore, the proviso to Section 64(1)(ii) was applicable. In appeal, the Commissioner of Income Tax (Appeals), Orissa, affirmed the conclusion of the Assessing Officer holding that, even if Smt. Shila Sahu was a member of the board of directors and had experience and professional knowledge, the proviso to Section 64(1)(ii) applied and the question of salary earned by the assessee being included in the income of Smt. Shila Sahu did not arise. The assessee's stand as appearing from such contentions was to the effect that it was open to the assessee to include the salary earned by him in the return of income of his wife in terms of Section 64(1)(ii) of the Act. Before the Tribunal, the assessee's stand continued to be the same. The Revenue's stand, as indicated above, was different. The Tribunal, however, proceeded on the basis that, after insertion of the expression "Clause (ii)" in Explanation 1 to Section 64(1) with effect from April 1, 1980, the income specified has to be included in the return of the spouse whose income was higher and, therefore, the income has been rightly assessed in the hands of the assessee. Unfortunately, the Tribunal did not consider the applicability of the proviso on which the departmental authorities based their conclusions. If the proviso has application, the question whether the Explanation 1 as amended with effect from April 1, 1980, would be applicable would be only of academic interest. The Tribunal appears to have made out a new case which was not the case of either the assessee or the Revenue. In that view of the matter, instead of answering the questions referred to us, we direct the Tribunal to rehear the appeal and to adjudicate about the applicability of the proviso to Section 64(1)(ii), as held by the Assessing Officer and the Commissioner of Income Tax (Appeals). Thereafter, if a necessity arises, it shall consider the applicability of the Explanation 1 as amended with effect from April 1, 1980.

3. The reference is, accordingly, disposed of.

S. K. Mohanty, J.

4. I agree.