
(1993) 04 PAT CK 0027
In the Patna High Court
Case No : Taxation Case No. 144 of 1980

Commissioner of Income Tax

APPELLANT

Vs

Ashok Kumar Jalan

RESPONDENT

Date of Decision : 09-04-1993

Acts Referred:

Citation : (1993) 04 PAT CK 0027

Judgement

G.C. Bharuka, J.—This reference has been made by the Tribunal u/s 256(1) of the Income Tax Act, 1961 (hereinafter to be referred to as "the Act" only), seeking the opinion of this court on the following question of law :

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in determining the cost of the shares at the market rate as on December 31, 1969, or it should be taken as nil ?"

2. Adverting first to the relevant facts : The assessee is a Hindu undivided family. The case relates to the assessment year 1975-76. One of the coparceners of the family, Ashok Kumar Jalan, had purchased 23,750 shares in Hindustan Malleable and Forgings Ltd., for a consideration of Rs. 41,875. Thus the cost of acquisition of each share came to Rs. 1.76. On December 31, 1969, he threw the entire shares in the common stock of the assessee family. Out of the total shares acquired by the Hindu undivided family, during the assessment years 1971-72, 1972-73 and 1973-74, 4,500 shares had been sold or gifted. Thus during the assessment year 1974-75, only 19,250 shares were left in its hands. Against these shares, the Hindu undivided family was awarded 19,250 bonus shares thereby totalling the holding at 38,500 shares. These entire shares were sold during the present assessment year for a sum of Rs. 90,000. But the assessee did not show any income by way of capital gains in the return of income filed by it.

3. The Income Tax Officer while making the assessment computed the capital gains in the hands of the assessee-Hindu undivided family by taking the cost of the shares to the assessee to be the same for which these shares had been

acquired by the said Ashok Kumar Jalan and spreading the said cost being Rs. 1.76 per share over the entire holding, worked out the cost of each share at 88 paise in the hands of the assessee.

4. On appeal to the Appellate Assistant Commissioner, the view of the Income Tax Officer was upheld on the reasoning that throwing of the shares in the common stock of the Hindu undivided family amounts to gift within the meaning of Section 49(1) of the Act and, therefore, the cost of the shares to the assessee shall be deemed to be the cost for which Ashok Kumar Jalan had acquired these shares. Against the said order, the assessee preferred a further appeal to the Tribunal. The Tribunal, in view of the decision of the Supreme Court in the case of Goli Eswariah Vs. Commissioner of Gift Tax, Andhra Pradesh, , held that throwing of all shares by coparcener of the family in its common stock does not amount to gift and, therefore, Section 49(1) of the Act has no application to the facts of the present case. The Department also did not dispute this position. But the Tribunal, by placing reliance on the decision of the Supreme Court in the case of Kalooram Govindram Vs. Commissioner of Incometax, Madhya Pradesh, Nagpur, , took the view that the cost of the shares to the assessee should be taken to be the market value of the shares as on December 31, 1969, which was the date on which the shares were thrown into the common stock. It also held that the cost of bonus shares received by the assessee will be determined by spreading it over the cost of the original share as determined above over the original shares and bonus shares. While coming to this conclusion, the Tribunal rejected the plea of the Department that the cost of the shares for working out capital gain in the hands of the assessee-Hindu undivided family should be taken as nil. Thus in the backdrop of these facts the question referred to above has fallen for our consideration.

5. In order to examine the question referred to this court, it is first necessary to understand the true import of the concept of throwing of properties into the common stock of the undivided Hindu family. But in view of the law laid down by the Supreme Court in the case of Goli Eswariah Vs. Commissioner of Gift Tax, Andhra Pradesh, , it is not necessary to enter into any detailed discussion in this regard. In this case, the Supreme Court at page 678 of the Report has held that :

". . . the doctrine of throwing into the common stock inevitably postulates that the owner of separate property is a coparcener who has an interest in the coparcenary property and desires to blend his separate property with the coparcenary property. The existence of a coparcenary is absolutely necessary before a coparcener can throw into the common stock his self-acquired properties. The separate property of a member of a joint Hindu family may be impressed with the character of joint family property if it is voluntarily thrown by him into the common stock with the intention of abandoning his separate claim therein. The separate property of a Hindu ceases to be separate property and acquires the characteristics of joint family or ancestral property not by any physical mixing with his joint family or his ancestral property but by his own

volition and intention by his waiving and surrendering his separate rights in it as separate property. The act by which the coparcener throws his separate property in the common stock is a unilateral act. There is no question of either the family rejecting or accepting it. By his individual volition he renounces his individual right in that property and treats it as a property of the family. No longer he declares his intention to treat his self-acquired property as that of the joint family property, the property assumes the character of joint family property. The doctrine of throwing into the common stock is a doctrine peculiar to the Mitakshara school of Hindu law. When a coparcener throws his separate property into the common stock, he makes no gift under Chapter VII of the Transfer of Property Act. In such a case there is no donor or donee. Further, no question of acceptance of the property thrown into the common stock arises."

6. In view of the above-quoted pronouncements of the highest court, it is now beyond any doubt that the throwing of his separate property by a coparcener in the common stock of his undivided family though it is an unilateral act without involving any consideration, still it does not tantamount to a gift under the Transfer of Property Act. It is a doctrine peculiar to the personal law. Therefore, so far as the family as recipient is concerned, it acquires the property without suffering any cost. Consequently, as a matter of fact, the cost of such an asset to the assessee-Hindu undivided family will be nil.

7. Having reached the aforesaid conclusion, it has to be next examined as to whether under the Act, there is any fiction created by the Legislature to evaluate any notional cost of assets which are thrown by the coparceners in the common stock of the family. Section 49(1) of the Act has set out certain transactions under which the assessee acquires the property in the capital assets without incurring any cost for the same. But by a fiction, the cost to the previous owner of such properties has to be taken as the cost of acquisition of the assessee. I may quote the relevant provisions of Section 49(1) of the Act :

"49, Cost with reference to certain modes of acquisition.--(1) Where the capital asset became the property of the assessee-

(i) on any distribution of assets on the total or partial partition of a Hindu undivided family ;

(ii) under a gift or will ;

(iii) (a) by succession, inheritance or devolution, or

(iv) such assessee being a Hindu undivided family, by the mode referred to in Sub-section (2) of Section 64 at any time after the 31st day of December, 1969,

the cost of acquisition of the asset shall be deemed to be the cost for which the previous owner of the property acquired it, as increased by the cost of any improvement of the assets incurred or borne by the previous owner or the assessee, as the case may be."

8. Clause (iv) of Section 49(1) of the Act was inserted by the Taxation Laws (Amendment) Act, 1975, with effect from April 1, 1976. But it will have its application only in such cases where a coparcener has thrown his separate property into the common stock of the family after December 31, 1969. In the present case, admittedly the shares in question have been impressed with the character of joint family property on December 31, 1969, and, therefore, on a plain reading, this clause is of no consequence to the transaction involved in the present case.

9. Now, it is to be examined whether the throwing of property in the common stock of the family can be said to be falling under any of the first three clauses of Section 49(1) of the Act. Clause (i) deals with the situation of partition of a Hindu undivided family which is not the case here. Clause (ii) takes into account the transfer under a gift or a will. This is also not applicable. Clause (iii) provides for passing of property by succession, inheritance or devolution. Reading these three words ejusdem generis, this can only mean passing of properties in the event of death of the owner. But since some divergent views have been expressed in the various pronouncements of the different High Courts, it is necessary to discuss this aspect at greater length.

10. In the case of Addl. Commissioner of Income Tax Vs. Madan Lal Jain and Sons., , the karta of the assessee-Hindu undivided family had acquired 40 shares in a company out of his own money and later on impressed the same with the character of Hindu undivided family property. Subsequently, in the context of computing capital gains u/s 45 of the Act, a question arose as to what should be taken as the cost of acquisition of the shares in the hands of the Hindu undivided family. The Delhi High Court in this case took the view that the cost of acquisition contemplated by Section 48 of the Act can be the cost of acquisition of the capital asset in someone's hands and not necessarily in the hands of the assessee, as the section does not use the words "to the assessee" after the words "cost of acquisition". It was accordingly held that the cost of acquisition of the shares in the hands of the karta would be the cost of acquisition within the meaning of Section 48 for the purpose of computation of capital gains in the hands of the assessee-Hindu undivided family. Same view has been again reiterated in a subsequent decision in the case of D.N. Nanda and Sons Vs. Commissioner of Income Tax, .

11. The Madras High Court in the case of Commissioner of Income Tax, Tamil Nadu-III Vs. N.S. Krishna Rao, , dealing with a question similar to the one at hand, has taken the view that, "the cost to the assessee-family must, therefore, be ascertained not in the abstract, but with a sense of reality on the basis of what it was in the hands of the coparcener, who has thrown the property in the common stock and the cost in the hands of the coparcener can be the only proper basis for cost in the hands of the assessee family." For coming to this conclusion, reliance has been placed on a decision of the Supreme Court, in the case of D.S. Bist and Sons, Nainital Vs. Commissioner of Income Tax, Delhi

Central, New Delhi, , which was a case relating to computation of depreciation in which certain criteria have been laid down for determining the cost of depreciation of assets for the purposes of the Act.

12. In the case of Commissioner of Income Tax, Gujarat Vs. Ashiwin M. Patel, , it has been held by the Gujarat High Court that, when the shares are thrown by the karta of a Hindu undivided family into the family hotchpot, the cost of acquisition of the shares to the Hindu undivided family for the purpose of computation of capital gains arising from the sale of those shares would be the market value of the share as on the date on which it acquired them. The view so taken is primarily based on a consideration for ascertaining both the capital gains as well as the depreciation, the basic factor being the cost of acquisition of the asset.

13. The Madras High Court in the case of Commissioner of Income Tax Vs. S. Krishnamurthy, , while dealing with a similar question has taken the view that the cost in the hands of the family would be the same as in the hands of the coparcener throwing the property in the common hotchpot. The reason ascribed for taking this view is that the word "devolution" as used in Section 49(1)(iii)(a) of the Act does not denote merely succession on death but includes also a change of ownership between living beings or bodies to another. Therefore, according to the learned judges, the fiction created by the Legislature in the said provision will have its application in the case of throwing of the properties into common hotchpot of the family. I may indicate here that the court while taking this view does not seem to have taken into consideration the reasons assigned by the same High Court in the case of Commissioner of Income Tax, Tamil Nadu-III Vs. N.S. Krishna Rao, .

14. On the contrary, the Bombay High Court in the case of Commissioner of Income Tax Vs. Trikamlal Maneklal (H.U.F.), , has held that where a coparcener throws his capital assets into the hotchpot of the Hindu undivided family, the actual cost of such assets in the hands of the family would be nil. While coming to the said conclusion after referring to the provisions of Sections 45, 48, 49 and 55(2) of the Act and reviewing all the decisions referred to above, it has been held that (at page 736) :

"Capital gains tax is thus levied on the profit or gain that arises on the transfer of a capital asset. This, ordinarily, is the actual profit or gain. It is to be computed by deducting from the consideration received on the sale of the capital asset, inter alia, the cost of its acquisition. Ordinarily, it is the actual cost of acquisition that has to be taken into account. It is only in the specific cases that Section 49 of the Income Tax Act, 1961, provides that such cost is deemed to be the cost at which the previous owner acquired it. The legal fiction created by Section 49 applies only to the situations set out therein. If the situation is not contemplated in terms of Section 49 or 55, the actual cost of acquisition alone can be taken into account. If the actual cost of acquisition is nil, it is that nil figure that must be taken into account.

Upon a plain reading of Sections 45, 48 and 49 of the Income tax Act, 1961, we take the view that the cost of acquisition of the shares by the Hindu undivided family in the instant case must be taken to be nil."

15. I am in respectful agreement with the reasons and conclusions arrived at by the Bombay High Court. Therefore, I am refraining from repeating the reasons for the sake of brevity.

16. Accordingly, in my opinion, the Tribunal was not justified in determining the cost of shares at the market rate on December 31, 1969, and it ought to have taken the same as nil. Though it is not necessary since the Legislature itself has so mandated, still as prayed for by Mr. Jain for the assessee, we are observing that at the stage of passing of the order u/s 260 of the Act, it will be open to the assessee to make such submissions as may be available to him keeping in view the opinion on the question referred to above. No costs.

S. K. Chattopadhyaya, J.

17. I agree.