

(1998) 03 MAD CK 0029

In the Madras High Court

Case No : TC No"s. 31 of 1982, 394 to 399 of 1983, 1075 to 1078 of 1984,
1098 to 1100, 1247 and 1248, 1561 to 1565, 1837 to 1840, 1991,
2064 and 2065 of 1984

COMMISSIONER OF INCOME TAX

APPELLANT

Vs

A.T. BALAKRISHNAN

RESPONDENT

Date of Decision : 18-03-1998

Acts Referred:

Citation : (1998) 148 CTR 618

Hon'ble Judges : P. Thangavel, J;N.V. Balasubramanian, J

Bench : Full Bench

Judgement

N.V. BALASUBRAMAAMAN, J.

In the above batch of tax cases, following questions of law arising under IT Act, 1961 as well as under the WT Act, 1957 for certain assessment

years in respect of some of the assessees have been referred to us for our consideration :

TC No. 31 of 1982 :

1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the property income of Rs. 42,814 assessed by

the ITO in the hands of the assessee individual could not be sustained?

2. Whether the Tribunal's finding that the conversion of property into that of HUF and the subsequent partial partition was genuine is based on

valid and relevant materials and is a reasonable view to take on the facts of the case?

3. Even if the act of conversion of the individual property to HUF property is held to be genuine and valid in law still whether the assessee is not

liable to be assessed in respect of the income attributable to his interest in the converted property as per s. 64(2)(b) of the IT Act, 1961?

TC Nos. 394 to 398 of 1983 and 399 of 1983:

1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that income from a portion of door No. 301, T.H.

Road, Madras allotted to assessee's (Bose) sister Ku. Chandra could not be considered as his income and income from another portion of the

same property allotted to the assessee himself under the partial partition dt. 27th July, 1970 could not be considered as his individual income?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the income arising out of a portion of door No.

301, T.H. Road, Madras really belonged to Smt. Bagyalakshmi Ammal (mother of Sivaprakasam) and therefore, the same cannot be treated as

the income of the assessee?

TC Nos. 1075 to 1078 of 1984

Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the income arising out of a portion of door

number 301, T.H. Road, Madras really belonged to Smt. Bagyalakshmi Ammal, mother of the assessee, and therefore, the same cannot be treated

as the income of the assessee?

TC Nos. 1098 to 1100 of 1984

Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the income from the portion allotted to Ku.

Chandra, the sister of the assessee herein, from door No. 301, T.H. Road, Madras, cannot be considered as the income of the assessee but only

as the income of the said Ku. Chandra?

TC Nos. 1247 & 1248 of 1984:

Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the net wealth of the properties the one No. 301,

T.H. Road, Madras allotted to Ku. Chandra and the other No. 303, T.H. Road, Madras said to belong to Bose Estate cannot be included as the

wealth of the assessee and should be considered as the wealth of Ku. Chandra and Bose Estate?

TC Nos. 1561 to 1565 of 1984

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the value of the two properties (1) 301, T.H.

Road, and (2) vacant site of 5 grounds at 303, T.H. Road, could not be included in the assessee's net wealth but should be considered only in the

hands of Ku. Chandra and Bose Estate (HUF of Bose comprising himself and his wife)?

TC Nos. 1837 to 1840 of 1984 :

Whether, on the facts and circumstances of the case, the Tribunal was right in holding that the value of the property No. 301, T.H. Road, Madras

allotted to Ku. Chandra by a partition cannot be included in the net wealth of the assessee HUF and should be considered in the hands of the said

Ku. Chandra?

TC No. 1991 of 1984 :

Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the income from the portion allotted to Mrs.

Chandra Kanakaraj, sister of the assessee Bose in door No. 301, T.H. Road, cannot be considered as income of the HUF of which the assessee

is the Kartha and should be considered only as income of Mrs. Chandra Kanakaraj and income from another portion of the same property allotted

to the assessee himself under the partial partition from 27th July, 1970 could not be considered as his individual income?

TC Nos. 2064 & 2065 of 1984:

Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that income from a portion of door No. 301, T.H.

Road, Madras allotted to assessee's sister Ku. Chandra could not be considered as his income and income from another portion of the same

property allotted to the assessee himself under the partial partition from 27th Nov., 1970 could not be considered as his individual income?

2. The resume containing the names of the assessee, assessment years involved and points involved are summarised as under..

TC No. 31 of 1982: Late Sri A.T. Balakrishnan (individual)-Asst. yr. 1971-72. Property income Rs. 42,814.

TC Nos. 394 to 398 of 1983 : B. Bose (Individual)-Asst. yrs. 1971-72 to 1973-74- Income from a portion of door No. 301, T.H. Road, Madras

allotted to the assessee's sister, Kumari Chandra, in the partial partition dt. 27th

July, 1970 Income from another portion of the same property

allotted to the assessee Whether to be included in the assessment of the individual or HUF of the assessee described as "Bose Estate".

TC No. 399 of 1983 - B. Sivaprakash (individual)-Asst. yr. 1972-73-Income from a portion of Door No. 301, T.H. Road, Madras allotted to

the assessee's mother Smt. Bhagyalakshmi Ammal in the partial partition.

TC Nos. 1075 to 1078 of 1984 : B. Sivaprakash (Individual)-Asst. yrs. 1971-72 to 1974-75-Income from a portion of Door No. 301, T.H.

Road, Madras, allotted to the assessee's mother Smt. Bhagyalakshmi Ammal in the partial partition.

TC Nos. 1098 to 1100 of 1984 : B. Bose (Individual)-Asst. yrs. 1977-78 to 1979-80-Income from a portion of door No. 301, T.H. Road,

Madras, allotted to the assessee's sister, Kumari Chandra.

TC Nos. 1247 & 1248 of 1984 : B. Bose (Individual) (Wealth-tax)-Asst. yrs. 1976-77 to 1977-78-Portion of the property at Door No. 301,

T.H. Road, Madras, allotted to the assessee's sister Kumari Chandra, -another portion of the property allotted to the assessee-Whether to be

included in the individual assessment or in the HUF described as "Bose Estate".

TC Nos. 1561 of 1565 of 1984 : B. Bose (Individual) (Wealth-tax)-Asst. yrs. 1971-72 to 1975-76-Portion of the property at Door No. 301,

T.H. Road, Madras, allotted to the assessee's sister Kumari Chandra, -Another portion of the property allotted to the assessee-Whether to be

included in the individual assessment or in the HUF described as "Bose Estate".

TC Nos. 1837 to 1840 of 1984 : Bose Estate (HUF) (Wealth-tax)-Asst. yrs. 1971-72 to 1974-75-Portion of the property at Door No. 301, T.H.

Road, allotted to Kumari Chandra.

TC No. 1991 of 1984 : Bose Estate (HUF)-Asst. yr. 1976-77-Income from a portion of the property at Door No. 301, T.H. Road, Madras

allotted to Kumari Chandra.

TC Nos. 2064 & 2065 of 1984 : B. Bose (Individual)-Asst. yrs. 1974-75 and 1975-76-Income from a portion of Door No. 301, T.H. Road,

Madras, allotted to the assessee's sister Kumari Chandra in the partial partition dt. 27th July, 1970-Income from another portion of the same

property allotted to the assessee-Whether to be included in the assessment of

the individual or HUF of the assessee described as "Bose Estate".

3. The facts leading to the batch of tax cases are as under.. There was one P.M.A. Thangappa Nadar who was a merchant carrying on his

business at Chennai. He had some extensive properties at Chermai and there were some disputes regarding the ownership of the properties. The

said Tharigappa Nadar claimed that the properties were his self-acquired properties, and on 20th June, 1955 a deed of compromise-settlement

was executed in which, the properties were allotted to his sister and his two sons, and in the deed, inter alia, it was described that late Thangappa

Nadar had acquired all the properties and he was the absolute owner of the properties. The genealogy of the family of Thangappa Nadar reads as

under :

Late P.M.A. Thangappa Nadar (died on 22nd Oct., 1960)

A.T. Balakrishnan (son) Bagyalakshmi (his wife)

Late A.T. Audimuthu (son) Jayalakshmi (his wife-issueless)

Son B. Bose Son two daughters

Mala Bose (wife) Sivaprakash (i) Jothi

Madan Mohan (ii) Chandra

(son of Bose).

Thangappa Nadar died on 22nd Oct., 1960 intestate. On his death, the properties retained by Thangappa Nadar after the execution of the deed of

compromise-settlement, passed to his sons who treated the same as HUF properties. Certain properties were sold by his sons, viz., A.T.

Balakrishnan and A.T. Audimuthu. Balakrishnan also sold some of the properties after the death of A.T. Audimuthu with the approval of

Audimuthu's wife. The second son A.T. Audimuthu died on 5th March, 1964 issueless and his wife Jayalakshmi survived him. At the time of his

death, he had the following properties.

1. Properties derived absolutely under the deed of compromise-settlement deed dt. 20th June, 1955. 301, Tiruvothiyur High Court (for short,

"T.H. Road") and 1/89, 2/89 and 88, 3rd Line Beach.

2. Share in the properties which devolved on the death of his father Thangappa Nadar on 22nd Oct., 1960. 27, T.H. Road and land and garden at

300 T.H. Road-

The above properties devolved on his wife Jayalakshmi and she settled the absolute interest over the property situate at No. 301, T.H. Road, in

favour of Bose, son of A.T. Balakrishnan. She also released her interest over the properties at Nos. 27 and 301 T.H. Road in favour of A.T.

Balakrishnan by way of a release deed dt. 16th Feb., 1966 and for a consideration of Rs. 5,000. The said A.T. Balakrishnan executed deeds of

settlement on 24th Sept., 1966, 1st Nov., 1966 and 2nd Nov., 1966 and under the above settlement deeds, he settled a portion of door No. 301,

T.H. Road, Madras in favour of his two sons, viz., Bose and Sivaprakash. Subsequently, on 24th March, 1967, by a deed of partial partition

entered into between Balakrishnan, Bose and Sivaprakash, the above mentioned property was said to be allotted to their share. The ITO has

recognised the said partial partition by his order dt. 31st Jan., 1970 w.e.f. 1st Nov., 1966. The effect of the action taken by the parties described in

the preceding paragraphs reads as under:

(A) A.T. Balakrishnan continued to have the following properties received by him under the deed of compromise settlement dt. 20th June, 1955:

(a) As absolute owner..

(i) 302 and 303 T.H. Road,

(ii) 24, Kalmandapam Road,

(iii) 12, Ill Line Beach

(iv) 304, T.H. Road.

As life interest along with his wife and Jayalakshmi, widow of his brother Audimuthu:

(i) House at West Car Street, Virudhunagar.

(ii) 7, Singara Garden, III Lane.

(B) Jayalakshmi possesses life interest along with other properties mentioned at (i) and (ii) of (b) above, also in 1/89, 2/89 and 88, 111 Line

Beach.

(C) Bose, son of A.T. Balakrishnan got the following properties..

(i) 301, T.H. Road, from Jayalakshmi.

(ii) Part interest in the remainder in the properties at West Car Street, 7, Singara

Garden III Lane and full interest in 1/89, 2/89 and 88, M Line Beach and in the building on leasehold land.

(iii) Part of 301, T.K Road on partial partition.

(D) Sivaprakash, another son of A.T. Balakrishnan, got the following properties, which were first blended with the character of joint family

properties:

(i) 302, T.H. Road, and 303 T.H. Road of A.T. Balakrishnan.

(ii) 301, T.H. Road, of Bose and Sivaprakash".

4. On 25th July, 1970, an instrument of declaration was executed by A.T. Balakrishnan declaring that the property situate in No. 303 T.H. Road

was his absolute property vested with him by a deed of partition dt. 23rd July, 1959 between himself and his brother Audimuthu and he threw the

said properties to the family hotchpotch consisting of his sons Bose and Sivaprakash, his wife, Bagyalakshmi and his unmarried daughter, Kumari

B. Chandra. Similarly, his son Sivaprakash executed a separate deed of declaration whereunder certain properties were thrown to the family

hotchpotch. So also, his another son Bose also executed a separate deed of declaration and in the said deed of declaration, the property situate at

No. 303, T.H. Road and a portion of the property in No. 301 T.H. Road were thrown to the joint family. In other words, the properties which

were allotted to Bose and Sivaprakash in the partial partition dt. 24th March, 1967 were thrown back to the family. On 27th July, 1970 a deed of

partition was entered into between Balakrishnan, his sons Bose and Sivaprakash and other family members, his wife Bagyalakshmi and his

unmarried daughter Kumari Chandra, whereunder the properties in 301 and 303, T.H. Road were divided and certain properties were allotted to

the wife of Balakrishnan to be enjoyed by her during her life time and certain other properties were allotted to his daughter Chandra to be enjoyed

by her during her life time. The properties described in Schedules A and G were allotted to the share of Sivaprakash and the properties described

in Schedule E.F.G., a portion of the property situate in Schedule-A and a portion of the property bearing No. 301, T.H. Road were allotted to the

share of Bose. Bose got married in the year 1970 and Bose claimed that the income from the property No. 301 T.H. Road allotted to Chandra

should not be included in his hands and he claimed that he and his wife constituted an HUF and the income from the property, No. 301, T.H.

Road should be considered as the income of his joint family and should not be included in his assessment.

5. Sivaprakash, an unmarried individual also claimed that the income derived from a portion of the properties which had been allotted to his mother

Bagyalakshmi Ammal should not be included in his individual assessment. A.T. Balakrishnan, the father of Bose and Sivaprakash claimed that on

27th July, 1970, there was a partial partition between the assessee, his sons, his wife and his unmarried daughter and the properties described in

Schedule A to C which were separate properties of A.T. Balakrishnan and his two sons and which were thrown into the hotchpotch of the family

were divided by way of partial partition among the members of the family viz., Sivaprakash, Bose, Bagyalakshmi and Chandra. According to

Balakrishnan, he did not take any share of the income from the properties belonging to him which were thrown into the family and divided

subsequently and the properties ceased to belong to him and therefore, no part of the income is includible in his assessment. The ITO as well as the

WTO included the income from the properties and assets originally belonged to Balakrishnan, Bose and Sivaprakash in their respective hands. It is

not necessary to set out the assessment results with reference to each of the members, but it is sufficient to notice the facts found in Balakrishnan's

case for the asst. yr. 1971-72 which is the subject-matter of tax case reference in TC No. 31 of 1982. It is not disputed that the decision to be

given in the above case would govern the other matters also.

6. A.T. Balakrishnan (hereinafter to be referred to as "the assessee") has filed the return for the asst. yr. 1971-72 on 4th Nov., 1971. He admitted

an income of Rs. 41,652. Then, he filed a revised return on 27th March, 1972 admitting an income of Rs. 11,505. The assessee filed the revised

return to consider the income from lease of the mill under the head "business" as against the head "other sources" admitted in the original return.

The ITO found that the income from the properties was admitted at Rs. 14,916 which showed a fall in the income as compared to the income

assessed under the same head in the prior years. The assessee did not admit the income in respect of residential portion of the properties. The

assessee explained that on 25th July, 1970, he made a declaration along with his sons throwing some of their individual properties to the

hotchpotch of the family and the partial partition took place thereafter. According to him, the share of the properties were allotted to the members

of the family. He produced the partition deed also. The ITO found that the shares were allotted to two sons, wife and daughter of the assessee and

no share was given to the assessee. The ITO held that the arrangements were only to give a share to the wife and daughter from out of the

properties belonging to the assessee and his sons without the transaction being subjected to any tax under GT Act. He, therefore, held that the

arrangement was not a genuine one and therefore, ignored the declaration and the deed of partition effected and the income from the entire

properties was to be assessed in the hands of the assessee.

7. The assessee went in appeal before the AAC. The AAC noticed the events that led to the declaration as well as the partial partition. He held

that there was no claim for the partial partition in terms of s. 171 of the IT Act and when there was no order under s. 171 of the IT Act, the

individuals have no right to plead partition either partial or total in so far as individuals' assets are concerned. He also held that the ITO had

assessed the joint family income in the hands of the individual assessee as he had no occasion to hold that the partial partition was genuine and

unless such a finding was recovered, the ITO was justified in not admitting the claim of merger and partial partition. He held that he had noticed the

joint family filed its return for the asst. yr. 1971-72, the relevant period ended on 30th March, 1972, on 4th Nov., 1971 and the omission to make

a claim for partial partition in the return at the time of filing the return on 4th Nov., 1971 led to the conclusion that the claim was not true or genuine

and the ITO was justified in ignoring the claim for merger of properties and the partial partition.

8. The assessee carried the matter in appeal to the Tribunal. Before the Tribunal it was contended on behalf of the assessee that the assessee was

entitled to throw his self-acquired properties into the hotchpotch of the family and on the same date when the assessee executed the deed of

declaration, his sons, Bose and Sivaprakash threw some of the properties described in B and C Schedules to the instrument of declaration to the

hotchpotch of the joint family and on 27th July, 1970, a partial partition was effected between the members of the family consisting of the assessee, his sons, his wife and his minor daughter in respect of the properties thrown by the assessee and his sons to the hotchpotch of the family. It was, therefore, contended on his behalf that by throwing into the hotchpotch the properties and by the subsequent partial partition, the properties ceased to belong to him and the income from the properties should not be included in his individual assessment. It was also submitted on behalf of the assessee that non-filing of application under s. 171 of the IT Act would not enable the ITO to include the income from the properties as they ceased to have belonged to him. It was also submitted that the claim for recognition of the partial partition was made on 28th Feb., 1974 before the receipt of the assessment order for the asst. yr. 1971-72. It was fairly conceded that since the assessee had thrown the properties to the hotchpot after 31st Dec., 1969, the provisions of s. 64(2)(b) of the IT Act would apply to the income derived from the converted properties received by the spouse or minor son on partition and that income could be clubbed with that of the assessee's income and not the entire income from the properties. Before the Tribunal, on behalf of the Revenue, it was submitted that there was nothing to show that there was a partial partition on 27th July, 1970 and in the absence of any order under s. 171 of the IT Act, the income derived from the entire properties could be assessed in the hands of the assessee. He also submitted that under s. 64(2)(b) of the IT Act, the entire properties should be deemed to belong to the assessee and the income derived from the properties is includible in the hands of the assessee. The Tribunal held that under the instrument of declaration, the assessee had abandoned all his separate rights over the properties and impressed the said properties with the character of joint family properties. The Tribunal, therefore, held that the assessee ceased to be the owner of the properties mentioned in Schedule-A. The Tribunal also held that the partial partition dt. 27th July, 1970 was genuine and valid and the genuineness of the partial partition deed cannot be questioned on the ground that the family had possessed substantial properties even undivided. The Tribunal also held that the non-recognition of the partial partition would not attract the provisions of s. 171 of the IT Act. The Tribunal proceeded on the basis that notwithstanding the fact that there was

no order under s. 171 of the IT Act, the partition total or partial, had taken place and the liability of the members had to be computed in

accordance with the property allotted to them in the partition. The Tribunal also held that the income arising from the converted properties,

received by the spouse or minor son on partition which shall be deemed to arise to the spouse or the minor son from the assets transferred would

arise indirectly to the assessee and directed the ITO to include such income in the hands of the assessee and modify the assessment.

9. The order passed by the Tribunal in Balakrishnan's case was followed by the Tribunal in other cases, and the questions of law set out earlier in

various tax cases have been referred to by the Tribunal.

10. Mr. J. Jayaraman, learned senior counsel for the Department, submitted that the declaration as well as partial partition cannot be said to be

genuine. He submitted that there was no physical distribution of properties and the Tribunal committed an error in law in holding that there was no

need to pass an order under s. 171 of the IT Act. He submitted that there was no need to redistribute the properties which were already allotted to

Bose and Sivaprakash and therefore, there was no need to throw the properties by the assessee, Bose and Sivaprakash to the joint family for the

benefit of the joint family members. He submitted that the joint family filed the return on 4th Nov., 1971 and in the return filed by the joint family,

the family had not claimed that there was a partial partition on 27th July, 1970 and it was only after the enquiry was set on foot in the individual

assessment with regard to A.T. Balakrishnan, a revised return was filed on 27th March, 1972 and only after the enquiry was made regarding the

reduction in the returned income from the properties, the assessee produced the documents. He submitted that if the view of the Tribunal that the

partition can be regarded as genuine because the properties were converted in favour of the joint family is accepted, the HUF would have shown

the income from the properties in its return. He, therefore, submitted that the two documents are liable to be ignored and the income is liable to be

assessed only in the hands of the assessee. He also submitted that. even assuming that the assessee treated the properties as joint family properties

by throwing the properties into the joint family hotchpot, the assessee by his own conduct, has attracted the provisions of s. 64(2) of the IT Act

and before the Tribunal though the point was raised, it has not considered the question. He submitted that even though under the provisions of s.

20 of the WT Act, there was no need to recognise a partial partition as the provisions for recognising the partial partition under the WT Act came

into force by s. 20A of the WT Act introduced by the Finance (No. 2) Act, 1980 w.e.f. 1st April, 1980, there must be an order recognising the

partial partition under s. 171 of the IT Act. He submitted that the view of the assessee that the throwing into the family hotchpot and the partition

happened in the same year and therefore, an order under s. 171 of the Act is not required to be passed is incorrect in law. He also referred to a

decision of the Supreme Court in *Kalwa Devadattam and Others Vs. The Union of India (UOI) and Others*, .. , and submitted that though the

deed of partition was executed and registered, mere execution of the deed is not decisive of the question whether it was intended to be effective.

The learned senior counsel for the Revenue submitted that the circumstances that a deed of partial partition was executed immediately after the

execution of the deed of declaration throwing the properties into the joint family hotchpot and there was no claim by the joint family that there was

a partial partition and some of the properties were allotted to the sons clearly show that the partial partition and the deed of declaration were only

sham and nominal documents and the Tribunal was not right in holding that the deeds were genuine documents. He also referred to the decision of

the Supreme Court in *Kalloomal Tapeswari Prasad (HUF), Kanpur Vs. Commissioner of Income Tax, Kanpur*, , and submitted that unless the

partial partition was recognised by an order under s. 171 of the IT Act, the income from the properties has to be included in the total income of the

HUF by virtue of s. 171 of the IT Act.

11. Mr. Janarthana Raja, learned counsel for the assessee, on the other hand, submitted that the assessee had filed the return on 4th Nov., 1971

and he had not shown the entire income in the return filed on 4th Nov., 1971. He submitted that the assessee has a right to throw his individual

properties to the joint family hotchpot as a member of the joint family. He submitted that the assessee had thrown his properties to the joint family

hotchpot and his intention is manifest from the deed of declaration. He also submitted that there were transactions relating to the family members

right from the year 1959 and the deed of declaration as well as the deed of partial partition cannot be looked into in isolation, but has to be seen in

the light of the events that happened to the family from the year 1959 and since there were a number of transactions in the family, it was not

uncommon for the members to resort to this transaction. He also submitted that since the deed of declaration as well as the deed of partial partition

took place in the same year, it was not necessary for the joint family to file an application for recognition of the partial partition effected on 27th

July, 1970. He, therefore, submitted that it is not an isolated transaction and therefore, the income, in any event, cannot be included in the individual

assessment of the assessee.

12. We have carefully considered the submissions of the learned counsel for the parties. We have already set out the facts in detail. In so far as the

deed of declaration is concerned, the deed reads as under:

"Instrument of Declaration, 25th July, 1970 : I, A.T. Balakrishnan, Hindu, aged about 45 years, son of P.M.A. Thangappa Nadar, residing at No.

303, Tiruvottiyur High Road, Madras-81, and now at No. 7, Shanmugam Pillai Lane West Car Street, Virudhunagar, do hereby solemnly declare

and sincerely affirm by this Instrument of Declaration as follows:

The property, vacant land and superstructure comprised as a portion of the property bearing door No. 303, Tiruvottiyur High Road, Madras-81,

marked in green colour in the blueprint, attached herewith to the extent of 13 grounds and 1200 sq. ft. comprised in R.S. No. 4056 more fully

described in Schedule herein is part of my absolute ownership vested on me vide Deed of Partition dt. 23rd July, 1959 between myself and my

younger brother Authi Muthu, now deceased. I have this date thrown the said portion of the property, Schedule A herein into the family hotchpot

and blended it with the joint Hindu family property and abandoned all my individual claims and rights and interest over the same and hereafter hold

the said property as Kartha of my Hindu Joint family.

My joint family now as on date consists of myself, my two sons, viz., B. Bose and B. Sivaprakasam as coparceners and my wife Bagyalakshmi

Ammal and my unmarried daughter Ku. B. Chandra, its female members thereof.

The family hotchpotch hereafter this date includes the said property along with its joint Hindu family properties now already in enjoyment by the

family.

I have made the present declaration out of free will and full consent with the intention to impress on my separate and individual property to the

extent described in Schedule A, the character of the Hindu joint family property.

I solemnly further declare that hereafter this date the said immovable property more fully described in the schedule hereunder and declined in the

blueprint in green colour belong to the Hindu joint family and I hold the said property as Kartha of the family and I have abandoned all my

individual rights whatsoever.

Schedule-A: Vacant land and superstructure being a portion of the property bearing door No. 303, Tiruvottiyur High Road, Madras-81, marked

in green colour in the plan attached herewith, comprised of R.S. 4056 in extent of 13 grounds and 1200 feet bounded on the north by R. S. No.

4056/1, on the west by the Tiruvottiyur High Road, in the south by the property of the blender bearing No. 4056/2 and on the east by common

passage 25 feet wide with right to ingress and egress with no obstructions whatsoever, situate within the subregistration districts of Madras and

registration district of Madras - Chengleput "".

13. A careful perusal of the deed of declaration clearly shows that the assessee had abandoned all the interests in the properties mentioned in the

Schedule to the deed of declaration and impressed the properties with the character of the joint family properties. A perusal of the deed shows the

intention of the parties was to treat the separate properties as joint family properties and when the intention is manifestly clear from the deed of

declaration, we are of the opinion that the deed has to be given full effect to. Mr. J. Jayaraman, learned senior counsel for the Department,

submitted that when the joint family filed the return on 4th Nov., 1971 for the asst. yr. 1971-72, it did not make any mention about the declaration

and the subsequent partial partition and it was only after the enquiry was made, the documents were produced by the assessee. It is true that when

the joint family filed the return on 4th Nov., 1971, the family did not claim that the properties were thrown into the hotchpot of the joint family and

also about the partial partition. But, the assessee in his individual capacity filed a return on 4th Nov., 1971 for the same asst. yr. 1971-72 and a

revised return was filed on 27th March, 1972. The revised return was filed to

consider the income of lease under the head "business" as against the head, "other sources" as admitted in the original return. It shows that the assessee had admitted the lesser income under the head, "properties" in the original return filed on 4th Nov., 1971. Though the enquiry was initiated against the assessee in his individual capacity, it is clear that right from the beginning, the assessee had not shown the income of the properties as his own and it can only be on the basis that the properties were joint family properties. Secondly, it is also not clear whether the joint family had admitted the income from the properties which were thrown into the joint family as part of its income. Naturally, it could not have filed the return admitting the income in view of the subsequent partial partition. Therefore, we are of the view that mere fact that after the enquiry was initiated, the assessee had produced the deed of declaration would not be sufficient to doubt the deed of declaration.

14. The ITO has not gone into the question whether the subsequent conduct of the parties in any way contradicted their stand as to the execution of the deed of declaration as well as the deed of partial partition. The ITO has not examined the surrounding circumstances, subsequent dealings of the properties, conduct of the parties, how the properties were used and other relevant factors to consider whether the deed of declaration was genuine or not and in the absence of any such enquiry by the ITO to the effect that the assessee was subsequently dealing with the properties of his own, it is not permissible for the ITO to hold that the deed of declaration was not genuine. No doubt, as held by the Supreme Court in *Kalwa Devadattam vs. Union of India* (supra), mere execution of the declaration is not decisive on the question whether it was intended to be effective.

But, there must be a clear evidence to show that the properties were under the enjoyment of the assessee even after the deed of declaration or he had any interest or, has exercised control over the properties even after the deed of declaration. There must be a clinching evidence to show that the deed of declaration was a sham transaction. In the absence of any evidence and merely on the basis of the failure of the joint family to prefer a claim for partial partition under s. 171 of the Act, it is not open to the ITO to hold that the deed was not a genuine one and it was a sham document. We are, therefore, of the view that the Tribunal was correct in holding

that the assessee on the execution of the declaration, had ceased to be the owner of the properties mentioned in the deed of declaration.

15. The Tribunal also held that the partial partition effected on 27th July, 1970 by a registered deed in document No. 4630170 was also valid. It is

well-settled that a partition in the joint family need not be equal and the position is wellsettled by the decision of the Supreme Court in the case of

CGT vs. N.S. Getti Chettiar 1972 CTR (SC) 349 : (1972) 82 ITR 599 .. . The ITO rejected the claim of the assessee that the partition was

genuine on the ground that the assessee had not retained any share in the properties mentioned in the partial partition. But, in our opinion, that is not

a ground to reject the claim on partial partition. It must be remembered here that it was a case of partial partition and the finding of the Tribunal is

that there are other properties of the joint family which were available for partition. Secondly, in the earlier settlement and in the earlier partition, the

properties were allotted only to the male members of the family. Subsequently, all the properties were converted into joint family properties and

certain properties were also allotted to female members. So, the mere fact that the assessee was not given any share in the subsequent partition

would not invalidate the partial partition as it is open to the members to divide the properties of the joint family not strictly in accordance with their

shares and it is not open to the ITO to impose his own view of justness at the time of partial partition. Furthermore, we have seen that it is only a

partial partition and even if some properties were not allotted towards the assessee's shares, that could be made up in the final partition of other

family properties. Therefore, the mere fact that no property was allotted to the assessee is not a ground to reject the partial partition and we hold

that the Tribunal has committed no error in holding that the partial partition effected between the members of the family as per registered deed of

partial partition was a valid one.

16. The next question that arises is whether there should be an order recognising the partial partition under s. 171 of the IT Act. The Tribunal held

that since the properties had gone out of the joint family and even without an order recognising the partial partition, the income from the properties

cannot be assessed in the hands of the joint family. The above view of the Tribunal is clearly erroneous in law in view of the decision of the

Supreme Court in *Kalloomal Tapeswari Prasad (HUF) vs. CIT (supra)*, wherein the Supreme Court held that unless an order recognising the total

or partial partition under s. 171 of the Act was made the income from the property had to be included in the total income of the joint family by

virtue of s. 171 of the IT Act. The reasoning given by the Supreme Court is that so long as the finding is not recorded under s. 171 of the IT Act,

holding that when the partial partition took place, the HUF shall be deemed for the purpose of IT Act to be the owner of the property which is the

subject-matter of partition and also recipient of the income of the property and the relevant passage of the apex Court reads as under:

"We have already held that s. 171 of the Act applies to all partitions-total and partial-and that unless a finding is recorded under s. 171 that a partial

partition has taken place, the income from the properties should be included in the total income of the family by virtue of sub-s. (1) of s. 171 of the

Act. The put it in other words, what would have been the position of an HUF, which had claimed in assessment proceedings under the 1922 Act

that a total partition had taken place and had failed to secure a finding to that effect in its favour under s. 25A thereof, would be the position of an

HUF, which has failed to substantiate its plea of partial partition as regards property under s. 171 of the Act. The property which is the subject-

matter of partial partition would continue to be treated as belonging to the family and its income would continue to be included in its total income

until such a finding is recorded. That is the true effect of s. 171(1).

17. The Supreme Court in the case of *ITO vs. Smt. N.X. Sarada Thampatty* (1990) 89 CTR (SC) 154(1991) 1871TR 696 (SC) and in *R.B.*

Tunki Sah Baidyanath Pd., Saraiyaganj, Muzaffarpur Vs. Commissioner of Income Tax, Bihar-I, Patna, , reiterated the proposition of law laid

down in *Kalloomal Tapeswan Prasad (HUF) vs. CIT (supra)* and held that s. 171 of the IT Act created a deeming fiction of the continuance of the

HUF except where a finding of partition is passed in respect of the concerned HUF and before recording that finding the ITO has to undertake an

enquiry on the question whether there was a total or partial partition among the joint family members and he must also record a finding as to the

date on which that partition took place. The Supreme Court held that in view of the express language of s. 171 of the Act, the HUF would be

liable to be taxed as undivided, notwithstanding the effect of s. 14(1) of the Hindu Succession Act, 1956. The Court held that the underlying idea

of s. 171 is that unless an enquiry was undertaken and the existence of the total or partial partition, as the case may be, is found as a fact and

recorded along with the particulars in respect of the date of partition, the HUF would continue as if there had been no change in the situation for

the purpose of the IT Act. The above proposition of law stated by the apex Court was again followed by the Supreme Court in the case of

ADDITIONAL COMMISSIONER OF Income Tax Vs. MAHARANI RAJ LAXMI DEVI., and the Supreme Court held that notwithstanding

the effect of s. 6 of the Hindu Succession Act, as far as the IT Act is concerned, the matter has to be governed by s. 171 of the Act and the

property devolved on the legal heir cannot be excluded for the purpose of Income Tax for the assessment of the income of the HUF. The above

decision of the Supreme Court make it clear that the order regarding a partition, whether partial or total, and date on which the partition took place

is imperative and is a sine quo non for leaving the income from the assessment of the HUF and in the instant case, the AO had not passed an order

under s. 171 of the IT Act recognising the partial partition, but the effect of which, in any case, would be that the income from the properties

cannot be assessed in the hands of the individual members of the family.

18. Therefore, in view of the categorical pronouncement of the Supreme Court in the aforementioned cases, the view of the Tribunal that the order

under s. 171 of the IT Act need not be passed for partial partition is not sustainable in law. We also do not accept the contention urged by the

learned counsel for the assessee that since the throwing into hotchpot and partial partition took place in the same year, there is no need to pass an

order under s. 171 of the IT Act. In our opinion, this contention overlooks the fact that there was already an existing joint family and it was hitherto

assessed as such and, therefore, when some of the properties became the joint family properties, the family has a duty to account for the same, and

therefore, it is necessary to obtain an order under s. 171 of the IT Act, if there is a partition-total or partial-subsequently. Though we are not able

to agree with the view of the Tribunal that the order under s. 171 of the IT Act is not required to be passed, still on the facts of the case, we are of

the view that the income from the properties cannot be included in the hands of the assessee individual as was done in this case. The Tribunal

noticed the arguments of the assessee that on 28th Feb., 1974, the claim for partial partition was made even before the receipt of the order of the

assessment for the asst. yr. 1971-72. It is not clear whether any order was passed recognising the partial partition or not. We have also noticed

that. the tax case references arise under the provisions of IT Act as well as under the WT Act. We have already seen that under s. 20 of the WT

Act, there is no necessity to pass an order recognising the partial partition as the provisions of s. 20 of the WT -act are applicable only in the case

of total partition of the properties of the HUF. Sec. 20A of the WT Act deals with the partial partition of the HUF and it was introduced in the WT

Act only by Finance (No. 2) Act, 1980 w.e.f. 1st April, 1980 and for the assessment year under consideration, the provisions of s. 20A of the

WT Act have no application. Even if we direct the matter to the Tribunal directing the Tribunal to remit the matter to the ITO to consider the

application filed on 28th Feb., 1974, that would not help the Revenue in so far as the reference under WT Act is concerned. The Tribunal also

recorded a finding that the partial partition entered into on 27th July, 1970 was valid and genuine one. It is also seen from other orders of the

Tribunal that the properties were allotted in accordance with the shares specified in the deed

of partial partition. The Tribunal referred to Schedules A to G and held that the properties were allotted to the parties covered under the partial

partition separately under the above partition agreement. Further, the joint family is also not before us. Therefore, we find that though there was no

order recognising the partial partition and in view of the fact that we are concerned with the asst, yr. 1971-72 onwards, no useful purpose would

be served by remitting the matter to the Tribunal to direct the ITO to consider the question whether the partition can be recognised under s. 171 of

the IT Act, particularly when we are upholding the order of the Tribunal that partial partition was genuine and valid and there is no necessity to

recognise the partial partition under s. 20 of the WT Act. Therefore, we are upholding the order of the Tribunal, though we do not agree with the

view of the Tribunal that the order under s. 171 of the IT Act need not be passed recognising the partition.

19. That apart, we are concerned in the tax case references with the assessment of income of various assessees in their individual assessments and

if we hold that the order under s. 171 of the IT Act should be passed, it would create further difficulties in making the assessment in respect of

income of the joint family as it is not clear whether the income from the properties were included in the assessments of the joint family either by the

ITO or WTO resulting in upsetting the entire assessment proceedings nor several years. Considering all these aspects, we are of the view that the

income from the properties cannot be included in the individual assessments of the assessee for various assessment years under consideration.

20. It is now necessary to consider one other aspect that is raised by the learned senior counsel for the Revenue. He referred to the provisions of

s. 64 of the IT Act and submitted that the Tribunal was in error in not considering the effect of the provisions of s. 64(2)(b) of the IT Act. We

agree with the criticism made by the learned senior counsel that the Tribunal has not considered the effect of s. 64(20) of the Act. The Tribunal, no

doubt, directed the ITO to include the income arising from the spouse of the assessee in the hands of the

assessee on the ground that the provisions of s. 64(2)(c) of the IT Act are attracted. The Tribunal apparently has not proceeded to consider the

provisions of s. 64(2)(b) of the IT Act on the basis that s. 64(2)(b) of the IT Act would apply only where the properties continued to remain with

the joint family and not subjected to partition subsequently. We have already seen that the joint family in which the assessee, A.T. Balakrishnan,

was the Kartha consisted of his sons, wife and his daughter, Chandra. It is also not clear whether the daughter was a minor during the relevant

accounting years and the Tribunal apparently proceeded on the basis that since the income of the wife was directed to be included under s. 64(2)

(c) of the IT Act and there being no minor sons, there was no need to give any further direction. The Tribunal, no doubt, should have considered

the provisions of s. 64(2)(b) of the IT Act and recorded a clear finding. Though there was no finding by the Tribunal regarding the application of s.

64(2)(b) of the Act, still we are of the view, the absence of such a finding would not help the Revenue to include the income from the entire

properties in the individual assessment of the assessee. We, therefore, hold that the Tribunal was right in holding that the income from the

properties could not be included in the hands of the assessee and only the income of Bagyalakshmi, the wife of the assessee, was liable to be

included in the hands of the assessee in his individual capacity.

21. Accordingly, we answer the questions of law referred to us as under

T. C. No. 31 of 1982

First question :

It is answered in the affirmative and against the Revenue.

Second question ..

It is answered in the affirmative and against the Revenue.

Third question ".

it is answered in the affirmative and against the Revenue.

All other Tax Cases ..

The question of law are answered in the affirmative and against the Revenue.

Though the Revenue has lost the case in all the tax cases, we are of the opinion that the counsel for the Revenue is entitled to the costs which is

fixed at Rs. 10,000. We direct the IT Department to pay the costs to the counsel.

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