
(1989) 09 KL CK 0039

In the High Court Of Kerala

Case No : Income-tax Reference No"s. 309 to 311 of 1985

Commissioner of Income Tax

APPELLANT

Vs

C.L. Anand

RESPONDENT

Date of Decision : 22-09-1989

Acts Referred:

Income Tax Act, 1961 — Section 64(1)

Citation : (1990) 1 ILR (Ker) 516 : (1990) 182 ITR 30

Hon'ble Judges : K.S. Paripoornan, J;K.A. Nayar, J

Bench : Division Bench

Advocate : P.K. Ravindranatha Menon and N.R.K. Nair, for the Appellant; Chacko George, for the Respondent

Judgement

K.A. Nayar, J.—The question for consideration in I. T. R. No. 310 of 1985 is that when the karta of a Hindu undivided family is a partner in a firm along with his wife, whether the wife's share income from the firm could be assessed in the hands of her husband in his individual capacity. The same question arose for consideration in I. T. R. Nos. 309 and 311 of 1985 as well. But, in those cases, the original assessments made on the assessee for the assessment years 1971-72 and 1974-75 were reopened u/s 147(a) of the Income Tax Act, 1961, on the ground that the share income of the wife from the partnership in which the assessee was a partner representing the Hindu undivided family has not been disclosed, The completed assessments of the same assessee for the assessment years 1970-71 and 1972-73 were also reopened on an earlier occasion u/s 147(a) of the Act on the ground that the assessee had not disclosed the share income of his wife from the partnership business in which the assessee was a partner representing the Hindu undivided family and the assessments were made including the share income of the wife in his individual assessments applying the provisions for aggregation u/s 64(1) of the Income Tax Act. Those assessments for the years 1970-71 and 1972-73 were the subject-matter of our decision in I. T. R. Nos. 4 of 1983 and 366 of 1982, respectively, in which we held that the question whether the share income of the wife derived from the partnership

business in which her husband also is a partner representing the Hindu undivided family should be included in the computation of the total income of the husband is a debatable question of law and, therefore, failure to disclose such income will not give jurisdiction to the Income Tax Officer to reopen the assessment u/s 147(a) of the Act. We held therein that the reopening of the assessment was invalid, relying upon the decisions of the Supreme Court in *Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another*, *Income Tax Officer and Others Vs. Madnani Engineering Works Ltd., Calcutta*, *Gemini Leather Stores Vs. The Income Tax Officer B Ward, Agra and Others*, *Commissioner of Income Tax, West Bengal, and Another Vs. Hemchandra Kar and Others*, *Commissioner of Income Tax, Gujarat Vs. Bhanji Lavji, Porbandar*, and *The Commissioner of Income Tax, Calcutta Vs. Burlop Dealers Ltd.*, . As we had held therein that the reopening of the assessments was invalid, it was not necessary to consider the other question whether the share income of the wife could be included in the individual assessment of the assessee.

2. The subject-matter of the present Income Tax references relates to the same assessee for the assessment years 1971-72, 1973-74 and 1974-75. But, for the assessment years 1971-72 and 1974-75, the assessments already made were reopened on the ground that the assessee has not disclosed the share income of the wife. If the reopening was invalid, the other question will not arise for consideration for these two years also. Therefore, following our decision in the case of the same assessee for the assessment years 1970-71 and 1972-73 in Income Tax References Nos. 4 of 1983 and 366 of 1982 *Commissioner of Income Tax Vs. C.L. Anand*,), we hold that the reopening of the assessments for the years 1971-72 and 1974-75 was invalid.

3. The questions of law arising out of the common order of the Tribunal dated August 16, 1984, in Income Tax References Nos. 776 to 778 (Coch) of 1982, relating to the assessment years 1971-72, 1973-74 and 1974-75 referred to us are :

"Whether, on the facts and in the circumstances of the case, the share income of the wife is to be included in the total income of the assessee?" (Question common for all the assessment years)

"Whether, on the facts and in the circumstances of the case, the reopening of the assessment is valid ?" (Question common for the assessment years 1971-72 and 1974-75 only)

4. Since we have held that the reopening of the assessments for the years 1971-72 and 1974-75 is invalid, we answer the questions formulated for the assessment years 1971-72 and 1974-75 regarding the reopening of the assessment in the negative, that is, in favour of the assessee and against the Revenue. In view of our answer that the reopening of the assessments is invalid for the years 1971-72 and 1974-75, the question relating to the clubbing of the wife's income formulated for the years 1971-72 and 1974-75 does not arise for

consideration. We decline to answer the questions for these years.

5. As there is a valid assessment for the year 1973-74, the question whether the share income of the wife is to be included in the total income of the assessee in question on the facts and in the circumstances of the case will have to be considered and, therefore, the facts leading to the question in Income Tax Reference No. 310 of 1985 will have to be stated.

6. The assessee-respondent is the managing director of a company called Toshiba Anand Batteries Ltd. Smt. Sheela Rani Anand, the wife of the assessee was a partner of Anand Water Metre Manufacturing Co., Julluri-dar. The assessee, representing his Hindu undivided family, was also a partner of Anand Water Metre Manufacturing Co. For the assessment year 1973-74, the total income assessed in the original assessment which was completed on November 8, 1974, was Rs. 1,01,100. Subsequently, as a result of certain investigations conducted in connection with the assessee's wealth-tax assessment, it was found that the assessee had derived some capital gains and that income had not been admitted in the original return and assessed in the original assessment. Acting on this information, the Income Tax Officer reopened the assessment for the assessment year 1973-74 and while completing the assessment he also included in the total income of the assessee the income received by his wife from the firm, Anand Water Metre Manufacturing Co. In appeal, the Commissioner of Income Tax (Appeals) after holding that the reopening was validly made, deleted the inclusion of the share income of the assessee's wife from the firm. On appeal by the Revenue, the Appellate Tribunal, following its own earlier order, dismissed the appeal. It is thereafter at the instance of the Commissioner of Income Tax, Cochin, that the question formulated herein-above was referred for the opinion of this court.

7. We heard counsel.

8. The assessee is a partner of a firm representing his Hindu undivided family along with his wife. The income from the partnership business received by the assessee in his representative capacity as karta will not be added in his individual assessment but the Hindu undivided family will be assessed on that income. The only question is whether the wife's share income from the partnership should be included in, or clubbed with, the individual income of the assessee. This will depend upon the interpretation of Section 64(1) of the Income Tax Act, the relevant portion of which reads as under :

"64. Income of individual to include income of spouse, minor child, etc.--(1) In computing the total income of any individual, there shall be included all such income as arises directly or indirectly-

(i) to the spouse of such individual from the membership of the spouse in a firm carrying on a business in which such individual is a partner."

9. This sub-clause enables clubbing of the income of the husband from the

partnership business with the income of the wife in the individual assessment of the wife or vice versa. To whose individual income the share income from the partnership of the other should be aggregated is mentioned in Explanation 1. That specifies the individual in whose total income the income of the other spouse is to be included. It shall be the spouse whose total income is greater. Therefore, it is submitted on behalf of the assessee that Section 64(1) read with the Explanation leads to the conclusion that the expression "individual" is used in Section 64(1)(i) in a restricted sense and that the expression takes in only a person in his individual capacity and does not include a person who acts in a representative capacity. In other words, the individual can only be an assessee who is being assessed in his individual capacity and not one who is being assessed in his representative capacity such as karta of a Hindu undivided family. If the husband is only a partner representing a Hindu undivided family in the partnership, the income of the wife cannot be aggregated in the individual assessment of the husband. As against this, counsel for the Revenue submitted that the section does not make any distinction between the partner in a representative capacity and individual capacity. The only thing we have to look into, according to counsel, is whether the husband and the wife are partners in a firm and whether that firm is carrying on business. If these two conditions are satisfied, the other thing to be looked into is as to whose total income is greater for the purpose of identifying the partner for aggregation.

10. We have carefully examined the rival contentions. There are a large number of decisions taking the views canvassed by both sides. The undermentioned decisions support the contention of the assessee that the share income of the wife cannot be aggregated with the total income of her husband in his individual assessments, if the husband is a partner in which the wife also is a partner of the firm, only representing the Hindu undivided family as karta : Commissioner of Income Tax Vs. Sanka Sankaraiah, , Dinubhai Ishvarlal Patel Vs. K.D. Dixit, Income Tax Officer, Ahmedabad and Others, , CIT v. Anand Sarup [1980] 121 ITR 873 , Commissioner of Income Tax Vs. Shri Amar Nath Bhatia, ; Prayag Dass Rajgarhia Vs. Commissioner of Income Tax, Delhi, ;, Commissioner of Income Tax, Bombay City-I Vs. S.K. Thakkar, ;, C. Arunachalam Vs. Commissioner of Income Tax, Karnataka, Bangalore, , Commissioner of Income Tax Vs. N.P. Khedkar, , Commissioner of Income Tax Vs. Prakashchandra Basantilal, and Commissioner of Income Tax Vs. Vallabhdas Manjibhai, . As against this, there are decisions supporting the contention of the Revenue that such share income of the wife can be clubbed with the individual assessment of the husband even though her husband is only a partner of the firm as karta representing his Hindu undivided family. These decisions are Madho Prasad Vs. Commissioner of Income Tax, , Addl. Commissioner of Income Tax Vs. Yashwant Lal, , Sahu Govind Prasad Vs. Commissioner of Income Tax, ; Commissioner of Income Tax, Tamil Nadu-I Vs. S. Balasubramaniam, and Smt. Rukmani Agrawal Vs. Commissioner of Income Tax, .

11. There is no dispute that in computing the total income of an individual there

shall be included all such income as arises directly or indirectly to the spouse of such individual from the membership of the spouse in a firm carrying on a business in which such individual is a partner. This is a provision intended to check tax avoidance or for reducing the tax incidence by persons through diversion of income to members of a family. The purport of the section is to overcome and circumvent the tendency of tax avoidance and also the reduction of tax incidence (see *Tulsidas Kilachand Vs. The Commissioner of Income Tax, Bombay City I*, and *Sevantilal Maneklal Sheth Vs. Commissioner of Income Tax (Central), Bombay*,). Since it was possible for the family members to avoid tax liability or at least to reduce the incidence of tax on the assessee, a fiction is created in Section 64 casting an artificial liability to tax. As the income of a person is clubbed with and deemed to be income of another person, the deeming section will have to be construed strictly. (See *The Commissioner of Income Tax Bombay Vs. Manilal Dhanji, Bombay*, , *Philip John Plasket Thomas Vs. Commissioner of Income Tax Calcutta*, , *Commissioner of Income Tax, Gujarat Vs. Keshavlal Lallubhai Patel*, , *Commissioner of Income Tax, West Bengal, Calcutta Vs. Prem Bhai Parekh and Others*, and *Col. H.H. Sir Harinder Singh Vs. Commissioner of Income Tax, Punjab and Haryana, Jammu and Kashmir and Himachal Pradesh*, .

12. Admittedly, in this case, the husband is only a partner in the firm representing the Hindu undivided family. Section 2(31) of the Act defines "person" so as to include a Hindu undivided family as an assessee under the Income Tax Act. Therefore, if the intention in providing Section 64 was to club the share income of the wife from the partnership with the income of the husband in his individual assessment only because the husband is a partner representing his Hindu undivided family, the word "individual" would not have been there in Section 64. The Legislature advisedly did not use the word "person" which would include Hindu undivided family also in Section 64(1) as well as in Explanation 1. In *Commissioner of Income Tax Vs. Sanka Sankaraiah*, , referring to Section 64(1), *Obul Reddy C. J.* held (at page 316) :

"This section applies only to the computation of total income of an individual. The expression "individual" does not comprehend in its meaning the "karta" of a joint family. If it were the intention of the Legislature that the expression "individual" used in Section 64 should also take in a Hindu undivided family, then it would have used the expression "person" so as to include a Hindu undivided family and not the words "spouse of such individual in Clause (i)" or the words "a minor child of such individual in Clause (iii)" or the words "either spouse or parent" in the Explanation. This section aims at putting an end to the attempts of an individual to avoid or reduce the incidence of tax by transferring the assets to a spouse or minor child. Under this section, the husband's share of the profits of a firm, where husband and wife are both partners, could be assessed in the wife's hands or vice versa, depending upon the fact whose total income is greater. The income of the minor child admitted to the benefits of the partnership is similarly to be included in the income of that parent whose total income is

greater."

13. In the present case also, the assessee only represents the Hindu undivided family in the partnership. The income which the assessee gets from the partnership should necessarily go to the Hindu undivided family and that Hindu undivided family will be assessed accordingly. The Hindu undivided family itself is an assessable unit and the income earned as the karta should necessarily be taxed in the hands of the Hindu undivided family and no part of such income is to be computed in the total income of the assessee in his individual assessment. But the question is whether the share income of the wife should be added on to the individual assessment of the assessee. A Full Bench of the Karnataka High Court in *C. Arunachalam Vs. Commissioner of Income Tax, Karnataka, Bangalore*, , considering a similar question, held that the words "any individual" and "such individual is a partner" occurring in Section 64(1) of the Act do not include an individual who may be the karta of a Hindu undivided family or any other person in his representative capacity but must be confined to a person who is being assessed in his individual capacity and in no other. The provisions of the section are intended to ensure that the assessee-individual does not escape his personal liability to Income Tax by tax-avoiding devices. We are unable to hold that a Hindu undivided family becoming a partner of a business is one such device. Therefore, where the karta of a Hindu undivided family is a partner in a firm representing his Hindu undivided family along with his wife, the share income of the wife cannot be assessed to tax in the hands of the karta, in his individual status. In arriving at the conclusion, we are adopting the reasoning of the Full Bench decision of the Karnataka High Court in *C. Arunachalam Vs. Commissioner of Income Tax, Karnataka, Bangalore*, and the Bench decision of the High Court of Andhra Pradesh in *Commissioner of Income Tax Vs. Sanka Sankaraiah*, .

14. Hence, on an anxious consideration of Section 64 of the Income Tax Act as explained by the Supreme Court in *The Commissioner of Income Tax, Madhya Pradesh and Bhopal Vs. Sodra Devi*, , the objective behind the deeming section, the history and the mischief which the section intended to remedy in its historical setting and with due regard to the spirit and purpose of the section and at the same time bearing in mind the canons of interpretation of taxing law, we are of the view that Section 64(1) of the Act can have application only where the individual is assessed as a partner of the firm in his individual capacity but not when he is a partner in a representative capacity as karta of a Hindu undivided family.

15. In the light of the above discussion, we answer the only question surviving for the assessment year 1973-74 in Income Tax Reference No. 310 of 3985 in the negative, that is, in favour of the assessee and against the Revenue.

16. The questions referred to us are answered as above.

17. A copy of this judgment under the seal of the High Court and the signature of

the Registrar shall be forwarded to the Income Tax Appellate Tribunal, Cochin Bench.