

(1997) 11 MAD CK 0108
In the Madras High Court
Case No : Tax Case No. 915 of 1984

Commissioner of Income Tax

APPELLANT

Vs

D. Jagadeesan

RESPONDENT

Date of Decision : 05-11-1997

Acts Referred:

Income Tax Act, 1961 — Section 171, 263, 263(1)

Citation : (1999) 237 ITR 371

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

Bench : Division Bench

Advocate : C.V. Rajan, for the Appellant; P.P.S. Janarthana Raja, for the Respondent

Judgement

N.V. Balasubramanian, J.—At the instance of the Revenue, the Tribunal has stated the case and referred the following questions of law

under s. 256(1) of the IT Act, 1961 :

(i) Whether, on the facts and in the circumstances of the case, the Tribunal was correct in holding that only 50 per cent of the share income from

the firms can be assessed as the income of the assessee HUF ?

(ii) Whether, on the facts and in the circumstances of the case, the entire share-income from the firms cannot be included in the total income of the

smaller HUF of D. Jagadeesan for the asst. yr. 1979-80 without cancelling the order under s. 171 recognising the partial partition of the bigger

HUF in the course of the assessment proceedings for the asst. yr. 1977-78 ?

The assessee is a Hindu joint family and the reference relates to the asst. yr. 1979-80. The assessee is a joint family consisting of one Jagadeesan

as a Kartha and his wife. The said Jagadeesan was the son of one Dharmar Nadar who was the Karta of a joint family carrying on a business.

There was a partial partition in the said family w.e.f. 31st March, 1964. A claim for recognition of the partition was made under s. 171 of the IT

Act, 1961 (hereinafter referred to as the Act) before the ITO and the ITO recognised the partition and passed an order recognising the partial

partition. Thereafter, Jagadeesan was taken as a partner in the firm which was constituted to succeed to the family business. Jagadeesan was a

bachelor at the time the partition was effected and he was assessed in the status of individual on the share of profits from the firm. Jagadeesan got

married in August, 1969 and, therefore, the ITO recognised his status as that of the HUF. Subsequently a son was born out of his wedlock, by

name Vijay Anand. There was another partial partition between Jagadeesan and Vijay Anand w.e.f. 1st April, 1976. It is significant to note that the

joint family was deriving share income from three firms, namely, (1) M/s Original Printing Press, (2) M/s Original Fire Works Industries and (3)

M/s Viswanath Match Industries and some other assets and with reference to other assets of income they were not the subject-matter of the

partition. The assessee made a claim during the assessment proceedings for the asst. yr. 1977-78 that a partial partition between the assessee and

his minor son has been effected with reference of the assets of the HUF held in the firm and it should be recognised under the provisions of s. 171

of the Act before the ITO having jurisdiction over the matter. The ITO considered the matter and held that the joint family consisted Jagadeesan

and Vijay Anand, as there was a partial partition between the assessee and his minor son and the minor son got half share. After making necessary

enquiries, the ITO was satisfied that there was a genuine partial partition and passed an order under s. 171 of the Act dt. 27th February, 1978

recognising the partial partition between the assessee and his minor son. Following the said order of the ITO, the assessee claimed that the share

income from all the three firms should be assessed in the hands of the assessee only to the extent of 50 per cent and the balance of 50 per cent

should be assessed in the hands of Vijay Anand, the minor Coparcener in accordance with the partial partition. The ITO accepted this claim for

the asst. yr. 1977-78 and, also for the later years and made the assessments accordingly.

2. The CIT, subsequently, for the asst. yr. 1979-80 issued a notice under s. 263(1) of the IT Act that the assessment of only 50 per cent of the

share income as having accrued to the assessee by way of share income from the three firms was erroneous in law and there was no overriding title

in favour of the minor as regards the balance of 50 per cent of the share income and, therefore, he issued notice under s. 263(1) of the IT Act

calling upon the assessee to submit an explanation against the proposed revision for the asst. yr. 1979-80. The assessee raised several objections,

and the CIT overruled and held that there was no diversion of income of the minor's share income from the firm and when the assessee paid 50

per cent share of the income, it amounted to an application of income and, therefore, the entire 100 per cent share income arising from the firms

should be assessed in the hands of the assessee. He therefore, held that the assessment made in the hands of the assessee limiting it to 50 per cent

of the share income from the firm was erroneous. Though a contention was raised before the CIT that a partial partition was recognised by the

ITO in his proceedings for the asst. yr. 1979-80 and after the recognition of partition and that orders has become final, it was not open to the CIT

to hold that the entire share income should be assessed in the hands of the assessee without disturbing the finality, the CIT has not considered the

objection.

3. Aggrieved by the order of the CIT, the assessee preferred an appeal before the Tribunal. The Tribunal held that after an order passed by the

ITO under s. 171 of the Act recognising the partial partition, it was not open to the CIT to revise the order of assessment without setting aside that

order. The Tribunal held that as long as the order under s. 171 of the Act holds the field, the action of the ITO of assessing only 50 per cent of the

share in the hands of the assessee's undivided joint family cannot be said to be erroneous and the CIT has no jurisdiction to invoke the provision

under s. 263 of the IT Act and cancel the assessment made earlier by the ITO.

4. Aggrieved by the order of the Tribunal, the Revenue sought for a reference and obtained a reference on the question stated above. Mr. C.V.

Rajan, counsel for the petitioner submitted that the order of the Tribunal holding that the CIT's order lacks jurisdiction, is not correct in law. On

the other hand Mr. Janarthana Raja, counsel for the respondent supported the order of the Tribunal.

5. We have carefully considered the submission made by the learned counsel for

the Revenue as well as learned counsel for the assessee.

6. The Supreme Court in the case of Joint Family of Udayan Chinubhai, etc. Vs. Commissioner of Income Tax, Gujarat, , dealt with s. 25A of the

Indian IT Act, 1922 and held that once an order under s. 25A of the Indian IT Act was passed by a competent authority, it is not open to the ITO

to ignore the same and issue a notice under s. 34 of the Indian IT Act, 1922 to the HUF to review the order passed under s. 25A of the Act,

which in its very nature is effective for all subsequent years. According to the apex Court, once an order under s. 25A of the Act was made, the

family ceases to be assessed as an entity and thereafter it cannot be assessed in that status, unless the order is set aside by a competent authority.

Obviously, in the instant case, the CIT has not taken any steps to set aside the order passed by the ITO under s. 171 of the Act and the proper

course, in our view would be for the CIT to initiate proceedings to set aside the order of the ITO passed under s. 171 of the Act when he is of the

opinion that the order passed was not legally correct and then to direct the ITO to compute the income of the HUF after setting aside the order

passed under s. 171 of the Act. We are of the opinion that so long as the order passed under s. 171 of the Act remains in force and operates, it is

neither permissible nor open to the ITO or the CIT to ignore the same as the order passed by the ITO under s. 171 of the Act is a statutory order

and has statutory force and the CIT is equally bound by the order passed under s. 171 of the Act. Though the assessee raised the contention

before the CIT that so long as the order was in force, the CIT has not chosen to set aside the order made by the ITO and more curiously the CIT

has not dealt with that aspect at all. We are not (sic) at a loss to understand, as to how the assessment order made by the ITO in accordance with

the order passed by the ITO under s. 171 of the Act can be said to be erroneous and it will be erroneous, if the order of assessment was in any

way contrary to that order. The CIT, in our opinion, has without jurisdiction revised the order of assessment made by the ITO. Therefore, we are

of the view that the CIT lacked the jurisdiction to revise the order of assessment made by the ITO passed in tune with the order passed under s.

171 of the Act. The order of the Tribunal, holding that the CIT has no jurisdiction, is in order and we do not find any infirmity in the order of the

Tribunal in holding that the CIT had no jurisdiction to revise the order of the ITO. We are of the view that the Tribunal was also justified in holding

that the CIT has no jurisdiction to revise the order of assessment without cancelling the order passed under s. 171 of the Act. Since we are

upholding the order of the Tribunal on the ground of lack of jurisdiction of the CIT, it is not necessary to consider other points decided by it.

Accordingly we answer both the questions of law referred above in the affirmative and against the Revenue. However, in the circumstances, there

is no order as to costs.