

(1976) 04 MAD CK 0026

In the Madras High Court

Case No : Tax Case No. 320 of 1970 (Reference No. 96 of 1970)

Commissioner of Income Tax

APPELLANT

Vs

Deghamwala Estates

RESPONDENT

Date of Decision : 05-04-1976

Acts Referred:

Income Tax Act, 1961 — Section 2(31), 45

Citation : (1977) 109 ITR 416

Hon'ble Judges : Sethuraman, J;Ismail, J

Bench : Division Bench

Advocate : J. Jayaraman and Nalini Chidambaram, for the Appellant; S. Narayanaswami, for the Respondent

Judgement

Ismail, J.—The Income Tax Appellate Tribunal, Madras Bench, u/s 256(1) of the Income Tax Act, 1961, has stated a case and referred the

following question of law to this court for its opinion :

Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that the two persons, M/s.

Sidhpurwala and Badruddin Mohammed Ali did not constitute an association of persons and that the capital gains on sale of property held by them

as "co-owners" was not liable to tax as association of persons ?

2. One M. A. Deghamwala died intestate on June 17, 1957. T.M. Sidhpurwala, Badruddin Mohammed Ali, Mariam Bi, Sarifa Bai, and Sakina

Bai were the heirs of the deceased, and inherited his properties under the Mohammedan law. On 22nd December, 1959, Mariam Bi, Sarifa Bai

and Sakina Bai executed a deed of release relating their rights, title and interest in the properties left by Deghamwala in favour of Sidhpurwala and

Badruddin Mohammed Ali. These two persons thus became entitled to half share

each in the properties left behind by Deghamwala. Out of the properties so left behind by Deghamwala was property No. 11, Angappa Naicken Street, and a half share in Seshigiria land in Baroda State. The said Seshigiria land in Baroda State was held by Deghamwala himself along with certain third parties. The two brothers, viz., Sidhpurwala and Badruddin Mohammed Ali, sold No. 11, Angappa Naicken Street, on February 28, 1964. The said two persons along with the other owners of Seshigiria land in Baroda State sold the same on October 12, 1964. The "two sales resulted in certain capital gains. For the assessment year 1965-66, a sum of Rs. 47,084 was ascertained as capital gains arising out of the sale of these properties and the said capital gains was sought to be assessed in the hands of Sidhpurwala and Badruddin Mohammed Ali as association of persons. The two brothers resisted this attempt of the Income Tax Officer to assess the capital gains in their hands as association of persons, and their attempt proved unsuccessful. However, on appeal preferred by them, the Appellate Assistant Commissioner went into the question and held that the capital gains could not be assessed in the hands of the two persons as association of persons and had to be assessed half each in their individual hands. The department preferred an appeal to the Income Tax Appellate Tribunal, and that Tribunal confirmed the order of the Appellate Assistant Commissioner. It is thereafter the present reference was asked for by the department, and the matter has come to this court.

3. The Appellate Tribunal in its order dated 16th July, 1969, held :

In the present case, there is no material to show that in effecting the sale they did anything more than what an ordinary owner of property would do to convey title. There is no material to hold that there was concerted action with a view to earn capital gains.

4. If these statements of the Appellate Tribunal are correct, admittedly, the department has to fail because it is conceded before us that it was the department that had to make out a case that the two brothers constituted an association of persons for earning this capital gains. It is not disputed that under the Mohammedan law, the two brothers succeeded to the property of their father in definite shares, and they became tenants in common in respect of their respective shares. In such circumstances, it is not disputed

that they were the co-owners of the property, and they did not constitute an association of persons for owning the property. However, it is contended that they resorted to concerted action for earning the capital gains in question.

5. The learned counsel for the department drew our attention to only one recital that is contained in the sale deed dated February 28, 1964, as

constituting the material on which the Tribunal should have held that the two brothers constituted an association of persons. That recital is :

AND WHEREAS the vendors herein are carrying construction work of their properties situate at Nos. 312 and 313, Linghi Chetty Street, G.T., Madras-1, and are in need of funds for the same.

6. The argument of the learned counsel for the department is that this shows that the two brothers have not divided the properties between them,

and, therefore, they were carrying on the construction work jointly in respect of the property situate in Nos. 312 and 313, Linghi Chetty Street,

G.T., Madras-1, and with reference to that construction work, they were in need of funds. We are unable to accept this argument. The acceptance

of the argument of the learned counsel will lead to the position that co-owners will always have to be assessed as an association of persons, unless

they divided the properties as between themselves by metes and bounds. There is no warrant for any such contention. Even the recital extracted

above does not show that they were the co-owners of both the items Nos. 312 and 313, Linghi Chetty Street, G.T., Madras-1, and they were

jointly carrying on the construction work in respect of both the items, and with reference to that joint construction work they were in need of funds.

Therefore, simply because this recital occurs in the sale deed dated February 28, 1964, it cannot be contended that there was concerted action on

the part of the two individuals in bringing about the sale in question for the purpose of making capital gains. It may be mentioned that even the

department did not claim that the two individuals owned both Nos. 312 and 313, Linghi Chetty Street, G.T., Madras-1, jointly as association of

persons (vide annexure ""F"" to the reference).

7. One other aspect present in the case will definitely be against the case of the department. As we pointed out already, the capital gains was

sought to be levied in respect of the sale of No. 11, Angappa Naicken Street,

Madras-1, that took place on February 28, 1964, and the sale of the property situate in Baroda State that took place on October 12, 1964. But the property situate in Baroda State, as we pointed out already, Was owned by M. A. Deghamwala along with others and those other people also joined the two individuals in executing that sale deed. Therefore, with reference to that sale deed, at any fate, it cannot be contended that these two persons constituted an association of persons. The department itself not making a distinction between the sale deed dated February 28, 1964, and the sale deed dated October 12, 1964, in arriving at and imposing tax on the capital gains, it cannot be contended that these two individuals alone constituted an association of persons in respect of the capital gains arising as a result of the two sales while admittedly one sale deed had been executed by these two persons along with certain third parties. Under these circumstances, we are clearly of the opinion that the conclusion of the Tribunal that there was no material to hold that there was a concerted action with a view to earn capital gains in question on the part of the two individuals concerned is correct. Accordingly, we answer the question referred to us in the affirmative and in favour of the assessee. The assessee will be entitled to its costs in this reference. Counsel's fee is fixed at Rs. 250.