
(1985) 08 RAJ CK 0035

In the Rajasthan High Court

Case No : Income Tax Reference No. 24 of 1980

Commissioner of Income Tax

APPELLANT

Vs

Duduwala and Co.

RESPONDENT

Date of Decision : 14-08-1985

Acts Referred:

Income Tax Act, 1922 — Section 41, 41(1)

Income Tax Act, 1961 — Section 160, 161, 161(1), 254(2)

Citation : (1985) 53 CTR 327 : (1986) 160 ITR 170 : (1985) 2 WLN 783

Hon'ble Judges : S.N. Bhargava, J; S.K. Mal Lodha, J

Bench : Division Bench

Advocate : B.R. Arora and A.K. Rajwanshi, for the Appellant;

Judgement

S.K. Mal Lodha, J.—The Income Tax Appellate Tribunal, Delhi Bench "A", New Delhi ("the Tribunal" herein), has referred the following question for the opinion of this court:

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in directing that in a case even though one assessment may be called for being made on the assessee in the status of an "association of persons", the tax liability to be determined would have to be to the same extent and in the like manner as in the case of the beneficiaries directly or on the erstwhile partners through their representatives under the provisions of Section 41 of the Indian Income Tax Act, 1922, in respect of assessment years 1960-61 and 1961-62 and u/s 161 of the Income Tax Act, 1961, in respect of the assessment years 1962-63 to 1966-67?"

2. The assessee, M/s. Duduwala & Co., was a registered firm consisting of two partners : (1) Shri Rai Bahadur Rameshwar Nathany, who died on January 18, 1957, and had 12 annas share; and (2) Shri Ram Kumar Agarwal, who had three annas share. One anna share was kept for charity. Shri Rameshwar Nathany was the karta of a Hindu undivided family, which was known as M/s. Baldeo Das Rameshwar and in the firm, he was a representative of the Hindu undivided

family up to September 21, 1943. A complete partition of the Hindu undivided family by the court was made on September 21, 1943, by a consent decree. Even after September 21, 1943, Shri Rameshwar Nathany continued as a partner in the firm of M/s. Duduwala & Co. with the same share, in the capacity of the representative of the following five persons, as a partition by metes and bounds of the share of the karta could not be made :

(i) Himself; (ii) Smt. Muniya Devi (wife); (iii) Shri Satya Narain Nathany (son); (iv) Shri Hari Ram Nathany (son); (v) Shri Mahaveer Prasad Nathany (son); and (vi) Shri Shree Gopal Nathany (son).

3. The Department did not accept the claim of the assessee for registration on the ground that the application for registration should have been signed by seven partners (not by two), who were in reality the partners of the firm. The matter was carried to the High Court. Ultimately, it was decided in favour of the assessee in 1950. After the death of Shri Rameshwar Nathany, his son, Shri Ram Kumar Nathany, instituted a suit in the court of District Judge, Bhilwara, for declaring the four sons as partners in M/s. Duduwala & Co. in place of their father, Shri Rameshwar Nathany. This suit was instituted on January 18, 1957. By that time, Shri Muniya Devi had also expired. The other partner, Shri Ram Kumar Agarwal, also filed a suit in the Calcutta High Court praying that on account of the death of Shri Rameshwar Nathany, the firm should be treated as dissolved with effect from January 18, 1957. During the pendency of the suit, the Calcutta High Court appointed an official receiver on June 26, 1957. The official receiver took over charge on March 17, 1958. The official receiver continued up to September 30, 1960, as there was a compromise between the parties in both the suits, which were pending at Calcutta and Bhilwara. The compromise provided that the firm, M/s. Duduwala & Co., would be managed by Shri Ram Kumar Agarwal and Shri Satya Narain Nathany, as joint receivers with the aim to wind up the business in regular process. The Calcutta High Court passed the order on September 15, 1960, and according to this, Shri R. K. Agarwal and Shri Satya Narain Nathany became joint receivers.

4. The Department refused to grant registration to the firm after the death of Shri Rameshwar Nathany as no fresh partnership deed was executed by the parties. The Department initiated proceedings for assessing the concern, M/s. Duduwala & Co., in the status of an unregistered firm (URF) up to the assessment year 1966-67. The Tribunal, however, directed in the appeals that the status should be taken as that of "association of persons" from the assessment year 1960-61. The assessee submitted a miscellaneous application u/s 254(2) of the Income Tax Act, 1961 (No. XLIII of 1961), and invited the attention of the Tribunal that the following grounds of appeal were not disposed of by the Tribunal:

(1) that the Appellate Assistant Commissioner has failed to appreciate that after the appointment of the joint receivers by the Calcutta High Court, the business which was being run by the receivers was for and on behalf of the five persons;

(2) that in any case the Appellate Assistant Commissioner ought to have directed that the assessment should be made by the Income Tax Officer on behalf of the five beneficiaries in the hands of the receiver.

5. The Tribunal accepted the application of the assessee, vide its order dated August 31, 1978. It observed as under:

"We are of the view that in the matter before us also even though one assessment may be called for being made on the assessee in the status of an "association of persons", the tax liability to be determined would have to be to the same extent and in the like manner as in the case of the beneficiaries directly or on the erstwhile partners through their representatives under the provisions of Section 41 in respect of the first two years (1960-61 and 1961-62) and u/s 161 in respect of the later four years."

6. According to it, no tax was to be levied on the income determined in the case of M/s. Duduwala & Co. by treating it as a single unit and that the tax was to be worked out in the hands of each beneficiary and further that the recovery of the whole amount of tax was to be made from the assets of M/s. Duduwala & Co. and that the demand was to be raised on the joint receivers representing M/s. Duduwala & Co. The Commissioner of Income Tax submitted an application u/s 256 of the Act. The Tribunal was of the opinion that a question of law does arise out of its order dated August 31, 1978 and, therefore, it has referred the aforesaid question for our opinion.

7. We have heard the learned counsel for the Revenue and nobody has appeared on behalf of the assessee-non-petitioner.

8. The question which we are called upon to determine is of great importance. It is clear from the question referred by the Tribunal that in this case, if one assessment is to be made on the assessee in the status of an association of persons, the tax liability to be determined would have to be to the same extent and in the like manner as in the case of beneficiaries directly or on the erstwhile partners through their representatives under the relevant provisions of the Act. Here, we may mention that the relevant provisions for the assessment years 1960-61 and 1961-62 is Section 41 of the Indian Income Tax Act, 1922 (the "old Act"), and for the assessment years 1962-63 to 1966-67, the material provision is Section 161 of the Act.

9. Learned counsel for the Revenue submitted that the provisions of Section 41 of the old Act are in pari materia with those of Section 161 of the Act.

10. Chapter XV of the Act deals with liability of payment of tax in special cases. Part B of this Chapter relates to representative assessee and this part contains general provisions. Section 160 enumerates who are representative assessee for the purpose of the Act. The important section for the present purpose is Section 161, which deals with liability for payment of tax of the representative assessee. It is as under :

"161. (1) Every representative assessee, as regards the income in respect of which he is a representative assessee, shall be subject to the same duties, responsibilities and liabilities as if the income were income received by or accruing to or in favour of him beneficially, and shall be liable to assessment in his own name in respect of that income; but any such assessment shall be deemed to be made upon him in his representative capacity only, and the tax shall, subject to the other provisions contained in this Chapter, be levied upon and recovered from him in like manner and to the same extent as it would be leviable upon and recoverable from the person represented by him.

(1A) Notwithstanding anything contained in Sub-section (1), where any income in respect of which the person mentioned in Clause (iv) of Sub-section (1) of Section 160 is liable as representative assessee consists of, or includes, profits and gains of business, tax shall be charged on the whole of the income in respect of which such person is so liable at the maximum marginal rate:

Provided that the provisions of this sub-section shall not apply where such profits and gains are receivable under a trust declared by any person by will exclusively for the benefit of any relative dependent on him for support and maintenance, and such trust is the only trust so declared by him.

Explanation.--For the purposes of this sub-section, "maximum marginal rate" shall have the meaning assigned to it in Explanation 2 below Sub-section (3) of Section 164.

(2) Where any person is, in respect of any income, assessable under this Chapter in the capacity of a representative assessee, he shall not, in respect of that income, be assessed under any other provision of this Act."

11. While construing Section 161 of the Act, it is to be remembered that Section 160 of the Act recognises five types of representative assessee and, according to it, every representative assessee is liable for payment of tax in respect of certain specified income which beneficially belongs to the other person.

12. If any income is received by the person as a representative assessee, that income or profit is liable to tax. Such representative assessee may be trustees, beneficiaries, receivers, etc. A perusal of Sections 160 and 161 in Part B of Chapter XV of the Act shows that they are merely enabling provisions which empower the Income Tax authorities if they so like to make assessment in respect of the income or to recover the tax due under the Act. According to Section 161(1), the tax to be realised from the beneficiaries, etc., can be levied upon and recovered from the representative assessee in the like manner and to the same extent as it would be leviable upon and recoverable from the person represented by him. In other words, Section 161 is not a charging section, but it is a machinery section for the recovery of the tax. The authorities have option to proceed for the recovery either against the representative assessee or the person represented by him. In this background, let us examine the order dated August 31, 1978, passed by the Tribunal. After considering the provisions of Section 41

of the old Act and Section 161 of the Act and N.V. Shanmugam and Co. Vs. The Commissioner of Income Tax, Madras, and Commissioner of Wealth-tax, Bihar and Orissa Vs. Kripashankar Dayashanker Worah, , the Tribunal held that though the levy and collection were upon and from the receivers, there is only one assessment and enforcement of the liability of the beneficiaries. Having held so, it reached the conclusion that after making the assessment u/s 10, the Revenue had to proceed further and to apply Section 41 of the old Act or Section 161 of the Act, as the case may be. In this connection, it took support from The Commissioner of Wealth Tax, Andhra Pradesh, Hyderabad Vs. Trustees of H.E.H. Nizam's Family Hyderabad, . Learned counsel for the Revenue placed strong reliance on N.V. Shanmugam and Co. Vs. The Commissioner of Income Tax, Madras, . In that case, a firm, consisting of three partners and a minor admitted to the benefits of partnership, had carried on business in the manufacture and sale of snuff. The deed of partnership provided that the firm could not be dissolved before August 31, 1955, but it was open to the partners to continue the partnership or enter into a fresh partnership. A suit was instituted on September 17, 1956, by one of the partners in the civil court for dissolution of the firm with effect from August 31, 1956, and for taking accounts. On September 21, 1956, the court appointed three receivers, two of whom were partners and the third was an advocate. . Since the business had been stopped from September 1 to 21, 1956, the court directed the receivers to reopen and conduct the snuff business for the purpose of winding up, subject to the terms, inter alia, that the receivers could carry on the business normally, that the profits earned, if any, shall be treated as an asset of the firm subject to be divided between the parties in the manner set out in the partnership deed, and that the receivers will pay every month certain specified amounts to the partners. A commissioner was appointed by the court for taking accounts and for arranging the sale of the business as a going concern. The question arose whether the profits could be assessed in the hands of the receivers in the status of an association of persons. The Supreme Court held : (1) that the fact that there were three receivers did not make them an association of persons ; (2) that the receivers had acted on behalf of the persons who were the owners of the business ; (3) that the receivers did not and could not have represented the individual interests of the various owners of the business and so the profits were earned on behalf of the persons who had a common interest created by the order of the court and were on that account an association of persons; and (4) that, in law, the erstwhile partners of the firm carried on the business through their representatives and the profits were earned from a business carried on by an association of persons. Sections 4 and 41 of the old Act were examined. In this connection, their Lordships observed as under N.V. Shanmugam and Co. Vs. The Commissioner of Income Tax, Madras, :

"It is not denied that the business was carried on by the receivers on behalf of the erstwhile partners of the firm and that considerable profits were earned from the business. The control and management of the business were in the hands of

the receivers. That control and management was a unified one. The receivers had joined in a common purpose and they acted jointly. When they did so, they acted on behalf of the persons who were the owners of the business. The receivers did not and could not have represented the individual interest of the various owners of the business. If they had done so there would have been chaos in the business. The profits to which those owners lay claim and which they were not averse to pocket, were earned on behalf of an "association of persons". The profits were earned on behalf of the persons who had a common interest created by the order of the court and were on that account an "association of persons". The existence of specific or defined interest in the profits did not make the earning any the less by an "association of persons". Liability to "tax depends upon the earning of profits by a unit and not upon the ultimate division of the profits. The expression "association of persons" is not defined in the Act. "

13. N.V. Shanmugam and Co. Vs. The Commissioner of Income Tax, Madras, , was considered in The Commissioner of Wealth Tax, Andhra Pradesh, Hyderabad Vs. Trustees of H.E.H. Nizam's Family Hyderabad, . In that case, sections 3, 21 and 21(4) of the Wealth-tax Act, 1957, were under consideration. While considering Section 21(1) of the said Act, where a similar expression "in the like manner and to the same extent" has been used like the one used in Section 161(1) of the Act, their Lordships found that the consequences are three-fold: (1) that there would have to be as many assessments on the trustees as there are beneficiaries with determinate and known shares, though for the sake of convenience, there may be only one assessment order specifying separately the tax due in respect of the wealth of each beneficiary ; (2) that the assessment of the trustee would have to be made in the same status as that of beneficiary whose interest is sought to be taxed in the hands of the trustee ; and (3) that the amount of tax payable by the trustee would be the same as that payable by each beneficiary in respect of his beneficial interest, if he were assessed directly, It was observed by their Lordships that the first two consequences were recognised and laid down in, N.V. Shanmugam and Co. Vs. The Commissioner of Income Tax, Madras, , and so far as the third consequence was concerned, Padmavati Jaykrishna Trust and Another Vs. Commissioner of Wealth Tax, Gujarat, , Trustees of Putlibai R.F. Mulla Trust Vs. Commissioner of Wealth Tax, and Chintamani Ghosh Trust Vs. Commissioner of Wealth Tax, were approved. At page 593 of the report, P. N. Bhagwati J., as he then was, held that the consideration which prevailed while construing Section 21 of the Wealth-tax Act must apply to the interpretation of Section 161(2) of the Act.

14. The Supreme Court also referred to Commissioner of Wealth-tax, Bihar and Orissa Vs. Kripashankar Dayashanker Worah, in which it was held that the decision given under the Income Tax law applies equally to the interpretation of Section 21 of the Wealth-tax Act. In the instant case, the business had been carried on jointly on behalf of all the partners. The business was conducted on behalf of all of them and, therefore, there should be one assessment. The tax had to be paid by them jointly as if there had been only one assessment and that

it must be deemed that in law the erstwhile partners or the members of the association had carried on the business of the firm jointly through their representatives. Section 41(1) of the old Act and Section 161(1) of the Act provide that the tax to be realised from a beneficiary, etc., can be levied upon and recovered from a representative assessee in the like manner and to the same extent as it would be leviable upon and recoverable from the person represented by him. It is well-settled that Section 161(1) is mandatory in its language and an assessment can only be made in accordance with the special provisions contained in Sub-section (1) of Section 41 of the old Act or Section 161(1) of the Act. This was so held in *The Commissioner of Wealth Tax, Andhra Pradesh, Hyderabad Vs. Trustees of H.E.H. Nizam's Family Hyderabad*, The liability of a representative assessee u/s 161(1) is a vicarious liability and it is co-extensive with the liability of a person represented by him. In other words, the liability of a representative assessee should not in any case be larger or wider than the liability of the person represented by him. In this view of the matter, in respect of the profits from the business of the partnership by the receivers, there should be one assessment as held by the Tribunal and only one assessment was called for being made on the assessee in the status of an association of persons. This is with respect to assessment. However, the tax liability will be to the same extent and in the like manner as it would be leviable upon and recoverable from the persons represented by them. It will be on the beneficiaries or the erstwhile partners through their representatives under the provisions of Section 41 of the old Act in respect of the assessment years 1960-61 and 1961-62 and u/s 161 of the Act regarding the assessment years 1962-63 to 1966-67. This conclusion of ours stands fortified by the principles laid down in *N.V. Shanmugam and Co. Vs. The Commissioner of Income Tax, Madras*, and *The Commissioner of Wealth Tax, Andhra Pradesh, Hyderabad Vs. Trustees of H.E.H. Nizam's Family Hyderabad*, . There should be one assessment for the profits of the business run by the receivers which was on behalf of the partners of the firm. That assessment of the assessee shall be in the status of an association of persons. However, the tax liability to be determined would have to be to the same extent and in the like manner as in the case of beneficiaries directly or on the erstwhile partners through their representatives under the provisions of Section 41 of the old Act and Section 161 of the Act, as the case may be. We are, therefore, of the opinion that the view taken by the Tribunal in its order dated August 31, 1978, by which it modified its earlier order dated August 7, 1975, is correct.

15. The question- referred to us is answered in the affirmative, i. e., in favour of the assessee and against the Revenue.

16. There will be no order as to costs. Let a copy of this order be sent to the Tribunal as required by Section 260 of the Act.