(1973) 08 AHC CK 0019

In the Allahabad High Court

Case No : Income Tax R. No. 277 of 1972 connected with I.T.As. No''s. 688 and 689 of 1972

Commissioner of Income Tax APPELLANT

Vs

Govind Narain RESPONDENT

Date of Decision : 17-08-1973

Acts Referred:
Income Tax Act, 1922 — Section 25A

Citation : (1975) 101 ITR 602

Hon'ble Judges : R.L. Gulati, J;H.N. Seth, J

Bench : Division Bench

Advocate : R.R. Misra, for the Appellant; R.K. Gulati, for the Respondent

Judgement

R.L. Gulati, J.—This is a consolidated reference for the assessment years 1965-66 and 1966-67 u/s 256(1) of the Income Tax Act, 1961.

2. The assessee, Sri Govind Narain, was assessed to Income Tax in the status of an individual up to the assessment year 1963-64. During the assessment proceedings for the year 1964-65, he claimed that the correct status should be that of a Hindu undivided family and not of an individual, because he had been allotted share on partition of a bigger Hindu undivided family of which he was a member. This claim was accepted by the Income Tax Officer. During the course of assessment proceedings for the assessment year 1965-66, he submitted an application dated May 20, 1965, before the Income Tax Officer claiming a partial partition in the family business carried on in the name of Munnilal and Company with effect from 31st March, 1965, on which date the total capital invested in the business was divided amongst the various members of the family. It was claimed that with effect from 1st April, 1965, the business which had been carried on by the Hindu undivided family was taken over by a partnership firm. In support of the claim reliance was placed upon the entries in the books of accounts and a deed of partition dated 1st April, 1965. The claim was rejected by the Income Tax Officer on the ground that the agreement purported, to bring about partial

partition with effect from 1st April, 1965, but was typed on a stamp paper which was purchased on 2nd April, 1965. For that reason the Income Tax Officer held that the deed was fictitious. On appeal, the Appellate Assistant Commissioner of Income Tax held that the disparity between the date of the execution of the deed and the date of the stamp paper was due to a typing error. He, accordingly, accepted the assessee''s claim. On second appeal preferred by the department, the Tribunal upheld the order of the Appellate Assistant Commissioner of Income Tax. The Commissioner is now aggrieved and has brought this reference before us on the following question :

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in allowing the claim of partial partition with effect from March 31, 1965, in the joint family of Govind Narain?"

3. The only ground pressed before us by the learned counsel for the department is that in the circumstances the Tribunal should have held the deed to be a fictitious one. The assessee had stated before the Appellate Assistant Commissioner of Income Tax that a draft of the agreement was prepared on 1st April, 1965, and the stamp paper was purchased on the following day and the draft was handed over to the typist to be transcribed on the stamp paper. By mistake he typed out the date of the deed as 1st April, 1965, as mentioned in the draft agreement. This explanation of the assessee has been accepted by the Appellate Assistant Commissioner of Income Tax and on appeal the Tribunal has also endorsed that finding. The finding that the deed was genuine and not sham is a finding of fact and since the explanation about the discrepancy in the dates has been believed by the Income Tax Appellate Tribunal, we do not think any question of law can arise from such a finding. Accordingly, we answer the question referred to us in the affirmative, in favour of the assessee and against the department. The assessee will get his costs which we assess at Rs. 200.

4. In the connected applications u/s 256(2) of the Income Tax Act, 1961, the Commissioner of Income Tax has prayed for a direction to the Tribunal to refer the following additional question :

"Whether, on the facts and in the circumstances of the case, the Tribunal was in law correct in holding that Smt. Radha Devi continued to remain a member of the joint family of Sri Govind Narain, even after the complete partition in 1952, in the joint family styled Lakshmi Narain Govind Narain within the meaning of Section 25A of the Indian Income Tax Act, 1922?"

5. One of the grounds upon which the assessee''s claim for partial partition was resisted by the department was that his widowed mother, Radha Devi, was also allotted a share even though she was not entitled to it. It was said that Radha Devi was entitled to a share when the partition of a bigger Hindu undivided family took place in 1952. She did not claim any share at that time but instead accepted a maintenance of Rs. 30 per month. The Tribunal found that merely because she accepted a maintenance of Rs. 30 per month did not mean that she

had relinquished her share. That apart, even if a share has been allotted to a person who is not entitled to it, it can be no ground for saying that the partition was illegal or void. Such a partition may be voidable at the instance of the members affected by it but the department has no locus stand to hold that such a partition was void ab initio. In these circumstances, it is not necessary to call for a reference on this question because even if the department''s contention is accepted it will not affect the partial partition carried out by the assessee. We, accordingly, decline to call for a reference on the question of law suggested in these applications.

6. The applications are accordingly dismissed with costs which we assess at Rs. 100 in each.

