
(1981) 01 BOM CK 0002

In the Bombay High Court

Case No : Income-tax Reference No.412 of 1978

Commissioner of Income Tax

APPELLANT

Vs

Indramohan Sharma (No. 1)

RESPONDENT

Date of Decision : 14-01-1981

Acts Referred:

Income Tax Act, 1961 — Section 171, 64

Citation : (1981) 23 CTR 117 : (1982) 138 ITR 696

Hon'ble Judges : M.N. Chandurkar, J;M.H. Mohta, J

Bench : Division Bench

Judgement

Chandurkar, J.—The assessee who is a partner in M/s. Flour Millers Engineering Corporation, Nagpur, had filed a return as an individual for the assessment year 1972-73. The HUF of the assessee consisted of himself, his wife and two minor sons and, according to the assessee, a partition had taken place in the family with effect from January 1, 1971, evidenced by a memorandum providing that even after the partition, the assessee was to continue to remain a partner of the Engineering Corporation. The memorandum also provides that the investment and interest of the joint family in the partnership firm was equally divided between the members of the joint family after setting apart a sum of Rs. 5,000 towards provision for the future expenses of the unmarried daughter of the assessee, who was about five years old. According to the memorandum, the amount which was to be received by the members out of the amounts standing to the credit of the HUF in the partnership firm was to continue to remain invested in the said partnership and was not to be withdrawn without the consent of the assessee. The clause dealing with the share in the profits or losses of the said partnership provided that the profits or losses up to December 31, 1970, shall be the profits or losses of the erstwhile joint family and the share of the profits or losses from January 1, 1971, be the profits or losses of the members of the joint family including party No, 1 (i.e., the assessee) jointly and severally in the proportion stated hereinafter.

2. The proportion in which the profits or losses were to be shared by the assessee and his wife was 25% in the case of profits and 5% in the case of losses. The two minor children were to get profits to the extent of 25% each but were not liable to share any losses.

3. The partition as recorded in the memorandum of partition was recognised by the ITO by an order under s. 171 of the I.T. Act, 1961 made on March 13, 1975. In the course of the assessment for the assessment year in question, i.e., 1972-73, the ITO took the view that the total income accruing to the assessee as a representative of all the favour members would be taxed in the hands of an unregistered firm. This view was, however, not accepted by the AAC, who deleted the addition made by the ITO.

4. The Revenue went up in appeal before the Income Tax Appellate Tribunal. The Tribunal took the view that after the partition of the HUF of the assessee was effected and which was recognised by the ITO himself, whatever was earned by the assessee was not earned for himself, but for and on behalf of the members of his erstwhile joint family. It took the view that the income which came into the hands of the assessee did not really, and in fact, belong to the assessee and thus the provisions of s. 64 were ruled out. Similarly, an argument which was advanced was that the income from the partnership firm could be assessed, on the footing that the members of the erstwhile joint family constituted an association of persons or body of individuals, was also rejected. The order of the AAC having been confirmed, the following questions have been referred to the High Court under s. 256(1) at the instance of the Revenue.

"Whether, on the facts and in the circumstances of the case, the share income of Indramohan Sharma in the profits of the partnership firm was subject to an overriding title in favour of the other members of the HUF in proportion to the share allotted to them in the partition deed, and as such, it could not be taxed in the hands of Indramohan Sharma ?"

5. Shri Joshi, appearing on behalf of the Revenue, has once again contended in this reference, as was done in I.T. Ref. No. 467 of 1976 [CIT v. M. D. Kanoria - [1982] 137 ITR that the questions which were framed in the application under s. 256(1) of the I.T. Act clearly included a question which turned on the applicability of s. 64 of the Act to the facts of the present case and, therefore, according to the learned counsel, when the Tribunal while making a reference reframed the question, the question as reframed and reproduced above must also be so construed as to indicate that the question raised by the Revenue in the application under s. 256(1) on the applicability of s. 64 of the Act was intended to be referred.

6. It is no doubt true that originally in the application for reference, the Revenue had drawn up as many as six questions and question No. 4 reads as follows :

"Whether , on the facts and in the circumstances of the case, the provisions of s. 64 were applicable to the instant case ?"

7. However, while making the reference order, the Tribunal has observed that "the questions suggested by the applicant are not happily worded and we reframe the question as follows". The question which has been referred is expressly not found to be one of the six questions reproduced in the application in exact terms. When the Tribunal reframed the question of law which is intended to be referred, was the question relating to the controversy as to whether after the partition of the joint family, the profits of the partnership firm could be excluded from the income of the assessee on the ground that those profits were subject to an overriding title in favour of the other members of the erstwhile joint family. Nothing prevented the Tribunal, if it had so wanted the question of law, with regard to the application of s. 64 of the Act, to be referred, to specifically make a reference of an additional question based on the applicability of s. 64. In any case, the question which has been referred can, by no stretch of imagination, be so construed as to required a consideration of the applicability of s, 64 of the Act. We have, therefore, declined to hear Shri Joshi on the question whether the income which had accrued to the members of the erstwhile joint family could be brought to tax in the hands of the assessee relying on the provisions of s. 64 of the Act.

8. So far as the question referred is concerned, we have to point out that a similar controversy has been decided by us by giving detailed reasons in I.T. Ref. No. 467 of 1976 Commissioner of Income Tax Vs. M.D. Kanoria, , where also the question involved was almost in identical terms, though the parties were different. We have taken the view in that reference that where there is a portion between the members of the joint family and the erstwhile karta of the joint continues to be a partner in the firm in which he originally represented the joint family, and there is an agreement between the members of the erstwhile joint family that the income was to be received for and on behalf of the members of the erstwhile joint family, such income cannot be wholly taxed in the hands of the erstwhile karta, because the income received by him is subject to an overriding title in favour of the other members of the erstwhile family. In the view which we have taken in I.T.Ref.No. 467 of 1976 Commissioner of Income Tax Vs. M.D. Kanoria, the question has to be answered against the Revenue. The question is, therefore, answered in the affirmative and against the Revenue. The assessee to get the costs of this reference.