

(1989) 02 MAD CK 0012
In the Madras High Court
Case No : Tax Case No. 1088 of 1979

Commissioner of Income Tax

APPELLANT

Vs

K.M. Jagannathan

RESPONDENT

Date of Decision : 09-02-1989

Acts Referred:

Income Tax Act, 1961 — Section 2(23), 22, 67(2)
Partnership Act, 1932 — Section 4

Citation : (1989) 76 CTR 1 : (1989) 180 ITR 191

Hon'ble Judges : V. Ratnam, J; Bhakthavatsalam, J

Bench : Division Bench

Advocate : C.V. Rajan, for the Appellant; K.C. Rajappa, for the Respondent

Judgement

Ratnam, J.—At the instance of the Revenue, u/s 256(2) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), the following

questions of law have been referred to this court for its opinion :

(1) Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in excluding the annual letting value of the property

in respect of the portion under the occupation of the firm while computing the income from property in the hands of the assessee partner ?

(2) Whether the Appellate Tribunal's view that for the purpose of section 22, the business carried on by the firm should be taken as the business

carried on by the partner and that, therefore, no income from property should be computed in respect of this portion of property occupied by the

firm is sustainable in law ?

2. The assessee is an individual having income from property, business in money lending, share income from K. M. K. Jagannathan and Co. and

other sources. In relation to the assessment year 1972-73, the assessee

admitted an annual letting value of Rs. 360 in respect of a house property owned by the assessee. This property was occupied by K. M. K. Jagannathan and Co., a firm, in which the assessee was also a partner, and under clause 8 of the deed of partnership, the entire premises owned by the assessee, except a small portion in the occupation of another partner of the firm, was to be used for the purpose of carrying on the business of the firm and the monthly rent was fixed at Rs. 30. In the course of the assessment proceedings, the Income Tax Officer found that the monthly rent of Rs. 30 was only a nominal amount and on the basis of the municipal tax value, he estimated the annual letting value at Rs. 4,800 and completed the assessment on that footing. Aggrieved by this, the assessee preferred an appeal before the Appellate Assistant Commissioner and it was contended that under the terms of the deed of partnership, which was binding on the assessee as well as the other partner, the property cannot reasonably be expected to be let out at a higher rent and that in all the prior years also, the income from the property had been assessed on the basis of the annual letting value at Rs. 360. This was accepted by the Appellate Assistant Commissioner, who directed the Income Tax Officer to recompute the income from the property by adopting the annual letting value at Rs. 360, instead of Rs. 4,800. On further appeal, at the instance of the Revenue, before the Tribunal, the assessee took the stand that as he was carrying on business through his partnership firm in the premises, the income in respect of the property was not chargeable to tax in his hands u/s 22 of the Act. The Tribunal took the view that the assessee carried on the business in a major portion of the premises in question through the firm, K. M. K. Jagannathan and Co., and as only room in the premises was used as residence by the other partner, in respect of which a rent of Rs. 30 per mensem was paid by the firm to the assessee and the share income from this firm is also assessed in the hands of the assessee, the income in respect of the property is not chargeable to tax u/s 22 of the Act. Ultimately, the Tribunal dismissed the appeal and that is how the two questions of law have come up before us.

3. Learned counsel for the Revenue contended that in order to enable the assessee to claim the benefit of section 22 of the Act and to exclude such portions of the property in the occupation of the assessee for purposes of

that section, the assessee should not only be the owner of the property, but he should also be carrying on business therein. In other words, learned counsel submitted that though the assessee may be the owner of the property, he was not in occupation of portions of such property for purposes of a business carried on by him and, therefore, the benefit of exclusion provided u/s 22 would not be available to the assessee. Reliance in this connection was placed by learned counsel upon the decisions reported in Commissioner of Income Tax, Karnataka Vs. K.N. Guruswamy, and Smt. Sharada Bai v. CIT (SLP (Civil) No. 11703 of 1986) [1987] 165 ITR 338.

4. On the other hand, learned counsel for the assessee contended that the assessee is the owner of the property in question and excepting a small portion reserved for the residential accommodation of the other partner, the remaining portions are in the occupation of the firm which is carrying on business therein and the carrying on of the business by the assessee, though as a partner in the firm, would be sufficient to enable the assessee to claim the benefit of section 22 of the Act. Our attention in this connection was drawn to the decision reported in Commissioner of Income Tax, Gujarat Vs. Rasiklal Balabhai, and Additional Commissioner of Income Tax Vs. N. Vaidyanathan, (Appendix). With reference to the reliance placed on Smt. Sharada Bai's case [1987] 165 ITR 338, learned counsel drew our attention to Late Nawab Sir Mir Osman Ali Khan Vs. Commissioner of Wealth Tax, Hyderabad, to contend that the dismissal of a SLP does not clothe that decision with the authority of the Supreme Court and that such dismissal cannot also be construed as the affirmation by the Supreme Court of the decision against which special leave to appeal was sought.

5. Before proceeding to consider these rival submissions, it would be useful to refer to sections 2(23) and 22 of the Act, which read as under :

2(23) "firm", "partner" and "partnership" shall have the same meaning respectively assigned to them in the Indian Partnership Act, 1932.

22. The annual value of property consisting of any building or lands appurtenant thereto of which the assessee is the owner, other than such

portions of such property as he may occupy for the purposes of any business or profession carried on by him profits of which are chargeable to

Income Tax, shall be chargeable to Income Tax under the head "Income from house property".

6. We may also refer to section 4 of the Partnership Act which defines a partnership as the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. It is further provided thereunder that persons who have entered into partnership with one another are called individually ""partners"" and collectively ""a firm"" and the name under which their business is carried on is called ""the firm name"". The deed of partnership entered into between the assessee and another on September 13, 1946, is found in annexure B to the stated case and therefrom it is seen that the assessee and another Sitaraman had entered into an agreement to carry on business in partnership in handlooms and other textiles under the name and style of Jagannathan and Co. and under clause 8 thereof, it has been provided that in the property belonging to the assessee, the firm should carry on the business, except in a small portion set apart for the residential use of another partner of the firm, on a monthly rent of Rs. 30. It is thus seen that in the property belonging to the assessee, the partnership consisting of the assessee and another is carrying on business. The question is, whether the carrying on of business in the property by the assessee and another partner as a firm, can be considered to be occupation by the assess of the property for the purposes of any business or profession carried on by him, the profits of which are chargeable to Income Tax u/s 22 of the Act. u/s 22, the charge to Income Tax gets affixed to the annual value of any property owned by the assessee, other than such portions of such property as he may occupy for the purpose of any business or profession carried on by him. There is no dispute that the share income of the assessee from the partnership has been subjected to assessment in his hands and this has also been accepted in para 5 of the order of the Tribunal. Can it be said that portions of the property under the firm's occupation for the purpose of carrying of its business is for purpose of carrying on the business of the assessee ? We have already referred to section 4 of the Partnership Act and the underlying idea in that provision is that when a person enters into a partnership with another or others for carrying on business, such that when the partnership after its birth carries on business, it only reflects the constituent partner's way of carrying on their business according to their joint

resolve and this principle is also reflected in section 67(2) of the Act. The scheme of the Act envisages an assessment of the firm's total income

under its various heads of income and partner would be subjected to assessment, inter alia, on his share income from the firm. It is in this context

that section 67(2) of the Act provides that the assessable share of a partner in the income of the firm, shall, for purposes of his assessment, be

apportioned under the appropriate heads of income under which the firm's income is assessed. If a firm is in receipt of business income or

professional income, assessable under the appropriate head, an aliquot part of the partner's share income from the firm should also be treated as

his business income or professional income and dealt with as such in his individual assessment for all purposes including allowances as well as

deductions. Section 67(2) of the Act also recognises the basic underlying concept of partnership law, according to which, partnership business is

nothing but the business carried on by every partner acting on behalf of all. We are, therefore, of the view that as per the legal as well as fiscal

theory, a partner may be appropriately regarded as carrying on business, even if the other partners look after the business of the firm and the user

and occupation by the firm, in which the assessee is a partner, of portions of the property belonging to the assessee, has to be regarded as

occupation of the property owned by the assessee for the purposes of a business carried on by him.

7. We may now briefly refer to the decisions to which our attention has been drawn. In Commissioner of Income Tax, Karnataka Vs. K.N.

Guruswamy, , relied on by the Revenue, the view has been taken that occupation of the property must be by the owner of the building and that, in

turn, would mean actual occupation for purposes of business or profession. In so holding, the jural relationship between the partners inter se and

the effect of section 4 of the Partnership Act have been overlooked. When a business is carried on by the firm, such business is carried on by the

partners of that firm and one partner is the agent of the other in the carrying on of the business. When a partnership carried on business, each

partner also carries on that business, and though, in the eye of law, a firm is a compendious expression used to indicate that several persons

constituting the firm are carrying on the business, yet, the business is being carried on by all the partners. This aspect has been lost sight of in the

decision reported in Commissioner of Income Tax, Karnataka Vs. K.N. Guruswamy, and we are, therefore, unable to subscribe to the view

expressed therein that where a house property owned by a partner of a firm is used for the firm's business, the notional income from the house

property is to be included in the total income of the partner. Though, it may be that the above decision had been followed by the Karnataka High

Court in Income Tax Reference Case No. 145 of 1980 (judgment dated November 10, 1983) and a SLP against that judgment was dismissed by

the Supreme Court, as could be gathered from Smt. Sharada Bai v. CIT [1987] 165 ITR 338, we are of the view that that may not be of any

assistance to the Revenue having regard to the pronouncement of the Supreme Court in Late Nawab Sir Mir Osman Ali Khan Vs. Commissioner

of Wealth Tax, Hyderabad, , wherein it has been pointed out that the dismissal of a SLP in limine does not clothe that decision under special leave

to appeal with the authority of a decision of the Supreme Court and that the dismissal of a SLP in the exercise of discretionary jurisdiction cannot

be construed as an affirmation by the Supreme Court of the decision against which the special leave to appeal was sought. We are, therefore,

unable to accept that the Supreme Court has accepted as correct the decision in Commissioner of Income Tax, Karnataka Vs. K.N. Guruswamy,

. We may point out that in Commissioner of Income Tax, Gujarat Vs. Rasiklal Balabhai, , the assessee, who was a partner in a firm, owned a

godown which was used by the firm as business premises and the Income Tax Officer estimated the annual letting value of the same and included it

in the total income of the assessee (an individual). On appeal, the Appellate Assistant Commissioner upheld the claim of the assessee that the

premises were used for purposes of business by the assessee as a partner of the firm and that was also found by the Tribunal. In dealing with the

reference on the question whether the Tribunal was justified in holding that the annual letting value of the godown owned by the assessee and

needed by him for the business carried on by him in partnership was not liable to be included in his total income u/s 22 of the Act, the Gujarat High

Court pointed out that the assessee must be held to be carrying on business, when that business is a business of a partnership firm, since the firm

has no legal entity. But that it is only a compendious expression for all the partners.

8. This view was expressed on a consideration of the decision in *Shantikumar Narottam Morarji Vs. Commissioner of Income Tax, Bombay City*,
, Sitaram Motiram Jain Vs. Commissioner of Income Tax, and *Commissioner of Income Tax, Gujarat Vs. Arun Industries*, . Apart from this, we
find that in *Additional Commissioner of Income Tax Vs. N. Vaidyanathan*, (T.C. No. 307 of 1977, judgment dated January 17, 1983), the
question arose whether a practising chartered accountant exercising his profession in partnership with another and in occupation of one-half of the
house owned by him, for purposes of using it as the office of the firm, could claim the benefit under the saving provision in section 22 of the Act.

The Tribunal, when the matter came up before it, took the view that one-half of the annual value must be excluded in reckoning the income of the
assessee under the head ""Property"". Considering whether the view so taken by the Tribunal was correct, a Division Bench of this court (to which
one of us was a party) laid down that the carrying on of a partnership business is nothing but the business carried on by a partner acting for all the
partners and this is recognised in section 4 of the Partnership Act as well as section 67(2) of the Income Tax Act. Finally, it was held that the
portion in the assessee's house occupied by the assessee's auditor firm for its office should have been held to be user by the assessee and,
therefore, the assessee would be entitled to the benefit of the saving provision u/s 22 of the Act. We are of the view that the principle of this
decision would be squarely applicable on the facts giving rise to this reference. We, therefore, hold that the Tribunal was right in the view it took
that for the purpose of section 22 of the Act, the business carried on by the firm should be regarded as being carried on by all the partners and,
therefore, no income from the property should be computed in respect of the portion of the property occupied by the firm of which the assessee is
a partner and in excluding the annual letting value of the property in respect of the portion under the occupation of the firm in the computation of the
income from the property in the hands of the assessee-partner. We, therefore, answer the question referred to us in the affirmative and against the
Revenue. The assessee will be entitled to his costs of this reference. Counsel's fee Rs. 500.