
(1994) 11 BOM CK 0029

In the Bombay High Court

Case No : Income-tax Reference No. 352 of 1983

Commissioner of Income Tax

APPELLANT

Vs

Moolsingh Karsondas

RESPONDENT

Date of Decision : 24-11-1994

Acts Referred:

Income Tax Act, 1961 — Section 28

Citation : (1996) 217 ITR 486

Hon'ble Judges : S.M. Jhunjunwala, J;B.P. Saraf, J

Bench : Division Bench

Advocate : Deokinandan, Dr V. Balasubramaniam and J.P. Devadhar, instructed by Smt. S. Bhattacharya, for the Appellant; K.M.L. Majele, V.H. Patil and K.B. Bhujle, for the Respondent

Judgement

S.M. Jhunjunwala, J.—By this reference made u/s 256(1) of the Income Tax Act, 1961, the following question has been referred at the instance of the Revenue for the opinion of this court :

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the assessee has converted half of his share in the firm of Tulsidas Khimji into joint family property and consequently upholding the exclusion of 10 per cent. share in the firm from him assessment?"

2. This reference relates to the assessment year 1974-75. The assessee, an individual, was a partner in the firm of Tulsidas Khimji (for short, "the said firm") which was a registered firm under the provisions of the Income Tax Act, 1961. The assessee and his brother one Shantu are the sons of the late Shri Karsondas, who died on February 17, 1972, and was having 16 per cent. share in the said firm. After the death of the said Karsondas, a new partnership deed was executed on May 25, 1972, by the then parties in the said firm for carrying on business thereof and the assessee was a partner therein having a share in the profits and losses to the extent of 32 per cent. There were four other partners therein. The assessee claimed his said 32 per cent. share in the profits and

losses of the said firm in different capacities as under :

- (i) 10 per cent. for him as his individual capacity;
- (ii) 14 per cent. for his smaller Hindu undivided family known as "Moolsingh Karsondas HUF";
- (iii) 8 per cent. for the larger Hindu undivided family known as "Karsondas Tulsidas HUF".

3. Accordingly, the assessee claimed deduction of 8 per cent. share as belonging to the said "Karsondas Tulsidas HUF" and 14 per cent. share as belonging to the said "Moolsingh Karsondas HUF" from his said 32 per cent. share in the profits of the said firm and contended that he was assessable in respect of the remaining 10 per cent. share only. The said claim of the assessee was rejected by the Income Tax Officer who held that the entire share of profit was to be taxed in the hands of the assessee as an individual. The Appellate Assistant Commissioner in appeal preferred by the assessee directed the Income Tax Officer to allow deduction of 10 per cent. out of the said 32 per cent. share in the profits received by the assessee from the said firm as it was payable by the assessee to the said "Moolsingh Karsondas HUF". According to the Appellate Assistant Commissioner, the said "Moolsingh Karsondas HUF" had an overriding title on the share of profit of the assessee in the said firm to the extent of 10 per cent. As regards the assessee's claim for deduction of the amount payable to "Karsondas Tulsidas HUF", the Appellate Assistant Commissioner held that no deduction whatsoever was permissible. The appeal of the assessee was thus partly allowed by the Appellate Assistant Commissioner.

4. Being aggrieved by the said order of the Appellate Assistant Commissioner, both the assessee and the Income Tax Officer preferred appeals to the Income Tax Appellate Tribunal, Bombay. According to the Income Tax Officer, the Appellate Assistant Commissioner was not justified in directing the Income Tax Officer to allow the deduction of 10 per cent. out of the said 32 per cent. share in the profits received by the assessee from the said firm as payable to the said "Moolsingh Karsondas HUF" by reason of diversion of income by an overriding title. According to the assessee, the Appellate Assistant Commissioner was not justified in rejecting the assessee's claim for further deduction of 4 per cent. out of the said 32 per cent. share in the profits as payable to the said "Moolsingh Karsondas HUF" as also for deduction of 8 per cent. out of the said 32 per cent. share in the said "Karsondas Tulsidas HUF". The Tribunal, following its decision in the earlier year in the assessee's own case, upheld the order of the Appellate Assistant Commissioner and dismissed both the said appeals. This has given rise to the present reference to this court at the instance of the Revenue.

5. On January 8, 1969, the assessee, then a partner in the partnership firm which carried on business in the firm name and style of "Messrs. Tulsidas Khimji" had made a declaration impressing his 10 paise share out of 20 paise share which he then had with the character of his joint family property with effect from

October 22, 1968. This was prior to the reconstitution of the said firm by the said deed of partnership executed on May 25, 1972, which was executed after the demise of the then partner the said Karsondas. In the said reconstituted firm, the assessee has been a partner in his individual capacity having 32 per cent. share in the profits thereof as stated in clear and unambiguous terms in the said deed of partnership dated May 25, 1972. Even in the statement of case drawn up for the purpose of this reference, it is stated as under :

"A new partnership deed was drawn up on May 25, 1972, in the case of the firm which showed that the assessee, Shri Moolsingh, and Shri Shantu were partners along with three others with shares as under :

Moolsingh Karsondas 32 per cent. Shantu Karsondas 24 per cent.

6. There is nothing on record to show either in the statement of case filed or otherwise that the said larger Hindu undivided family, viz., the said "Karsondas Tulsidas HUF", and/or the said smaller Hindu undivided family, viz., the said "Moolsingh Karsondas HUF", had any share in the profits of the said firm constituted under the said deed of partnership dated May 25, 1972. After reconstitution of the said firm under the said deed of partnership dated May 25, 1972, whereunder the assessee acquired the said 32 per cent. share in the profits of the said firm, no declaration has even been made by the assessee impressing his 14 per cent. share and/or 8 per cent. share out of the said 32 per cent. share with the character of the said smaller Hindu undivided family. The declaration dated January 8, 1969, made by the assessee in respect of his share in the profits of the partnership firm constituted prior to May 25, 1972, cannot, in the changed circumstances, be said to be valid and/or operative to impress part of his said 32 per cent. share in the profits of the said firm with the character of the Hindu undivided family property.

7. Moreover, under the law of partnership, a partner alone is entitled to the profits of a business carried in the partnership. The profits of the business carried on in the partnership accrued to the partners in the said reconstituted partnership firm as soon as accounts of the firm were made up and the profits so accrued were divided amongst the partners therein as per the shares allotted under the said deed of partnership dated May 25, 1972. A stranger to the partnership had no claim to the profits derived from the business carried on in the partnership. Hence, the income derived by the assessee by reason of his 32 per cent. share in the profits of the business carried on in the partnership was income of the assessee alone and there was no diversion of the assessee's income in the said reconstituted partnership under the said deed of partnership dated May 25, 1972, by overriding title by reason of the said declaration dated January 8, 1969, or otherwise. This, maximum, can be a case of application of income by the assessee after he derived it by reason of his partnership share in the profits of the business carried on in the said deed of partnership dated May 25, 1972. In our this view of the matter, we are supported by the decision of this Bench in the case of Commissioner of Income Tax Vs. Shri and Smt. Ganesh G.K.

Azrenkar, (income tax Reference No. 256 of 1983, decided on November 11, 1994).

8. The question, therefore, is answered in the negative, that is, in favour of the Revenue and against the assessee.

9. In the facts of the case, there shall be no order as to costs.