(1990) 02 MP CK 0009

In the Madhya Pradesh High Court

Case No : Miscellaneous Civil Case No. 629 of 1986

COMMISSIONER OF INCOME TAX — APPELLANT

Vs

NANAKRAM. — RESPONDENT

Date of Decision : 13-02-1990

Acts Referred:
Income Tax Act, 1961 — Section 139, 2, 256, 5, 64

Citation : (1991) 95 CTR 269 : (1992) ILR (MP) 151 : (1990) 35 MPLJ 727 : (1990) MPLJ 727

Hon'ble Judges : B. C. Varma, J

Bench : Division Bench

Judgement

B. C. VARMA, J. :

The Income Tax Appellate Tribunal, Jabalpur Bench, Jabalpur, has referred under s. 256(1) of the IT Act, 1961, the following question for decision by this Court :

"Whether on the facts and in the circumstances of the case, the Tribunal was correct in holding that the income arising to the minor sons of the assessee from their admission to the benefits of partnership was not liable to be included in computing the total income of the assessee ?".

2. The assessee in this case is one Nanakram. The years of assessment are 1976-77 and 1977-78. Dilip Kumar and Suresh Kumar, two minor sons of the assessee, were admitted to the benefit of the partnership firm by name M/s. United Service Station, Santa. Yet other two minor sons, Ashok Kumar and Brijlal, were admitted to the benefit of another partnership firm, styled as M/s. Krishna Dal Mills. The assessee himself was a partner in both these firms, as representative of the Hindu undivided family. The ITO while assessing the total income in the hands of the assessee included the income of the minor sons, derived from these partnership firms. This was in terms of s. 64(1)(iii) of the IT Act. The AAC, in appeal, affirmed that order and rejected the contention that if the income of the assessee is nil, the benefit earned by his minor sons from the

partnerships could not be included and taken into consideration, while assessing the total income in the hands of the assessee. The Income Tax Appellate Tribunal reversed this finding. The view taken by the Tribunal is that in case the assessee has no income at all, which could be assessed to Income Tax, the income of his minor children, earned as a result of their admission to the partnership, was not includible for assessing the income of the father (assessee in the present case). It is under these circumstances and the facts that the aforesaid question has been referred at the instance of the Department for decision by this Court.

3. It is not disputed and it is also clear from the record that Shri Nanakram, father of the minor sons admitted to the benefit of the two partnership, is assessee within the meaning of the term, as defined in s. 2(7) of the Act. "Assessee", there, is defined to mean a person by whom any tax or any other sum of money is payable under the Act. It includes every person in respect of whom any proceeding under this Act has been taken for the assessment of his income or of the income of any other person in respect of which he is assessable, or of the loss sustained by him or by such other person. According to this expression as used in the Act, the term assessee should cover a person who is liable for assessment of income belonging to his minor children, which is fictionally treated as his income for purposes of assessment. Total income has been defined in s. 2(45) of the Act, to mean total amount of income referred to in s. 5, computed in the manner laid down in the Act. It will thus include profits and gains, representing both positive or negative profits, or it may be nil profit. Sec. 64 speaks of income of certain persons to be included, while computing the total income of any individual. The clause relevant for our purposes may be quoted :

"64. Income of individual to include income of spouse, minor child, etc. - (1) In computing the total income of any individual, there shall be included all such income as arises directly or indirectly -

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(iii) to minor child of such individual from the admission of the minor to the benefits of partnership in a firm.

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Explanation I .... for the purposes cl. (iii), the income of the minor child from the partnership shall be included in the income of that parent whose total income (excluding the income referred to in that clause) is greater; and where any such income is once included in the total income of either spouse or parent, any such income arising in any succeeding year shall not be included in the total income of the other spouse or parent unless the Assessing Officer is satisfied, after giving that spouse or parent an opportunity of being heard that it is necessary so to do."

From these provisions, it can be safely inferred that while assessing the total income, which is computed in the manner laid down in the Act, the income belonging to the minor children of the assessee has to be treated, though fictionally, as income of the assessing for the purposes of assessment. In computing, i.e., calculating, such income, the assessing, in his return, is bound to include the income falling under s. 64(1)(iii) of the Act, i.e., the share income arising to the minor children of an individual on their admission to the benefits of the partnership in firm, notwithstanding the fact that the total income of such an individual assessee is either less than the minimum liable to tax or that such an individual has no income at all from any source other than the income included under s. 64(1)(iii) of the Act. It is not permissible to exclude income mentioned in s. 64 of the Act, if the income assessable in the hands of an assessee may be his own income or the income of any other person, in respect of which the assessee is assessable under the provisions of the Act. The provisions in s. 64 form part of an individual scheme for the purpose of assessment of income in the hands of the assessee, in respect of which he is assessable under the Act and the categories of income specified in s. 64, or income of other persons in respect of which the assessee is assessable under the Act. In the return, required to be furnished under s. 139 of the Act, the assessee is under an obligation to furnish return, declaring his total income, which, as we have seen above includes also the income of any other person in respect of which he is assessable [See vs. Kochamma Amma (1980) 12 ITR 624 . This decision of the Supreme Court was followed by a Division Bench of the Andhra Pradesh High Court in Commissioner of Income Tax, Visakhapatnam Vs. G. Gopal Rao and Others, . The learned Judges expressed themselves in these words :

"Once it is accepted that the assessee is under an obligation to himself declare in the return filed by him the income arising to his minor sons on their admission to the benefits of partnership in a firm, no further consideration becomes relevant. It would be immaterial whether such an assessee has income from any other source under the Act. In the first place, the income, although derived by his minor children is held to be his income and an obligation is imposed on the assessee under s. 139(1) of the Act to declare such income in the return filed by him. It would, therefore, be true to say that the income of the minor children is treated at the income of the assessee.

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For the aforesaid reasons, we are satisfied that the provisions of s. 64(1)(iii) of the Act empower the ITO to include the share income arising to the minor children of an individual on their admission to the benefits of the partnership in a firm under s. 64(1)(iii) of the Act, in the total income of such an individual assessee notwithstanding the fact that the total income of such individual assessee is either less than the minimum liable to tax or that such an individual has no total income at all from any source other than the income under s. 64(1)(iii) of the Act."

We are in full agreement with the view so taken. Similar view has been expressed by the Karnataka High Court in Commissioner of Income Tax Vs. L.N. Horkeri, . The learned Judges said that the income, in order to come within the purview of the term total income as defined in s. 2(45) of the Act, may comprise profits and gains representing both positive or negative profits or it may be nil profit. It may not be, therefore, proper to state that if an individual has got nil income, the minors income shall not be included in his total income. The Court rightly observed, and with which observation we fully agree, that such an interpretation would defeat the purpose of s. 64(1).

Shri Nema, learned counsel for the assessee, referred to the Explanation 1 appended to s. 64 and submitted that the income of the minor children from the partnership has to be included in the income of that parent, whose total income is greater. Learned counsel urged that if the income of a parent is nil, it will not be possible to say that the income of one of the parent is greater than that of the other and, therefore, the minors income cannot be considered as an income of any of the parents. The fallacy is that the argument forgets that what is to be assessed is the total income of the assessee. If this is borne in mind, then it will not be difficult at all to identify that parent, whose total income is greater. Therefore, this argument, based upon Explanation 1 to s. 64(1) of the Act, does not help the assessee at all, because it will be easily possible for the ITO to identify that parent, whose total income is greater. The Andhra Pradesh High Court in G. Gopal Raos case (supra), has dealt with this question at page 318 of the report. It has been rightly observed that the ITO has to enquire into the question as to who has greater income between the parent of a minor child. If the ITO comes to the conclusion that the income included in the return filed by an individual liable to be assessed to be assessed by reason of Explanation 1 to s. 64(1), in the hands of another parent, the ITO would then be under an obligation to disregard the income returned by the assessee in whose hands it is not assessable because of Explanation-I to s. 64(1), and assess it in the hands of the real person according to Explanation-I.

4. Shri Nema, however, referred to a decision of the Madras Bench of the Income Tax Appellate Tribunal in ITO vs. S. Krishna Iyer (1983) 2 SOT 55 which does support the contention raised by the learned counsel. The Tribunal rejected the Departments contention that there is no requirement of the parent, in whose hands the minors share income is sought to be assessed, having any other income before the provisions of s. 64(1)(iii), requiring the inclusion, are attracted. With all respect to the Tribunal as to what it observed, we are unable to accept the view so taken, for, if that interpretation is to be accepted, then it may be possible for any individual to so manage the affairs as to distribute his income to his minor child and wife and avoid tax. The object with which s. 64(1)(iii) was introduced by the Taxation Laws (Amendment) Act, 1975, w.e.f. 1st April, 1976, is to check tax avoidance by diverting the income to the minor children of the family by their admission to the benefits of the partnership in the firm. These provisions in the fiscal statute should, therefore, be so construed as to avoid any chance of escape or the means of evasion. Any interpretation that may defeat the intent and purpose of the legislation should be avoided. It will, therefore, be just to subscribe to the view, which will promote the object with which s. 64(1)(iii) was introduced by that amendment. We, therefore, hold that the assessment made by the ITO and upheld by the AAC is correct and the Tribunal was in error in coming to the conclusion that such income earned by the minor admitted to the benefits of the partnership, is not liable to be taxed in the hands of the assessee, i.e., the respondent Nanakram.

5. We accordingly answer the question, referred to us, in favour of the Revenue and against the assessee. There shall be no order as to costs.

