

(1993) 12 GUJ CK 0024

In the Gujarat High Court

Case No : Income-tax Reference No. 377 of 1981

Commissioner of Income Tax

APPELLANT

Vs

Prashant J. Kinariwala

RESPONDENT

Date of Decision : 07-12-1993

Acts Referred:

Income Tax Act, 1961 — Section 28, 60

Citation : (1995) 217 ITR 393

Hon'ble Judges : M.B. Shah, J;J.M. Panchal, J

Bench : Division Bench

Advocate : M.J. Thakore, for the Appellant;

Judgement

J.M. Panchal, J.—The Income Tax Appellate Tribunal, Ahmedabad Bench ""A"", has referred the following question of law for the opinion of

this court u/s 266(1) of the Income Tax Act, 1961 :

Whether, on the facts and in the circumstances of the case, the amount of Rs. 26,405 being 40 per cent. of income by way of share in the firm of

Messrs. Ramniklal J. Kinariwala and Co., was not includible in the total income of the assessee?

2. The reference arises in the background of the following facts : The assessee is assessed in the status of ""individual"". He was a partner in a firm of

Messrs. Ramniklal J. Kinariwala and Co., under a deed of partnership dated January 24, 1972. He had a share of 15 per cent. in the profits of the

firm and a share of 19 per cent. in the losses. The accounts of the partnership firm were closed on December 31, 1972. In the meantime, by a

deed of settlement dated December 22, 1972, the assessee created a trust known as ""Prashant Jivanlal Trust"" for the benefit of his sister-in-law,

nephew and niece. By the said deed, the assessee settled in trust 40 per cent. of the right, title and interest out of his 15 per cent. share in the profits and 19 per cent. share in the losses of the aforesaid partnership. He also settled a sum of Rs. 6,000 by way of a transfer entry from his capital account in the books of the firm to the account of the trust. At the time when the accounts of the firm were closed, there was a profit and 15 per cent. of the profit was determined at Rs. 85,277 which was credited to the capital account of the assessee. At the stage of assessment, the assessee took up the stand that 40 per cent. of his income by way of share in the firm was not includible in his total income as it was diverted by a superior title to the trust. The Income Tax Officer rejected this claim of the assessee. The Appellate Assistant Commissioner, however, accepted the claim of the assessee in an appeal filed by him. On an appeal by the Revenue before the Tribunal, two learned Members who heard the appeal first had a difference of opinion on the point at issue and the matter was referred to the President u/s 255 of the Act. The Vice President of the Tribunal considered the relevant facts and circumstances and came to the conclusion that by virtue of the settlement the income by way of share in the firm was diverted by a superior title and, therefore, the income in question was not includible in the total income of the assessee.

3. Feeling aggrieved, the Revenue made an application to the Tribunal requiring it to refer a question of law said to arise out of order dated December 20, 1980, passed in Income Tax Appeal No. 2358/(Ahd.) of 1977-78. The Tribunal agreed that a question of law arises out of the said order. and has, therefore, referred the abovequoted question for the opinion of this court.

4. At the time of hearing of this matter, learned counsel for the assessee submitted that, on identical facts, a similar question is answered by this court in favour of the assessee, who was also a partner of the firm of Messrs. Ramniklal Jivanlal Kinariwala Industries, in Income Tax Reference No. 191 of 1980 (Sunil J Kinariwala v. CIT [1995] 211 ITR 127), decided on October 29, 1993. It is admitted by learned counsel for the Revenue that the facts in the present reference and the facts in Income Tax Reference No. 191 of 1980 (see [1995] 211 ITR 127) are identical.

5. In Income Tax Reference No. 191 of 1980 [Sunil J. Kinariwala v. CIT [1995] 211 ITR 127], we referred to the decision of the Supreme

Court in the case of Commissioner of Income Tax, Madras Vs. Bagyalakshmi and Co., Udamalpet, and held that a partner of a firm is entitled to

enter into a sub-partnership or he can transfer his share capital by executing a trust deed. We also referred to the decision of the Supreme Court in

the case of Fatehchand Murlidhar and Another Vs. Commissioner of Income Tax, Calcutta, and held that when a sub-partnership is entered into,

the partner changes his character vis-a-vis the sub-partners and the Income Tax authorities. In the case of a sub-partnership the sub-partnership

creates a superior title and diverts the income before it becomes the income of the partner. In other words, the partner in the main firm receives the

income not only on his behalf but on behalf of the partners in the sub-partnership. We have also referred to the decision of this court in the case of

CIT v. Nandiniben Narottamdas [1983] 140 ITR 16 and finally held as under (at page 135 of 211 ITR) :

In the present case, the assessee has transferred 50 per cent. of his right, title and interest in the partnership of Messrs. Kinariwala R. J. K.

Industries, that is to say, the assessee has divested himself of the income-producing apparatus or assets by overriding title created in favour of the

beneficiaries of Sunil Jivanlal Kinariwala Trust.

In the case of Nandiniben [1983] 140 ITR 16 and in the case of Fatehchand Murlidhar and Another Vs. Commissioner of Income Tax, Calcutta,

decided by the Supreme Court, it is apparent that what has been diverted by the assessee in both the cases was the right to receive profits and to

pay losses, and that the amounts standing in the capital account of the firm continued to belong to the assessee. The Supreme Court had not given

any importance to the factor that capital is not transferred. The Supreme Court has observed that the right to receive profits and to contribute to

losses constituted the income-producing apparatus or "asset" and once that stood transferred by gift to the beneficiaries section 60 of the Income

Tax Act cannot be invoked.

In this case also, the same would be the result. The assessee has transferred 50 per cent. of his right, tide and interest to share profits/ losses of his

10 per cent. share in the partnership firm, namely, Messrs. Kinariwala R. J. K. Industries. By the deed, the assessee's assets in the partnership-

firm are assigned and for that purpose, it is not necessary that the capital owned

by the assessee ought to be transferred. In the result, section 60 would not be applicable to the facts of the present case. We, therefore, answer questions Nos. 1, 2 and 3 in the affirmative, in favour of the assessee and against the Revenue.

6. For the reasons recorded in the judgment dated October 29, 1993, in Income Tax Reference No. 191 of 1980 (Sunil J. Kinariwala v. CIT

[1995] 211 ITR 127), it is held that the amount of Rs. 26,405 being 40 per cent. of income by way of share in the firm of Messrs. Ramniklal J.

Kinariwala and Co. was not includible in the total income of the assessee.

7. In the result, the question referred is answered in the affirmative, i.e., in favour of the assessee and against the Revenue. The reference stands disposed of accordingly with no order as to costs.