(1989) 07 KL CK 0062

In the High Court Of Kerala

Case No : IT Reference No''s. 248 to 250 of 1985

Commissioner of Income Tax APPELLANT

Vs

P.T. Mannel RESPONDENT

Date of Decision : 17-07-1989

Acts Referred:
Income Tax Act, 1961 — Section 14, 2(23), 22, 23, 4

Citation : (1990) 181 ITR 256

Hon'ble Judges : K.S. Paripoornan, J;K.A. Nayar, J

Bench : Division Bench

Advocate : P.K.R. Menon, for the Appellant; A.K. Jose, for the Respondent

Judgement

K.A. Nayar, J.—At the instance of the Commissioner, Cochin, the Tribunal Cochin Bench has referred the following question of law arising out of the common order of the Tribunal dated 2-3-1984 in IT Appeal Nos. 379 to 381 (Coch.) of 1982:

Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the annual letting value of the ground floor of a building belonging to the assessee and which was in the occupation of a firm in which the assessee was a partner, is not includible in the income of the assessee u/s 22 of the income tax Act, 1961 and consequently in holding that the reopening of the assessment is not sustainable?

The matter arises out of income tax assessment for the years 1969-70 to 1971-72 for which the accounting period ended on 31-3-1969, 31-3-1970 and 31-3-1971, respectively. The assessee was a partner in the firm of fashion jewellery. The original assessments for the aforesaid three years were completed on the assessee as an individual on 20-11-1970, 24-2-1971 and 7-3-1974. During the relevant accounting period, the assessee had allowed the firm to use the ground floor of the building belonging to him for the purpose of the business of the firm. He had neither let out the ground floor nor collected any rent for the same and therefore the assessee had not returned any income from the ground floor. But the assessment was reopened on the ground that the assessee failed to disclose the particulars of income relating to the ground floor. The assessee objected to the re-opening on the ground that the annual value relating to the ground floor is not income chargeable to tax as the same is exempt u/s 22 of the income tax Act, 1961 (''the Act'') . u/s 22, the annual value of a building of which the assessee is the owner which he is occupying for the purpose of a business carried on by him, the profits of which are chargeable to income tax, is exempted from taxation. But the ITO rejected the contention of the assessee and assessment was completed including the annual value of the ground floor of the building also as his income. On appeal, the AAC accepted the contention of the assessee. The department came up in appeal against the decision of the AAC for the three years. But the Tribunal confirmed the order of the AAC, and in so doing the Tribunal followed the decision of the Gujarat High Court in Commissioner of Income Tax, Gujarat Vs. Rasiklal Balabhai, wherein it was held that when a partnership carries on a business each partner thereof carry on that business and further held that when the partnership is in occupation the assessee must also be deemed to be in occupation thereof. It is thereafter the above question of law was formulated and referred to this Court.

We heard the counsel for the revenue as well as for the assessee.

2. The Tribunal appreciated the facts that the assessee was the managing partner and the other partners were his sons. The licence issued by the excise authorities for carrying on business in gold was in the name of the assessee. The licence had also mentioned the ground floor of the building as the premises where the business was carried on under the licence. Therefore, the assessee as the managing partner is carrying on business in partnership using the licence issued in his name in the ground floor of the building belonging to him and occupied by him as partner.

Under section 14 of the Act, all income chargeable to income tax is classified. Income from house property is one of such heads of income. Sections 22 to 27 of the Act relate to computation of income from house property. Section 22 says that the annual value of property consisting of any buildings or lands appurtenant thereto of which the assessee is the owner is chargeable to income tax under the head ''Income from house property'', unless otherwise provided. Such portion of such property as he may occupy for the purposes of any business carried on by him the profits of which are chargeable to income tax is exempted. If the owner occupied the property for the purpose of his business the profits of which are assessable to tax, no tax is payable in respect of that house property. The tax is on the owner and not on the occupant and levied not on actual income but on the annual value as determined u/s 23. The charge is not on rest but on the inherent capacity of the property to yield profit. Even if the owner receives no income the charge will be there on the artificial or notional income statutorily fixed. In order to be taxed u/s 22 conditions to be satisfied are (a) property should consist of buildings or lands appurtenant thereto; (b) assessee should be the owner; (c) the property should not be used by the owner for the purpose of any business carried on by him the profits of which are chargeable to income tax. We are concerned herewith the third condition. If it is not satisfied, section 22 will not be attracted. If a person occupies his house property for the purpose of his business the annual value thereof will not be chargeable provided the profits thereof are taxable. In other words, when an owner occupies any portion of house property for the purpose of his business carried on by him the profits of which are chargeable to income tax, the annual value will not be chargeable. In order to claim exemption also three conditions should be satisfied viz. (a) the assessee should be in occupation of the property; (b) the occupation must be for the business carried on by the assessee; and (c) the profits of the business should be chargeable to tax. The admitted case is that the elements of conditions ''b and c'' mentioned above have been satisfied in the case for the assessee is carrying on business as the managing partner of the firm and the profits of the business are chargeable to tax.

3. The contention strongly pressed on behalf of the revenue is that the assessee cannot be deemed to be in occupation of the premises as the occupation of the firm cannot be treated as occupation by the partner. For this purpose, the counsel strongly relied on the decision of the Karnataka High Court in Commissioner of Income Tax, Karnataka Vs. K.N. Guruswamy, and submitted that exemption u/s 22 is available only to the owner of house property who occupies it for the purpose of any business carried on by him. If the property or portion of it, owned by an assessee, is occupied by him for the purpose of his own business or profession, or a property owned by a firm is used for its business, such the assessee is entitled to exemption. In that case, the question to be considered was similar like the one in question, viz. whether the notional income from house property owned by a partner of a firm and used in the firm''s business, can be included in the total income of the partner. The ITO rejected the assessee''s claim and included the annual value in the assessee''s income. But the AAC upheld the contention of the assessee and deleted the addition. The Tribunal also agreed with the view taken by the AAC in that case. On reference at the instance of the revenue the Division Bench of the High Court held that "only the owner of the property who can claim deduction and that owner must be an assessee and the property concerned must have been used or occupied for the assessee''s business. ''The occupation'' of the property in the context must mean ''occupation as owner or his own occupation''. The fact of occupation, therefore, must go with the owner of the building which means actual occupation for the purpose of his business or profession. Therefore, the Division Bench stated that the conclusion of the law is as under:

If the property or a portion of it, owned by an assessee, is occupied by him for the purpose of his own business or profession, or a property owned by a firm is used for its business, such assessee is entitled to exemption u/s 22. (p. 38)

The counsel on behalf of the respondent-assessee relied on the decision in the

Gujarat High Court in Rasiklal Balabhai''s case (supra) . In that case also similar question arose for consideration wherein an individual assessee owning godown used by partnership in which he is partner was assessed, including the annual value of the godown in the total income for the assessee. The AAC deleted the inclusion and the deletion was upheld by the Tribunal. The question that arose before the Gujarat High Court was, whether the Tribunal was justified in holding that the annual letting value of the godown owned by the assessee and used for the business carried on by him in partnership, was not liable to be included in his total income u/s 22. In answering the question in favour of the assessee the Division Bench held that when a partnership carries on a business each partner thereof carried on that business and the exemption in section 22 will apply in such cases. A partner of the firm can be said to be carrying on his business when he carries on business of partnership. Section 2(23) of the Act says ''firm'', ''partner'' and ''partnership'' have the meaning respectively assigned to them in the Indian Partnership Act, 1932 and section 4 of the said Act defines ''partnership'' as the relationship between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. Referring to the concept of the partnership the Supreme Court in Commissioner of Income Tax, Madras Vs. R.M. Chidambaram Pillai and Others, observed that a firm is not an entity or ''person'' in law, but is merely an association of individuals and a firm name is only a collective name of those individuals who constitute the firm. In the decision in Sitaram Motiram Jain Vs. Commissioner of Income Tax, the Gujarat High Court held that when a partnership carries on a business each partner thereof carried on that business. Section 22 exempts the annual value of the 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 purpose of any business carried on by him. The interpretation canvassed by the counsel for the revenue is that the occupation must be exclusive, in the sense, no other person should be considered to be occupying that premises. Factually in the case in question the assessee as the managing partner is occupying the house property for the purpose of his business and the business is done in partnership with his sons. There may be occupation of the premises by other partners also, even though the licence issued by the excise authority for carrying on business in gold was only in the name of the assessee. We are, therefore, of the view that the assessee is carrying on business in the premises. When a partnership carries on a business, each partner thereof carries on that business and if the business is carried on in the premises, it must be held, as a necessary implication, that the partner is occupying the premises. It cannot be stated that the managing partner is not occupying the premises. In fact, all the partners are occupying the premises including the managing partner, the assessee, herein. There is no case that the income from the business is not subjected to tax. On a perusal of the decision of the Karnataka High Court, we find that the position has not been considered in the light of the partnership law in that case. The reasoning of the Gujarat High Court is more acceptable to us. We also find that the decision of the Gujarat High Court has been accepted by the Madras High Court in Commissioner of Income Tax Vs. K.M. Jagannathan, where also similar question arose for consideration. It was held in that case that when a partnership carries on business, each partner also carries on that business and in the eye of law, a firm is a compendious expression used to indicate that several persons are constituting the firm. When the firm is carrying on business it can be said that the business is being carried on by all the partners. This aspect has been lost sight of in the decision in K.N. Guruswamy''s case (supra) and, therefore, their Lordships of the Madras High Court were not able to subscribe to the view expressed therein. In that case an assessee-partner owned the house property which was occupied by the firm for its money-lending business. The ITO included the annual value of the property in the assessment of the assessee. But the AAC accepted the assessee''s contention that the assessee is carrying on business in the premises, though as a partner. On further appeal by the revenue, the Tribunal upheld the view expressed by the AAC. At the instance of the revenue, the question whether the Tribunal was right in excluding the annual letting value of the property in respect of the portion under the occupation of the firm and whether the 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 are correct, was referred for the opinion of the High Court. It was contended on behalf of the revenue that even though the assessee is the owner of the property he was not in occupation of such a property for the purpose of a business carried on by him and, therefore, the benefit of exclusion provided u/s 22 could not be available to the assessee. Reliance was placed by the revenue on the decision aforementioned viz. K.N. Guruswamy''s case (supra) . It was contended on behalf of the assessee that carrying on business by the assessee though as a partner of the firm, would be sufficient to enable the assessee to claim the benefit. The assessee relied on the decision in Rasiklal Balabhai''s case (supra) and an unreported decision in Addl. CIT v. N. Vaidyanathan [Tax Case No. 307 of 1977, dated 17-1-1983]. The Division Bench of the Madras High Court referred to section 4 and the scheme of the income tax Act especially section 67(2) which recognized the basis of partnership law according to which partnership business was nothing but the business carried on by every partner, acting for all the partners and concluded 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 purpose of a business carried on by him. In N. Vaidyanathan''s case (supra) 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 could claim the benefit u/s 22. It was held that the portion in the assessee''s house, occupied by the assessee''s auditor firm can be held to be user by the assessed and, therefore, the assessee would be entitled to the benefit of section 22. The assessee in this case was the managing partner of the firm. The counsel for the revenue also brought to our notice the decision in R.B. Jodha Mal Kuthiala Vs. The Commissioner of Income Tax, Punjab, Jammu and Kashmir, Himachal Pradesh and Patiala, which deals with the question as to who can be considered the owner of the property. In this case, there is no dispute relating to the ownership and, therefore, we are not referring to that decision in detail.

There is no dispute that the assessee is the owner of the ground floor of the building. The assessee is carrying on business in partnership the profits of which are chargeable to income tax. It cannot be stated that the assessee is not occupying the building for the purpose of his business. The business is done in partnership, the other partners also occupying the ground floor along with the assessee and the partnership business is carried on by him along with the other partners. Therefore, we are of the view that the annual letting value of the ground floor of the building, belonging to the assessee which is in occupation of a firm, in which the assessee is a partner, is not includible in the income of assessee u/s 22 and consequently the reopening of the assessment was not sustainable.

In the light of the above discussion we answer the question referred to us in the affirmative, i.e., in favour of the assessee and against the revenue.