

(1994) 11 OHC CK 0021

In the Orissa High Court

Case No : Special Jurisdiction Case No. 54 of 1989

Commissioner of Income Tax

APPELLANT

Vs

Rabindranath Dhol

RESPONDENT

Date of Decision : 22-11-1994

Acts Referred:

Income Tax Act, 1922 — Section 10(2), 2(6B)

Income Tax Act, 1961 — Section 22, 23, 23(2), 256(1), 28

Partnership Act, 1932 — Section 4

Citation : (1995) 79 TAXMAN 170

Hon'ble Judges : P.C. Naik, J;G.B. Patnaik, J

Bench : Division Bench

Advocate : A.K. Ray, for the Appellant;

Judgement

G.B. Patnaik, J.—On an application being filed by the department u/s 256(1) of the income tax Act, 1961 the Tribunal has referred the following questions for opinion of this Court and a statement of the case has been made. The two question referred are : "1. Whether income from a house property owned by a partner and used in the business carried on by the partnership firm would qualify for the exemption provided in section 23 of the income tax Act, 1961 ?

2. On the facts and in the circumstances of the case, whether the Tribunal was justified in allowing deduction u/s 23(2) of the income tax Act ?"

The assessee, an individual, is also a partner of a partnership firm. The said assessee had allowed some rooms in his building where the partnership business was being carried on. No rent was being charged from the said partnership firm. During the assessment year 1988-89 the assessee contended that the rooms wherein the business was being carried on by the partnership firm of which the assessee himself is a partner should be excluded while computing the income from house property under-section 28 of the income tax Act, 1961 ("the Act"). The ITO, however, rejected the said claim and on the basis of the rent which the assessee was receiving from other tenants computed the notional income in

respect of the rooms under the occupation of the partnership firm and then determined the tax liability. The assessee carried the matter in appeal, but the appellate authority dismissed the appeal as the business of the partnership firm cannot be said to be the business of the assessee himself. The assessee then carried the matter in second appeal to the Tribunal. The Tribunal came to the conclusion that the portion of the building which is utilised by the partnership firm should be treated as being used by the assessee for the purpose of business and, therefore, the income from such property would not be taxable u/s 22. It, accordingly, directed to delete the income of that portion of the property which was being occupied by the partnership firm. In respect of the claim of the assessee claiming deduction u/s 23(2) for a portion of the building which was under occupation of a bank, the Tribunal took into account the fact that the ITO had allowed such deduction in respect of the assessee for the assessment year 1987-88 and, therefore, there was no reason why the same should not be allowed in respect of the year under consideration. Accordingly, the Tribunal directed the ITO to allow necessary deduction u/s 23. The appeal of the assessee, thus, having been allowed, the department moved the Tribunal u/s 256(1), and the Tribunal on being satisfied referred the two questions as already stated for opinion of this Court.

2. So far as the first question is concerned, the learned standing counsel for the department, submitted that the answer to the aforesaid question would depend upon an interpretation of section 22. Section 22 of the Act is extracted hereinbelow in extenso :

"22. Income from house property. - The annual value of property consisting of any buildings or lands apartment 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 the profits of which are chargeable to income tax, shall be chargeable to income tax under the head "Income from house property"."

According to the learned standing counsel, the business carried on by the partnership firm cannot be held to be the business of the assessee himself even though he is a partner of the partnership firm and, therefore, he is not entitled to exclude the same from the purview of the income from house property. A plain literal meaning of section 22 undoubtedly supports the contention of the learned standing counsel for the department. The decision of the Karnataka High Court in the case of Commissioner of Income Tax, Karnataka Vs. K.N. Guruswamy, also fully supports the contention of the learned standing counsel for the department. Their Lordships of the Karnataka High Court came to hold that if the property owned by an assessee is occupied by him for the purpose of his own business or profession, then such assessee is entitled to exemption u/s 22. According to their Lordships, u/s 22 it is only the owner of the property who can claim exemption and that owner must be an assessee and the property concerned must have been used or occupied for the assessee's business. Ultimately, it was held that

where a house property owned by a partner of a firm is used for the firm's business, the exemption u/s 22 is not available and the notional income from the house property is to be included in the total income of the partner. The learned Judges of the Karnataka High Court have relied upon the decision of the Delhi High Court in the case of *Bhai Sundar Dass and Sons Vs. The Commissioner of Income Tax, New Delhi*, as well as the decision of the Calcutta High Court in the case of *Sarvamangala Properties Ltd. Vs. Commissioner of Income Tax*, . The two decisions of the Delhi and the Calcutta High Courts though are not directly on the point, yet the principles therein were applied by the learned Judges of the Karnataka High Court.

But a Bench of the Gujarat High Court in the case of *Commissioner of Income Tax, Gujarat Vs. Rasiklal Balabhai*, , answered a similar question against the revenue. Interpreting section 22 their Lordships of the Gujarat High Court have come to the conclusion that even where the partnership business is carried on in the premises of one of the partners, the said partner, as an individual, would be entitled to the exemption u/s 22. On an examination of the provisions of the Indian Partnership Act as well as relying upon the decision of the Bombay High Court in the case of *Shantikumar Narottam Morarji Vs. Commissioner of Income Tax, Bombay City*, it was held that when a partnership carries on business, each partner thereof carries on that business and if the firm is carrying on business in the premises in respect of the income of which the exemption is claimed, it must be held as a necessary implication that the partner is occupying the premises. Chagla, C.J., in *Shantikumar Narottam Morarji's* case (supra) was examining as to what are the rights of a partner in a registered firm with regard to deductions u/s 10(2) of the Indian income tax Act, 1922. The learned Judge had observed :

"...In the eye of the law, a firm is a compendious expression used to indicate that several persons constituting that firm are carrying on a business. But that compendious expression cannot give to the firm a legal entity or a legal existence. In law it is only the partners who exist and who carry on the business. It is equally true that looking to the definition of "partnership" in section 4 of the Partnership Act, when you have a partnership business, the business is carried on by each of the partners, and the definition of a partnership in the Partnership Act has been incorporated in the Indian income tax Act, in section 2(6B)." (p. 76)

A partnership as defined in section 4 of the Indian Partnership Act is 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. Therefore, when a firm carries on business, it is a business carried on by the partners of that firm. One partner is the agent of the other in carrying out that business. Consequently, when a partnership carries on a business, each partner thereof must be said to be carrying on that business. In the aforesaid premises, in our considered opinion, the learned Judges of the Karnataka High Court were not justified in interpreting section 22 by holding that the business of the partnership firm carried on in the premises of an individual partner cannot be held to be the business of the said partner. We would

profitably extract at this stage an observation made by their Lordships of the Supreme Court in the case of Commissioner of Income Tax, Bangalore Vs. J.H. Gotla, Yadagiri, to the effect:

"... Though equity and taxation are often strangers, attempts should be made that these do not remain always so and if a construction results in equity rather than in injustice, then such construction should be preferred to the literal construction...." (p. 339)

In the case in hand, we are of the considered opinion that the literal construction put by the Karnataka High Court to section 22 works out gross injustice and does not subserve the object of the legislation. In the aforesaid premises, we respectfully differ with the views expressed by the Karnataka High Court and agree with the conclusion and reasonings adopted by the Gujarat High Court in Rasiklal Balabhai's case (supra) and hold that the income from a house property owned by the assessee-partner and used in the business carried on by the partnership firm in which the assessee is a partner would qualify for the exemption provided in section 22. We, accordingly, answer the first question in favour of the assessee and against the revenue. Coming to the second question, the learned standing counsel appearing for the department did not advance any elaborate argument. We have ourselves examined the order of the Tribunal as well as the orders of the ITO and the first appellate authority. Our answer to the second question is that on the facts and circumstances of the case, the Tribunal was fully-justified in allowing the reduction u/s 23(2). The answer is, accordingly, in favour of the assessee and against the department.

The reference, accordingly, stands disposed of.

P.C. Naik, J.

I agree.