(2004) 08 AHC CK 0181

In the Allahabad High Court

Case No : IT Ref No. 154 of 1982

Commissioner of Income Tax APPELLANT

Vs

Ram Krishna Tekriwal RESPONDENT

Date of Decision : 03-08-2004

Acts Referred:
Income Tax Act, 1961 — Section 147, 148, 64(1)

Citation : (2004) 191 CTR 181 : (2005) 274 ITR 266

Hon'ble Judges : R.K. Agrawal, J;K.N. Ojha, J

Bench : Division Bench

Advocate : A.N. Mahajan, for the Appellant; None, for the Respondent

Judgement

1. The Tribunal, Allahabad, has referred the following questions of law u/s 256(1) of the IT Act, 1961 (hereinafter referred to as the Act), for opinion to this Court :

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in taking the view that reopening of the assessment by the ITO was not legal or permissible ?"

2. The present reference relates to the asst. yr. 1973-74. The respondent-assessee is a partner in the firm M/s Vijay Picture Palace, Gorakhpur, in the capacity of Karta of his HUF. His wife, Smt. Chameli Devi, is also a partner in the firm. In the original assessment order the income derived by the wife of the respondent-assessee from the firm was not included in the hands of the respondent-assessee. The AO initiated proceedings u/s 147/148 of the Act. He recorded the following reasons for reopening of the assessment in the case of Sri Indu Kumar Tekriwal. The reasons for reopening the assessment in the present case is also similar.

"28th March, 1978. The assessee is a partner in the status of an individual in the registered firm M/s Hari Narain Ram Krishan. He is also a partner in the status of an HUF in registered firm M/s Vijay Picture Palace, wherein his wife Smt. Lalita Devi is also a partner. As such, the income of the assessee''s wife Smt. Lalita

Devi, should have handled in the hands of Shri Indu Kumar Tekriwal as Individual. u/s 64 of the IT Act, which has escaped assessment. Issue notice u/s 148 at once."

3. In response to the notice issued u/s 148 of the Act, the respondent-assessee filed his return under protest disclosing an income of Rs. 17,580 with remark in part III of the report to the effect that the share income of the wife from M/s Vijay Picture Palace, Gorakhpur, at Rs. 6,009 was not legally includible in his hands u/s 64 of the Act and the proceedings were illegal. It was also stated that the share income had already been assessed in the individual assessment of the spouse and as such the addition of this income in his hands would amount to double taxation, which is illegal. It was further contended that the reassessment amounted to a change of opinion. The ITO did not accept any of the objections raised by the respondent-assessee and held that it was a case where there was an omission to include the share income of the spouse u/s 64(1)(i) of the Act.

4. The assessee carried the matter in the appeal. The AAC, however, dismissed the appeal by observing that after the decision of this Court in the case of Madho Prasad Vs. Commissioner of Income Tax, , the ITO had reopened the assessment, although this fact has not been mentioned either in the assessment order or in the reasons recorded by him. The AAC presumed the reopening of the assessment to be u/s 147(b) of the Act. The objection regarding change of opinion was negatived by him.

5. The respondent-assessee further appealed before the Tribunal. The Tribunal while allowing the appeal had held that after passing of the assessment order neither any information nor any fresh material was on record, which could have led the ITO to form a belief that income has escaped assessment to tax. The Tribunal, therefore, annulled the reassessment proceedings.

6. We have heard Sri A.N. Mahajan learned standing counsel appearing for the Revenue. Nobody has put in appearance on behalf of the respondent-assessee.

7. The learned counsel for the Revenue submitted that it is not necessary to go into the merits of the reopening of the assessment proceedings inasmuch as the Hon''ble Supreme Court in the case of Commissioner of Income Tax, Ludhiana, etc.etc. Vs. Shri Om Prakash, etc.etc., has already overruled the decision of this Court in the case of Madho Prasad (supra). The Hon''ble Supreme Court has held that for Section 64(1) of the Act to get attracted it is necessary that the husband/ father should be a partner in a partnership firm as an individual, i.e., in his individual capacity, It is not attracted where he is a partner as the Karta of the HUF to which such wife- and/or minor children belong.

8. Since the reopening of the assessment proceeding appears to be on the basis of a Division Bench decision of this Court in the case of Madho Prasad (supra), which has been subsequently overruled by Hon''ble the Supreme Court in the case of Om Prakash (supra), there is no infirmity in the order passed by the Tribunal.

9. We, therefore, answer the question referred to this Court in the affirmative i.e., in favour of the assessee and against the Revenue. However, there will be no order as to costs.

