(1984) 07 AP CK 0004

In the Andhra Pradesh High Court

Case No : Case Referred No. 245 of 1978

Commissioner of Income Tax — APPELLANT

Vs

S. Krishna Rao — RESPONDENT

Date of Decision : 16-07-1984

Acts Referred:

Income Tax Act, 1961 — Section 155(5), 256(1), 34(3)(b)
Partnership Act, 1932 — Section 14

Citation : (1984) 19 TAXMAN 591

Hon'ble Judges : Jeevan Reddy, J;Anjaneyulu, J

Bench : Division Bench

Advocate : M.S.N. Murthy, for the Appellant; J. Srinivasa Rao and M.J. Swamy, for the Respondent

Judgement

Anjaneyulu, J.—The following two questions of law are referred to this Court for its opinion u/s 256(1) of the income tax Act, 1961 (''the Act'') : "1. Whether, on the facts and in the circumstances of the case, the Tribunal is justified in holding that the development rebate cannot, be withdrawn by applying the provisions of section 155(5) ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal is justified in holding that there is no transfer or sale within the meaning of section 34(3)(b) ?"

The reference relates to the assessment year 1970-71. The assessee was a Hindu joint family consisting of the ''karta'' and three major sons. During the accounting year relevant for the assessment year 1970-71, the family purchased new machinery of the value of Rs. 1,38,977 and secured deduction on account of development rebate to the extent of Rs. 48,648. On 10-5-1972, there was a partition of the joint family assets including the business of the family. After the partition, it appears, the four coparceners of the erstwhile joint family constituted themselves into a partnership and carried on the business which was previously carried on by the joint family. The ITO held the view that, by reason of the partition of the joint family assets including the properties, there was a violation of the conditions of section 34(3)(b) of the Act, governing the grant of development rebate and, consequently, applied the provisions of section 155(5) of the Act and rectified the assessment of the joint family for the year 1970-71. In the order of rectification, the ITO withdrew the development rebate originally granted. The assessee appealed to the AAC challenging the correctness of the withdrawal of the development rebate u/s 155(5). The limited plea taken before the AAC was that the partition of the assets of the joint family did not amount to transfer under law and, consequently, there was neither a sale nor transfer within the meaning of section 34(3)(b). The AAC accepted the above contention and held that, inasmuch as the machinery, in respect of which development rebate was allowed, was not the subject-matter of either a sale or transfer, the ITO was in error in withdrawing the development rebate initially allowed. The AAC, accordingly, allowed the appeal. Against the order of the AAC, the revenue filed an appeal before the Tribunal. It was urged before the Tribunal that, in any event, when the machinery, in respect of which development rebate was initially allowed, was thrown into the common stock of the partnership consisting of the four coparceners of the erstwhile joint family, there was a transfer and, consequently, there was a violation of the conditions of section 34(3)(b). The Tribunal rejected the contention of the revenue and held that partition of property by metes and bounds between the members of the joint family did not involve any transfer of property. The Tribunal did not specifically deal with the contention that there was transfer of the assets to the partnership firm. The Tribunal dismissed the appeal filed by the department. The Commissioner applied for a reference u/s 256(1) and the Tribunal referred the above-mentioned questions for the opinion of this Court. 2. It is settled law that so far as partition of the joint family assets is concerned, it does not amount to a transfer at all. Reference may be invited to the decision of the Supreme Court in Commissioner of Income Tax, Madras Vs. M.K. Stremann, Madras, where the Supreme Court clearly held that the partition of the assets of a joint family does not amount to a transfer in the eye of law. The same view was taken in a number of other cases and it is not necessary to multiply authorities for this purpose. It, therefore, follows that when the machinery, in respect of which development rebate was allowed, was partitioned between the coparceners of the joint family, there was in law no transfer. As regards the contention that, in any event, there was a transfer when the divided coparceners threw the same machinery again into the common stock of the partnership, the position here again is fairly settled. When a person throws his individual property into the common stock of partnership abandoning his separate rights over the same with the intention of treating such property as the property of the partnership firm u/s 14 of the Indian Partnership Act, 1932, there is no transfer by the partner to the partnership firm. This proposition flows directly from the judgment of the Supreme Court in Addanki Narayanappa v. Bhaskara Krishnappa AIR 1966 SC 1300. Reference may also be invited to the decision of this Court in Comissioner of Income Tax, Andhra Pradesh Vs. A.V. Bhanoji Rao, wherein this Court has taken the same view that, when a partner impresses his individual property with the character of partnership property, there is in law no transfer and much less a sale. It must, therefore, be said that, even when the divided coparceners threw the machinery, which fell to their respective shares, into the common stock of partnership, there is neither a sale nor transfer within the meaning of section 34(3)(b) and, consequently, the provisions of section 155(5) have no application.

3. There is also another difficulty in accepting the revenue''s contention regarding the application of section 155(5). Before section 155(5) could be applied, the transfer or sale has to be effected by the assessee to whom development rebate was initially allowed and not by any other person. Section 155(5) does not comprehend cases where the transfer is not effected by the assessee to whom development rebate was allowed, but by some other person to whom the assets have been allotted, as in the present case, by partition. When a partition is effected between the members of the joint family, the joint family having gone out of existence as far as the asset in question was concerned, there could not be any sale or transfer of the asset by the joint family. Consequently, the assessee-family in the present case could not be subjected to an order u/s 155(5), inasmuch as the transfer by the divided members, assuming that there is a transfer, did not attract the provisions of section 155(5). The above view finds support in the decision of the Supreme Court in Malabar Fisheries Co. Vs. Commissioner of Income Tax, Kerala, and also the decision of the Madras High Court in Commissioner of Income Tax, Tamil Nadu-I Vs. S. Balasubramanian, . For the aforesaid reasons, we hold that the Tribunal was correct in coming to the conclusion that the order passed by the ITO u/s 155(5) is erroneous. We answer the questions referred to us in the affirmative, i.e., in favour of the assessee and against the revenue. There shall be no order as to costs.

