

(1977) 10 AP CK 0021
In the Andhra Pradesh High Court
Case No : R.C. No. 51 of 1976

Commissioner of Income Tax

APPELLANT

Vs

Sanka Sankaraiah

RESPONDENT

Date of Decision : 24-10-1977

Acts Referred:

Income Tax Act, 1961 — Section 64, 64(1)

Citation : (1978) 113 ITR 313

Hon'ble Judges : S. Obul Reddy, C.J.;Chennakesava Reddy, J

Bench : Division Bench

Advocate : P. Rama Rao, for the Appellant; M.J. Swamy and J.V. Srinivasa Rao, for the Respondent

Judgement

S. Obul Reddy, C.J.—The facts leading to this reference u/s 256(1) of the Income Tax Act, 1961, at the instance of the Commissioner of Income Tax are these : One Sanka Sankaraiah, his wife and two minor sons and daughter constituted a Hindu undivided family. This Hindu undivided family was carrying on business at Parvathipuram in pulses, grams, tamarind, etc. On April 9, 1967, there was a partial partition in the family by dividing the family business. With effect from April 15, 1967, a partnership firm was constituted for the purpose of carrying on the same business with Sanka Sankaraiah as the karta and his wife as a partner. His two minor children were admitted to the benefits of the partnership, and a partnership deed was executed for that purpose. Sankaraiah also made a claim for recognition of the partial partition, which was accepted by the Income Tax Officer on March 31, 1970. An application for registration of the firm was also tiled and it was granted registration. Sankaraiah, the karta, has his individual income and he has been assessed separately on that individual income. So far as the interest in the partnership is concerned, his share in the firm which has come into existence after the partial partition, Sankaraiah has been assessed as Hindu undivided family consisting of himself, his wife and his minor daughter inasmuch as the partial partition was effected between Sankaraiah and his two minor sons. It is also an admitted fact that Sankaraiah has transferred from out of his self-

acquired properties a sum of Rs. 30,000 by way of gift in favour of his wife and with that amount, his wife became a partner in the firm constituted on April 15, 1967. The Tribunal found on the basis of the undisputed facts that Sankaraiah, apart from being assessed as an individual, was assessed as karta of the family in respect of his share in the partnership firm. That was also the finding recorded by the Income Tax Officer, viz., that so far as the partial partnership was concerned, Sankaraiah was representing the Hindu undivided family consisting of himself, his wife and minor daughter. The income arising from the partnership firm was, therefore, assessed as Hindu undivided family of which Sankaraiah is the karta. The Tribunal also recorded a finding of fact that even after the partial partition of the family business, the smaller Hindu undivided family consisting of his wife and daughter continued and it was being assessed separately in respect of the share income from the partnership realised by Sankaraiah, being a partner of the firm.

2. For the assessment year 1968-69, the income realised by his wife and his two minor sons was included in the income of Sankaraiah in his individual capacity u/s 64(1)(ii) and (iii) of the Act. The same method was adopted for the subsequent assessment year 1969-70 also by the Income Tax Officer and also for the assessment year with which we are concerned, viz., 1970-71. The assessee objected to the inclusion of the income realised by his wife and minor sons in his income before the Appellate Assistant Commissioner. The Appellate Assistant Commissioner deleted the inclusion of the share income of the wife and minors in the individual assessment of Sankaraiah. That led to the revenue preferring an appeal before the Tribunal and the Tribunal confirmed the decision of the Appellate Assistant Commissioner. Hence, the following question was referred for our opinion by the Tribunal at the instance of the Commissioner of Income Tax :

"Whether, on the facts and in the circumstances of the case, the share incomes derived by the assessed wife and minor children could be considered in the hands of the assessee-individual u/s 64 of the Income Tax Act, 1961 ?"

3. The answer to the question depends upon the construction to be placed upon the unamended provisions of Section 64 of the Income Tax Act. These provisions, to the extent relevant, read :

Section 64:

" In computing the total income of any individual, there shall be included all such income as arises directly or indirectly-

(i) to the spouse of such individual from the membership of the spouse in a firm carrying on business in which such individual is a partner ;

(ii) to a minor child of such individual from the admission of the minor to the benefits of partnership in a firm in which such individual is a partner;.....

Explanation.--For the purpose of Clause (i), the individual in computing whose total income the income referred to in that clause is to be included shall be the

husband or wife whose total income (excluding the income referred to in that clause) is greater ; and, for the purpose of Clause (ii), where both the parents are members of the firm in which the minor child is a partner, the income of the minor child from the partnership shall be included in the income of that parent whose total income (excluding the income referred to in that clause) is greater ; and where any such income is once included in the total income of either spouse or parent, any such income arising in any succeeding year shall not be included in the total income, of the other spouse or parent unless the Income Tax Officer is satisfied, after giving that spouse, or parent an opportunity of being heard, that it is necessary so to do."

4. From the admitted facts, it is manifest that Sankaraiah was a partner of the firm in his capacity as karta of the Hindu undivided family consisting of himself, his wife and his minor daughter. Sankaraiah was also assessed separately as an individual on his separate income. Even after the partial partition, the department recognised the existence of the Hindu undivided family of the above members and it was being assessed separately in respect of the share income from the partnership derived by Sankaraiah, being the partner of the firm, in his capacity as the karta. Section 64 provides for, the inclusion of all such income as arises directly or indirectly to a spouse of an individual from the membership of that spouse in a firm carrying on business in which such individual is a partner. The income which a minor derives from the minor's admission to the benefits of partnership in a firm in which such individual is a partner is also to be computed in the total income of any individual. The Explanation further provides that in computing the total income, the income of the minor child from the partnership shall be included in the income of that parent whose total income is greater.

5. This section applies only to the computation of total income of an individual. The expression "individual" does not comprehend in its meaning the "karta" of a joint family. If it were the intention of the legislature that the expression "individual" used in Section 64 should also take in a Hindu undivided family, then it would have used the expression "person" so as to include a. Hindu undivided family and not the words "spouse of such individual in Clause (i)" or the words "a minor child of such individual in Clause (iii)" or the words "either spouse or parent" in the Explanation, This section aims at putting an end to the attempts of an individual to avoid or reduce the incidence of tax by transferring the assets to a spouse or minor child. Under this section, the husband's share of the profits of a firm, where husband and wife are both partners could be assessed in the wife's hands or vice versa, depending upon the fact whose total income is greater. The income of the minor child admitted to the benefits of the partnership is similarly to be included in the income of that parent whose total income is greater.

6. In the instant case, the Hindu undivided family of which Sankaraiah was the karta was being assessed separately in respect of the share income from the partnership derived by him as partner of the firm. Sankaraiah's position as a

partner in the partnership firm was that of karta of the Hindu undivided family consisting of himself, his wife and minor daughter. He was, therefore, not a partner of the firm in his individual capacity.

7. Mr. Rama Rao, the learned counsel for the revenue, placed great reliance on the view expressed by the Allahabad High Court in *Madho Prasad Vs. Commissioner of Income Tax*, where, it opined that even where a karta of a joint family enters into a partnership with others in relation to the firm and his rights and obligations in regard to the other partners, he is a partner only as an individual, though his joint family is entitled to get from him his share in the profits of the firm and the joint family is liable for his share of losses in the firm. It is so generally ; but here we are concerned with the question of inclusion of the income of a spouse from the membership in a firm of which "such individual" is a partner and also the income of a minor child admitted to the benefits of a partnership in the total income of ""such individual". Since this section creates artificial liability, it has to be construed strictly. Sankaraiah has been found to be a partner of the firm as "karta" of the joint family and the income derived from the firm was included in computing the total income of the Hindu undivided family. How can that income from the firm once again be included "in computing the total income of Sankaraiah as an individual, as if realised in his individual capacity from the membership of the firm of which his wife and minor child Were also partners along with him. It is not the case of the revenue that Sankaraiah was a partner of that firm in his individual capacity. It is true that a contract of partnership has no concern with the obligation of the partners to others in respect of their shares of profit in the partnership and it only regulates the rights and liabilities of the partners. A partner could be a trustee. A partner could be the karta of a Hindu joint family or he may under an agreement, express or implied, be the representative of a group of persons or even be a benamidar for another. As stated by the Supreme Court in *Commissioner of Income Tax, Madras Vs. Bagyalakshmi and Co., Udamalpet*, in all such cases he occupies a dual position. Qua the partnership, he functions in his individual capacity; qua the third parties, in his representative capacity. Where a person represents as trustee or as karta or as a benamidar, Section 64, in our view, cannot be invoked. If we are to agree with the learned counsel for the revenue that Section 64 applies to a karta or a trustee, then it would lead to certain absurd situations. Take for instance the case of a trustee as a partner in a firm. If the trustee's spouse or a minor child are to be a partner of that firm, the income realised by the spouse or the minor child in that firm will have to be added to the income of the trustee earned from sources other than partnership in his individual capacity. Certainly, that could not have been the intention of the legislature. We are unable to share the view of the Allahabad High Court that the words "in which such individual is a partner" take in a karta or trustee or representative of a group of persons. The expression "individual" only takes in a person in his individual capacity and does not take in the karta of a Hindu joint family or a trustee or one who acts as a representative of others. We, therefore, answer the

question referred to us in the negative and against the revenue with costs.
Advocate's fee Rs. 250.