(1994) 03 RAJ CK 0074

In the Rajasthan High Court

Case No : Income Tax Reference No. 18 of 1987

COMMISSIONER OF Income Tax — APPELLANT

Vs

SMT. SARASWATI DEVI. — RESPONDENT

Date of Decision : 21-03-1994

Acts Referred:
Income Tax Act, 1961 — Section 256

Citation : (1995) 212 ITR 445

Hon'ble Judges : V. K. Singhal, J

Bench : Division Bench

Judgement

V. K. SINGHAL J. - The Income Tax Appellate Tribunal has referred the following question of law arising out of its order dated February 19, 1986, in respect of the assessment year 1978-79 u/s 256(1) of the Income Tax Act, 1961 :

Whether, on the facts and in the circumstances of the case, Tribunal was legally justified in deleting the additions in question as a protective measure only ?

The brief facts of the case are that the assessee filed a return of income declaring Rs. 5,995 as income. During the course of the assessment proceedings, it was found by the Income Tax Officer that the assessee was not having any capital to start the business and the investment was made by her mother-in-law and it was the income of the assessees husband. In these circumstances, a protective assessment was made in the hands of assessee and unexplained cash credits and other items of Rs. 13,080 were added. The Appellate Assistant Commissioner upheld the order of the Income Tax Officer, but, on appeal the Tribunal observed as under :

2. We have heard the representatives of the parties at length in this appeal. Without expressing any opinion on the actual income earned by the assessee, we are of the opinion that no addition could have been made to the Income Tax Officers case that the assessee at all earned any income. In fact the whole assessment has been made on a protective basis and according to the assessee

the ?entire income belonged to her husband. In these circumstances, there was no question of making any addition in the hands of the assessee. All the additions, if any, had to be made in the hands of the person to whom the income was stated to have belonged. A protective assessment is practically no assessment in the eyes of law. It is only made on the basis of some return filed by the assessee. Therefore, no addition can be made unless the Department comes to the conclusion that the income really belongs to the assessee. Till such a conclusion is arrived at, the question of making addition does not arise. We, therefore, delete all the additions in question as a protective measure only.

3. By now the Income Tax Officer must have made up his mind whose income this is and how much income was actually earned by the assessee if at all she had earned any income. We, therefore, direct that the substantive assessment shall be made on the assessee now along with the assessment of Shri Laxmi Chand who according to the Department really earned this income.

The arguments of both learned counsel have been heard. We do not find any illegality having been committed in the order passed by the Income Tax Appellate Tribunal in observing that the Income Tax Officer must have made up his mind, as to in whose hands, the income has actually to be assessed. The directions which were given were that the substantive assessment shall be made on the assessee along with the assessment of Shri Laxmi Chand who, according to the Department, really earned this income. Learned counsel for the petitioner were not able to find as to what is the correct position now. An income which has been earned can be taxed in the hands of an assessee, who is liable to pay the tax. Protective assessments are also permissible, but they cannot continue to infinity. The observation of the Income Tax Appellate Tribunal was only to this effect that substantive assessment has to be made by the Department, and when the income has already been added in the hands of the husband of the assessee, and finally upheld, then the assessee would not be liable. If no assessment has been made on the husband of the assessee in respect of the income in dispute or he was not held finally liable for payment of tax on the income in dispute, then the substantive assessment has to be made in the hands of the assessee. If a protective assessment is made, then additions, if any, could be made in the hands of the person who has really earn the income or is liable to pay tax thereon. On this ground, the additions which were made could be made only in the hands of the person who has actually earned the income. It was in these circumstances as observed by the Income Tax Appellate Tribunal that by now the Income Tax Officer must make up his mind as to who has really earned the income. The additions are consequently to be made in the hands of such person alone and not in the hands of the assessee where the Department itself treated that the income is not earned by the person and the assessment is made only on a protective basis. The additions, therefore, had to be added in the hands of the ? person who has really earned the income and substantive assessment is made in respect of the income itself. If a person is "benami", then, the additions also cannot be made in his hands and can be made in the hands of that person on whose behalf he/she is acting as "benami". The Income Tax Appellate Tribunal has already given the direction to make a substantive assessment on the assessee along with the assessment of Shri Laxmi Chand, who according to the Department really earned the income. The observation of the Income Tax Appellate Tribunal could only mean that there could be one substantive assessment, either in the hands of the assessee or in the hands of Laxmi Chand, and because much time has already lapsed, the Department must have made up its mind. The object of making the protective assessment is that the assessment is also made in the hands of some other person, and if such other person objects to the assessment, or finally it is held that it is not liable for payment of tax on such income, then the Department must get the tax from the person in whose hands the protective assessment is made. If the assessment made in the hands of Laxmi Chand has already been upheld, then the addition can also be made in respect of unexplained cash credits and other items of business, which has not considered of Smt. Saraswati Devi, but of her husband (sic). If the assessment in the hands of her husband has not been upheld then substantive assessment be made in the hands of the assessee. The position of the two persons, namely, Smt. Saraswati Devi and her husband, has to be taken together with regard to their final liability and then the question of additions has to be considered. In these circumstances, we are of the view that the Income Tax Appellate Tribunal was justified in not upholding the additions which were made on a protective basis and directing the Revenue now to proceed with the substantive assessment. Accordingly, the reference is answered in favour of the assessee and against the Revenue. No order as to costs.