

(1989) 02 CAL CK 0016

In the Calcutta High Court

Case No : Income-tax Reference No. 84 of 1982

Commissioner of Income Tax

APPELLANT

Vs

S.N. Malhotra

RESPONDENT

Date of Decision : 01-02-1989

Acts Referred:

Income Tax Act, 1961 — Section 64(2)

Citation : (1989) 178 ITR 380 : (1989) 44 TAXMAN 400

Hon'ble Judges : Suhas Chandra Sen, J; Baboo Lall Jain, J

Bench : Division Bench

Advocate : H.M. Dhar and Ram Chandra Prasad, for the Appellant; N.K. Poddar, S.N. Day and A.K. Dey, for the Respondent

Judgement

Suhas Chandra Sen, J.—The Tribunal has referred the following question of law u/s 256(1) of the Income Tax Act, 1961 :

"Whether, on the facts and in the circumstances of the case and the provisions of Section 64 of the Income Tax Act, 1961, the Tribunal is correct in holding that the interest and dividend income of Rs. 39,414 cannot be included in the hands of the assessee ?"

2. The relevant facts as found by the Tribunal have been stated in paragraph 1 of the order of the Tribunal, which are as under :

"There was a partial partition and the assessee got 3,010 shares of the said firm which included 2,660 shares which he had thrown into the hotchpotch. The assessee's contention was that he had received these shares in a different capacity, i.e., as karta of the smaller HUF consisting of himself, his wife and children. The Income Tax Officer, however, was of the view that Section 64(2)(c) was clearly attracted because the converted property after partition yielded income to the assessee, his spouse and minor children. During the earlier accounting year, the assessee sold these shares for Rs. 8,13,000 and utilised the sale proceeds for purchasing fixed deposits and making other investments. The

Income Tax Officer, however, held that this did not affect the legal position of the taxability of the income arising out of the investments thus made because the word "property" in the Explanation to Section 64(2) included converted property also. He, therefore, added the interest and dividend income arising out of these shares and the investment of their sale proceeds to the total income of the assessee. This decision has been confirmed by the Commissioner of Income Tax (Appeals). The assessee has consequently come up in second appeal before us." Before the Tribunal the case of the assessee was, " . . . that on partial partition of the bigger HUF, Ms. Harbanslal Malhotra, no portion of the converted property was received by the spouse or minor child of the assessee. On the other hand, out of the total pool of 12,320 shares, 2,010 shares were received by the smaller HUF of V. P. Malhotra, and they could not be said to have been received by the assessee, his spouse or minor children."

3. On the points of fact, there is no dispute. It is not the case of the Income Tax Officer that any property has been received by the spouse or minor child of the assessee ; it is not also his case that on partition any benefit or income thereto has been received by the spouse or the minor child. If that be so, it is difficult to see how Section 64(2)(c) can be made applicable to this case.

4. Section 64(2)(c) is as under :

"64. Income of individual to include income of spouse, minor child, etc.--... (2) Where, in the case of an individual being a member of a Hindu undivided family, any property having been the separate property of the individual has, at any time after the 31st day of December, 1969, been converted by the individual into property belonging to the family through the act of impressing such separate property with the character of property belonging to the family or throwing it into the common stock of the family or been transferred by the individual directly or indirectly, to the family otherwise than for adequate consideration (the property so converted or transferred being hereinafter referred to as the converted property), then, notwithstanding anything contained in any other provision of this Act or in any other law for the time being in force, for the purpose of computation of the total income of the individual under this Act for any assessment year commencing on or after the 1st day of April, 1971,--....

(c) where the converted property has been the subject-matter of a partition (whether partial or total) amongst the members of the family, the income derived from such converted property as is received by the spouse or minor child on partition shall be deemed to arise to the spouse or minor child from assets transferred indirectly by the individual to the spouse or minor child and the provisions of Sub-section (1) shall, so far as may be, apply accordingly."

5. There is no dispute that a partition has taken place. The assessee's case is that, as a result of the partition, the larger Hindu undivided family has been converted into a smaller Hindu undivided family, consisting of the assessee, his wife and a child and the said smaller Hindu undivided family had been allocated

certain properties but the income from these properties have not been received individually by the spouse or minor child. In fact, no property has been allocated to the spouse or minor child on partition. If that be the case, I fail to see how the provisions of Section 64(2)(c) can be invoked in a case like this. Until and unless there has been some allocation of property to the spouse or minor child or some device by which the income of such converted property is received by the spouse or minor child on partition, the provisions of Section 64(2)(c) are not attracted.

6. My attention was drawn to the circular issued by the Central Board of Direct Taxes at the time of amendment of Section 64(2). The said circular reads as follows:

"16.7. Hitherto, Section 64(2) provided that where an individual converts his separate property into property belonging to the Hindu undivided family of which he is a member, then, the income derived from such converted property, in so far as it is attributable to the interest of the individual, his spouse and minor sons in the property of the family, will be assessed in the hands of the individual. The provision, as amended, provides that in such cases the entire income from the converted property will be includible in the income of such individual, and not merely that part of the income which is attributable to the interest of the individual, his spouse or minor sons in the family property. After a partition of the Hindu undivided family (whether partial or total), however, only the income received by the spouse or minor child (as against only minor son previously), out of his or her share in the said converted property obtained on the partition shall be so includible."

7. Even according to this circular, after the partition of a Hindu undivided family, only the income received by the spouse or minor child out of his or her share in the converted property on partition shall be includible in the hands of a member of the smaller Hindu undivided family. In this case, there is no finding of fact that any property was allocated on partition to the spouse or minor child of the assessee. There is no finding that the income which is sought to be included in the hands of the assessee was income received directly or indirectly by the spouse or the minor child at all. If a smaller Hindu undivided family on partition has been allocated a portion of the property of the larger Hindu undivided family, then the income derived from such property cannot be included in the hands of the karta of the smaller Hindu undivided family in his individual assessment under the provisions of Section 64(2)(c) of the Income Tax Act, 1961.

8. In the premises, the question referred is answered in the affirmative and in favour of the assessee,

9. There will be no order as to costs.

Baboo Lall Jain, J.

10. I agree.