

(1967) 03 P&H CK 0010

In the Punjab And Haryana At Chandigarh

Case No : Income-tax Reference No. 48 of 1964

COMMISSIONER OF Income Tax, PUNJAB.

APPELLANT

Vs

MOTHU RAM PREM CHAND.

RESPONDENT

Date of Decision : 12-03-1967

Acts Referred:

Income Tax Act, 1922 — Section 28(1)(c), 66(1)

Citation : (1967) 66 ITR 638

Judgement

The answer to the following question referred to this court by the Income Tax Appellate Tribunal (Delhi Bench "C") (hereinafter referred to as the Tribunal) u/s 66(1) of the Indian Income Tax Act, 1922 (11 of 1922), as subsequently amended (hereinafter called the Act), at the instance of Messrs. Mothu Ram Prem Chand (referred to as the assessee in this judgment), depends on a proper construction and correct interpretation on sub-section (3) of section 25A of the Act :

"Whether on the facts and in the circumstances of the case, the imposition of penalty u/s 28(1) (c) on 13th February, 1959, is bad in law as the assessee Hindu undivided family had already disrupted on March 31, 1956 ?"

The facts leading to this reference are brief and may first be set out in chronological order. The assessee was a registered Hindu undivided family firm. Its assessment for the year ending 1954-55 u/s 23(3) of the Act was completed on September 30, 1954. On September 29, 1958, the Income Tax Officer initiated action u/s 34 of the Act on having come to know of substantial income of the Hindu undivided family from undisclosed sources which had not been assessed. On March 31, 1956, the Hindu undivided family disrupted. A registered partition deed, dated December 1, 1956, was executed between the members of the Hindu undivided family witnessing the partition. During the course of assessment for the year 1957-58, the assessee claimed disruption of the Hindus undivided family and filed an application, dated March 13, 1957, praying for an order being passed u/s 25A of the Act accepting the partition of the Hindu

undivided family with effect from March 31, 1956. The application was accompanied by a copy of the registered partition deed, dated December 1, 1956, the original partition deed on a stamp paper of Rs. 2,000 and a copy of the Punjab Government Gazette, dated April 20, 1956, in which a public notice had been issued regarding the partition of the Hindu undivided family. In pursuance of that application, notices were issued to the other members of the Hindu undivided family on March 22, 1957, under proviso to sub-section (1) of section 25A, but no final order accepting the disruption of the Hindu undivided family was passed at that stage. The assessment u/s 34 of the Act was completed by the order of the Income Tax Officer, dated September 29, 1958 (annexure "A" to the statement of case).

On October 1, 1958, the Income Tax Officer issued a notice u/s 28 calling upon the assessee to show cause why penalty u/s 28(1) (c) of the Act should not be levied on it as the assessee had concealed its income and had deliberately furnished inaccurate particulars thereof. By order, dated November 26, 1958 (erroneously referred to in the statement of the case as of February 13, 1959), a penalty of Rs. 60,000 was imposed on the assessee in pursuance of the said notice. The assessee, on March 11, 1959, preferred an appeal against the order of the imposition of penalty to the Appellate Assistant Commissioner of Income Tax under sections 30/31 of the Act. During the pendency of the appeal, the Income Tax Officer went into the claim of the assessee about the disruption of the Hindu undivided family and passed a detailed order, dated January 29, 1960 (annexure "B" to the statement of the case), wherein he referred to the history of the case and documentary evidence produced by the assessee and finally held as follows :

"On the basis of the evidence placed on record by the assessee I am satisfied that partition took place amongst the members of the Hindu undivided family consisting of Shri Mothu Ram and his son, Shri Prem Chand with effect from 31st March, 1956, and I record an order to that effect u/s 25A(1) accepting the partition of the Hindu undivided family with effect from 31st March 1956."

Reliance was placed on the abovesaid order u/s 25A(1) of the Act at the hearing of the appeal before the Appellate Assistant Commissioner. In a detailed order, dated March 9, 1962 (annexure "C" to the statement of the case), Shri N. S. Pruthi, the Appellate Assistant Commissioner, referred to the entire law on the subject and, taking notice of all the arguments addressed before him, held that the order of the imposition of penalty against the Hindu undivided family could not be upheld in this case, where an order u/s 25A(1) of the Act had been passed accepting the disruption of the family with effect from March 31, 1956. Department's appeal against the order of the Appellate Assistant Commissioner was accepted by the Tribunal's order, dated June 1, 1963 (annexure "D" to the statement of the case), with the following observations :

"We are of opinion that the Appellate Assistant Commissioner erred in his decision. He has placed reliance on a certain decision, but he has failed to see

that in this case the facts are different. Here the order u/s 25A had not been passed before the levy of the penalty. In this case, the penalty was levied on 13th February, 1959, whereas the order u/s 25A was passed only subsequently, viz., 29th January, 1960. The true position in the present case is, that as a matter of fact, there was no order u/s 25A(1) when the penalty was levied. The true implication of section 25A(3) does not appear to have been understood by the Appellate Assistant Commissioner. The sub-section quoted already refers to the actual passing an order u/s 25A(1) and it is common ground that in the present case an order u/s 25A(1) had not been passed on the date of the penalty order."

It is in the above circumstances that the question quoted in the opening paragraph of this judgment has been referred to this court by the Tribunal at the instance of the assessee.

The penalty in question has been imposed u/s 28(1) (c) of the Act. The relevant part of the provision is in the following terms :

"28 (1) If the Income Tax Officer, the Appellate Assistant Commissioner or the Appellate Tribunal, in the course of any proceedings under this Act, is satisfied that any person - ...

(c) has concealed the particulars of his income or deliberately furnished inaccurate particulars of such income, he or it may direct that such person shall pay by way of penalty ...

Provided that -...

(3) No order shall be made under sub-section (1) or sub-section (2) unless the assessee or partner, as the case may be, has been heard, or has been given a reasonable opportunity of being heard."

A plain reading of the provision shows that there are two condition precedent for invoking the same, viz.,

(i) there should be in existence "any person" who has concealed the particulars of his income or deliberately furnished inaccurate particulars thereof; and

(ii) such person has been given a reasonable opportunity of being heard.

"Person" is defined in sub-section (9) of section 2 of the Act to include a Hindu undivided family. A Hindu undivided family is treated as a separate legal entity under the Act distinct from its members. The existence of such a legal entity comes to an end on its disruption or on a partition of the erstwhile Hindu undivided family. Unlike a partnership firm, there are no partners in a Hindu undivided family. Consequently, it is impossible to satisfy the provisions of sub-section (3) of section 28 of the Act of giving an opportunity to the assessee in case of a Hindu undivided family after it is dissolved. No proceedings for imposition of penalty can, therefore, be taken against the estate of an assessee after the assessee is dead. Similarly, no such proceedings can be taken against a

Hindu undivided family (subject to the provisions of sub-section (3) of section 25A) after it is disrupted and ceased to exist in the eye of law. Section 25A may be quoted at this

"25A(1) Where, at the time of making an assessment u/s 23, it is claimed by or on behalf of any member of a Hindu family hitherto assessed as undivided that a partition has taken place among the members of such family, the Income Tax Officer shall make such inquiry thereinto as he may think fit, and, if he is satisfied that the joint family property has been partitioned among the various members or groups of members in definite portions he shall record an order to that effect :

Provided that no such order shall be recorded until notice of the inquiry have been served on all the members of the family.

(2) Where such an order has been passed, or where any person has succeeded to a business, profession or vocation formerly carried on by a Hindu undivided family whose joint family property has been partitioned on or after the last day on which it carried on such business, profession or vocation, the Income Tax Officer shall make an assessment of the total income received by or on behalf of the joint family as such, as if no partition had taken place, and each member or group of members shall, in addition to any Income Tax for which he or it may be separately liable and notwithstanding anything contained in sub-section (1) of section 14, be liable for a share of the tax on the income so assessed according to the portion of the joint family property allotted to him or it; and the Income Tax Officer shall make assessments accordingly on the various members and groups of members in accordance with the provisions of section 23 :

Provided that all the members and groups of members whose joint family property has been partitioned shall be liable jointly and severally for the tax assessed on the total income received by or on behalf of the joint family as such.

(3) Where such an order has not been passed in respect of a Hindu family hitherto assessed as undivided, such family shall be deemed, for the purposes of this Act, to continue to be a Hindu undivided family."

The effect of the operation of the above quoted provision is that a Hindu undivided family which was being assessed as such, shall continue to be assessed in the same status notwithstanding partition of the property amongst its members; but if a claim is made during the course of an assessment that there has been a partition in the family, the assessing authority is to issue notices to other members of the family and to make a proper order after due inquiry if it is satisfied about the partition. In a case where an order u/s 25A(1) is passed the assessment has to be made in accordance with the requirements of sub-section (2) of section 25A. In a case where no order u/s 25A(1) has been passed, the Hindu undivided family is deemed by the legal fiction created under sub-section (3) of section 25A to continue for the purpose of the Act in spite of the fact that it has in fact ceased to be in existence.

Sub-section (3) of section 25A shall operate in a case where no order u/s 25A(1) is made irrespective of the reason for no such order being passed, e.g., it may be due to no claim having been made for the purpose or such a claim having been made and refused, or due to the fact that right up to the finalisation of the assessment proceedings by the Tribunal, the proceedings u/s 25A(1) may have remained pending for one reason or the other.

In *Commissioner of Income Tax v. Sanichar Sah Bhim Sah* it was held by a Division Bench of the Patna High Court (Ramaswami and Choudhary JJ.) that the machinery prescribed by section 25A cannot be applied to the proceedings taken u/s 28 of the Act for imposing penalty on a Hindu undivided family after it has disrupted and after the Income Tax Officer had made an order u/s 25A. In that case, however, the order of imposition of penalty u/s 28 was passed on April 24, 1950, after the Income Tax Officer had passed an order u/s 25A(1) on March 18, 1949, holding that the Hindu undivided family had become separate with effect from February 13, 1946. Sub-section (3) of section 25A of the Act could not and did not, therefore, come into the field in a Patna case. It has not been disputed before us by Shri J. N. Kaushal, the learned senior counsel for the assessee, that if no order u/s 25A(1) had at all been passed in this case, the order of imposition of penalty could not have been questioned by the assessee on the ground on which it is now attacked. Nor does the judgment of a Division Bench of the Andhra Pradesh High Court (Subba Rao C.J., as he then was, and Mohammad Ahmad Ansari J.) in *Mahankali Subba Rao v. Commissioner of Income Tax* take the matter any further, because in that case the penalty u/s 28 had been imposed on January 29, 1947, after the passing of the order u/s 25A(1) of the Act on February 26, 1946, accepting the division of the Hindu undivided family with effect from April 5, 1943. Sub-section (3) of section 25A was, therefore, no hurdle in the way of the assessee in that case. Subba Rao C.J., who spoke for the court, held in *Mahankali Subba Rao's* case as follows :

"Section 28, which enables the Income Tax authorities to impose penalty under the circumstances mentioned therein, says that if the Income Tax Officer, the Appellate Assistant Commissioner or the Appellate Tribunal in the course of any proceedings under this Act is satisfied that any person has committed the defaults mentioned in clause (a), (b) or (c), he may direct him to pay penalty in addition to any tax and super-tax. Person is defined to include a Hindu undivided family. Therefore, under this section an undivided Hindu family, who is a person, can be directed to pay the penalty. But, by reason of the disruption in the family at the time the proceedings were initiated, the Hindu family ceased to be a person within the meaning of the said section."

To the same effect was the subsequent judgment of the Andhra Pradesh High Court in *Mareddi Krishna Reddy v. Income Tax Officer, Tenali*. In that case Subba Rao C.J. (with whom M. A. Ansari J. concurred) brought out the distinction between section 25A on the one hand and section 44 of the Act on the other. It was pointed out that, whereas section 25A prescribes for the assessment of a

joint family which was divided, apportions the liability between the erstwhile members and imposes a joint and several liability for its collection; section 44 contains the additional words : "All the provisions of Chapter IV shall so far as may be apply to any such assessment", which words are significantly absent from section 25A. Since section 28 is one of the sections in Chapter IV, section 44 applies to it because of the special provisions made in that behalf in that section. No such phraseology having been used in section 25A, all the provisions of Chapter IV do not apply thereto. The observations of Subba Rao C.J. in Mareddi Krishna Reddys case were approved by their Lordships of the Supreme Court in C. A. Abraham v. Income Tax Officer, Kottayam.

Mr. D. N. Awasthy, the learned counsel for the Commissioner of Income Tax has, however, emphasised that the order of the Income Tax Officer imposing the penalty was perfectly valid and within his jurisdiction, because the Income Tax Officer was bound to ignore the disruption of the Hindu undivided family on the date he passed the order u/s 28(1) (c), as no order u/s 25A(1) had admittedly been passed till then. There is force in this argument of Mr. Awasthy to the extent to which it goes. Mr. Kaushal has fairly conceded that, if no order u/s 25A(1) had been made in this case till the penalty proceedings become final with the order of the Tribunal, the assessee would not be able to press its claim. What is pointed out by Mr. Kaushal is that during the pendency of the appeal before the Appellate Assistant Commissioner, an appropriate order u/s 25A(1) having been passed and the Income Tax authorities having accepted the disruption of the Hindu undivided family with effect from March 31, 1956, by order, dated January 29, 1960, the order u/s 25A(1) was deemed to take from and relate back to March 31, 1956, and in any case to March 31, 1957, the date on which the claim of dissolution of the Hindu undivided family was made on behalf of the assessee during the course of assessment. The operative part of the order u/s 25A(1) has already been quoted above. It clearly shows that the Income Tax authorities accepted the disruption of the Hindu undivided family "with effect from March 31, 1956." This, therefore, is a case "where" an order u/s 25A(1) had been passed, and the notice u/s 25 had been issued long after the date of accepted disruption of the Hindu undivided family. Mr. Awasthy seems to read into section 25A(3) of the Act the word "until" in place of the word "where". "Where" refers to a case in which the order in question has been passed. No indication of point of time can be spelt out of sub-section (3) of section 25A. The relevant point of time is the date with effect from which the partition of the joint family is accepted by the Income Tax authorities. Unless the proceedings for imposition of penalty have become final in the sense that no appeal or second appeal, etc., is pending against the initial order, the mere fact that the disruption of the Hindu undivided family is subsequently accepted by the Income Tax authorities would not disentitle the assessee to claim that the imposition was illegal. In the instant case, however, the appropriate order u/s 25A(1) was passed during the pendency of the assessee's first appeal, which is for all practical purposes continuation of the proceedings for imposition of penalty. The

Appellate Assistant Commissioner was, therefore, right when he took notice of the order, dated January 29, 1960, and set aside the impugned order. Precisely this question arose before the Madras High Court and was answered in favour of the assessee in *S. A. Raju Chettiar v. Collector of Madras*. Notice u/s 28 was served in that case on September 4, 1944. The Hindu undivided family was disrupted on January 25, 1946. A penalty of Rs. 83,000 was imposed in pursuance of the said notice on March 18, 1948. The application of the assessee for acceptance of the family partition, dated January 25, 1946, was allowed by the order of the Income Tax Officer, dated December 31, 1948, long after the passing of the order of imposition of penalty. Section 25A(3) was invoked on behalf of the revenue to support the imposition. The argument was rejected by a Division Bench of the Madras High Court (Rajagopalan and Rajagopalan Ayyangar JJ.) in the following words :

"Learned counsel contended that, since the order that was passed by the Income Tax Officer was only on December 31, 1948, the Hindu undivided family should be deemed to have continued in existence till that date. We are unable to accept this in interpretation of section 25A(3).

Each of the clauses u/s 25A begins with the expression where. To construe where as until does not seem to fit in with the scheme underlying section 25A of the Act. Besides, such a contention put forward in *Commissioner of Income Tax v. K. M. N. N. Swaminathan Chettiar* was specifically repelled by a Division Bench of this court."

I am in respectful agreement with the above quoted law laid down by the Madras High Court in the case of *S. A. Raju Chettiar*. There is no doubt that "where" has sometimes been interpreted to imply not only "cases in which", but also "if and so long as", but the expression has to be given the meaning which would best fit in the context. If the legislature had intended that an order of imposition of penalty u/s 28 of the Act would be deemed to be legal because of the operation of section 25A(3) of the Act even after an appropriate order under sub-section (1) of that section has been passed with retrospective effect, the word "until" would have been used in the place of the word "where" in section 25A(3). In each of the three sub-sections of section 25A, the legislature has intentionally used the word "where". The word has, therefore, to be give a meaning which would fit in each of the three clauses of the section. In sub-section (1) the word "where" is incapable of being given any meaning other than "a case in which". If it is given the meaning sought to be assigned to it by Mr. Awasthi, it would make the provisions of sub-section (1) of section 25A senseless, I would, therefore, hold that the word "where" in all the three sub-sections of section 25A is intended to imply "cases in which" and not "until". Mr. Awasthy then invited our attention to the Full Bench judgment of the Kerala High Court in *Govardan Hathi Bhai and Company v. Income Tax Officer, Mattancherry*, where a writ petition seeking to quash an order of imposition of penalty was dismissed on the ground that a Hindu undivided family must be deemed to continue as such until the

order u/s 34(3) of the Cochin Income Tax Act had been passed recognising the partition and as no such order had been passed in that case, and it was found that the Hindu undivided family had not even made a claim for such an order, it was held that there was no invalidity in the impugned order. There is a clear distinction between the facts of that case and of the reference before us. No claim for partition had been made before the assessing authorities at any time prior to the imposition of penalty. No order under sub-section (3) of section 34 of the Cochin Income Tax Act (corresponding to section 25A(3) of the Act) had been passed in the Cochin case. The judgment of the Kerala High Court does not, therefore, help the respondent. Similarly, no assistance can be obtained from the judgment of the Allahabad High Court in *Moman Ram Ram Kumar v. Commissioner of Income Tax*, the next case cited by Mr. Awasthy. That was a case of partial partition where no order u/s 25A(1) had at all been passed. Nor had any order u/s 25A(1) been passed in *Muppana Somaraju and Veeraraju v. Commissioner of Income Tax*, the last case relied upon by Mr. Awasthy. There can be no quarrel with the proposition of law laid down by the Andhra Pradesh High Court in *Muppana Somaraju and Veerarajus case*. Sub-section (3) of section 25A has its full effect in a case where no order under sub-section (1) of that section is passed at all, proceedings in question become final in all respects. Reference has then been made by Mr. Awasthy to the scheme of section 25A as discussed in the judgment of their Lordships of the Supreme Court in *Additional Income Tax Officer, Cuddapah v. A. Thimmayya*. Nothing has, however been said in that judgment which goes contrary to the law laid down by the Madras High Court in *S. A. Raju Chettiar v. Collector of Madras*.

It was lastly contended, on behalf of the revenue, that the order u/s 25A(1) can become effective only in respect of the year of assessment subsequent to the one in which the claim for disruption is made. The argument appears to be misconceived. The order u/s 25A(1) becomes effective from the date which is specified in the order itself as the date with effect from which the disruption of the Hindu undivided family is accepted by the Income Tax Officer. In spite of the vehement arguments advanced at the Bar by Mr. Awasthy, we have not been persuaded to take a view different from the law laid down by the Madras High Court in *S. A. Raju Chettiar v. Collector of Madras*.

For the foregoing reasons, the question referred to us is answered in the affirmative, that is, in favour of the assessee, but the parties are left to bear their own costs of the proceedings in this court.

Question answered in the affirmative.