
(1983) 09 AHC CK 0051

In the Allahabad High Court

Case No : Income-tax Reference No. 841 of 1977

Haji Abdul Hamid

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 02-09-1983

Acts Referred:

Income Tax Act, 1961 — Section 145(1), 145(2), 256(1), 41

Citation : (1984) 38 CTR 294 : (1983) 144 ITR 948 : (1983) 15 TAXMAN 506

Hon'ble Judges : H.N. Seth, J;A. Banerji, J

Bench : Division Bench

Advocate : R.K. Gulati, for the Appellant; M. Katju, for the Respondent

Final Decision : Disposed Of

Judgement

A. Banerji, J.—The following questions have been referred for the opinion of this court by the Appellate Tribunal u/s 256(1) of the I.T. Act, hereinafter referred to as the Act.

"1. Whether, on the facts and in the circumstances of the case, the assessee is entitled to any earned income relief on the share of the income received by him from the business which is the subject-matter of wakf in his capacity as beneficiary ?

2. Whether, the assessment in the year in question having directly been made in the hands of the beneficiary, the Income Tax Appellate Tribunal was right in holding that the assessee was not entitled to earned income relief ?"

2. The assessee is the Mutawalli of a wakf, Haji Lal Mohd. Bin Works and also one of the beneficiaries of the wakf. In the assessment year 1970-71, the disclosed income from the wakf was stated to be Rs. 1,51,534 after deducting a sum of Rs. 8,700 payable to the other beneficiary. In the assessment-proceeding it was held that the assessee was the real owner of the business carried on in the name of the wakf. Consequently, the income of the wakf was treated as the assessee's income, subject to a deduction of Rs. 8,700 payable to the other beneficiary, Haji

Abdul Shakoor. The ITO at Rs. 8,45,320 (sic). The assessee preferred an appeal and disputed the rejection of the book results and the application of the proviso to Section 145(1) of the Act. The AAC held that the account had been entirely manipulated and effective verification of the actual consumption on the basis of raw material was not possible. It was further held that the assessee's accounts were liable to be rejected both in terms of Sub-sections (1) and (2) of Section 145 of the Act. He confirmed the assessment order for the other two years 1962-63 and 1970-71. He passed separate orders and confirmed the assessments.

3. The assessee then filed an appeal before the Appellate Tribunal. The Appellate Tribunal held that the objections taken by the Revenue authorities had been satisfactorily explained and in view of the assessee's past history and further that the profit shown was reasonable declined to take a view contrary to that taken by the AAC. The contention raised on behalf of the assessee, that the income should be assessed in the hands of the assessee-beneficiary as earned income, did not find favour. The Appellate Tribunal observed that the High Court in ITR No. 13 of 1965 Haji Abdul Hameed Vs. Commissioner of Income Tax, and ITR No. 201 of 1966 rejected the aforesaid contention and had held against the assessee. It further observed that even though the appeal had been filed before the Hon. Supreme Court, they would prefer to follow the High Court decision so long as it stood. The Appellate Tribunal held that the income accrued from the business in the above case could not be treated as earned income in the hands of the assessee. Therefore, the above two questions were referred to this court at the instance of the assessee.

4. On behalf of the assessee, Mr. R.K. Gulati urged that the view taken in Haji Abdul Hameed Vs. Commissioner of Income Tax, is no longer good law, for, in a later decision concerning the same assessee, a Division Bench of this Court in Haji Abdul Hamid Vs. Commissioner of Income Tax, , had taken a view that a beneficiary of a wakf would be entitled to earned income relief in respect of the income received from a business carried on by a trustee of the wakf, as the business could be treated as being carried on on his behalf. Mr. Gulati urged that the earlier decision in Haji Abdul Hameed Vs. Commissioner of Income Tax, had been noticed by the Division Bench, that it referred to the decisions of the Supreme Court in support of the view taken by it. These decisions are in the case of (1) Commissioner of Income Tax, Kerala and Coimbatore Vs. Puthiya Ponmanichintakam Wakf Manager P.P. Ayesha Bi Bi, , (2) W. O. Holdsworth v. State of U.P. [1957] 33 ITR 472 and (3) CIT v. P. Krishna Warier : [1970]75ITR154(SC) .

5. In the case of Commissioner of Income Tax, Kerala and Coimbatore Vs. Puthiya Ponmanichintakam Wakf Manager P.P. Ayesha Bi Bi, , their Lordships of the Supreme Court were considering the position of a trustee under a waqf with reference to Section 41 of the Act. Their Lordships observed (p. 1004 of 122 ITR):

"Section 41, however, equates the mutawalli of a waqf to the trustee. Nevertheless, as Section 41 contains the word "on behalf of any person", it means that the mutawalli receives the income on behalf of the beneficiaries."

6. It was, therefore, held that the beneficiaries were the primary assessees. The ITO is entitled to make a direct assessment on the beneficiaries, but if he chooses to assess the trustees, he has to assess the income in the same manner as an assessment on the beneficiaries is made. The Division Bench also pointed out that in the case of CIT v. Krishna Warier : [1970]75ITR154(SC) their Lordships of the Supreme Court held that as the business was being carried on by the trustees, even though he had no beneficial interest in the income, the income would be earned income. The question is whether "earned income relief" can be denied to the beneficiaries of a waqf, when direct assessment is made on them. The Supreme Court held that in the case of trustees carrying on business, they are entitled to earned income relief on the basis that the income was referable to the business being carried on by the trustees.

7. Mr M. Katju appearing for the Department contended that the earlier decision in Haji Abdul Hameed Vs. Commissioner of Income Tax, was still good law and since that decision had not been set aside by the Supreme Court in the appeal filed by the assessee, the later Division Bench was bound to follow the earlier decision and in case it differed, the matter ought to have been referred to a larger Bench. He further submitted that the later decision in Haji Abdul Hamid Vs. Commissioner of Income Tax, , ought not to be followed so long as the earlier decision in Haji Abdul Hameed Vs. Commissioner of Income Tax, stood. In support of his contention he cited two decisions of the Supreme Court in the case of Ram Jivan Vs. Smt. Phoola (Dead) by Lrs. and Others, and Sri Venkateswara Rice, Ginning and Groundnut Oil Mill Contractors Co. and Others Vs. State of Andhra Pradesh and Others, .

8. Mr. R.K. Gulati, in rejoinder, urged that the above plea was not taken by the Department while the Division Bench heard the reference reported in Haji Abdul Hamid Vs. Commissioner of Income Tax, . He further submitted that the decision in the above case proceeded on the footing of the law enunciated by their Lordships of the Supreme Court and it was not open to the Division Bench to take a contrary view on what had been settled by their Lordship of the Supreme Court. The decision by the Division Bench Haji Abdul Hamid Vs. Commissioner of Income Tax, , gave adequate reasons and also noticed the previous decision but did not follow it in view of the law laid down by their Lordship of the Supreme Court, That judgment not having been appealed from has become final as between the parties.

9. The question of law which have been referred to for opinion of this court stands decided in favour of the assessee as held in Haji Abdul Hamid Vs. Commissioner of Income Tax, . That decision ought to be followed. We are in respectful agreement with the view of law taken in the aforesaid decision. Since we do not differ from it, the question of referring the matter to a larger Bench

normally does not arise. Learned counsel for the Department desired us to follow the decision reported in *Haji Abdul Hameed Vs. Commissioner of Income Tax*, which is also between the parties. That decision is, however, not final and an appeal is pending in the Supreme Court. The contention raised by the learned counsel for the Department that the matter ought to be referred to a larger Bench, as there is a conflict between the two decisions, is not acceptable.

10. The Supreme Court in its earlier decisions reported in *Mahadeolal Kanodia Vs. The Administrator-general of West Bengal*, and *Jaisri Sahu Vs. Rajdewan Dubey and Others*, , had laid down that one Division Bench or a court of co-ordinate jurisdiction should follow the decision of another Division Bench or a co-ordinate court and in case of difference refer the matter to a larger Bench. Subsequently, in the decision in *Sri Venkateswara Rice etc., Co. v. State of AP* [1971] 28 STC 599 ; and *Ram Jivan Vs. Smt. Phoola (Dead) by Lrs. and Others*, , the Supreme Court observed that the decision of a previous Division Bench is binding on the later Division Bench. These pleas, in our opinion, could and ought to have been raised before the Division Bench which decided the reference report- in *Haji Abdul Hamid Vs. Commissioner of Income Tax*, . The plea was not taken there. That decision of the Division Bench was not even challenged by way of an appeal. Consequently, it is clear that the view taken by the later Division Bench having not been challenged by the Department ought to be followed by this court. The contention of the learned counsel for the assessee that this decision was binding on this court is not without substance.

11. Applying the principles laid down in the aforesaid decisions of the Supreme Court and further supported by the observation of Chief Justice Chandrachud in the case of *Eknath Shankarrao Mukkawar Vs. State of Maharashtra*, , that when there is a decision of a co-ordinate court, it is open to the judge to differ from it, but, in that case, the only judicial alternative is to refer to a larger Bench, and not to dispose of the appeal by taking a contrary view, we feel that since we are not differing from the decision of the Division Bench in *Haji Abdul Hamid Vs. Commissioner of Income Tax*, , there is no point in referring the matter to a larger Bench.

12. The other question is that, if there be two conflicting decisions of two co-ordinate courts, whether a co-ordinate Bench should refer the matter to a larger Bench or to follow the decision of one of the co-ordinate Benches. We are of the view that if there was a conflict of opinion on a question of law when the point has not been considered or decided by the Supreme Court, a reference to a larger Bench is called for, but, where the decision of a Division Bench is based on the law laid down by the Supreme Court on the point, referring the matter to a larger Bench would serve no purpose. Further, in the present case, the earlier decision of the court *Haji Abdul Hameed Vs. Commissioner of Income Tax*, , was appealed from and is pending before the Supreme Court, whereas in the later case *Haji Abdul Hamid Vs. Commissioner of Income Tax*, , the decision has reached a finality, no appeal having been taken against that decision. In this

view of the matter, we do not think that this is a fit case for a reference to a larger Bench. So long as the view of the Supreme Court laid down in the cases of Commissioner of Income Tax, Kerala and Coimbatore Vs. Puthiya Ponmanichintakam Wakf Manager P.P. Ayesha Bi Bi, , W.O. Holdsworth and Others Vs. The State of Uttar Pradesh, and CIT v. P. Krishna Warier : [1970]75ITR154(SC) is not differed from, the law laid down in Haji Abdul Hamid Vs. Commissioner of Income Tax, holds good, we see no reason not to follow the law laid down by their Lordship of the Supreme Court.

13. In the result, therefore, question No. 1 is answered in the affirmative and question No. 2 is answered in the negative. The assessee will be entitled to costs which are assessed at Rs. 150.