

(1957) 01 AP CK 0019
In the Andhra Pradesh High Court
Case No : Writ Appeal No. 77 of 1956

MAREDDI KRISHNA REDDY	Vs	APPELLANT
Income Tax OFFICER, TENALI.		RESPONDENT

Date of Decision : 25-01-1957

Acts Referred:

Income Tax Act, 1961 — Section 14, 2, 22, 23, 25A

Citation : AIR 1957 AP 368 : (1957) 31 ITR 678

Hon'ble Judges : Subba Rao, C.J

Bench : Division Bench

Judgement

SUBBA RAO, C.J. - This is an appeal against the judgment of our learned brother Satyanarayana Raju, J.

The facts may be briefly stated. The appellant was a partner of the registered firm of Messrs. Talluri Suryanarayana and others. The firm carried on the business of milling paddy from 17th January, 1945, to 28th December, 1947, after which it discontinued the business. On 7th August, 1950, the firm filed a return discount an income of Rs. 2,389 for the assessment year 1947-48. That was signed by the partner Talluri Suryanarayana. During the scrutiny of the accounts, the assessee admitted that some cash credits found in the accounts represented the firms own income and the Income Tax Officer also found that for some others credit items the assessee had no explanation. The assessment was completed on a total income of Rs. 50,776. Thereafter, a notice was issued u/s 28(1)(c) of the Indian Income Tax Act for the admitted concealment of income by the firm. On 31st August, 1953, a penalty of Rs. 9,300 was levied on the firm and the said order and the notice of demand were duly served on the partner T. Suryanarayana, who represented the firm. As the firm discounted the business, the amount of penalty was sought to be realised proportionately from all the partners. The objections raised by some of the partners including the appellant were rejected. All the partners, except the appellant, paid their proportionate share of the penalty. The Income Tax Officer is now proceeding to recover the

share of the penalty from the appellant. The main contention of the learned counsel is that the Income Tax Officer has no jurisdiction to impose a penalty on the partners of a dissolved firm and to collect the same from any one of them.

Section 44 of the Income Tax Act governs the situation. It reads :

"Where any business, profession or vocation carried on by a firm or association of persons has been discontinued, or where an association of persons is dissolved, every person who was at the time of such discontinuance or dissolution a partner of such firm or a member of such association shall, in respect of the income, profits and gains of the firm or association, be jointly and severally liable to assessment under chapter IV and for the amount of tax payable and all the provisions of Chapter IV shall, so far as may be, apply to any such assessment."

This section was enacted to meet the difficulty of assessing the income and for levying tax in the case of discontinuance of a firm or dissolution of an association of persons. By reason of this section the erstwhile partners would be jointly and severally assessed and made liable for the tax. The argument is that the section only makes the partners liable jointly and severally for assessment and for the amount of tax and does not provide for levying and collecting any penalty from the said partners and, therefore, there is no provision where under penalty can be levied on the partner of a discontinued firm. In support of this contention, reliance is placed on the judgment of a Division Bench of the Patna High Court in *Commissioner of Income Tax, Bihar and Orissa v. Sanichar Sah Bhim Sah*. That decision turned upon the provisions of section 25A of the Act. Section 25A was introduced to provide for the contingency of a division in a joint family by enacting that profits could be computed as if the said family continued to exist at the time of the assessment and by enabling the tax payable by the joint family to be recoverable from the members who composed the joint family either jointly or severally. The question arose whether, by reason of that section, penalty could be imposed on a Hindu undivided family which had become disrupted. The relevant provision governing the case of a divided Hindu family is section 25A which reads :

"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 in 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 assessment accordingly with the provisions of section 23."

It will be seen from the aforesaid provision that section 25A only refers to the assessment of a Hindu undivided family which had become divided in the course of the assessment year. It does not empower the Income Tax Officer to impose a penalty on the divided members of a Hindu family. Advertising to section 28(1)(c), which enables penalty to be imposed on an assessee under certain circumstances, Ramaswami, J., observed at page 313 :

"It is clear in these circumstances that the Hindu undivided family was not existing on the date the Income Tax Officer imposed the penalty. In my opinion the proceeding initiated by the Income Tax Officer u/s 28(1)(c) of the Act is legally invalid since the Hindu Undivided family was non-existent of that date."

Dealing with the argument based upon a section 25A of the Act, the learned Judge observed :

"The section does not, in my opinion, lay down the machinery for the imposition of penalty on a Hindu undivided family which had become disrupted..... it is clear that there is a gap in the provisions of the Act; but it is not the function of the Court to fill up the gap."

A Division Bench of the Madras High Court in *Raju Chettiar v. Collector of Madras* followed where, at the time notice was issued u/s 28(1)(c), the family was undivided but became divided at the time notice was issued u/s 28, the family was undivided but became divided at the time the order of penalty was made. The learned Judges, in holding that the imposition of the penalty was illegal, observed at page 244 :

"Under section 28(1)(c) of the Act, any person, in whose case it is held that requirements of that section have been satisfied, liable to be penalised. A Hindu undivided family is within the scope of the expression person : See section 2(9) of the Act. It was that person, the Hindu undivided family, that was the assessee. Section 28(1)(c) requires that the assessee should be heard before an order is passed u/s 28(1)(c). That assessee had ceased to exist when the order u/s 28(1)(c) was passed in this case.... We are referring to this aspect only to emphasise that there is no machinery provided by the Act to impose the penalty u/s 28(1)(c), after the assessee had ceased to exist."

The question is whether the said decisions on the interpretation of section 25A would govern section 44 of the Act. The wording of the two sections is not in *pari materia*. They differ in essential respects. Section 25A provides for the assessment of a Hindu undivided family after partition and says that the Income Tax Officer shall make a 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 that each member or group of members shall 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 to it. The proviso further adds that all the members 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. The section, therefore, prescribes for the assessment and

payment of the tax. But this section adds the following words, which are not present in section 25A, "all the provisions of Chapter IV shall, so far as, may be, apply to an such assessment." Is section 28(1)(c) a provision relation to any such assessment ? Section 28 is one of the section is in Chapter IV. It imposes a penalty for the concealment of income or the improper distribution of profits. The defaults made in furnishing a return of the total income, in complying with a notice under sub-section (4) of section 22 or sub-section (2) of section 23 and in concealing the particulars of income or deliberately furnishing inadequate particulars of such income are penalised under that section. The defaults enumerated therein relate to the process of assessment. Section 28(1)(c), therefore, is a provision enacted for facilitating the proper assessment of taxable income and can properly be said to apply to an assessment made under Chapter IV. We cannot say that there is a lacuna in section 44 such as that found in section 25A of the Act.

It is argued but the learned counsel that a person can be penalised only if he has mens rea and, therefore, one of the members of a quondam partnership cannot be punished if the firm has been discontinued for a default made by another partner. It is not an inflexible rule of law that mens rea is a necessary ingredient of every default. One of the exceptions to that rule is where an Act excludes the said factor. Section 44 specifically provides for joint assessment in the case of discontinuance of a firm. The position, therefore, is that, despite the discontinuance, all the partners would be jointly liable for assessment. If section 28(1)(c) applies, the word "person" in that section whose default attracts the penal consequences takes in partners jointly liable for the assessment.

Nor can we accept the argument that the Act has not prescribed a machinery for imposing penalty on and for collecting the same from the erstwhile partners of a discontinued firm. As we have pointed out, the words in the last limb of section 44 making applicable all the provisions of Chapter IV attract those of section 28(1)(c). The words "so far as may be" in the clause of section 44 far from supporting the assessee's contention permits the application of section 28(1)(c) to the extent applicable to a given situation. We, therefore, hold that section 28(1)(c) is attracted to the assessment made u/s 44. In this view the Income Tax Officer has jurisdiction to proceed against the partners for collecting the share of the penalty imposed on the firm.

In the result, the appeal fails and is dismissed with costs. Advocates fee Rs. 100.

Appeal dismissed.