
(1981) 09 AHC CK 0020

In the Allahabad High Court

Case No : Income-tax Reference No. 1027 of 1976

M.K. Dar

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 14-09-1981

Acts Referred:

Income Tax Act, 1961 — Section 148, 26, 86

Citation : (1982) 26 CTR 165 : (1982) 138 ITR 801 : (1982) 8 TAXMAN 176

Hon'ble Judges : Satish Chandra, C.J;R.R. Rastogi, J

Bench : Division Bench

Advocate : S. Harkauli and A.N. Mahajan, for the Appellant; M. Katju, for the Respondent

Judgement

Satish Chandra, C.J.—This reference relates to the assessment years 1959-60 to 1965-66.

2. It appears that for the aforesaid assessment years, M.K. Dar was assessed to Income Tax in the status of an individual in respect of a half share of the income from Jeewan Cinema. Similarly, P.K. Dar and R. K, Dar were assessed to Income Tax as individuals for the aforesaid years in respect "of their 1/4th share each of that income.

3. Subsequently on March 5, 1966, the ITO, Special Survey Circle, Agra, issued notices u/s 148 of the I.T. Act, in respect of these years Seeking to assess them in the status of an "association of persons" in respect of the income from Jeewan Cinema. The assessees contested the matter. The ITO, however, repelled their objections and assessed them in the status of an "association of persons."

4. The assessees went up in appeal. The AAC by an order of April 30, 1969, annulled the assessments on the ground that when individual members had already been assessed on their individual share"s, the same income could not be assessed as an "association of persons".

5. It appears that the notices were challenged by the assessee by way of writ

petitions in this court (being Writ Petition No. 1294 of 1966, connected with Writ Petitions Nos. 1360 to 1366 and 1465 of 1966). These petitions came up for hearing before a learned single judge and were dismissed on March 24, 1967. This court held that it had not been established that the ITO was aware of the facts and that he did not in fact exercise the option to assess the petitioners individually or as members of an association. It was hence open to him to exercise that option now. It was further held that the notices issued u/s 148 of the Act again were valid and the ITO had jurisdiction to issue the same. On these findings the writ petitions were dismissed.

6. Meanwhile the Department had gone up in appeal to the Tribunal. The Tribunal accepted the decision of this court and set aside the order of the AAC and remanded the matter to him. It observed that the AAC may also consider whether, in the circumstances of the case, the assessee could be an "association of persons" in relation to the income from the lease of the building known as "Jeewan Cinema".

7. Thereafter, the matter came back to the AAC. He upheld the view of the ITO that the assessee formed an "association of persons" and could be assessed in that status. The assessee again took up the matter to the Appellate Tribunal, which affirmed the order of the AAC.

8. At the instance of the assessee the Tribunal has referred the following questions of law for our opinion :

"(1) Whether, on the facts and circumstances of the case, the Tribunal was right in holding that the assessments of the assessee in the status of an "association of persons" could be effected for the present year ?

(2) Whether, on the facts and circumstances of the case, the Tribunal was right in holding that the lease income from the cinema building and the furniture, etc., were inseparable and composite ?

(3) Whether, on the facts and circumstances of the case, the Tribunal was right in holding that the lease income enjoyed from the letting out of the cinema building and the furniture, etc., could be assessed as income from other sources ?"

9. Before dealing with the questions, we may give the facts in a little more detail.

10. It appears that in the years 1946 and 1947 M.K. Dar and Smt. Gaura Shri Dar (widow of M.K. Dar's brother, and the mother of P.K. Dar and R.K. Dar) purchased two pieces of land. They constructed a cinema building on it jointly which they called "Jeewan Cinema". Before the building was completed they agreed to let it out by an agreement dated 28th May, 1957 to "Young Theatre". The lease was of a fully furnished and running cinema building. Subsequently, on 7th November, 1957, a regular lease deed was executed on a rent of Rs. 1,500 per month. The lease was for a period of three years. It appears that it was agreed between the two owners, namely, M.K. Dar and Smt. Gaura Shri Dar, that on the payment of Rs. 37,000 to Smt. Gaura Shri Dar, her share in the property

would vest in her two sons, P.K. Dar and R.K. Dar. In due course the lease of the cinema building was renewed. Under these documents the cinema building was leased on a rent of Rs. 1,000 per month while furnishings, fixtures, electrical installations, etc., were let out on a monthly rent of Rs. 500. The agreement of lease relating to the fixtures, etc., stated that the hirer would not remove the said goods or any of them from the cinema building and they would be used in the same manner as being then done. It was further agreed that if the lease of the cinema building was renewed, the hiring of the furniture, etc., would as well be renewed. On these facts the ITO recorded the following finding :

"As regards the status there is no dispute that the investments over the construction of property and furniture were made jointly by the members, and there is no definite share either of the investment or of the proprietary rights. The furniture was also installed jointly. The agreement for lease of the cinema building and furniture has also been executed by the members themselves as party No. 1 and the lessee as party No. 2. It is, therefore, quite evident that the entire income was earned by the members by their joint efforts and joint investments. The assessee is thus assessable as a separate entity recognised by the I.T. Act and if any income is earned by it, it has to be taxed in its hands irrespective of the fact that the pro rata share of the income was assessed in the individual hands of the members. For double assessment of the income, if any, the remedy of the assessee does not lie here and this would be for the individual members to agitate in their personal assessment."

11. These findings were affirmed by the Appellate Assistant Commissioner as well as the Tribunal.

12. We asked the learned counsel for the assessee how does he question this finding and how does he establish the definite and specified shares of the three members of the association with which we are concerned. He pointed out that in the individual assessment, M.K. Dar was assessed in respect of his half share of the income from the cinema building while P.K. Dar and R.K. Dar were assessed to the extent of 1/4th share each. That was in accordance with the agreement of December 15, 1957, inter se the estate of three persons. That may be so, but that does not deal with the question fully. There seems to be no evidence to indicate the shares in which the land was purchased by M.K. Dar and the lady in 1946 and 1947. The sale deeds have not been filed and the learned counsel was unable to show whether any specified shares were mentioned in the documents. In the next place there seems to be no evidence of contribution in the construction of the building and installation of fixtures and electrical fittings and furnishings therein by the two owners. In the third place there is no evidence of specification of any shares of the co-owners in the lease deed executed by them in favour of the "Young Theatre". On these facts it cannot but be gainsaid that the acquisition of the land and construction of the building and its furnishings were made jointly by the two, M.K. Dar and Smt. Gaura Shri Dar. The finding that there is no definite share either of the investment or of the proprietary

rights appears to be quite justified and the further finding that the income was earned by the members by their joint efforts and joint investment is also unassailable.

13. Learned counsel for the assessee invited our attention to the decision of the Calcutta High Court in Rama Devi Agarwalla and Others Vs. Commissioner of Income Tax, . There some of the tests for determining whether a group of persons constitute an "association of persons" were indicated. It was held as follows (headnote) :

"The Supreme Court has observed in the case of G. Murugesan and Brothers Vs. Commissioner of Income Tax , Madras, , that for forming an association of persons, the members must join together for the purpose of producing an income, that an association of persons could be formed only when two or more individuals voluntarily combined together for a certain purpose, that volition on the part of the members was an essential ingredient, that for receiving dividends from shares, there was no question of any management, and that an association could not be inferred from the mere fact that more than one person jointly owned shares and jointly received the dividends. In the instant case, the Tribunal had found that the five ladies had drawn out their separate funds to purchase the property and that they had distinct shares in the ownership of the property. There was no specific finding of the Tribunal that the five ladies had intended to embark upon a joint enterprise. There was also no finding that there was any arrangement or agreement or any common aim or purpose or volition of the persons concerned. There was no evidence of any common management or use of the property after the purchase. Except for the deed of purchase and the deed of sale where the five ladies joined as purchasers and vendors, there was no other material before the Tribunal."

14. Here the position is quite different. The two persons concerned purchased the land obviously with a view to embark upon a joint venture of constructing a cinema building. During the course of its construction they thought of letting it out instead of running a business in it. There was no specification of share in the investment between the two persons. Subsequently also in the lease deeds there was no specification of share nor any indication of specification of share or of investment or expenditure. The aim initially was to embark upon a joint venture of constructing a building and running in it either a commercial business or letting it out. That aim continued. An intention of common management or use of the property is quite evident in the present case.

15. We have hence no hesitation in holding that the finding of the authorities below that the members of this group could be taxed in the status of an "association of persons" is correct.

16. Learned counsel for the assessee then submitted that the notice issued u/s 148 of the Act was invalid. This point is no longer open, as it was repelled by the High Court in the writ petitions filed by the petitioners themselves. It was then

urged that the impugned assessments constitute double taxation. Learned counsel invited our attention to Section 86 of the Act. He referred specifically to Clause (v) thereof. Section 86 provides :

"86. Income Tax shall not be payable by an assessee in respect of the following--...

(v). if the assessee is a member of an association of persons, or a body of individuals other than a Hindu undivided family, a company or a firm, any portion, of the amount which he is entitled to receive from the association or body on which Income Tax has already been paid by the association or body."

17. In its term the provision does not apply. Nobody is seeking to tax the share of individual members after having taxed the same share of income in the hands of an "association of persons". In fact, the present, if at all, is a reverse case which is not provided for by Section 86. As observed by the authorities, below, the petitioners' remedy is to rake up the matter in their individual assessments. The assessment as an "association of persons" in the present case, hence, cannot be held invalid on the ground of double taxation.

18. Learned counsel for the assesseees then invited our attention to Section 26 of the Act which deals with income from property. Section 26 is inapplicable to a case where the income has been assessed to tax as "income from other sources". In the circumstances it cannot be said that the income from Jeewan Cinema should have been taxed under the head "Income from property".

19. In our opinion, the Tribunal was right in holding that the assessment of the assessee in the status of an "association of persons" was valid.

20. The second question referred to us is whether the income from the cinema building as well as from the furniture and fixtures, etc., were inseparable and composite. The Tribunal has on this part of the case relied upon a decision of the Supreme Court in *Sultan Brothers (P) Ltd. Vs. Commissioner of Income Tax*, . In that case plant or building as well as the furniture installed in it were let out separately. It was held that the question whether they can be taxed on the footing that they constitute inseparable lettings was dependent upon the intention of the parties. That intention may be ascertained by framing the following questions :

(1) Was it the intention in making the lease and it matters not whether there is one lease or two, that is, separate leases in respect of the furniture and the building, that the two should be enjoyed together ?

(2) Was it the intention to make the letting of the two practically one letting ?

(3) Would one have been let alone, and a lease of it accepted, without the other ? .

21. If the answers to the first two questions are in the affirmative, and the last in the negative, then it has to be held that it was intended that the lettings would

be inseparable. In the present case letting was of a cinema building, which was already fully furnished. By a separate document a lease relating to the fixtures, furnishings, electrical fittings, etc., was made. There was a specific clause in the separate document of lease that no part of the fixtures or furnitures, etc., would be removed and that they would continue to be used as such. There is no dispute that, after the execution of the lease deed in 1957, the cinema building and the furnishings, fixtures, etc., were used for running a cinema business. The same manner of use continued. It is thus apparent that the two leases were intended to be enjoyed together and the intention was of a single transaction split into two documents. It is also apparent that the lease of the furnishings, fixtures, etc., would not have been accepted without the lease of the cinema building. Thus, the first two questions posed by the Supreme Court have to be answered in the affirmative and the third one in the negative. In this view the Tribunal was right in holding that the lease income from the cinema building and furniture, etc., was inseparable and composite. That answers the second question.

22. On the findings in respect of the three questions the position is that the assessee could be assessed in the status of an "association of persons" and that the income from Jeewan Cinema was inseparable and composite. It is evident that such an income could not be taxed under the head "Income from property" and was correctly taxed under the head "Income from other sources".

23. In the result, all the three questions are answered in the affirmative, in favour of the Department and against the assessee, with costs, which are assessed at Rs. 200.