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(1994) 05 DEL CK 0019

In the Delhi High Court

Case No : Income-tax Reference No. 8 of 1983

Ram Chander Aggarwal APPELLANT

Vs

Commissioner of Income Tax RESPONDENT

Date of Decision : 18-05-1994

Acts Referred:

Citation : (1994) 3 AD 291 : (1994) 120 CTR 322 : (1994) 55 DLT 119 : (1995) 211 ITR 4 : (1994) 74 TAXMAN 544

Hon'ble Judges : D.P Wadhwa, J;D.K. Jain, J

Bench : Division Bench

Advocate : Anoop Sharma, for the Appellant; Rajendra, for the Respondent

Judgement

D. K. Jain, J.—The following question has been referred to this court for opinion, at the instance of the assessed, u/s 256(1) of the Income Tax Act, 1961 (for short, "the Act") :

"Whether the Tribunal was right in law in holding that the transfer of capital asset takes place when the property or asset, belonging to the assessed (partner) is brought in or introduced by the partner into a firm?"

2. It may be stated that keeping in view the factual background of the case, the question referred does not clearly bring out the controversy and, Therefore, requires to be reframed as under :

"Whether the Tribunal was right in law in holding that contribution in the form of plot of land by the assessed to the partnership firm amounted to a transfer within the meaning of section 2(47) of the Act, resulting in capital gains chargeable to tax?"

3. At the outset, Mr. Anoop Sharma, learned counsel for the assessed, pointed out that the answer to the question stands concluded by the decision of the Supreme Court in Sunil Siddharthbhai Vs. Commissioner of Income Tax, Ahmedabad, Gujarat, . Mr. Rajendra, learned standing counsel for the Revenue,

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though candidly admitted that it was so, strenuously urged before us that in view of certain observations of the Supreme Court in the same decision, we should go into the question whether the contribution of a plot of land by the assessed as his capital contribution in the firm was merely a device to convert the said asset into money, which would be available for his benefit without attracting any liability to Income Tax on capital gains and for this purpose, he suggested that we should now require the Income Tax Appellate Tribunal to submit a supplementary statement of the case. The observations of the Supreme Court sought to be relied upon are as follows (at page 523) :

"If the transfer of the personal asset by the assessed to a partnership in which he is or becomes a partner is merely a device or ruse for converting the asset into money which would substantially remain available for his benefit without liability to Income Tax on a capital gain, it will be open to the Income Tax authorities to go behind the transaction and examine whether the transaction of creating the partnership is a genuine or a sham transaction and, even where the partnership is genuine, the transaction of transferring the personal asset to the partnership firm represents a real attempt to contribute to the share capital of the partnership firm for the purpose of carrying on the partnership business or is nothing but a device or ruse to convert the personal asset into money substantially for the benefit of the assessed while evading tax on a capital gain. The Income Tax Officer will be entitled to consider all the relevant indicia in this regard, whether the partnership is formed between the assessed and his wife and children or substantially limited to them, whether the personal asset is sold by the partnership firm soon after it is transferred by the assessed to it, whether the partnership firm has no substantial or real business or the record shows that there was no real need for the partnership firm for such capital contribution from the assessed. All these and other pertinent considerations may be taken into regard when the Income Tax Officer enters upon a scrutiny of the transaction, for, in the task of determining whether a transaction is a sham or illusory transaction or a device or ruse, he is entitled to penetrate the veil covering it and ascertain the truth."

4. There can be title dispute that the jurisdiction of the High Court u/s 256 of the Act is not in the nature of an appellate or revisional or supervisory jurisdiction but is purely advisory. It has only to spell out its opinion on legal aspects on the facts as found by the Tribunal. Therefore, the advisory jurisdiction can be exercised only in respect of the question for which advice has been sought by the Tribunal. However, on a particular question of law referred by the Tribunal for its opinion, it is open to the High Court to consider another aspect of the same question of law and it may even reframe or amplify the question in order to bring out the real controversy between the parties but at the same time in these proceedings it cannot address itself to an entirely new controversy which had neither been raised before the Tribunal nor considered by it nor was it raised on an application u/s 256 of the Act. The question which can be answered must be the question which was raised before the Tribunal and was decided by it. It must

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not be an entirely different question which the Tribunal never considered. This is the legal position settled by a catena of decisions of the Supreme Court. Conscious of this legal position, Mr. Rajendra has not pleaded for reframing or modification of the question but urges to obtain a supplementary statement of case so as to bring out the other aspect of the controversy now raised by him, viz., whether the transaction of contribution to land as capital is a genuine contribution to a real partnership or merely a ruse to avoid capital gains.

5. The question which arises for consideration is whether the issue now raised by standing counsel for the Revenue could be considered as another aspect of the question referred to us, entitled us to go into it. For it, it would be necessary to travel beyond the statement of the case drawn up by the Tribunal (not a normal practice) and bring out some material facts from the annexures forming part of the statement of the case not included therein.

6. During the course of assessment proceedings for the assessment year 1974-75, the Income Tax Officer noticed that in his return of income the assessed had claimed that the surplus generated on account of contribution of his land to the firm, Messrs. Nirmal Construction and Finance Company, as its partner, was not taxable in his hands as to transfer or sale of the land had taken place. The Income Tax Officer traced the history of various transactions involving the land and came to the conclusion that the assessed had created a legal facade by reconstituting the said firm in admitting his second son as partner and showing as contribution by the partners three plots of land as capital at highly inflated prices with the clear intention to evade huge tax liability resulting from the said land transactions. Relying on two decisions of the Supreme Court in G. Venkataswami Naidu and Co. Vs. The Commissioner of Income Tax, and Khan Bahadur Ahmed Alladin and Sons Vs. Commissioner of Income Tax, Andhra Pradesh, , he treated the difference between the purchase price and the enhanced value at which the land was transferred to the said firm as the assessed''s business profit from an adventure in the nature of trade. In the alternative, he also held that it was a clear case of "transfer" of land by the assessed within the meaning of section 2(47) of the Act to the said firm and as such the assessed was liable to short-term capital gains. Accordingly, while framing the assessment, he made an addition on account of short-term capital gains in respect of the land in question. In the first appeal preferred by the assessed, the Commissioner of Income Tax (Appeals) when deeply into the question as to whether the transaction was a transfer within the meaning of section 2(47) of the Act and concurred with the Income Tax Officer in taxing short-term capital gains in the hands of the assessed. The Commissioner of Income Tax (Appeals), however, did not go into the question as to whether the entire exercise by the assessed was a facade created for evading tax. Relying on the decision of the Supreme Court in Commissioner of Income Tax, West Bengal Vs. Hind Construction Ltd., , he disagreed with the Income Tax Officer that the resultant surplus could be treated as the assessed''s profit from business. The assessed carried the matter further in appeal to the Tribunal but the Revenue, it

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seems, kept quiet. The Tribunal merely relied on a decision of the Gujarat High Court in Commissioner of Income Tax, Gujarat-I Vs. Kartikey V. Sarabhai, and dismissed the assessed''s appeal.

7. From the above brief narration of facts, it is evident that the Tribunal dealt with only the legal proposition of law, viz., whether the transaction in question amounted to a "transfer" within the meaning of section 2(47) of the Act, resulting in capital gains chargeable to tax. The point now raised before us by learned counsel for the Revenue was not set up before the Tribunal or dealt with by it, nor was any such question sought to be referred on the basis of which this alternative submission could be made. It cannot be permitted to be urged in these proceedings.

8. It cannot, Therefore, be said to arise out of the order of the Tribunal. In that view of the matter, there is no ground for us to call upon the Tribunal to submit a supplementary statement of the case, as pleaded by learned counsel for the Revenue.

9. Accordingly, we decline to reopen the issue, now raised, at this stage, and shall confine ourselves to the consideration of the abovementioned question, which has been referred to us at the instance of the assessed. Having reached this conclusion, in view of the authoritative pronouncement of the Supreme Court in Sunil Siddharthbhai Vs. Commissioner of Income Tax, Ahmedabad, Gujarat, , wherein the decision of the Gujarat High Court in Commissioner of Income Tax, Gujarat-I Vs. Kartikey V. Sarabhai, , relied upon by the Tribunal has been partly reversed, the answer to the reframed question has to be that the Tribunal was right in holding that the handing over of the capital asset to the firm by the assessed did amount to "transfer" but no capital gains chargeable to tax accrued to the assessed.

10. The reference is accordingly answered.

11. Before parting we may also note that under identical circumstances, a similar view has been expressed by the Punjab and Haryana High Court in the case of another partner of the same firm, since reported as Ved Parkash Aggarwal Vs. Commissioner of Income Tax, .

12. There will, however, be no order as to costs.

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