

(1976) 01 SHI CK 0011

In the High Court Of Himachal Pradesh

Case No : Income-tax Reference No. 1 of 1975

Satinder Kumar (H.U.F.)

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 16-01-1976

Acts Referred:

Income Tax Act, 1961 — Section 263

Citation : (1977) 106 ITR 64 : (1977) ShimLC 53

Hon'ble Judges : R.S. Pathak, C.J.;C.R. Thakur, J

Bench : Division Bench

Advocate : P.N. Chopra and D.P. Sud, for the Appellant; Inder Singh, for the Respondent

Judgement

R.S. Pathak, C.J.—The Income Tax Appellate Tribunal has referred the following questions for the opinion of this court. Those questions are :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal erred in law in holding that Satinder Kumar's joining the partnership, M/s. Vijay Traders, was an extension of the Hindu undivided family business comprised by Satinder Kumar's partnership in the firm, M/s. R. S. Lehnua Mall Thakur Dass ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was in law right in upholding the order of the Additional Commissioner of Income Tax u/s 263, Income Tax Act, on the ground of Satinder Kumar's joining the partnership, Messrs. Vijay Traders, being an extension of the Hindu undivided family's earlier business when the said ground did not form the basis of the Additional Commissioner's order ?

3. Whether, on the facts and in the circumstances of the case, particularly in the face of assessee-Hindu undivided family's conduct in having shown Satinder Kumar's share income from M/s. Vijay Traders in its return of loss for the assessment year 1967-68 and in its original return for the assessment year 1968-69, was the Tribunal's finding that the 11% share income from M/s. Vijay

Traders had been right till October 13, 1969, treated as belonging to the Hindu undivided family bad as being based on no evidence ?

4. Whether the Additional Commissioner's order dated March 17, 1972, setting aside the assessments of the assessee-Hindu undivided family for the assessment years 1968-69 to 1970-71 was sustainable for the assessment years 1968-69 and 1969-70 in view of the facts that the 11% share income from M/s. Vijay Traders had been separately assessed in the hands of Satinder Kumar, individual, for the aforesaid two years and that those separate assessments had on March 5, 1974, the date of the Tribunal's order, already become final ?"

2. The assessee is a Hindu undivided family and Satinder Kumar is its karta. We are concerned with the assessment years 1968-69, 1969-70 and 1970-71, the relevant previous years in each case being the immediately preceding financial years.

3. The assessee-Hindu undivided family consists of Satinder Kumar, his wife, two minor sons and four daughters. Satinder Kumar, his mother and three brothers were partners in the firm, M/s. Rai Sahib Lehnu Mall Thakur Dass, of Lower Bazar, Simla. Up to the assessment year 1963-64, the share income from the partnership firm was assessed in the hands of Satinder Kumar in his individual status. For subsequent years the share income has been assessed in the hands of the assessee-Hindu undivided family.

4. On January 14, 1966, Satinder Kumar and two of his brothers, Harnam Dass and Devi Dass, and three strangers, Orn Parkash Gupta, Jagdish Prasad Gupta and Braham Prakash Gupta, entered into a partnership for the purpose of carrying on business as timber merchants, forest lessees and commission agents under the name and style of Messrs. Vijay Traders at 47, Lower Bazar, Simla. Satinder Kumar and his two brothers had a 11% share each in the profits and losses of the firm while the three strangers had a share of 67 per cent, in the profits and losses. For the assessment year 1967-68, the relevant previous year being the calendar year 1966, it appears that M/s. Vijay Traders showed a loss. The share of Satinder Kumar in the loss suffered by M/s. Vijay Traders was shown in the return of the assessee-Hindu undivided family for the said assessment year 1967-68 in its return dated April 12, 1968. The return was a loss return; For the assessment year 1968-69, the assessee-family filed its return on April 10, 1969, and again showed the share income of Satinder Kumar from M/s. Vijay Traders as its income. However, on October 13, 1969, the assessee-family filed a revised return for the assessment year 1968-69 and omitted from the return the share income derived by Satinder Kumar from M/s. Vijay Traders. The share income was now shown instead in the return filed by Satinder Kumar in his individual status for the assessment year 1968-69.

5. The Income Tax Officer accepted the revised return of the assessee-family and the individual return of Satinder Kumar for the assessment year 1968-69 and assessed them accordingly. Similar assessments were made in respect of the

assessee-family and Satinder Kumar for the succeeding assessment years 1969-70 and 1970-71.

6. The Additional Commissioner of Income Tax, it appears, took the view" that the assessments made on the assessee-family for the assessment years 1968-69 to 1970-71 were prejudicial to the revenue, and acting u/s 263 of the Income Tax Act, 1961 he made an order dated March 20, 1972, for the three years holding that the share income of Satinder Kumar from M/s. Vijay Traders fell to be included in the assessments of the assessee-family. He relied on the circumstance that the initial return of the assessee-family for the assessment year 1968-69 showed that the assessee considered Satinder Kumar to be a partner in M/s. Vijay Traders on behalf of the family and not in his individual capacity. He also pointed out that even if the share income was to be treated as the personal income of Satinder Kumar it had been impressed with the character of Hindu undivided family property by including it in the return of the assessee-family. However, the essential basis on which he proceeded was that Satinder Kumar was a partner in M/s. Vijay Traders on behalf of the assessee-family.

7. The assessee-family appealed to the Income Tax Appellate Tribunal. The appeals were dismissed by the Tribunal by a common order dated March 5, 1974.

8. At the instance of the assessee-family, the Tribunal has made the present reference.

9. The Tribunal considered the principal issue in the case to be whether the business of M/s. Vijay Traders was a new business entirely distinct from, or a business which could be considered as an extension of, the business of the assessee-family. It relied on certain statements of the law in D. F. Mulla's Principles of Hindu Law and Mayne's Treatise on Hindu Law and observed that as the business of the karta prior to joining the new firm, M/s. Vijay Traders, was the same, that is timber business, the modus operandi was the same, that is, in partnership with others, the location and the principal place of business was the same, that is, Lower Bazar, Simla, the business must be treated as an extension of the business carried on by the assessee-family. The Tribunal also relied on the circumstance that the karta had treated the business up to October, 1969, as that of the assessee-family. It also observed that the mere non-contribution of personal capital was not a factor deciding whether Satinder Kumar was partner in M/s. Vijay Traders in his personal capacity or on behalf of the assessee-family. It pointed out that, in fact, the assessee-family had no capital except a petty sum of Rs. 278"95 for the assessment year 1968-69, a debit balance of Rs. 42,838"23 for the assessment year 1969-70 and a debit balance of Rs. 48,106.87 for the assessment year 1970-71.

10. At the outset, it appears necessary to set down what the courts have regarded as a fundamental proposition of law. The circumstance that the karta of a Hindu undivided family is a partner in a partnership firm does not by itself raise the presumption that he is such partner on behalf of the Hindu undivided family.

In *Chattanatha Karayalar Vs. Ramachandra Iyer and Another*, , the Supreme Court laid down that under the Hindu law there is no presumption that a business standing in the name of any member of a joint Hindu family is the business of the joint Hindu family, even where that member is the manager of the family. This view was followed by the Bombay High Court in *Commissioner of Income Tax, Bombay City I Vs. Champaklal Dalsukhbhai*, A Full Bench of the Allahabad High Court in *Ram Nath and Another Vs. Chiranji Lal and Another*, observed that there can be no presumption that a business started by a manager or a coparcener of a joint Hindu family should be treated as ancestral. The test, it was observed, for deciding whether a business was a new business wholly unconnected with the joint family ancestral business or was an extension of that business was to determine the source which supplied the money with which the new business was started. The Patna High Court in *CHANDMULL RAJGARHIA Vs. COMMISSIONER OF Income Tax, BIHAR AND ORISSA.*, declared that if a new business was started by a member of the family the presumption would be that it was his own until otherwise proved, unless the new business was started by a sufficient nucleus from joint family assets.

11. It would, therefore, appear that the mere circumstance that Satinder Kumar was the karta of the assessee-family and at the same time partner in M/s. Vijay Traders cannot lead to the conclusion that he represented the assessee-family in the partnership firm. There must be positive material to show that he was a partner in the firm on behalf of the assessee-family. On the Tribunal's own finding, no question arose of the assessee-family having contributed any capital to the partnership firm for the reason that there were hardly any available funds with the assessee-family.

12. The Tribunal has relied on the circumstance that the assessee-family was a trading family and that the business carried on by M/s. Vijay Traders was substantially the same business as that carried on by the assessee-family in M/s. Rai Sahib Lehnu Mall Thakur Dass, and, therefore, it has concluded that the business in which Satinder Kumar was engaged as partner in M/s. Vijay Traders was an extension of the family business. Reference has been made to passages from the text books by D. F. Mulla and Mayne. The extract from D. F. Mulla runs thus:

"A family carrying on trade in a particular commodity may legitimately extend it to another commodity, and whether such extension would amount to a new business or not depends upon the nature or type of the extended business and not on the particular commodities it deals with. If the family is a trading family and the extended business is not more hazardous or speculative than the one previously existing, it may not be regarded as a new business."

13. The extract from Mayne reads :

"Another important question is whether a particular business is a continuation or an admissible extension or change of the ancestral business or an altogether new

business. Whether it is the one or the other can only be an inference of fact from all the circumstances of each case. One good test is whether the new line of business entails larger and new kinds of hazards than the old business, for it is against these fresh hazards that the minor's interests are protected by law. Once an exception is made to the strict law of the joint family by admitting the usual risk of a joint family business, it would seem that any bona fide extension or reconstruction of the business cannot make it a new business, and this would be so whether the business was exclusively a joint family business or whether it was carried on in partnership with a stranger."

14. In *Damodaram Chetty v. Bansi Lal Abeerchand* ILR[1928] Mad 51: AIR 1928 Mad 566, it was laid down that where a family business consisted in the purchase and sale of one commodity, the purchase and sale of another commodity was not outside the scope of that business."The question to be determined in each case should be whether having regard to the recognised business, profession, means of livelihood or what is called the "kulachara" of the family, the particular enterprise in question is one within the reasonable limits of its exercise or really, having regard to its nature or extent, a new speculative enterprise."

15. This is followed by another passage from Mulla :

"When a manager of a trading joint family enters into partnership with a stranger for the purpose of carrying on the same kind of business, the other members are liable to the same extent of their interest in the family property."

16. The Tribunal has read these passages to mean that if the karta of a trading family engages in a business akin to that carried on already by the family it must be presumed that he carries on that business on behalf of the family. It was necessary for the Tribunal to have applied itself more closely to the import of those passages and considered what was the topic to which they related. It should have examined the several cases set out in the foot-notes for that purpose. It is unfortunate that the cases themselves were not placed before the Tribunal. Had that been done, the Tribunal would have perceived that the passages did not relate to the controversy before it. The question whether a business started by a karta can be described as an extension of the family business or is a new business altogether relates to the powers of the karta in the matter of carrying on business on behalf of the family. It is settled law that the karta of a trading family has wider powers than those of the manager of a non-trading family in the carrying on of a business. But there is no deviation from the fundamental principle that what has been done by him must be for the benefit and necessity of the family. The acts of the karta will bind the family if they are within his ostensible authority as a manager conducting the family business. How far the other coparceners, including minor members, are liable for the acts of the karta to the extent of their family assets only or also to the extent of making them personally liable will vary with the facts of each case. An extension of the family business has been held not to fall outside the competency of the karta. The commencement of a new business altogether is a different matter. Whether

that lies within the powers of a karta cannot be presumed. In every case, the question is whether having regard to the "kulachara" of the family the particular business falls within the reasonable limits of the karta's powers. Now, the question whether the commencement of a business lies within the scope of the karta's powers arises in those cases only where the karta, in carrying on such business, professes to act on behalf of the family. Unless he claims to act on behalf of the family the principles laid down in the passages from Mayne and Mulla, to which the Tribunal has referred, do not fall to be considered. It is one thing to say that a karta commencing a business professes to act on behalf of the family. It is quite another thing to say that in commencing such business he can be presumed to be acting on behalf of the family. If a karta declares that he is acting for himself alone no such presumption can be raised. Whether he is acting for himself alone or on behalf of the family is a matter governed by very different considerations. If he does not claim to act on behalf of the family, there must be clear and definite material, if the contrary is to be proved, linking the family with the business carried on by the karta. The circumstance that the karta has commenced a business of the same character or in the same commodity as the family business gives rise to no presumption that the business commenced is an extension of the family business.

17. In the present case, Satinder Kumar is a partner in Messrs. Vijay Traders. It is true that Messrs. Vijay Traders carry on the same kind of business as Messrs. Rai Sahib Lehnu Mall Thakur Dass, and that the business is carried on in the Lower Bazar, Simla, where Messrs. Rai Sahib Lehnu Mall Thakur Dass also carry on their business. It is also true that both are partnership firms and Satinder Kumar is a partner on behalf of the family in Messrs. Rai Sahib Lehnu Mall Thakur Dass. Those circumstances do not, to my mind, lead to the conclusion that Satinder Kumar is a partner in Messrs. Vijay Traders also on behalf of the family. Some thing more is needed, and that something must be material showing that the business carried on by Satinder Kumar as partner in Messrs. Vijay Traders is in fact the business of the family. There is no evidence to show that Satinder Kumar drew on the family funds or acted to the detriment of the family assets in carrying on such business. There is no material whatever on the record indicating that Satinder Kumar was representing the family in M/s. Vijay Traders.

18. The Tribunal has relied on the fact that when the assessee-family filed its return for the assessment year 1967-68 and its original return for the assessment year 1968-69 it included therein the share of Satinder Kumar in Messrs. Vijay Traders. The assessee-family, however, explained subsequently that the income had been mistakenly included in the returns and that the share did not belong to it. The record before us does not show that the assessee's explanation has been considered at all by the Tribunal. It has neither accepted it nor rejected it. In the circumstances, it is not open to the Tribunal to treat the fact as decisive that the share of Satinder Kumar was included in the returns. In *M. N. Murugappa Chetty and Sons Vs. Commissioner of Income Tax, Madras.*, it

was held that even if for some years an assessee did not object to the assessment of his income as joint family income it did not necessarily follow that the income must also be treated as joint family income in a subsequent assessment year when he contended that it was his personal income. In *L. BAIJ NATH Vs. COMMISSIONER OF Income Tax, U. P. AND AJMER-MERWARA.*, the Allahabad High Court observed that if income from a property was assessed as the income of a joint family in one assessment year, it was still open to the assessee in a subsequent year to prove that the income did not belong to the family but to the assessee as an individual. It is true that an admission made by the assessee constitutes a relevant piece of evidence, but that it can be relied on as such without considering the assessee's case that he proceeded on a mistaken understanding or the true position has not been laid down anywhere.

19. The Additional Commissioner had expressed the view that by including the share in the assessee-family's return, Satinder Kumar must be considered as having impressed his personal property with the character of coparcenary property. That circumstance has not been made the basis of the Tribunal's order, and therefore, it need not be taken into consideration.

20. Upon the aforesaid considerations, I answer the questions as follows:

Question No. 1 :

The Tribunal erred in law in holding that because Satinder Kumar was a partner in Messrs. Vijay Traders there was an extension of the Hindu undivided family business represented by Satinder Kumar's partnership in the firm, Messrs. Rai Sahib Lehn Mall Thakur Dass. The question is answered in the affirmative.

Question No. 2:

In view of the answer to question No. 1, no answer is necessary to this question.

Question No. 3

The fact that Satinder Kumar's share income from Messrs. Vijay Traders had been shown in the assessee-Hindu undivided family's return for the assessment year 1967-68 and in its original return for the assessment year 1968-69 does not constitute material for the Tribunal's finding that the 11 per cent, income from M/s. Vijay Traders belonged to the assessee-Hindu undivided family. The question is answered in the affirmative.

Question No. 4

In view of the answers to questions Nos. 1 and 3, it is not necessary to reply to question No. 4.

21. The assessee is entitled to its costs, which we assess at Rs. 200. Counsel's fee is assessed at the same figure.

C.R. Thakur, J.

22. I agree.