

(1984) 03 DEL CK 0006
In the Delhi High Court
Case No : Income Tax R. No. 48 of 1976

Smt. Budho Devi

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 31-03-1984

Acts Referred:

Citation : (1984) 03 DEL CK 0006

Hon'ble Judges : Sunanda Bhandare, J;D.K. Kapur, J

Bench : Division Bench

Judgement

D.K. Kapur, J.—The assessed, Smt. Budho Devi, had sold property situated at R7/8, Green Park Extention, New Delhi, making a capital gain of Rs. 30,767 for which she filed a return in the asst. yr. 1967-68. The ITO, after discussing the investing in the construction of the property amounting to Rs. 53,000, came to the conclusion that it came from Shri Darbari Lal, the assessed's husband. He also held that the capital gain was not assessable in the assessed's hands as it belonged on Shri Darbari Lal. So, the assessment was made for nil income.

2. The Addl. CIT came to the collusion that this order was prejudicial to the interest of revenue because even the income disclosed in the return was not assessed in the hands of the assessed. After giving the necessary notice be set aside the assessment order and directed to be made a fresh. An appeal was taken by the assessed to the Tribunal which affirmed the order of the Addl. CIT.

3. On a reference being sought by the assessed, the following question has been referred to us u/s 256(1) of the IT Act, 1961 by the ITAT :

"Whether, on the facts and circumstances of the case, the order passed by the ITO making nil assessment on the assessed for the asst. yr. 1967-68 was erroneous insofar as it was prejudicial to the interest of the revenue within the meaning of s. 263(1) of the IT Act, 1961 and the Addl. CIT was justified in setting aside the assessment and directing the ITO to reframe the same according to law ?"

4. Before us it is contended for the assessed that the order passed by the ITO making the assessment nil was neither prejudicial to the interest of revenue nor was it erroneous and hence s. 261(1) was not attracted. Reference to certain judgments has been made to support this point of view.

5. However, it is sufficient to note what the Tribunal said in his order. It was said : "On behalf of the department reliance was placed on the decision of the Additional Commissioner of Income Tax and it was submitted that the ITO should have made a protective assessment on the assessed. It was further submitted that as the ITO failed to make the necessary protective assessment, the action of the ITO was prejudicial to the interests of the revenue."

6. Later on, it was said in the same order by the Tribunal. Even before the Addl. CIT it was submitted on behalf of the assessed that the lady would be able to prove the sources of investment claimed by her. On these facts the order of the ITO in not making even a protective assessment was, in our opinion, erroneous insofar as it was prejudicial to the interest of revenue. Prejudice to the interest of revenue may be caused, if both the assessed and her husband are ultimately found not to be assessable to this capital gain in their individual assessments." These remarks were made in the context of the fact that the assessed's husband Shri Darbari Lal was also sought to be assessed under s. 147(a) of the IT Act by re-opening his assessment. It was thus possible that if the result in that case had been that the property was concluded not to belong to Shri Darbari Lal the capital gains would not be assessed in his hands. The conclusion of the Tribunal was based on the possibility that in case the ITO's order stood, then the income might escape assessment both in the hands of the assessed as well as her husband. That is why a protective assessment was necessary .

7. In the judgment relied upon by the Id. counsel for the assessed. H.H. Maharaja Raja Pawan Dewas Vs. Commissioner of Income Tax, , the court concluded that the order must be erroneous as well as prejudicial to the interest of revenue. On the facts of that case, it was found that the order might be erroneous but it could not be held to be prejudicial. In another case Commissioner of Income Tax Vs. Late Sunderlal (through Bankey Behari Lal), , the equivalent provision in the IT Act, 1922, was analysed and it was held that the Commissioner must give reasons for being satisfied that the order passed by the ITO was prejudicial to the interest of revenue and without reasons the order could not be passed. In the third case decided by this Court, Gee Vee Enterprise Vs. Additional Commissioner of Income Tax, , the provisions of s. 263 were examined in a writ petition under Art. 226 of the Constitution. In that case, the ITO had not made a proper enquiry and so it was held that the order was sufficiently erroneous within the meaning of section 263.

8. Each case must necessarily turn on its own facts. The facts in this case are quite clear and distinct. The assessed had herself submitted a return showing a capital gain of Rs. 30,767. So far as we can see, she had to be assessed for this amount unless somebody else was assessed for the said capital gain. The

mistake made by the ITO was to hold that the amount was not assessable in the hands of the assessed. Thus, leaving it upon to the department to start proceedings against the assessed's husband. The mistake of the ITO was to fail to protect the revenue against the possibility that the income was not that of Shir Darbari Lal. In such an event, the income would not be assessed in the hands of both the husband as well as the wife. It was, Therefore, necessary that the order should have been passed assessing the amount in the hands of the assessed, with the condition that in case it was assessed in the name of the husband, then the assessment order would stand cancelled. This type of assessment is what is commonly described as a protective assessment. In as much as, there was a failure to do this, the order was certainly prejudicial to the interest of revenue and the Tribunal is quite right in its conclusion on this aspect of the case.

9. It remains to be seen whether the order can be described as erroneous. It can be seen that this is a simple case following a particular pattern. If in the return, income has been shown by the assessed, it is not for the ITO to say that the income is not assessable in the hands of the assessed. If it is assessable in the hands of somebody else, then only can the assessment in respect of this assessed be cancelled. Inasmuch as the ITO did not guard against the possibility of the amount not being the income of anybody else, the order is also erroneous. It is thus both erroneous as well as prejudicial.

10. The fact, that the Addl. CIT has not given very detailed reasons, his conclusion, has been criticised by the Id. counsel for the assessed but, it seems that in this case, this matter was quite obvious. All along the assessed had been claiming that the amount utilised for making the construction was her own money, for this purpose "her own money" would be the money belonging to her and loans from Shri Darbari Lal, Sat Narain, Chander Mohan and Ashok Rumar. It was thus the assessed's own case that the money did belong to her and, Therefore, capital gains were here and not those of anybody else. It is that a case in which there has been a mistake by the ITO which required revision .

11. Accordingly, we answer the question referred to us in the affirmative, in favor of the department and against the assessed but leave the parties to bear their own costs.