

(1981) 08 DEL CK 0003

In the Delhi High Court

Case No : IT Reference No. 118 of 1974

Smt. Sushila Devi Jain

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 06-08-1981

Acts Referred:

Income Tax Act, 1922 — Section 22, 22(5), 3, 34, 34(1)(a)

Income Tax Act, 1961 — Section 139, 139(1), 139(6), 147(a), 22(5)

Citation : (1982) 8 TAXMAN 221

Hon'ble Judges : S. Ranganathan, J; Leila Seth, J

Bench : Division Bench

Advocate : B.N. Goswami and Rajiv Khanna, for the Appellant; Wazir Singh and Anoop Sharma, for the Respondent

Judgement

S. Ranganathan, J.—The assessee, Smt. Sushila Devi Jain, was a partner in a firm known as "Raj Motors" which was constituted under an instrument of partnership dated 1-4-1961. She was a partner till 31-8-1961. The other partners were, Shri P.S. Jain, Smt. Sukhari Devi, Smt. Sushila Devi, Master Raj Kumar, Master Ravi Kumar and Kumari Renu. For the assessment year 1962-63 (for which the previous year ended 31-3-1962), the assessee filed her return at Calcutta on 21-3-1963. Part III of the return at page 4 required the following details to be given in a case where the assessee filing the return was a partner in a firm: 1. Name and address of the firm

2. Name of each partner including the assessee

3. Relationship with the assessee

4. Residential address of the partners, and

5. Shares of partners.

In the return filed by the assessee the name and address of the firm was given; the names of all the partners including the assessee was mentioned but without

any indication as to whether Master Ravi Kumar, Master Raj Kumar and Kumari Renu were major partners or minors admitted to the benefits of the partnership, the residential address of all the partners was given as 7-A, Rajpur Road, Delhi; and the individual shares of the several partners were specified. But the column, which required the assessee to state the relationship of the partners with the assessee was left blank. It appears that at the time of the assessment a copy of the partnership deed dated 1-4-1961 had also been filed before the ITO, Calcutta. The original assessment of the assessee for 1962-63 was completed on 30-3-1963 including in the assessment her share income from the firm abovementioned. 2. Earlier on 11-6-1962, the assessee had filed a return in Delhi on behalf of Master Ravi Kumar as his guardian as he was a minor. In this return was shown the share income of the minor from the firm of Raj Motors for the financial year 1961-62. The ITO who completed the assessment on 21-3-1964, excluded the share income from the firm referable to the period from 1-4-1961 to 31-8-1961 from the assessment of Master Ravi Kumar on the ground that since he was the minor son of Smt. Sushila Devi who was also a partner in the firm during the said period, his share of income referable to this period was liable to be included in the hands of the present assessee on account of the provisions of section 64(ii) of the income tax Act, 1961 (hereinafter referred to as "the Act"). The same thing happened in the case of Master Raj Kumar and Kumari Renu in whose cases returns had been filed on their behalf by their father Shri R.C. Jain.

3. When this came to the knowledge of the ITO assessing the present assessee, he initiated proceeding for reopening her assessment to include the share income of the minors referable to the above period in the hands of the present assessee for he had discovered that Master Raj Kumar, Master Ravi Kumar and Kumari Renu were the minor children of the present assessee and had been admitted to the benefits of the partnership in which she was a partner. The ITO mentioned in the reassessment order made in pursuance of a notice u/s 147(a) of the Act that action under the above clause was taken "as the assessee had not furnished in Part III of the return full facts regarding the other partners and failed to disclose the relations of the partners inter se and there was thus an omission on the part of the assessee to disclose fully and truly all material facts necessary for her assessment". The assessee did not file any reply to the letter with which the ITO followed up his notice u/s 147(a). The ITO referred to the decision of the Madras High Court in the case of VD. M. RM. M. RM. Muthiah Chettiar Vs. Commissioner of Income Tax, Madras, , wherein in similar circumstances it had been held by the Madras High Court that action u/s 34(1)(a) of the 1922 Act, corresponding to section 147(a). would be justified. In view of the decision referred to above and in view of the fact that the assessee had not filed any objections, the ITO completed the reassessment after including the share income of the three minor children referred to for the period abovementioned in the assessment of the present assessee. The officer's action was upheld by the AAC and, on further appeal, by the Tribunal. Aggrieved by the order of the Tribunal, the assessee

required the Tribunal to state a case and refer certain questions of law for the opinion of this Court. It is under these circumstances that the Appellate Tribunal has made the present reference and referred the following question of law for our opinion:

Whether, on the facts and in the circumstances of the case, the provisions of section 147(a) of the Act are applicable and have been rightly invoked?

4. Before proceeding to discuss the arguments of learned counsel for the assessee one factual position should be cleared up. In paragraph 3 of the statement of case it is stated:

On going through the assessment record, it was observed that a copy of the partnership deed dated 1-4-1961 was filed before the income tax Officer, Calcutta, showing appellant as partner and admitting her three children to the benefits of partnership. Nowhere in the said deed the relationship of the appellant with Master Raj Kumar, Ravi Kumar and Kumari Renu was mentioned nor their father's name was given.

The first part of this sentence gives the impression that the partnership deed had mentioned that the three children of the assessee had been admitted to the benefits of the partnership. At the same time the second sentence of the above extract contradicts the first and seems to say that the partnership deed did not give any indication of the relationship between the appellant and the three minors. In these circumstances, to clear up the ambiguity and having regard to the fact that the partnership deed had been looked into by all the authorities, we directed the standing counsel for the department to produce the partnership-deed before us. We have looked into the partnership deed dated 1-4-1961 that was placed on record before the ITO at the time of the original assessment. We find that the partnership deed does not mention that the three minors were the children of the present assessee. There is also no indication in the partnership deed either by way of reference to the name of the father of the children or otherwise from which the ITO could have gathered that the firm in which the assessee was a partner had the three minor children of hers admitted to the benefits of the partnership. We have, therefore, to proceed in disposing of this case, on the footing that there was no information before the ITO at the time of the original assessment to show that Master Raj Kumar, Master Ravi Kumar and Kumari Renu were the minor children of the present assessee.

5. On behalf of the assessee, it is contended that the proceedings u/s 147(a) in the present case were without jurisdiction and in support of the contention it is pointed out that the decision in Muthiah Chettiar's case (supra) on which the ITO had relied has been reversed by the Supreme Court in the decision reported as V.D.M.R.M.M.R.M. Muthiah Chettiar Vs. Commissioner of Income Tax, Madras, . We shall refer to this decision presently but to continue with the arguments of the learned counsel for the assessee, it has been contended that though the Supreme Court had decided the case under the 1922 Act, the position was no

different under the 1961 Act. In support, decisions of the Calcutta High Court in *Radheshyam Ladia Vs. Income Tax Officer, "B" Ward and Others*, , *Madanlal Maheswari Vs. Income Tax Officer, "J" Ward and Others*, and *Ramesh Ch. Sood v. ASO* AIR 1972 Cal. 455 were cited, on the strength of these decisions it is contended that the assessee was under no obligation to include in her return the share income of the minor children and that the proceedings u/s 147(a) were, therefore, uncalled for. The second argument put forward on behalf of the assessee is that even assuming that the assessee had omitted to indicate the relationship between herself and the minor children that would not constitute a failure to disclose fully and truly all material facts necessary for her assessment and in support of this contention reliance is placed on the decision of the Bombay High Court reported in *D.R. Dhanwate Vs. Commissioner of Income Tax, M.P., Nagpur and Bhandara*, . Thirdly, it is contended that even assuming that the assessee was bound to return the share income of the minors and had failed to do so and thus failed or omitted to disclose fully or truly all material facts, it could not be said in the present case that the escapement of the share income of the minors from assessment was as a result of the assessee's failure or omission. It is suggested, relying on a decision of the Bombay High Court reported in *Ahmedabad Cotton Mfg. Co. Ltd. Vs. Union of India and Another*, , that the escapement of the income from assessment, if any, was the result of a combined dereliction of duty partly on the part of the assessee and partly on the part of the ITO and that, therefore, it could not be said that income had escaped assessment by reason of the omission or failure on the part of the assessee.

6. The principle argument addressed on behalf of the assessee is based on the decision of the Supreme Court in *Muthiah Chettiar's* case (supra). That case arose under the 1922 Act. The assessee had submitted a return of income. Part III of the return required information to be supplied in respect of the name and address of the firm, the name of each partner including the assessee and his share income. The assessee for the assessment year 1952-53 set out all the particulars required by this return and also indicated that three of the persons were minors. For the subsequent two assessment years 1953-54 and 1954-55 similar details were given but without any indication that the three persons above referred to were minors. The ITO completed the assessments on the assessee including only his share income from the firm. Subsequently, he issued notices of reassessment to the assessee u/s 34(1)(a) of the 1922 Act for the assessment years 1952-53 and 1953-54. The question before the Supreme Court was whether the reassessments made on the assessee u/s 34(1)(a) for the three assessment years in question were valid in law; of which we are concerned here only with the answers for the assessment years 1952-53 and 1953-54. The Supreme Court answered the question in the negative. After referring to the provisions of sections 3, 4 and 22 of the 1922 Act and the terms of rule 19 of the income tax Rules and the contents of a form of return prescribed for the case in question, the Court came to the conclusion that the Act and the Rules imposed no obligation upon the assessee to disclose to the ITO in his return information

relating to income of any other person by law taxable in his hands. The inclusion of the minors' share income in the hands of the parents, it was pointed out, was the duty imposed upon the ITO. The department relied upon certain notes of guidance contained in the return which indicated or instructed the assessee to disclose the income received by his wife or minor children from a firm of which the assessee was a partner. Apart from the fact that there was some doubt regarding the exact form of return in vogue at the relevant time and this was not clarified, the Supreme Court pointed out that even assuming that there were instructions printed in the form of return in the relevant years, in the absence of any head under which the income of the wife or minor child of the partner whose wife or minor child was a partner in the same firm could be shown, the taxpayer, by not showing that income, cannot be deemed to have failed or omitted to disclose fully and truly all material facts necessary for his assessment. The Supreme Court, therefore, held that the conditions set out in section 34(1)(a) were not satisfied, and therefore the reassessments for the assessment years 1952-53 and 1953-54 were set aside.

7. The present case arises under the provisions of the 1961 Act. The learned counsel for the assessee. submits that there is no material distinction between the relevant provisions of the 1922 Act and the 1961 Act. This contention is correct but only to a limited extent because, in our opinion, there is one material distinction to which we shall advert later. Learned counsel for the assessee, however, is right in pointing out that u/s 139 of the Act an assessee is required to furnish a return only of his total income or the total income of any other person in respect of which he is assessable under the Act. Though there are words in section 139 to the effect that an assessee has to file a return of his income or "the income of such other person" which at first sight appear to be comprehensive enough to include the income of a minor child admitted to the benefits of the partnership in which the assessee is a partner, learned counsel may be right in stating that "the other person" referred to in this sub-section is only a person in respect of whom or whose income the assessee happens to be a "representative assessee". This is the interpretation placed on the above provision by the Calcutta High Court in the case of Madanlal Maheswari (supra) and for the purpose of the present case we may assume that this interpretation is correct and that section 139(1), like section 22 of the 1922 Act does not impose an obligation on the part of the assessee to include in his return the share income of her minor child. The next provision in the statute which is relevant is section 139(6). As it stood at the relevant time, this corresponded to section 22(5) of the 1922 Act. It stated that the prescribed form of returns "...in the case of an assessee engaged in business or profession, require him to furnish particulars of the location and style of the principal place where he carries on the business or profession and all the branches thereof, the names and addresses of his partners, if any, in such business or profession...and the extent of the share of the assessee and the shares of all such partners or the members, as the case may be, in the profits of the business or profession and any branches thereof".

Learned counsel for the assessee is right in pointing out that section 139(6), like section 22(5), does not contain any direction that the prescribed form of return should include particulars regarding the relationship of the partners of the firm in which the assessee is a partner. So far this position is the same as under the 1922 Act. However, while prescribing forms of return in order to give effect to the provisions of the Act a very substantial variation has taken place. We have already indicated this difference in the earlier portion of our judgment but it may now be emphasised. In the form of return filed under the 1922 Act, Part HI required an assessee to give details only regarding the name of the firm, the names of the partners and the shares of the various partners. There was no column in Part III which required the assessee to mention the relationship between the partners. But subsequently when a new form of return was prescribed under the 1961 Act, the contents of Part III were revised and, as already mentioned, Part III of the return, which the assessee in this case filed before the ITO, contained a column in which the assessee was required to mention the relationship among the various persons shown as partners. The minor children were shown as partners (and this was correct because under the income tax Act the definition of "partner" also includes the minor admitted to benefits of the partnership), but significantly the column regarding the relationship between the partners was not mentioned. There is, therefore, fundamental difference between the position considered by the Supreme Court and the circumstances of the present case. Whereas, according to the form prescribed under the 1922 Act, there was no place where the assessee could or should have shown the relationship between himself or herself and the other partners of the firm, there is a specific column to this effect in the form prescribed under the 1961 Act. It is no doubt true that even under the 1961 Act, until amendment in 1972, there was no particular place in which an assessee could include the share income of the minor admitted to the benefits of the partnership. But there was a column which required mention of the relationship between the partners and that column the assessee had failed to fill up. In short, whereas in the case before the Supreme Court the position was that the assessee had fully complied with all requirements of the statute, the rules and the form of return, the position in the present case is that the assessee had failed to mention a very important fact which he was bound to disclose in the return made in the form prescribed under the Act.

8. We are unable to appreciate the suggestion made by the counsel that this requirement in the form was bad because section 139(6) did not direct the inclusion of such a column. Section 139(6) only provided for matters which had to be included while prescribing a form of return and did not curtail the powers of the Central Board of Direct Taxes to prescribe forms with appropriate columns to give effect to the various provisions of the Act. There can be no doubt that the fact to which reference has been made is a very material fact. The assessee is a partner in a firm and if the ITO was aware that there were minors admitted to the benefits of the partnership and that these minors were the children of the

assessee, then he would have completed the assessment by applying the provisions of section 64. The fact that the minor child of the assessee was also admitted to the benefits of the firm of which assessee was a partner was clearly a very material fact necessary for the purpose of her assessment and this material fact the assessee did not disclose. In our opinion, therefore, the decision of the Supreme Court, in the case of Muthiah Chettiar (supra), is clearly distinguishable having regard to the provisions of the 1961 Act along with the Rules and the Forms prescribed under the 1961 Act. There was, therefore, a failure on the part of the assessee to disclose fully all material facts necessary for the assessment and, therefore, action u/s 147(a) was justified.

9. The learned counsel for the respondent invited our attention to the decision of the Supreme Court in the case of Commissioner of Income Tax, Kerala Vs. Smt. P.K. Kochammu Amma Peroke, . In this case the question was whether penalty u/s 271(1)(c) could be levied for the failure on the part of the assessee who was a partner in a firm to include in her return the share income of her husband and minor daughter. The Court came to the conclusion that the amounts representing the share of the husband and the minor daughter from the firm were part of the assessee's income for purposes of tax and had to be shown in the return filed by her. Referring to a note in the form of return prescribed under the Act, the Supreme Court held that the respondent-assessee had failed to disclose those two amounts in the return submitted by her and there was plainly and manifestly a breach of the obligation imposed by section 139(1) requiring the assessee to furnish a return of her income in the prescribed form and in failing to do so she was guilty of concealment of those amounts which attracted the applicability of section 271(1)(c). The attention of the Court was drawn to the earlier decision in Muthiah Chettiar's case (supra) and their Lordships made the following observations in dealing with the above decision:

It is difficult to see how the note in the prescribed form of the return could be ignored by the assessee and she could contend that, despite the note, she was not liable to show in her return the amounts representing the shares of her husband and minor daughter in the two partnership firms. The contention of the assessee, if accepted, would render the note meaningless and futile and turn it into dead letter and that would be contrary to all recognised canons of construction. There can be no doubt that the assessee was bound to show in her return the amounts representing the shares of her husband and minor daughter in the two partnership firms and in failing to do so, she was guilty of concealment of this item of income which plainly attracted the applicability of section 271, sub-section (1), clause (c).

It is obvious that on this view the order imposing penalty on the assessee would have to be sustained but there is a decision of this Court in V.D.M.R.M.M.R.M. Muthiah Chettiar Vs. Commissioner of Income Tax, Madras, , which is binding upon us and where we find that a different view has been taken by a Bench of three judges of this court. It was held in this case that even if there were any

printed instructions in the form of the return requiring the assessee to disclose the income received by his wife and minor child from a firm of which the assessee was a partner, there was, in the absence in the return of any head under which the income of the wife or minor child could be shown, no obligation on the assessee to disclose this item of income, and the assessee could not be deemed to have failed or omitted to disclose fully and truly all material facts necessary for his assessment within the meaning of section 34(1)(a) of the Indian income tax Act, 1922. With the greatest respect to the learned judges who decided this case, we do not think, for reasons already discussed, that this decision lays down the correct law on the subject, and had it not been for the fact that since 1st April, 1972, the form of the return prescribed by rule 12 has been amended and since then, there is a separate column providing that "income arising to spouse/minor child or any other person as referred to in Chapter V of the Act" should be shown separately under that column and consequently there is no longer any scope for arguing that the assessee is not bound to disclose such income in the return to be furnished by him, we would have referred the present case to a larger Bench. But we do not propose to do so since the question has now become academic in view of the amendment in the form of the return carried out with effect from 1st April, 1972. We would, therefore, follow this decision in Muthiah Chettiar's case (supra), which being a decision of a Bench of three judges of this court, is binding upon us, and following that decision, we hold that the assessee could not be said to have concealed her income by not disclosing in the return filed by her the amounts representing the shares of her husband and minor daughter in the two partnership firms." (pp. 629-30)

10. We are unable to agree with the learned counsel for the respondent that this decision of the Supreme Court must be taken to have overruled the earlier decision in Muthiah Chettiar's case (supra) for obvious reasons though it is clear that their Lordships have doubted the correctness of the earlier decision. But, as we have already pointed out for the purposes of this case we are of opinion that the position is entirely different from that which prevailed in Muthiah Chettiar's case (supra) for the reasons already mentioned and that the present case is not governed by the decision in that case.

11. The second argument addressed by the learned counsel for the assessee was based on the decision of the Bombay High Court in D.R. Dhanwate's case (supra). In that case also the question that arose was whether action u/s 34(1) (a) could be taken for bringing to assessment the share income of a minor in the hands of the parent where such parent had omitted to include the share income while filing a return of his total income. At page 263, their Lordships observed:

We would, however, for the sake of argument, assume that it is obligatory on the assessee in making a return to include in his total income the income of his wife and minor child. The question that next arises for determination is whether failure on his part to do so would amount to a "failure to disclose fully and truly

all material facts necessary for his assessment for that year". As already stated, it is Mr. Joshi's contention that that would amount to a failure to disclose fully and truly all material facts within the meaning of section 34. We find it difficult to accept this contention of Mr. Joshi also. To accept this contention we will have to read in the section, failure to disclose fully and truly in his return all material facts necessary for his assessment for that year. (p. 263)

12. The above observations were made by the court in the context of the facts of the particular case wherein it had been found that though the share income of the minor child had not been included in the return of the assessee there was a discloser at the time of the original assessment of the firm that the assessee's wife and minor sons were also members of the partnership. These facts had been known to the ITO at the time he made the assessment of the firm as well as the assessment of the assessee, his wife and the minor son. All the assessments had been made on one and the same day and by the same ITO. It was in those circumstances that the court pointed out that, though the share income had not been returned by the assessee, there had been no failure to disclose fully and truly all material facts. In the present case, on the other hand as we have pointed out earlier, the assessee had not at all disclosed to the ITO at any stage during the assessment proceedings the fact that her minor children had already been admitted to the benefits of the partnership. This contention of the learned counsel, therefore, fails.

13. The last argument of the learned counsel was that even if there was any escapement of income, it was due to the negligence of the ITO and not on account of dereliction of duty on the part of the assessee. It is pointed out that in Part III of the return the names of the minor children have been mentioned as Master Ravi Kumar, Master Raj Kumar and Kumari Renu and it was stated that this was sufficient for the ITO to take notice that these persons were minors. Further, it is stated that the residential addresses of all the partners had been given as 7-A, Rajpur Road, Delhi and this, it is suggested, must have made the ITO aware that the minors must be the minor children of one of the other partners. Referring to the decision of the Bombay High Court in the case of Ahmedabad Cotton Mfg. Co. Ltd. (supra), it is submitted that the escapement of the share income was attributable to the negligence of the ITO. We are unable to agree. The disclosures made in the return were not sufficient to make the ITO aware of the relationship between the assessee and the minor children. The use of the words "Master" and "Kumari" does not necessarily mean that they were minor children. But even assuming that this was so, there was nothing to show that they were the minor children of one or the other partners. The fact that they were all shown to be living at the same address does not mean that there was some relationship between them and it cannot be assumed that the minors must have been the minor children. The aforesaid decision relied upon by the learned counsel has no relevance to the present case. In that case, the assessee had failed to point out to the ITO that the total depreciation allowed to him in respect of certain assets exceeded the original cost of the assets. Action was taken to

rectify the position by reference to section 34(1)(a). It may be pointed out that the full details regarding the depreciation allowed earlier were available in the assessment records. The court also pointed out that if the ITO had calculated the written down value in the manner enjoined by the statute, such excessive depreciation would not have been allowed. In the circumstances, therefore, the escapement of assessment by allowance of excessive depreciation could not be attributed to the assessee's default which was also there. It is in this context that the observations were made at pages 651, 652 and 654 upon which learned counsel for the assessee strongly relied. It is clear that the position is totally different in the present case. As we have already pointed out, the ITO could not be visited with the knowledge of the relationship between the assessee and the minor children. If there had been some indication of the relationship between the assessee and the minor children and still the ITO had failed to apply section 64, it could be said that the escapement was due to his negligence but this is not the situation in the present case. For the reasons mentioned above, we are of opinion that the contentions put forward by the learned counsel for the assessee have no force and that the Tribunal was justified in coming to the conclusion that the provisions of section 147(a) were rightly invoked. The question referred to us is, therefore, answered in the affirmative and in favour of the department. As the assessee has failed he will pay the costs. Counsel's fee Rs. 350.