D. S. Bist and Sons, Nainital

Vs

Commissioner of Income Tax, Delhi Central, New Delhi

Civil Appeal No. 1727 (NT) of 1972

(P. N. Bhagwati, V. D. Tulzapurkar, R. S. Pathak JJ)

03.11.1978

JUDGMENT

PATHAK, J. -

1.This appeal by special leave is directed against the judgment of the High Court of Delhi disposing of a reference made to it by the Income Tax Appellate Tribunal on the following question :

> Whether on the facts and in the circumstances of the case the sum of Rs. 24,252 is an item taxable in the previous year under the provisions of Section 10(2)(vii) ?

The appellant is a partnership firm carrying on business as forest contractors. The partners are Thakur Dan Singh and his son, Thakur Mohan Singh. The appeal relates to the assessment year 1958-59, for which the previous year is the financial year ending march 31, 1958. The business was originally carried on by a Hindu undivided family consisting of the aforesaid father and son. There was a total disruption of the family on March 22, 1956 and on the same day the separated members of the family constituted a partnership firm under the name and style of Messrs. D. S. Bist & Sons. The business was taken over as a running concern by the firm. At the time when the business was owned by the family, it included three trucks. On account of depreciation allowed in earlier years the written down value of two trucks came to nil in the assessment year 1952-53. As regards the third truck, according to what is stated in the judgment of the High Court the written down value stood reduced to nil by the date disruption of the Hindu undivided family. During the previous year ending March 31, 1958, relevant to the assessment year 1958-59, two trucks were sold for a total of Rs. 12,000 while the third truck was sold for Rs. 12,252.

2. During the assessment proceeding for the assessment year 1958-59, the Income Tax Officer held that he entire sum of Rs. 24,252, representing the sale proceeds of the three trucks, should be deemed to be profits of the previous year ending March 31, 1958 by virtue of the second proviso to Section 10(2)(vii) of the Indian Income Tax Act, 1922, and he included that amount in the total income of the appellant. Before the Appellate Assistant Commissioner the appellant contended that as no depreciation was allowed to the appellant in respect of the three trucks no question arose of computing any profit in its hands, but the contention was rejected. The appellant was unsuccessful before the Income Tax Appellate Tribunal also. At the instance of the appellant, a reference was made to the High Court of Delhi. The High Court took the view that inasmuch as the partners of the appellant were the same individuals who were members of the Hindu undivided family and as the business was taken over as a running concern by the appellant from the family "there was merely a change in the style and nature of the Hindu undivided family on March 22, 1956". In the opinion of the High Court the original cost of the trucks to the appellant would be the same as it was to the

Hindu undivided family and it rejected the contention that the original cost of the three trucks in the hands of the appellant must be taken as nil. In the result, the High Court affirmed that the sum of Rs. 24,252 was taxable in the hands of the appellant by virtue of the second proviso to Section 10(2)(vii).

3. It appears from the judgment of the High Court that the written down value of the three trucks was exhausted while they were still the assets of the Hindu undivided family business, the written down value of two trucks having been exhausted in the assessment year 1952-53 and that of the third truck having been exhausted in the assessment year 1956-57. Accordingly, when the business was taken over by the appellant the written down value, of the three trucks was nil. In defining the expression "written down value" Section 10(5)(b) declares that in the case of assets acquired before the previous year the written down value means "the actual cost of the assessee less all depreciation actually allowed to him under the Act". It is urged on behalf of the appellant that the actual cost to the appellant of the three trucks was nil inasmuch as the written down value had already been exhausted when the business was taken over by the appellant. It is urged that as no depreciation could possibly have been allowed to the appellant, no question arises of applying the second proviso to Section 10(2)(vii). Now in enacting the second proviso to Section 10(2)(vii) the legislature sought to recover back from the assessee the benefit allowed to him by way of depreciation allowance earlier, and it did so by imposing a balancing charge on the excess of the sale price over the written down value to the extent of the total depreciation allowance granted to the assessee in the past. In the present case, there appellant could not have been allowed any depreciation allowance for the reason that from the outset when the three trucks became its property, the written down value was nil. No question can arise of imposing a balancing charge under the second proviso to Section 10(2)(vii).

4. It is contended by the Revenue that the business was taken over as a running concern by the appellant and, therefore, account should be taken of the depreciation allowed in the hands of the Hindu undivided family. In our opinion, it is immaterial that the business was taken over as a running concern. Where a business is taken over as a running concern by an assessee, the cost to it of the assets must ordinarily turn on the value of the assets as on the date of acquisition. There is no material before us evidencing an intention to the contrary. It cannot be disputed that the actual cost to the appellant of the three trucks must be regarded as nil, and that being so no depreciation can be said to have been ever actually allowed to the appellant.

5. It is pointed out by the Revenue that the partners of the appellant are the same two individuals who constituted the Hindu undivided family, and reliance has been placed on the observation of the High Court that in the constitution of the firm "there was merely a change in the style and nature of the hindu undivided family". Now we must remember that we are dealing with a case under the Income Tax Act. We are concerned with provisions for the computation of income of an assessee for the purpose of determining its income-tax liability. It may be, as is quite often said, that a firm is merely a compendious description of the individuals who carry on the partnership business. But under the Income Tax Act, a firm is a distinct assessable entity. Section 3 of the Indian Income Tax Act, 1922 treats it as such, and the entire process of computation of the income of a firm proceeds on the basis that it is a distinct assessable entity. In that respect it is distinct even from its partners. C. I. T., West Bengal v. A. W. Figgies and Co. ((1953) 24 ITR 405 (SC) : AIR 1953 SC 455). As an assessable entity it is also distinct from a Hindu undivided family, which in itself is regarded as a separate unit of assessment under Section 3. Raja Bejoy Singh Dudhuria v. C. I. T., Bengal ((1933) 1 ITR 135 (PC) : AIR 1933 PC 145). For the purposes of the question before us it recks little that the very individuals who constituted the Hindu undivided family now constitute the appellant firm.

When depreciation allowance was allowed to the Hindu undivided family in its assessment proceedings, it was a step taken in determining the taxable income of the family. The depreciation allowed to the family cannot be regarded as depreciation allowed to the appellant. We must ignore entirely the circumstance that depreciation has been allowed to the Hindu undivided family in the past.

6. On these considerations it is not possible to say that the second proviso to Section 10(2)(vii) is attracted.

7. Accordingly, we hold that the sum of Rs. 24,252 is not taxable in the hands of the appellant for the assessment year 1957-58 by virtue of the second proviso to Section 10(2)(vii) of the Indian Income Tax Act, 1922, and we answer the question referred in favour of the appellant and against Revenue.

8. It was strenuously contended on behalf of the Revenue that the sum of Rs. 24,252 should be considered as capital gains under Section 12B of the Act, and that it could be brought to tax under that head. There was some debate before us whether that point can be regarded as an aspect of the question specifically referred by the Tribunal for the opinion of the High Court. We consider it unnecessary to enter into the matter, because it is open to the Tribunal to consider whether the assessment should be confirmed on any other ground, now that the case will be before it again for disposal conformably to this judgment. The appellant is entitled to its costs of this appeal.

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