S. P. Jaiswal

Vs

Commissioner of Income Tax

Civil Appeals Nos. 2587-92 of 1983 with No. 2586 of 1983

(S. C. Agarwal, G. B. Pattanaik JJ)

06.03.1997

JUDGMENT

PATTANAIK, J. –

1. These appeals by grant of special leave are directed against the judgment of the Punjab and Haryana High Court, answering the question posed in favour of the Revenue and against the assessee. The Income Tax Appellate Tribunal (Chandigarh Bench) referred the following question to the High Court for being answered under Section 256(1) of the Income Tax Act, 1961 namely :

> "Whether the Tribunal has been right in law in deleting the addition on account of interest in respect of the assessee's children and his wife for the Assessment Years 1967-68 to 1970-71 ?"

2. For the Assessment Year 1963-64 the assessee brought the reference made by approaching the High Court under Section 256(2) of the Act to the effect :

> "Whether on the facts and in the circumstances of the case, the add back of Rs. 15,814 is justified in law ?"

3. The assessee is the Managing Director of the Karnal Distillery Company Limited, Karnal. As per the books of accounts of the company the said assessee had a deposit of Rs. 1,74,639.00 on 3-4-1962. The aforesaid amount was debited to the credit of Messrs Modern Property Dealers, Karnal, the partnership firm consisting of two sons and a daughter of the assessee. The said partners had 1/3rd share each in the partnership. The aforesaid amount was shown to the credit of three partners in equal shares, in the books of accounts of Messrs Modern Property Dealers. On 1-4-1963 the aforesaid amount was shown in the accounts of Messrs Modern Property Dealers to have been returned to the assessee and further on the very same day it was also shown that the assessee gave the said amount as loan equally to the three partners of the Messrs Modern Property Dealers. During the Assessment Year 1963-64, the assessee had shown the interest derived from the aforesaid so-called loan amount in his return but later on a revised return was filed deleting the aforesaid amount. The Assessing Officer, however, came to the conclusion that the interest derived from the aforesaid amount has to be taken as an income of the assessee and accordingly the assessment order was passed. The assessee challenged the said order in appeal before the Income Tax Appellate Commissioner and then in second appeal before the Tribunal but lost in the forums. The assessee approached the Tribunal for making a reference under Section 256(1) of the Act and the Tribunal having declined, the assessee got the matter referred to by approaching the High Court under Section 256(2) of the Act.

4. So far as the subsequent assessment years, however, the Assessing Officer came to the conclusion that the interest derived has to be assessed in the hands of the assessee and in fact no loan had been advanced by the assessee to his children who were said to be the partners of the firm - Messrs Modern Property Dealers and the Appellate Assistant Commissioner also confirmed the order of the Assessing Officer. The Tribunal, however, came to the conclusion that the transaction dated 1-4-1963 not being benami in nature, the interest income derived from the said amount cannot be said to be the income of the assessee, and therefore, the said amount cannot be taxed in the hands of the assessee. The Tribunal did consider the earlier order in relation to the Assessment Year 1963-64 and had held that for that year the assessee himself having indicated in the return filed that the interest income is his income was not entitled to later on wriggle out of the same and for this reason the amount had been taxed in the hands of the assessee. But the Tribunal did make a reference at the instance of the Revenue on being moved under Section 256(1) of the Act as already stated. The High Court on analysis of the entire material came to hold that the transaction cannot be termed to be benami and will not attract the provisions of Section 60 of the Act. The Court then on re-examining the facts and circumstances under which the amount of Rs. 1,74,639.00 was transferred to the names of two sons and a daughter of the assessee came to hold that the said transaction cannot be considered to be a genuine loan, and therefore, the interest derived from the said amount could be taxed in the hand of the assessee under Section 61 of the Act. With this conclusion the questions posed for different years having been answered in favour of the Revenue and against the assessee, the assessee has moved this Court.

5. The assessee appeared in person and ably argued his case. The assessee contended that the transaction in question having been held to be a loan by the Appellate Tribunal and the said conclusion being on a question of fact, it was not open for the High Court on a reference being made to interfere with that conclusion on a question of fact. The assessee also further contended that any father is entitled to give loan to his children if the children want to carry on any business even without charging any interest from them and in such an event the income accruing from such loan amount cannot be taxed in the hands of the father and the High Court was wholly in error in coming to the conclusion that it was not a case of genuine loan on the ground that no interest had been charged. The assessee further urged that the amount in question having been debited from the accounts of Messrs Modern Property Dealers and thereafter the assessee having given the same to the partners of the said Messrs Modern Property Dealers and the said amount ultimately having been refunded to the assessee, the High Court erred in holding that it was not a loan transaction.

6. Mr. Ramamurti, the learned Senior Counsel appearing for the Revenue, on the other hand contended that the very object of Chapter V of the Act is designed to meet the situation arising out of the tendency on the part of the taxpayer to endeavour to avoid or reduce the tax liability by means of settlement. That being the object, the impugned transaction which was merely a paper adjustment cannot be termed as loan in any sense and thus attracts the provisions of Section 61 of the Act and consequently the income accruing therefrom has to be taxed in the hands of the assessee. In this view of the matter; the counsel argued, there has been no error in the judgment of the High Court.

7. The assessee in support of his contention contended that the High Court could not have under its advisory jurisdiction under Section 256 of the Act interfered with the finding of the Tribunal that the transaction was a loan transaction, relied upon the decision of this Court in the case of CIT v. Calcutta Agency Ltd. ((1951) 19 ITR 191 : AIR 1951 SC 108), wherein this Court had observed : (ITR headnote p. 191)

> ". . . The jurisdiction of the High Court in the matter of income tax references made

> by the Appellate Tribunal under the Indian Income Tax Act is an advisory jurisdiction and under the Act the decision of the Tribunal on facts is final, unless it can be successfully assailed on the ground that there was no evidence for the conclusions on facts recorded by the Tribunal."

8. In that particular case the assessee had claimed certain exemptions under the provisions of the Income Tax Act as it stood then but at no stage of the assessment proceedings the assessee had established the necessary facts for getting the exemption in question. The High Court, however, on a reference being made applying the principles in Mitchell case (Mitchell v. B. W. Noble Ltd., (1927) All ER Rep 717), assumed certain facts which have not been proved and held that the assessee was entitled to the deductions claimed. This Court, therefore, held that the High Court had exceeded its jurisdiction. There is no dispute with the proposition that a reference can be made to the High Court under Section 256 of the Act only on the question of law and the court would answer the said question of law and would not be justified in interfering on a question of fact. The assessee also relied upon the decision of this Court in the case of Patnaik & Co. Ltd. v. CIT ((1986) 4 SCC 16 : 1986 SCC (Tax) 763 : (1986) 161 ITR 385), wherein this Court had held :

> "That the High Court was in error in re-examining the fact and in coming to the conclusion that the investment made by the assessee was not connected with the orders placed by the Government with the assessee and therefore the loss was a capital loss."

9. In that case the Tribunal on consideration of the sequence of events and the close proximity of the investment made by the assessee with the receipt of Government orders for motor vehicles had come to the conclusion that the investment was made to further the sales of the assessee and boost his business and that the investment was made by way of commercial expediency and as such the loss occurred was a revenue loss. But the High Court had interfered with that conclusion, and therefore, this Court had observed that since the question referred to the High Court was framed on the assumption that it had to be decided in the factual matrix delineated by the Tribunal, the High Court was wrong in reappreciating the evidence.

10. The assessee also relied upon the decision of this Court in the case of CIT Raghbir Singh ((1965) 57 ITR 408 : AIR 1966 SC 18) wherein the question for consideration was whether the assessee who had created a trust in respect of the shares which he had a obtained in the partition of the family could be taxed on the income derived from such settlement under the provisions of the first proviso to Section 16(1) (c) of the Indian Income Tax Act, 1922 and this Court came to the conclusion that the assessee not having obtained any benefit from the trust and the trust having been created to discharge an obligation that was on the assessee, the assessee could not have been taxed under Section 16(1) (c) of the Indian Income Tax Act, 1922 as the income from shares would not be deemed to be the income of the assessee. The aforesaid conclusion of this Court was on account of the terms and conditions of the trust deed and it was found that the assets and the income were unmistakably impressed with the obligations arising out of the trust deed. We fail to understand how this decision is of any assistance to the assessee in the case in hand.

11. Mr. Ramamurti, appearing for the Revenue on the other hand relied upon the decision of this Court in the case of Mohini Thapar v. CIT ((1972) 4 SCC 493 : 1974 SCC (Tax) 302 : (1972) 83 ITR 208) wherein from out of the gifts made by the assessee to his wife the wife had purchased certain shares and invested the balance amount in deposits and the question for consideration was whether the income derived by the wife from the said deposits and shares had to be assessed in the

hands of the assessee under Section 16(3) (1) (iii) of the Income Tax Act, 1922. This Court held that the transfers in question were direct transfers and the income realised by the wife was income indirectly received in respect of the transfer of cash directly made by the assessee, and therefore, there was a proximate connection between the income and the transfer of assets made by the assessee and as such the said income has to be included in the income of the assessee under Section 16(3) (a) (iii) of the Income Tax Act, 1922.

12. Mr. Ramamurti also relied upon the decision in the case of CIT v. Pelleti Srideramma ((1995) 6 SCC 315 : (1995) 216 ITR 826) but in the said case clause (iv) of Section 64(1) of the Income Tax Act, 1961 came up for consideration as to whether in computing the total income of an individual all income which arises directly or indirectly to a minor child can be included or not. It is in that connection this Court had explained the true meaning of the expression that the income must be proximate as observed in Prem Bhai Parekh case (CIT v. Prem Bhai Parekh, (1970) 1 SCC 784 : (1970) 77 ITR 27). But in the case in hand we are not really concerned with Section 64(1) of the Act and the case is, therefore, of no direct assistance.

13. The assessee in course of his argument had also contended that the interest income which the children derived from the amount of loan transaction in their favour has already been taxed in their hands, and therefore, the same cannot be taxed twice. Mr. Ramamurti, however, repelling the aforesaid contention had urged that under the Income Tax Act the Assessing Officer has the right to tax the right person namely the person a who is liable to be taxed according to law with respect to a particular income and merely because a wrong person has been taxed with respect to a particular income the Assessing Officer is not precluded from taxing the right person with respect to that income. In this connection, he placed reliance on the observation of this Court in the case of ITO v. Atehaiah ((1996) 1 SCC 417 : (1996) 218 ITR 239) wherein this Court observed as under : (SCC p. 422, para 7)

> "... We are of the opinion that under the present Act, the Income Tax Officer has no option like the one he had under the 1922 Act. He can, and he must, tax the right person and the right person alone. By 'right person', we mean the person who is liable to be taxed, according to law, with respect to a particular income. The expression 'wrong person' is obviously used as the opposite of the expression 'right person'. Merely because a wrong person is taxed with respect to a particular income, the Assessing Officer is not precluded from taxing the right person with respect to that income. This is so irrespective of the fact which course is more beneficial to the Revenue."

14. In view of the aforesaid decision of this Court, the assessee's contention that the children of the assessee have been taxed in respect of the income accruing from the amount is of no relevance. It may be stated at this stage that Mr. Ramamurti, appearing for the Revenue fairly stated that there is no bar for a father to advance loan to his children for carrying on their business and such loan or the income arising from such loan cannot be taxed in the hands of the father but he reiterated that in the case in hand in fact no loan had been advanced and it was merely a paper device invented by the assessee to reduce the tax liability. It would be apt, at this stage to quote the observations of Lord Macmillan in the case of Chamberlain v. IRC ((1943) 25 TC 317 : (1943) 2 All ER 200) (Tax Cas at p. 329) :

> "This legislation... designed to overtake and circumvent a growing tendency on the part of taxpayers to endeavour to avoid or reduce tax liability by means of

> settlements. Stated quite generally, the method consisted in the disposal by the taxpayer of part of his property in such a way that the income should no longer be receivable by him, while at the same time he retained certain powers over or interests in the property or its income. The legislature's counter was to declare that the income of which the taxpayer had thus sought to disembarrass himself should notwithstanding be treated as still his income and taxed in his hands accordingly."

15. And this Court in the ease of Tulsidas Kilachand v. CIT ((1961) 42 ITR 1 : AIR 1961 SC 1023) had held that the aforesaid observations apply to the provisions of Indian Income Tax Act and Section 16 thereof which has been enacted with the intent and for the same purpose. Chapter V of the Indian Income Tax Act, 1961 is also designed for the same purpose, and therefore, the aforesaid observations in Chamberlain case ((1943) 25 TC 317 : (1943) 2 All ER 200) would also apply.

16. Admittedly, the transaction between the assessee and the partners of the firm constituted by his children, and the so-called return of money on 1-4-1963 in the books of accounts of the firm of the children and re-transfer of the same amount in the names of the children in the books of accounts of the assessee's firm is nothing but a paper device designedly made to reduce the tax burden of the assessee and by no stretch of imagination can be held to be a loan transaction by the assessee in favour of his children. This is also apparent from the inconsistent stand taken by the children in the affidavits filed in this Court. Such a paper transaction intended merely to reduce the tax liability and cannot be held to be a loan nor the High Court in the circumstances can be said to have exceeded its advisory jurisdiction in answering the question posed. In our considered opinion, there is no error in the judgment of the High Court requiring interference by this Court. The appeals are accordingly dismissed but in the circumstances there will be no order as to costs.