

ANDHRA PRADESH HIGH COURT

Mahankali Subbarao

Vs.

Commissioner of Income-tax

Case Referred No. 25 of 1953

(Subba Rao, C.J. and Mohammad Ahmad Ansari, J.)

17.01.1957

JUDGMENT

Subba Rao, C.J.

1. The Income-tax Appellate Tribunal, Madras has submitted the following question under Section 66 (1) of the Indian Income-tax Act.

"Whether the levy of penalty of Rs. 15,000/- on the assessee is valid in law." The assessee, Mahankali Subbarao and Nageswararao, Eluru, was a Hindu undivided family, which carried on business at Eluru and Vijayavada as agents of the Standard Vacuum Oil Co., for sale of petrol, kerosene oil etc. The family comprised of two brothers, Subbarao and Nageswararao. It is now found that they became divided on 05-04-1943. In respect of the year 1943-44, the assessee filed a return on 15-07-1947 declaring a total income of Rs. 32,073.

The Income-tax Officer did not accept the figure but added a sum of Rs. 40,000/- on the ground that the assessee had dealings in black-market and suppressed his income therefrom. He also took proceedings under Section 28 of the Income-tax Act and imposed penalty of Rs. 21,960/- by his order dated 29-01-1947. The question is whether the members of a disrupted family are liable to pay penalty under Section 28 of the Act.

2. Section 25-A of the Income-tax Act reads :

(1) Where, at the time of making an assessment under Section 23, it is claimed by or on behalf of any member of a Hindu family hitherto assessed as undivided that a partition has taken place among the members of such family, the Income-tax Officer shall make such inquiry thereinto as he may think fit, and, if he is satisfied that the Joint family property has been partitioned among the various members or groups of members in definite proportions, he shall record an order to that effect;

Provided that no such order shall be recorded until notices of the inquiry have been served on all the members of the family.

2A. Where such an order has been passed the Income-tax Officer shall make an assessment of the total income received by or on behalf of the Joint family as such as if. no partition had taken place, and each member or group of members shall, in addition to any income-tax for which he or it may be separately liable and notwithstanding anything contained in Sub-Section (1) of Section 14, be liable for a share of the tax on the income so assessed according to the portion of the joint family property allotted to him or it; and the Income-tax Officer shall make assessments accordingly on the various members and groups of members in accordance with the provisions of Section 23 :

Provided that all the members and groups of members whose joint family property has been partitioned shall be liable jointly and severally for the tax assessed on the total income received by or on behalf of the joint family".

3. This section was introduced to provide machinery for assessing the disrupted members of a joint Hindu family to income-tax and for collecting the share of the tax payable by each member of that family. Under the proviso, the members of the erstwhile family are liable to pay the tax assessed jointly and severally. But there is no provision authorizing the authorities Concerned to impose a penalty on the members of a divided family. Section 28, which enables the income-tax authorities to impose penalty under the circumstances mentioned therein, says that if the Income-tax Officer, the Appellate Assistant Commissioner or the Appellate Tribunal in the course of any proceedings under this Act is satisfied that any person has committed the defaults mentioned in clause (a), (b) or (c), he may direct him to pay penalty in addition to any tax and super tax. ' Person' is defined to include a Hindu undivided family. Therefore, under this section an undivided Hindu family, who is a person, can be directed to pay the penalty. But by reason of the disruption in the family at the time of the proceedings were initiated, the Hindu family ceased to be a "Person" within the meaning of the said section. The said provisions were the subject of judicial scrutiny both by the Patna High Court and the Madras High Court.

4. A Division Bench of the Patna High Court in the Commissioner of *Income-tax, Bihar and Orissa v. Sanichar Sah Bhim Sah*¹, held that there was a lacuna in the Act and that Section 25-A enacted to bring in the disrupted family within the net of taxation failed to provide for imposing and collecting penalty from the members of a divided family. Ramaswami J., after quoting the relevant section, made the following observations at p. 314 (of ITR) :

"It is manifest that Section 25-A refers to assessment of a Hindu undivided family which had become separated in the course of the assessment year. The section does not, in my opinion, lay down the machinery for the imposition of penalty on a Hindu undivided family which has become disrupted. This is clear from the opening words of Section 25-A (1)". Later on, the learned Judge pointed out :

"It is clear that there is a gap in the provisions of the Act; but it is not the function of the Court to fill up the gap". We respectfully agree with the aforesaid observations.

¹27 ITR 807 : AIR 1955 Pat 103

5. Rajagopalan and Rajagopala Ayyangar, JJ. of the Madras High Court had to consider a similar question in *Raju Chettiar v Collector of Madras*², The observations of the learned Judges in the context of the applicability of Section 28 (1) of the Act to the members of a disrupted family may

usefully be extracted. At p. 244 (of ITR) the learned Judges observed :

"A Hindu undivided family is within the scope of the expression 'person'; see Section 2(9) of the Act. It was that 'person' the Hindu undivided family that was the assessee. Section 28 (3) requires that the assessee should be heard before an order is passed under Section 28 (1). That assessee had ceased to exist when the order under Section 28 (1) was passed in this case. That Balagurumurthis was heard before the order was passed would not, in the circumstances of the case, satisfy the requirements of Section 28 (2).

We are referring to this aspect only to emphasise that there is no machinery provided by the Act to impose the penalty under Section 28 (1) after the assessee has ceased to exist. Section 28 (2) on the other hand provided for the imposition of a penalty, but still the person to be penalised is not the registered firm; but the individual partner."

We agree with the aforesaid observations.

6. The result is that, as the assessee, the Hindu family, became divided before the procedure under Section 28 was invoked the members of the erstwhile family are not liable to be penalised under that section. We, therefore, answer the reference in the negative. The assessee will be entitled to his costs, which we fix at Rs. 250/.

Reference answered.

²29 ITR 241