ANDHRA PRADESH HIGH COURT

Atchaiah

Vs

Income-Tax Officer

(A Kuppuswami and V.M Rao, JJ.)

25.03.1975

JUDGMENT

Kuppuswami, J.

1. The petitioner in these two writ petitions and one Kondal Reddy purchased under a sale deed dated October 20, 1962, an extent of 454.11 acres in Manmole Village, Sangareddy Taluk, Medak Dist., from Sri Ikramuddin and Smt. Azizunnisa Begum for a sum of Rs. 75,000. Even prior to the sale deed, by a notification dated October 10, 1961, the property had been acquired under the Land Acquisition Act for M/s. Bharat Heavy Electrical Project. The purchasers, therefore, claimed the compensation amount. By an award dated February 4, 1964, the Land Acquisition Officer fixed compensation including solatium at Rs. 1,38,794.12. This amount was received by the purchasers on December 4, 1964 (not on February 4, 1964, as stated in the petition) and was shared equally by the purchasers. On a reference to the court of the district judge in O.P. No. 6/65 the district judge by his judgment dated August 3, 1967, enhanced the compensation according to the petitioner to Rs. 3,95,026, but according to the respondent to Rs. 4,17,477. According to the petitioner this amount was shared by him and Kondal Reddy as follows:

Rs.

Petitioner 2,08,739
Kondal Reddy 1,86,288

2. The ITO, C-Ward, Special Circle II, Hyderabad, in his assessment order for the year 1965-66 assessed the petitioner to capital gains in a sum of Rs. 35,397. It is stated that the petitioner along with Kondal Reddy purchased the lands and according to the statement given by the petitioner he invested a sum of Rs. 34,000 approximately towards his share. The assessee's share of compensation was Rs. 69,397 and hence the assessee derived a net capital gain of Rs. 35,397 which is taxable under Section 41(2) of the Act. After" the district judge enhanced the compensation the petitioner's share of the enhanced compensation in his hands was assessed to

tax for the assessment year 1968-69. Similarly, the share of Kondal Reddy was also assessed in his hands for the relevant years.

3. On February 18, 1972, the ITO, F-Ward, Circle I, issued a notice addressed to the petitioner and Kondal Reddy, in which he stated that he had reason to believe that their income chargeable to tax for the assessment year 1964-65 had escaped assessment within the meaning of Section 147 of the I.T. Act. He, therefore, proposed to assess the income for the said year and required him to deliver to him a return for the said assessment year. Accordingly, the petitioner and Kondal Reddy by their letter dated April 3, 1962, enclosed a "Nil" return, as there was no income received or accrued to them for the assessment year under consideration, namely, 1964-65. Thereafter, the ITO gave a notice dated August 3, 1972, to both of them in which he stated that on going through the records he found that they did not mention the "status" in the return filed by them and they were requested to state the status in which the return was filed. He added that he found that they had actually received a compensation of Rs. 2,29,180 under the award passed by the Land Acquisition Officer on February 4, 1964. In the judgment passed by the District Court, they received a sum of Rs. 4,17,476. The total amount thus received was Rs. 6,46,656. Deducting the cost of purchase, the profit to be taxed would be Rs. 5,71,650. The petitioner and Kondal Reddy by their letter dated September 18, 1972, raised several objections to the notice dated Augusts, 1972. The petitioner, however, apprehending that further action would be taken in pursuance of the notice dated February 18, 1972, filed this writ petition praying for the issue of a writ of prohibition or any other appropriate writ or order restraining the respondent, namely, the ITO concerned from taking any action pursuant to his notice dated February 18, 1972, under Section 148(2) of the I.T. Act.

4. The main contention of the petitioner is that the respondent having assessed the shares in the individual hands of the petitioner and Kondal Reddy has no jurisdiction to assess the same income in their joint hands.Having exercised the discretion vested in him to assess them individually with respect to the shares, to which they were entitled, he was not entitled to assess them as an association of persons. It is further contended that the notice under Section 148 of the Act is invalid as the officer has not recorded his reasons for doing so, nor did he communicate them to the petitioner. It is submitted that it cannot be said that the respondent had any further information as all the relevant facts and materials had been placed by the petitioner before the authorities in his individual assessment and after considering the entire material before him the officer exercised his discretion by assessing the income in the individual hands of the petitioner and Kondal Reddy. The provisions of Section 147 are not complied with.

5. Lastly, it is urged that the relevant assessment year is not 1964-65.

6. Another notice was issued under Section 148 of the Act on March 17, 1972, in the personal assessment of the petitioner. The petitioner has filed W.P. No. 338/73 for the issue of a writ of

prohibition or other appropriate writ restraining the respondent from taking any action on that notice also. The grounds urged are practically the same as those in W.P. No. 5856/72.

7. The main contention urged on behalf of the assessee by Sri Panduranga Rao is that having exercised his option to assess the tax on the members of the association of persons as individuals in respect of their respective shares of the profits made, it is not open to the ITO to seek to assess the same income in the hands of the association. In the order of assessment dated March 10, 1970, the ITO clearly says that the assessee, along with Kondal Reddy, purchased the lands and according to the statement given by the assessee on January 6, 1970, he invested a sum of Rs. 30,000 towards his share. Deducting this from the assessee's share of compensation which was fixed at Rs. 69,397 the officer found that the net capital gain derived by the assessee was Rs. 39,397 and assessed it accordingly. The officer was informed that the properties have been purchased by the association of persons, namely, the assessee and Kondal Reddy, that they were paid compensation by the Government and thereby derived^ profit, but the officer chose to tax the capital gain in respect of the assessee's share and not the gain of the association as such. It is clear, therefore, that he exercised his option and assessed the tax not on the association as a unit of association, but as a member of the association individually. There is abundant authority that in such a case he cannot thereafter assess the same income in the hands of the association. Vide CIT v. Murlidhar Jhawar and Puma Ginning and Pressing Factory , *Joti Prasad Agarwal v. ITO*[1] and the recent decision of this court in CIT v. Hyderabad Deccan Liquor Syndicate and Ravinder Narain v. ITO . The learned standing counsel for income-tax tried to distinguish these decisions on the ground that they were concerned with the relevant provisions of the I.T. Act of 1922. He submitted that the position under the new Act is different, as under this Act, the ITO has no option to assess the tax on the association as a unit or as members of the association individually, and it is obligatory on him to assess the tax on the association as a unit. We see no warrant for this distinction. Under Section 4 of the 1961 Act, income-tax shall be charged in respect of the total income of the previous year or the years, as the case may be, of every person. "Person" is defined under Section 2(31) as including, (1) an individual; (2) a HUF; (3) a company ; (4) a firm ; (5) an association of persons or a body of individuals, whether incorporated or not; (6) a local authority and (7) every artificial juridical person, not falling within any of the preceding sub-clauses.

8. Under Section 3 of the old Act, instead of stating that the tax shall be charged on every person, the categories of assessees were enumerated in the section itself and one of the categories was an association of persons. Under the, present Act, instead of enumerating the categories in the body of the section, it is stated that the income will be charged on every person and in the definition of "person" in Section 2(31) the various categories of persons are enumerated. In our view, this change in the wording of the section does not affect the legal position and all the decisions under

the old Act referred to above are applicable even to-day under the present Act. As observed by the Supreme Court in CIT v. Murlidhar Jhawar and Purna Ginning and Pressing Factory an association of persons and the individual members of an association are two distinct and different assessable entities and under Section 3 of the Indian I.T. Act, 1922, the tax can be levied on either of the said two entities. The ITO cannot seek to assess the one income twice--once in the hands of the partners and again in the hands of the association. This principle holds good even under the present Act. The learned standing counsel for the income-tax department was unable to give any valid reason why the said principle does not apply under the Act of 1961.

9. The learned income-tax counsel relied strongly on the decision of the Supreme Court in ITO v. Bachu Lal Kapoor . In that case, the respondent was assessed to income-tax as karta of the HUF. Sometime, thereafter, the ITO accepted the claim of partition under Section 25A of the Act and in the subsequent years the members of the family were assessed as individuals. Later on, the ITO issued a notice under Section 34 of the Indian I.T. Act of 1922, in regard to one of those years as the karta of an HUF. It was held that an HUF was a distinct assessable entity and if its income had escaped assessment for any year, the ITO could issue a notice to the family under Section 34 of the Act. If the case for the revenue were true and the fact of the existence of the joint family was kept back from the knowledge of the ITO it would be a clear case of the family's income escaping assessment, and in such a case it could not be said that the ITO had elected to assess the members with the knowledge that the joint family existed. So long as the HUF exists, the individuals thereof cannot separately be assessed in respect of its income. Hence, the ITO had jurisdiction to initiate proceedings under Section 34 of the Act against the respondent as karta of the HUF. It is seen that the whole basis of this decision is that if there is an HUF, an "individual member thereof could not be separately assessed in respect of its income. In other words, in the case of an HUF, the officer has no option to assess the individual or the family. But in the case of an association of persons the position is different as the officer has such an option. This distinction is clearly pointed out at pages 79 and 80 of the judgment where their Lordships observed that this was not a case of election between two alternative units of assessment, but an attempt to bring to tax the income of an assessable entity which had escaped assessment and that under Section 3 of the Act there is no question of any election between an HUF and a member thereof in respect of the income of the family. If an HUF exists, the ITO has to assess it in respect of its income. Reference was made to Section 14(1) of the Act which says that any part of the income received by its members cannot be assessed over again. The distinction between an association of persons and an HUF was expressly referred to and it was observed :

> "While Section 3 confers an option on the ITO to assess either the association of persons or the members of the association individually, no such option is conferred on him thereunder in the case of a HUF, as its existence excludes the liability of its members in

respect of the income of the former received by the latter."

10. The above decision of the Supreme Court has no application to the facts of this case where we are concerned with the assessment of an association of persons in respect of which we have already held that even under the new Act there is an option to assess either the association as a unit or the members individually. It is true, in the above decision, the Supreme Court gave a direction that if the assessment proceedings initiated under Section 34 culminated in the assessment of the HUF, appropriate adjustments had to be made by the ITO in respect of the tax realised by the revenue on that part of the income of the family assessed in the hands of the individuals. But that direction was given because the original assessment in the hands of the individuals was contrary to the provisions of the Act. In a case of association of persons, if the officer exercises his option and assesses the tax in the hands of the members individually, it cannot be said that the assessment is invalid. Hence, no question of adjustment arises.

11. The impugned notice merely states that the ITO has reason to believe that the income chargeable to tax for the assessment year 1964-65 has escaped assessment. It is, however, argued that the escaping of assessment is by reason of omission or failure on the part of the association of persons to make a return for the assessment year in question, namely, 1964-65. It is submitted that there is no dispute that the association of persons did not submit return for that assessment year and, therefore, the notice is justified under Section 147 of the Act. Section 147, however, applies only if the assessee omits or fails to submit a return. "Assessee" is defined as a person by whom any tax or any other sum of money is payable under the Act and also includes every person who is deemed to be an assessee under any provision of the Act. In this case, as the ITO had exercised his option and assessed the individual member to tax, the assessee must be taken to be the individual. Once that option is exercised, the association of persons cannot be assessed in so far as the same transaction is concerned. It cannot, therefore, be said that in this case the association of person's which omitted to file a return is the assessee.

12. Sri Rama Rao, learned counsel for the income-tax department, submitted that the order of assessment dated March 10, 1970, was set aside on appeal by the AAC in his order dated February 21, 1973, in so far as this item of capital gain is concerned. He, therefore, contended that it cannot be regarded that the ITO has exercised his option and assessed the individual member to tax. We are unable to agree with the contention. Firstly, in judging the validity of an impugned notice which was issued on February 18, 1972, it is not possible to take into account an order passed long after that notice, namely, February 21, 1973. Secondly, the AAC observed as follows :

"It is seen that the assessee purchased the rights of another person who was to receive the compensation from the Government in respect of the land acquired by the Government

for the establishment of Bharat Heavy Electricals Ltd., in Ramachandrapuram area, on the outskirts of Hyderabad City. The appellant acquired 60 per cent. right in the compensation to be realised from the Government. The Income-tax Officer has described the income arising therefrom as capital gains, in the head-note, but brought it to tax under sec. 41(2) of the Income-tax Act. I have not followed what the Income-tax Officer had in his mind. The present Income-tax Officer assured me that the matter was being re-looked into and he had nothing to say in support of the inclusion in the present assessment. In my view, there is no proper basis for including this amount either as capital gain or as profit under sec. 41(2). As the matter is being looked into once again, the addition of Rs. 35,397 is deleted."

13. It is seen that the deletion is because the ITO said that the matter was being looked into once again and the AAC found there was no basis for including the amount either as capital gains or as profit under Section 41(2). We do not read the order as saying that the ITO either did not exercise his option of taxing the individual member and not the association or that he was wrong in doing so. We have also perused the grounds of appeal filed before the AAC. The only ground relating to this item was that the income had arisen regarding the transaction pertaining to agricultural land at Ramachandrapuram and it should not be brought under the purview of capital gains. The petitioner did not question the exercise of the option by the ITO.

14. The next submission that was made on behalf of the department was that the present notice is for the assessment year 1964-65, whereas the assessment previously made on the assessee was for the assessment year 1965-66. Therefore, it cannot be said that the ITO exercised his option for the year 1964-65, as there was no assessment of tax on this capital gain either in respect of the individual or in respect of the association for the year 1964-65. In our view there is a fallacy in this argument. When making an assessment, the ITO exercised his option and chose to assess the individual, but he did so for the year 1965-66, as the amount was received by the assessee on December 4, 1964. The question is not for what particular year the assessment was made, but whether the ITO exercised his option in levying the tax on the income in the hands of the individual or in the hands of the association. By merely choosing to give a notice in respect of a different year, it is not open to the officer to contend that he has not exercised his option earlier in the matter of assessment of tax of a particular income in the hands of either the individual or the association. We, therefore, do not see any force in the contention that because the present notice relates to the year 1964-65 and the previous assessment relates to the year 1965-66, the ITO is not precluded from assessing the association of persons. The impugned notice by which the officer seeks to assess the association of persons who has already exercised his option to assess the capital gain in the hands of the individual is, therefore, liable to be quashed. In the view we have taken, it is unnecessary for us to deal with the various other contentions raised by Sri

Panduranga Rao in regard to the notice issued.

15. The writ petition is allowed with costs.

W.P. No. 338/73 :

16. The writ petition relates to a notice dated March 17, 1972, in regard to the personal assessment of the petitioner. No serious arguments were addressed by the learned counsel for the petitioner in respect of this notice. The writ petition is, therefore, dismissed with costs.

Cases Referred.

1[1959] 37 ITR 107 (All)