COMMISSIONER OF INCOME TAX, ASSAM, TRIPURA, MANIPUR & NAGALAND

v.

M/S. RAMESHWARI LAL SANWARMAL

September 22, 1971

[K. S. HEGDE AND A. N. GROVER, JJ.]

Income-tax Act, 1922, *ss.* 27 *and* 34(3)—*Assessment on S as individual set aside under s.* 27 *and fresh assessment made on S as karta of H.U.F.—Fresh assessment is on a different assessee and not one under s.* 27—*Cannot claim protection of s.* 34(3) *2nd proviso.*

Income-tax Act, 1922, *s.* 2(6*A*)—*Shares of company in which public are not substantially interested—Held in name of karta in H.U.F.—Loan to karta by company whether liable to be treated as 'dividend' under s.* 2(6*A*).

In connection with the assessment year 1955-56 the Income-tax Officer issued notice under s. 22(2) of the Income-tax Act, 1922 to S in the status of an individual. He submitted a return in the status of karta of his H.U.F. The Income-tax Officer passed an *ex-parte* assessment order on him as individual under s. 23(4). The assessment was however set aside on S's application under s. 27 of the Act. A fresh assessment was made on the H.U.F. on February 6, 1961 on the basis of the return submitted by S in that status. This assessment was made after the period of four years mentioned in s. 34(3) of the Act. The question in appellate and reference proceedings was whether the latter assessment was one under s. 27 and therefore protected as regards limitation under s. 34(3) 2nd proviso.

In the previous years relevant to the assessment years 1955-56 and 1956-57 certain loans were advanced to the aforesaid H.U.F. by a company. The tribunal found that S held certain shares in that company. Its further finding was that he held these shares as the karta of his H.U.F. The company being one in which the public were not substantially interested the question was whether these loans could be considered as belonging to S and therefore any loan given by the company to S could not come within the scope of cl. (3) to s. 2(6A).

HELD : (i) The return submitted by S in respect of the year 1955-56 was in his capacity as karta of his family. The status shown in the return was H.U.F. He filed no return in the status of an individual. The two capacities are totally different. The ex-parte order was made against S in the status of an individual. What was set aside under s. 27 was the assessment made on him in the status of an individual. There was no assessment against H.U.F. and there was no question of setting aside any assessment made against H.U.F. On February 6, 1961 the H.U.F. was assessed for the first time though the Income-tax Officer wrongly called it as a fresh assessment. On the facts established it was not possible to come to the conclusion that the assessment made against the H.U.F. was an assessment under s. 27. That being so the assessment made against the H.U.F. on February 6, 1961 was clearly barred by time. The High Court was accordingly justified in answering the first question against the Department. [858 D-G]

A (ii) Since the High Court had not gone into the question whether the shares were held by S in his individual capacity or as karta of H.U.F., this Court had to proceed on the basis of the finding of the Tribunal that he held those shares as the karta of his family. This Court held in *Kishanchand Lunidasing Bajaj's* case that when the shares acquired with the funds of H.U.F. were held in the name of the karta, the H.U.F. could be assessed to tax under the Act on the dividend from those shares. B In view of that decision the loan in question must be held to be dividend within the meaning of cl. (e) of s. 2(6A). [The Court however made it clear that the loan granted in the account year previous to the assessment year 1955-56 could not be brought to tax because assessment in respect of that year was not made within the time prescribed.] [859 B-H]

Kishanchand Lunidasing Bajaj v. *C.I.T., Bangalore,* 60 I.T.R. 500, applied.

C CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 1956 and 1957 of 1969 and 1426 and 1427 of 1971.

Appeals by certificate/special leave from the judgment and order dated May 10, 1965 of the Assam and Nagaland High Court in Income-tax Reference No. 2 of 1964.

D *S. C. Manchanda* and *R. N. Sachthey,* for the appellant (in all the appeals).

O. P. Khaitan, for the respondent (in all the appeals).

The Judgment of the Court was delivered by

E **Hegde, J.** Ciivl Appeals Nos. 1956-57 of 1969 by certificates have become infructuous as the certificates on the strength of which those appeals were brought were not properly issued. To get over that difficulty, the Commissioner of Income-tax applied for and obtained special leave to appeal against the judgment of the High Court of Assam and Nagaland. The appeals filed on the F basis of the special leave granted are Civil Appeals Nos. 1426 and 1427 of 1971. At present we are only concerned with those appeals.

The judgment under appeal is one rendered in a reference under s. 66(1) of the Indian Income-tax Act, 1922 (to be hereinafter called the Act). The Income-tax Appellate Tribunal after G stating the case referred the following six questions for the opinion of the High Court :

> "1. Whether on the facts and in the circumstances of the case and upon a true interpretation of the provisions of the Second proviso to s. 34(3), the assessment for the year 1955-56 on the applicant Hindu undivided family H made on 6-2-1961, pursuant to an order under section 27, cancelling the assessment of Shri S. M. Saharia, as an individual, was barred by limitation ?

2. Whether on the facts and in the circumstances of the case, and on a true interpretation of the terms of section 2(6A)(e) of the Income-tax Act, 1922, the Tribunal was right in holding that the amounts of Rs. 2,21,702 (gross) and Rs. 3,43,505 (net) were taxable as dividends in the hands of the applicant H.U.F. for the assessment years 1955-56 and 1956-57 respectively, when the shares were registered in the name of Sri S. M. Saharia, the Karta of the family ?

3. Whether on the facts and in the circumstances of the case, there was any material before the Tribunal to justify the conclusion that Sri S. M. Saharia was holding shares in Messrs. Shyam Sunder Tea Co. (Private) Ltd. in his capacity as Karta of the applicant family consisting of himself and his minor son ?

4. Whether on the facts and in the circumstances of the case, there was any material before the Tribunal for the finding that the applicant family was the beneficiary up till 16-8-1955 in respect of 50 shares registered in the name of Sri S. M. Saharia on 16-5-1953, before the disruption in the joint status of the family of Hanutram Ramprotap ?

5. Whether on the facts and in the circumstances of the case, the Tribunal was justified in holding that the Hindu undivided family of Hanutram Ramprotap was not a shareholder in M/s. Shyam Sundar Tea Company (P) Ltd. up till 16-8-1955 ?

6. Whether on the facts and in the circumstances of the case, in computing the accumulated profits of Messrs. Shyam Sunder Tea Co. (P) Ltd. within the meaning of Section 2(6A)(e), the Tribunal acted rightly in refusing to allow,

(a) deduction in respect of loans advanced by the said Company to the erstwhile family of Messrs. Hanutram Ramprotap which amounted to Rs. 3,60,989 as at 31-12-1954 and increased to Rs. 3,80,567 as at 16-8-1955 and written off at the end of the year 1955.

(b) deduction in respect of Rs. 51,049 and Rs. 66,206 for the assessment years 1955-56 and 1956-57, respectively, being the difference between the written down value of depreciable assets of the said Company as per income-tax records and their book value ?"

A The High Court has answered the first two questions in favour of the assessee and it did not go into the other questions as it opined that in view of the answers given to the second question, there was no need to answer the remaining questions. For the reasons to be presently stated, we have come to the conclusion that the answer given by the High Court to the first question is correct and that B given by it to the second question is wrong. As a result of our finding, the appeal relating to the assessment year 1955-56 *viz.* Civil Appeal No. 1426 of 1971 has to be dismissed. But the appeal relating to the assessment year 1956-57 should be allowed and the case remitted to the High Court for answering the questions that remain to be answered.

C

Let us first refer to the facts relating to the first question. As mentioned earlier this question exclusively relates to the assessment year 1955-56, the relevant previous year being Ramnaami year 2011 (ending on March 31, 1955). In respect of that assessment, the Income-tax Officer issued a notice under s. 22(2) to Shri D Sanwarmal Saharia in the status of an individual on December 27, 1955. He submitted a return on October 29, 1959 on behalf of his H.U.F. On February 29, 1960, the Income-tax Officer passed an *ex-parte* assessment order on him as individual under s. 23(4) without issuing any notice under s. 23(2). On March 22, 1960, Saharia filed an application under s. 27 to cancell the *ex-parte* E assessment. On December 16, 1960, the Income-tax Officer set aside the order of assessment made on February 29, 1960. Therein he stated that fresh assessment will be made in due course. An assessment was made on the H.U.F. on February 6, 1961 on the basis of the return submitted on October 29, 1959. *Prima facie* this assessment is barred by s. 34(3) which says :

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> "No order of assessment or reassessment, other than an order of assessment under section 23 to which clause (c) of sub-section (1) of section 28 applies or an order of assessment or reassessment in cases falling within clause (a) of sub-section (1) or sub-section (1A) of this G section shall be made after the expiry of four years from the end of the year in which the income, profits or gains were first assessable."

It is not the case of the Department that the assessment in question either falls under clause (c) of sub-section (1) of section H 28 or clause (a) of sub-section (1) or sub-section (1A) of s. 34. Therefore the Department cannot take any assistance from the main s. 34(3). But in support of its contention that the assess-

ment was made within time, reliance was placed by the Department on the second proviso to s. 34(3). That proviso reads :

> "Provided further that nothing contained in this section limiting the time within which any action may be taken or any order, assessment or reassessment may be made shall apply to reassesment made under section 27 or to an assessment or reassessment made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under section 31, section 33, section 33A, section 33B, section 66 or section 66A."

What was contended on behalf of the Department is that the reassessment in this case was made under s. 27. That contention has been upheld by the Appellate Assistant Commissioner as well as by the Tribunal. But the High Court has come to the conclusion that the reassessment was not made under that section.

To recapitulate the facts which we have earlier mentioned, the return submitted by Saharia was in his capacity as the *karta* of his family. The status shown in the return is H.U.F. He filed no return in the status of an individual. The same person can be taxed both as an individual as well as the *karta* of his family. The two capacities are totally different. The liability to be taxed as an individual is different from the liability to be taxed on behalf of his H.U.F. The individual and the H.U.F. are totally different units of taxation. They are two different assessees. The *ex-parte* order was made on February 29, 1960 against Saharia in the status of an individual. What was set aside under s. 27 was the assessment made on him in the status of an individual. There was no assessment against H.U.F. Hence there was no question of setting aside any assessment made against H.U.F. On February 6, 1961, the H.U.F. was assessed for the first time though the Income-tax Officer wrong called it as a fresh assessment. On the facts established, it is not possible to come to the conclusion that the assessment made against the H.U.F. was an assessment under s. 27. That being so, the assessment made against the H.U.F. on February 6, 1961 is clearly barred by time. Hence the High Court was justified in answering the first question against the Department.

Now coming to the second question, the relevant facts are these :

In the relevant previous years to the assessment years 1955-56 and 1956-57, certain loans had been advanced to the H.U.F. by a company known as M/s. Shyam Sunder Tea Co. (P) Ltd. The Tribunal has found that Saharia had held certain shares in that company. Its further finding is that he held those shares as the

A *karta* of his H.U.F. Therefore the question that arose for decision was whether those loans can be considered as "dividends" as provided in clause (e) of s. 2(6A). There was controversy between the parties whether those shares were held by Saharia in his individual capacity or as the *karta* of the family. That controversy has not been gone into by the High Court. At present we are proceed-
B ing on the basis that he held those shares as the *karta* of his family. Clause (e) of s. 2(6A) says :

> " "dividend" includes.....
>
> (e) any payment by a company, not being a company in which the public are substantially interested with-
C in the meaning of s. 23A, of any sum (whether as representing a part of the assets of company or otherwise) by way of advance or loan to a shareholder or any payment by any such company on behalf or for the individual benefit of a shareholder, to the extent to which the company in either case possesses accumulated profits."

D It is not disputed that M/s. Shyam Sunder Tea Co. (P) Ltd. is not a company in which public are substantially interested. It is a private company. The only question that was in issue was that as the shares in question stood in the name of Saharia, can they in law be considered as the shares of the H.U.F. ? The High Court held for the purpose of the Act, they must be considered as
E the shares of Saharia and therefore any loan granted by M/s. Shyam Sunder Tea Co. Ltd. to the H.U.F. cannot come within the scope of clause (e) to s. 2(6A). In arriving at that conclusion, the High Court differed from the view taken by the Mysore High Court in *Kishanchand Lunidasing Bajaj* v. *Commissioner of Income-tax, Mysore*(1), wherein that Court held that provisions of s. 18(5),
F 23A and 16(2) and other provisions of the Act relating to shares and dividends do not lead to the conclusion that for the purposes of assessment to income-tax dividend income derived by a *benami* holder of shares should be treated as his own income and not that of the real owner of the shares which have yielded the dividend income. That decision was affirmed by this Court in *Kishanchand*
G *Lunidasing Bajaj* v. *Commissioner of Income-tax, Bangalore*(2). Therein this Court held that where the shares acquired with the funds of H.U.F. were held in the name of the *karta*, the H.U.F. could be assessed to tax under the Act on the dividend from those shares. In view of that decision we must hold that the High Court erred in its answer to the second question. Hence that answer is discharged and in its place we answer that question in
H favour of the Department. But we hasten to make it clear that in respect of the loan granted in the account year previous to the

(1) 53 ITR 604. (2) 60 I.T.R. 500.

assessment year 1955-56, the same cannot be brought to tax, as assessment in respect of that year was not made within the time prescribed. A

In the result Civil Appeals Nos. 1956-57 of 1959 are dismissed as being not maintainable. There will be no order as to costs in those appeals. So far as Civil Appeal No. 1426 of 1971 (appeal relating to assessment year 1955-56) is concerned, it is also dismissed but Civil Appeal No. 1427 of 1971 (appeal relating to assessment year 1956-57) is allowed to the extent mentioned above and the case remitted to the High Court for answering the questions that were not answered by it. As both sides have partly succeeded and partly failed before this Court, there will be no order as to costs. B C

G.C. *Ordered accordingly.*