(2012) 07 P&H CK 0306

High Court Of Punjab And Haryana At Chandigarh

Case No: Income Tax A. No''s. 463, 464 and 559 of 2009 and 49, 51, 217, 218 and 219 of 2010

Sudhir Nagpal and Others	APPELLANT
Vs	
Income Tax Officer	RESPONDENT

Date of Decision: July 26, 2012

Acts Referred:

- Income Tax Act, 1922 - Section 3
- Income Tax Act, 1961 - Section 147, 148, 167B, 167B(2), 2(31)

Citation: (2013) 257 CTR 253 : (2012) 349 ITR 636

Hon'ble Judges: G.S. Sandhawalia, J; Ajay Kumar Mittal, J

Bench: Division Bench

Advocate: Radhika Suri, for the Appellant; Kuldeep Singh, Advocate for G.S. Hooda, for the Respondent

Final Decision: Allowed

Judgement

Ajay Kumar Mittal, J.

This order shall dispose of a bunch of eight appeals bearing I.T.A. Nos. 463, 464, 559 of 2009, 49, 51 and 217 to 219 of 2010 as according to the learned counsel for the parties, the primary issue involved therein is identical. For brevity, the facts are being extracted from I.T.A. No. 463 of 2009. This appeal has been filed by the assessee u/s 260A of the income tax Act, 1961 (in short "the Act"), against the order dated January 22, 2009, passed by the income tax Appellate Tribunal, Amritsar Bench, Amritsar (hereinafter referred to as "the Tribunal") in I.T.A. No. 352/ASR/ 2006 for the assessment year 2004-05. On May 24, 2010, all the appeals were admitted for determination of the following substantial questions of law:

1. Whether, on the facts and in the circumstances of the case, the learned income tax Appellate Tribunal is justified in upholding the action of the learned Assessing Officer, initiating the proceedings u/s 147 of the Act, on mere change of opinion on

any other ground ?

2. Whether, on the facts and in the circumstances of the case, the plinths rental income is not assessable as income of association of persons and is assessable as individual income of the co-owners ?

2. Briefly stated, the facts necessary for adjudication of the present appeal are that five persons, namely, S/Sh. Sunil Nagpal, Sudhir Nagpal, Raj Kumar Nagpal, Adarsh Kumar Nagpal and Smt. Saraswati Nagpal were co-owners of the agricultural land known as "Nagpal Farms" inherited from their forefathers situated at Old Fazilka Road, Abohar, and executed a general power of attorney on March 26, 1996, in favour of Sudhir Nagpal appointing him to construct plinths on their joint agricultural land in the names of all the owners and to further lease out such open plinths to any party on their behalf. The land was not purchased for the purpose and it was inherited by them and they were the owners not in their joint capacity but in their individual capacity with a definite/defined proportion of share. Agreement dated November 15, 2002, was executed by the co-owners leasing out the plinths to the Punjab State Civil Supplies Corporation Ltd., Chandigarh, for the period which included the period assessable for the assessment year 2004-05. Sudhir Nagpal filed his return of income for the assessment year 2004-05 showing this central income and also paid tax accordingly. Vide assessment order dated December 20, 2005, the rental income was duly included in the said assessment. Similar returns were filed by the assessees in the cases of other co-owners wherever they were taxable and necessary tax was deposited in the treasury in accordance with law. Thereafter, the Assessing Officer issued notice u/s 148 of the Act to all the co-owners of the property in the name of Sudhir Nagpal and others on the ground that there is association of persons (AOP) made by the co-owners and that income had escaped assessment in the hands of association of persons. The assessee was asked to file the return who filed return of income declaring nil income. It was pleaded that since no land was purchased, therefore, the status of the co-owners cannot be treated as association of persons and that the income of the plinths was assessed by the Department in the hands of individual as per their shares in the property. The Assessing Officer, vide order dated October 10, 2007, assessed it as an association of persons treating the entire income from plinths as income from other sources in the hands of association of persons determining tax payable by applying section 167B(2) of the Act. Against the order of the Assessing Officer, an appeal was filed before the Commissioner of income tax (Appeals), Bathinda (in short "the CIT(A)") who, vide order dated March 19, 2008, dismissed The appeal. Still feeling dissatisfied, the assessee filed an appeal before the Tribunal. The Tribunal, vide order dated January 22, 2009, rejected the appeal holding that the proceedings u/s 147 of the Act have been rightly initiated and the income has rightly been assessed as an association of persons. Hence, the present appeal by the assessee.

3. We have heard learned counsel for the parties and have perused the record.

4. Learned counsel for the appellant-assessee submitted that she does not press question No. 1. Accordingly, the same is disposed of as not pressed. Addressing on question No. 2, learned counsel for the appellant submitted that with regard to the lease deed, the same was entered by the co-owners for letting out plinths on rent to the Punjab Civil Supplies Corporation Ltd., Chandigarh, and was let out as co-owners whereas the Assessing Officer, the Commissioner of income tax (Appeals) and the Tribunal had erred in treating the income as that belonging to the association of persons. It was contended that unless the persons had joined hands as an association of persons for carrying on any venture, income therefrom could not have been taxed as belonging to association of persons. It was also argued that while treating the co-owners as an association of persons, the Assessing Officer had treated the income from other sources which was contrary to the basic principle that if joint venture was there then income could be assessed as income from the business only. Reference was made to the following judgments:

(1) Commissioner of Income Tax, Bombay Vs. Smt. Indira Balkrishna,

(2) Mohamed Noorullah, Representing The Estate of Late Khan Sahib Mohd. Oomer Sahib Vs. The Commissioner of Income Tax, Madras,

(3) Commissioner of Agricultural Income Tax, Hyderabad Vs. Raja Ratan Gopal,

(4) G. Murugesan and Brothers Vs. Commissioner of Income Tax , Madras,

(5) Smt. R. Valsala Amma Vs. Commissioner of Gift-tax, Kerala,

(6) Commissioner of Income Tax Vs. Shiv Sagar Estates (Aop), and

(7) Commissioner of Income Tax Vs. A.P. Parukutty Mooppilamma and Others,

5. On the strength of the aforesaid judgments, it was urged that unless there was joint management in a joint enterprise for producing the income, profits or gains, the status of association of persons could not have been fastened on the assessee. It was pleaded that the test for constituting an association of individuals as an association of persons was that they should have joined in a promotion of joint enterprise with the object of producing income, profits or gains which was missing in the present case. Heavy reliance was placed on the decision of the Bombay High Court in Commissioner of Income Tax Vs. Shiv Sagar Estates (Aop), in support of her submissions.

6. On the other hand, learned counsel for the Revenue opposing the prayer made by the learned counsel for the appellant supported the order passed by the Tribunal. He submitted that since there was one joint account opened by the assessee, they were rightly assessed as an association of persons and even Form 16A was issued in one name only.

7. After giving our thoughtful consideration to the respective submissions, we find considerable force in the submissions made by the learned counsel for the

appellants. The Tribunal had erred in coming to the conclusion that the status of the assessee would be an association of persons.

8. The core question that arises for adjudication in these appeals is whether the appellants are to be assessed as "an association of persons" or as "individuals".

9. In I.T.A. Nos. 49, 51 and 217 to 219 of 2010, besides the aforementioned issue, the appellants have raised substantial question No. 2 therein that the income arising from renting of plinths was assessable u/s 26 of the Act. At the outset, it may be noticed that in so far as the head under which the income from rental of plinths is to be assessed, the same stands settled by the Division Bench judgment of this court in Gowardhan Das and Sons Vs. Commissioner of Income Tax, , wherein it has been held that it would fall under "Income from other sources" and not "Income from house property". The relevant observations therein read thus (page 485):

A plain reading thereof provides that it is the income from property consisting of any ''building'' or ''land appurtenant thereto'' which is assessed u/s 22 of the Act and not the income from renting out of open land or some kutcha plinth only. In the present case, no building having been let out, there is no question of treating the rent received for letting out of land only as income from house property.

What is covered by the expression "appurtenant" is the land which is necessary for enjoyment of the building and not the land only. Similar issue came up for consideration before the Madras High Court in M. Ramalakshmi Reddi Vs. Commissioner of Income Tax, where the issue was decided against the assessee and in favour of the Revenue.

10. Accordingly, it is held that the rent received from letting out the plinths is assessable u/s 56 of the Act and, therefore, provisions of section 26 of the Act have no applicability.

11. Taking up the primary issue as to whether the assessee could be assessed in the status of "an association of persons" or not, it would be appropriate to refer to "person" as defined in section 2(31) of the Act. The definition of "person" as given in this clause is inclusive and not exhaustive. Section 2(31) of the Act reads thus:

2(31) ''person'' includes--

(i) an individual,

(ii) a Hindu undivided family,

(iii) a company,

(iv) a firm,

(v) an association of persons or a body of individuals, whether incorporated or not,

(vi) a local authority, and

(vii) every artificial juridical person, not falling within any of the preceding sub-clauses.

12. Under clause (i) of section 2(31), person includes "an individual" whereas under clause (v) thereof, it specifies "an association of persons or a body of individuals, whether incorporated or not." For the just decision of these appeals, it would be essential to examine the meaning of the expression "an association of persons".

13. The Act no where defines "association of persons". Reference shall have to be made to judicial precedents to discern the meaning of the said expression. The hon''ble apex court in Commissioner of Income Tax, Bombay Vs. Smt. Indira Balkrishna, , delving into the meaning of "association of persons" noticed in paragraph 9 as under (page 551):

Now, section 3 imposes a tax ''in respect of the total income... of every individual Hindu undivided family, company and local authority, and of every firm and other association of persons or the partners of the firm or members of the association individually. In the absence of any definition as to what constitutes an association of persons, we must construe the words in their plain ordinary meaning and we must also bear in mind that the words occur in a section which imposes a tax on the total income of each one of the units of assessment mentioned therein including an association of persons. The meaning to be assigned to the words must take colour from the context in which they occur. A number of decisions have been cited at the Bar bearing on the question, and our. attention has been drawn to the controversy as to whether the words ''association of individuals'' which occurred previously in the section should be read ejusdem generis with the word immediately preceding, viz.; firm or with all the other groups of persons mentioned in the section. Into that controversy it is unnecessary to enter in the present case. Nor do we pause to consider the widely differing characteristics of the three other associations mentioned in the section, viz., Hindu undivided family, a company and a firm, and whether in view of the amendments made in 1939 the words in question can be read ejusdem generis with Hindu undivided family or company.
It is enough for our purpose to refer to three decisions: B. N. ELIAS AND OTHERS, IN RE., COMMISSIONER OF Income Tax, BOMBAY Vs. LAXMIDAS DEVIDAS AND ANOTHER., and DWARAKANATH HARISCHANDRA PITALE AND ANOTHER Vs. RE., In re: B N. Elias (supra) Derbyshire C.J. rightly pointed out that the word ''associate'' means, according to the Oxford Dictionary, ''to join in common purpose, or to join in an action''. Therefore, an association of persons must be one in which two or more persons join in a common purpose or common action, and as the words occur in a section which imposes a tax on income, the association must be one the object of which is to produce income, profits or gains. This was the view expressed by Beaumont C.J. in CIT v. Laxmidas Devidas at page 589 and also in. In re: Dwarakanath Harishchandra Pitale (supra). In re: B.N. Elias (supra), Costello J. put the test in more forceful language. He said: It may well be that the intention of the

Legislature was to hit combinations of individuals who were engaged together in some joint enterprise but did not in law constitute partnership... When we find,... that there is a combination of persons formed for the promotion of a joint enterprise... then I think no difficulty arises whatever in the way of saying that... these persons did constitute an association...

We think that the aforesaid decisions correctly lay down the crucial test for determining what is an association of persons within the meaning of section 3 of the income tax Act, and they have been accepted and followed in a number of later decisions of different High Courts to all of which it is unnecessary to call attention. It is, however, necessary to add some words of caution here. There is no formula of universal application as to what'' facts, how many of them and of what nature, are necessary to come to a conclusion that there is an association of persons within the meaning of section 3; it must depend on the particular facts and circumstances of each case as to whether the conclusion can be drawn or not.

14. The hon''ble Supreme. Court in Mohamed Noorullah, Representing The Estate of Late Khan Sahib Mohd. Oomer Sahib Vs. The Commissioner of Income Tax, Madras, following its earlier decision in Commissioner of Income Tax, Bombay Vs. Smt. Indira Balkrishna, observed as under (page 119):

This court in Commissioner of Income Tax, Bombay Vs. Smt. Indira Balkrishna, considered the question as to what an association of persons means. The test laid down in three cases: B. N. ELIAS AND OTHERS, IN RE., COMMISSIONER OF Income Tax, BOMBAY Vs. LAXMIDAS DEVIDAS AND ANOTHER., and DWARAKANATH HARISCHANDRA PITALE AND ANOTHER Vs. RE., was accepted by this court as correctly laying down the crucial test for determining what is an association of persons and that in each case the conclusion has to be drawn from the circumstances. In the first case, the test was laid down as applying to combinations of individuals who were engaged together in some joint enterprise but not constituting a partnership. Such a combination of persons formed for the promotion of a joint enterprise banded together as if they were ''co-adventurers'' it was held would constitute an association of individuals. In the second case, that is COMMISSIONER OF Income Tax, BOMBAY Vs. LAXMIDAS DEVIDAS AND ANOTHER., Beaumont C.J. at page 589 laid down the test as follows:

In my opinion, the only limit to be imposed on the words ''other association of individuals'' is such as naturally follows from the fact that the words appear in an Act imposing a tax on income, profits and gains, so that the association must be one which produces income, profits or gains. It seems to me that an association of two or more persons for acquisition of property which is to be managed for the purpose of producing income, profits or gains falls within the words other association of individuals'' in section 3; and u/s 9 of the Act, the association of individuals is the owner of the property and as such is assessable.

In that case, it was also held that the fact that one of the assessees was a minor during the year of the assessment did not affect the question. In In re: Dwarkanath Harischandra Pitale (supra) the assessees were two brothers who became entitled to certain house properties as tenants in common and held and managed the properties as such and derived profit therefrom. It was held that though the assessees in the first instance-did not constitute an association of individuals, they became so when they elected to retain the property and manage it as a joint venture producing income. The test there laid down was that as soon as there was election to retain the property and manage it as a joint venture the persons so electing became an association of individuals. The Rangoon High Court in AIR 1939 258 (Rangoon) (Rangoon) also laid down the same interpretation of the words ''association of individuals''. That was a case of Mohammedan co-heirs and it was held that by merely inheriting a share of property no person can become a member of an association of individuals unless there is some forbearance or act upon his part to show that his intention and will accompanied the new status, that is, an association of individuals. One of the co-heirs in that case was appointed an agent to realise the income from the properties left to the co-heirs by their father and mother under the Mohammedan law and that was held to be sufficient to constitute them an association of individuals.

15. Relying upon its earlier decision in Commissioner of Income Tax, Bombay Vs. Smt. Indira Balkrishna, and Mohamed Noorullah, Representing The Estate of Late Khan Sahib Mohd. Oomer Sahib Vs. The Commissioner of Income Tax, Madras, , the hon''ble Supreme Court in Commissioner of Agricultural Income Tax, Hyderabad Vs. Raja Ratan Gopal, in paragraph 2 noted as under (page 731):

The first question is whether the High Court was right in holding that the respondent should be assessed on his share of the income and not on the income of the four brothers as ''association of individuals''. u/s 3 of the Act, for the financial year commencing on April 1, 1950, and for every subsequent financial year, agricultural income tax shall be charged in accordance with and subject to the provisions of the Act on the total agricultural income of the previous year of every person. ''Person'' has been defined in section 2(k) of the Act to mean ''any individual or association of individuals, owning or holding property for himself or for any other, or partly for his own benefit and partly for another, either as owner, trustee, receiver, common manager, administrator, or executor or in any capacity recognized by law, and includes an undivided Hindu family, firm or company''. A combined reading of these two provisions indicates that assessment can be made on an individual or an association of individuals. The question is whether the respondent should be assessed as an individual or along with his co-sharers as an ''association of individuals.. The expression ''association of individuals'' was found in the Indian income tax Act, before the words ''AOP'' were substituted, by the amendment Act of 1939. The word "person" is more comprehensive than the word ''individual''. But the meaning given to that expression as a unit of assessment

under the Indian income tax Act by the court will equally apply to the expression ''association of individuals'' under the Hyderabad Agricultural income tax Act. This court in Commissioner of Income Tax, Bombay Vs. Smt. Indira Balkrishna, construed the said expression used in the Indian income tax Act and held that it did not apply to co-widows of a Hindu in the circumstance of that case. The three co-widows succeeded as co-heirs to the estate of their deceased husband, and took a joint tenancy with the right of survivorship and equal beneficial enjoyment. They were entitled as between themselves to an equal share of the income. Either of them could not enforce an absolute partition, though for the purpose of convenience of enjoyment they could divide the property and enjoy their respective shares of the income therefrom. The question arose whether they should be assessed as individuals or as an association of persons. Das J., speaking for the court, accepted the following test to ascertain whether two or more persons constituted an ''association of individuals'' within the meaning of the income tax Act:

An association of persons must be one in which two or more persons join in a common purpose or common action, and as the words occur in a section which imposes a tax on income, the association must be one the object of which is to produce income, profits or gains.

The learned judge then gives the caution that there is no formula of universal application and that the question must depend on the particular facts and circumstances of each case. On the facts found in that case, the court held that the widows were only co-heirs of the estate of the deceased husband and that they could not be assessed as an association of persons within the meaning of section 3 of the Indian income tax Act. This court again in Mohamed Noorullah, Representing The Estate of Late Khan Sahib Mohd. Oomer Sahib Vs. The Commissioner of Income Tax, Madras, considered the question in the context of an income realized by receivers appointed by consent of the heirs to run the business of the deceased, Khan Saheb Mohmed Oomer Sahib. Kapur J., speaking for the court, laid down the same test accepted by this court in the earlier judgment and held that on the facts of that case the co-heirs, who carried on the business by consent as one unit, formed an association of persons within the meaning of section 3 of the Indian income tax Act, for the purpose of producing income, profits or gains. The said decisions laid down the test that, to constitute an association of individuals two or more individuals should have joined in the promotion of a joint enterprise with the object of producing income, profits or gains. In the present case, the said test is not satisfied. The four nephews of Raja Khaja Pershad succeeded to the estate as co-sharers and each one of them was entitled to one-fourth share of the income from the estate. They did not form a unit for the promotion of any joint enterprise to earn income, profits or gains. The collection of the entire income from the estate by one of the sharers or even by a common employee will not make that income an income from a joint venture. Each of the sharers gets his income as an individual and not as an association of individuals. In this view, the High Court was right in

answering the first question in favour of the respondent.

16. Similar view was taken by the hon''ble apex court in G. Murugesan and Brothers Vs. Commissioner of Income Tax , Madras,

17. The Kerala High Court in Smt. R. Valsala Amma Vs. Commissioner of Gift-tax, Kerala, held that a joint gift made by two sisters to their brothers by a common gift deed, the sisters having separate interest in the property would not make them taxable as an association of persons. The Kerala High Court held that the two sisters who have conveyed the title to their brothers through a common gift deed could not be held to form an association of persons as the title did not belong to the association of persons. It was observed as under (page 584):

In other words, the individuals who make the gift must be associated in respect of the title or ownership of the property which is transferred. To put it differently, a gift must be one made by two or more individuals who own the property as an association of individuals. In our view, if two or more persons execute one deed of gift in favour of the same person in respect of properties which belong to them individually, or in which they have separate and distinct rights, it cannot make them an association of individuals. It would be a joint gift by different individuals, between whom there is no association of interest in respect of the gifted properties.

18. Dealing with an identical issue, the Bombay High Court in Commissioner of Income Tax Vs. Shiv Sagar Estates (Aop), where 65 persons purchased property not as an association of persons but as co-owners and there was no change in their status as co-owners qua the property, it was held that the 65 persons who had purchased the property having definite and determinate shares could not be held as an association of persons only on the ground that the lease was executed, by a single document. While adjudicating the issue in favour of the assessee, it was observed (page 963):

We have carefully considered the rival submissions. We have already set out the facts of the case and also given our observations in regard thereto at different places. So far as the law is concerned, it is well settled by the decision of the Supreme Court in Commissioner of Income Tax, Bombay Vs. Smt. Indira Balkrishna, In this case, the Supreme Court considered what constitutes an association of persons. It was held that an association of persons must be one in which two or more persons join in a common purpose or common action, and as the words occur in a section which imposes a tax on income, the association must be one the object of which is to produce income, profits or gains. The Supreme Court, however, made it clear that there is no formula of universal application as to what facts, how many of them and of what nature, are necessary to come to a conclusion that there is an association of persons. It must depend on the particular facts and circumstances of each case as to whether the conclusion can be drawn or not. The court made it further clear that no test is conclusive or determinative.

19. Civil appeal against the aforesaid decision was dismissed by the hon''ble Supreme Court as reported in Commissioner of Income Tax Vs. Shivsagar Estate,

20. From the above, it emerges that in order to assess individuals to be forming "association of persons", the individual co-owners should have joined their resources and thereafter acquired property in the name of association of persons and the property should have been commonly managed, only then it could be assessed in the hands of "associations of persons". Conversely, the mere accruing of income jointly to more persons than one would not constitute thereon an association of persons in respect of such income. In other words, unless the associates have done some acts or performed some operations together, which have helped to produce the income in question and have resulted in that income, they cannot be termed as association of persons. Unless the members combine or join in a common purpose, it cannot be held that they have formed themselves into an association of person. In the present case, the co-owners had inherited property from their ancestors and there was nothing to show that they had acted as association of persons. The income was, thus, to be assessed in the status of "individual" and the Assessing Officer, the Commissioner of income tax (Appeals) and the Tribunal were not right in treating the income arising to "association of persons". Once it is held that the income was to be assessed as individual and not an "association of persons", therefore, section 167B of the Act is not attracted. In view of the above, the conclusion of the Tribunal cannot be legally sustained. The income in the hands of the appellants could not be assessed in status of association of persons. Accordingly, the appeals are allowed in the manner indicated above.