Commissioner of Income Tax Vs Jayantilal D. Patel

Court: Gujarat High Court

Date of Decision: April 21, 2006

Acts Referred: Income Tax Act, 1922 â€" Section 16(1)
Income Tax Act, 1961 â€" Section 256(1), 60
Partnership Act, 1932 â€" Section 14, 15, 29(1)
Transfer of Property Act, 1882 â€" Section 100, 122, 124

Citation: (2007) 212 CTR 271

Hon'ble Judges: H.N. Devani, J; D.A. Mehta, J

Bench: Division Bench

Advocate: Manish R Bhatt, for the Appellant;

Judgement

H.N. Devani, J.
The Income Tax Appellate Tribunal, Ahmedabad Bench-A, has referred the following two questions u/s 256(1) of the

Income Tax Act, 1961 (the Act), at the instance of the Commissioner of income tax:

1. Whether, the Appellate Tribunal is right in law and on facts in directing the ITO to exclude 50% share of profit of Biren Nandish Trust from the

income of the assessee?

2. SWhether, the Appellate Tribunal is right in law and on facts in holding that the provisions of Section 60 of the Income Tax Act cannot be

invoked?

2. The Assessment Years are 1979-80, 1980-81, 1981-82 and 1982-83, and the corresponding accounting periods are Samvat Years 2034,

2035, 2036 and 2037 respectively.

3. The assessee is an individual, deriving income from property, partnership share in various firms, including partnership share from M/s Jayantilal

& Co., as well as dividend, interest, Director''s fees etc. The assessee had 60 per cent share in the profits and loss of the business in the firm of

Jayantilal & Co.

4. By a trust deed dated 13th June 1978, the assessee created a trust known as Biren Nandish Trust. The beneficiaries of the said trust were (i)

Biren s/o Indumati Shantilal Gandhi, his wife, if married and his child or children if any, (ii)Nandish s/o Indumati Shantilal Gandhi, his wife, if married and his child or children if any (iii) Aditi d/o Indumati Shantilal Gandhi. The trustees of the said trust were the assessee and Indumati

Shantilal Gandhi. In the deed of settlement it was mentioned that the trust was created out of love and affection for Biren, Nandish and Aditi. A

sum of Rs. 1000/- was settled in the trust.

5. On the next day, that is, on 14th June 1978, the assessee executed a deed of assignment whereby, the assessee gifted one half of his partnership

share in the said firm to the aforesaid Biren Nandish Trust. In addition to the gift of the said partnership share, the assessee also gifted a cash

amount of Rs. 3000/- out of the amount standing to his credit in the said firm to the Trust.

6. For the years under consideration, the assessee claimed deduction of 50 per cent out of the profits from his 60 per cent share in M/s Jayantilal

& Co. on the ground that as per the deed of assignment executed on 14.6.78, the income had been diverted in favour of the Biren Nandish Trust

and as such was not liable to be included in his total income.

7. The Assessing Officer observed that the share of profit earned by the assessee from the firm M/s Jayantilal & Co. accrued to the petitioner first

and then further entries were passed to transfer 50 per cent of the profit in favour of the Trust. That, in the books of account of the firm the capital

account had not been transferred from the name of the assessee to the names of the trustees of the Trust. That, the petitioner had kept control over

the capital and assets of the firm. The Assessing Officer found that only 50 per cent of the share of profit had been transferred without transferring

the source of the income producing assets. That, in view of the fact that the capital balance appearing in the accounts of the assessee had been

carried forward in the subsequent year, the transactions evidenced by the declarations amounted only to transfer of the share in the profit of the

firm and that the asset, namely, the assessee''s interest as a partner in the firm continued to remain the property of the assessee, therefore, there

was no effective diversion of income before it accrued or arose to the assessee. The Assessing Officer further observed that under the law of

partnership it is the partner and partner alone who is entitled to the profit. A stranger, even if he is an assignee, cannot have any direct claim to the

profits. That, this was a case of application of income for the benefit of the beneficiaries of the Trust after the accrual of the income. The Assessing

Officer found that none of the decisions cited by the assessee viz. C.I.T. v. Chandulal C. Shah, Murlidhar Himarsingka v. C.I.T., Smt. Nandiniben

Narottamdas are applicable to facts of the case.

8. The Assessing Officer further found that the assignment deed by virtue of which the minor beneficiaries would have to share losses in the firm

was not in accordance with law. The Assessing Officer was of the view that the share in the firm consists of the entire bundle of rights of a partner

and not merely a portion thereof and that unless the entire bundle of rights is transferred, there is no transfer of assets within the meaning of Section

60 of the Act. That as the entire income producing asset, namely the share in the partnership firm, comprising of all the concomitant rights had not

been transferred, by virtue of the provisions of Section 60 of the Act, the whole of the income was assessable in the hands of the assessee. The

Assessing Officer observed that 60 per cent profit arising to the assessee''s share was credited to his account and it was thereafter that 50 per cent

share was credited to the account of the Trust. The Assessing Officer found that the decision of the Supreme Court in the case of K.A. Ramachar

and Another Vs. Commissioner of Income Tax, Madras, , was applicable to the facts of the case. That, applying of the ratio of decision of the

Supreme Court in the case of The Commissioner of Income Tax, Bombay City II Vs. Shri Sitaldas Tirathdas, , it cannot be said that the profits

were diverted by an overriding title before the accrual to the assessee. The Assessing Officer found that this was a case of application of income

and not a case of diversion of income at source and held that the assessee was liable to be taxed on the entire income derived from the said firm.

9. The Assessing Officer was also of the view that the subject matter of the gift was a future unascertained property, hence, the same would not fall

within the meaning of gift as defined u/s 122 of the Transfer of Property Act, 1882 (T.P. Act). Hence, the gift in question was not a valid gift, and

neither was any charge created in terms of Section 100 of the T.P. Act. That, by virtue of the provisions of Section 124 of the T.P. Act, a gift of

future property was void.

10. The Assessing Officer finally concluded in paragraph No. 16 of the Assessment Order by observing :

16. In view of the above facts of the case, the present case is one in which the children of the assessee received a portion of the income of the

assessee after the assessee had received the income as his own. The case is one of application of a portion of income to discharge an obligation

and not a case in which by an overriding charge the assessee became only a collector of another''s income. The provision of Section 60 of the I.T.

Act are, therefore, clearly attracted and the amount in question had accrued to the assessee and it was a case of application of income after its

accrual and not a case of diversion of income at source. Therefore, the assessee is not entitled to deduct it from his assessable income but the same

is taxable as income in his hands. Hence, the claim for deduction is not allowed and therefore, the entire income arises to the assessee on account of his share in the profit of the firm of M/s Jayantilal & Co. is included in the total income of the assessee.

11. The assessee challenged the assessment orders in relation to each of the Assessment Years, by way of appeals before the Commissioner of

Income Tax (Appeals). Before the Commissioner of Income Tax (Appeals), on behalf of the assessee reliance was placed upon the decision of the

Supreme Court in the case of Commissioner of Income Tax, Madras Vs. Bagyalakshmi and Co., Udamalpet, , to contend that the partnership

share being a ""property"" is capable of being transferred by way of gift, settlement, sale, assignment etc. That in terms of the assignment deed, the

assignor namely the assessee had gifted away 50 per cent out of his 60 per cent share in the partnership firm and that the assignee had signed the

deed of assignment in acceptance of the gift. That, thereupon, the assessee ceased to have any right, title or interest in the gifted property and the

trust is the sole beneficiary thereof. That the trust had a definite enforceable right to claim share in the profit of the assignor. That, the share in the

firm was effectively transferred to the assignee and that it was not merely the right to receive the income that was transferred. That insofar as the

partnership firm is concerned, it only recognizes the assignor as a partner, hence, the entire share was credited to the account of the assessee.

However, in view of the fact that 50 per cent of the amount credited to the credit of the assessee belongs to the Trust, the same was paid over to

the trust on the same day by passing an entry to that effect in the books of the firm, thus, discharging his legal obligation.

12. It was further submitted that it was beyond the scope of the powers of the Assessing Officer in the course of assessment proceedings under the

Income Tax Act to pronounce upon the validity of the gift. More so, in the light of the fact that the assessee had duly filed gift tax return in relation

to the gift of partnership share and cash gift of Rs. 3000/- and the same had been accepted as a valid gift by an order dated 8.10.82 under the Gift

Tax Act, made by the very same Assessing Officer. It was pointed out that the said order had been passed on final and substantive basis. The

Commissioner of Income Tax (Appeals) vide his common order dated 22nd September 1986 in respect of each of the Assessment Years, found

that the issue involved in this case, stood concluded in favour of the assessee by a decision of this Court in the case of C.I.T. v. Nandini

Narottamdas, (1983)140 ITR 16. That, the said decision had been accepted by the Revenue. Accordingly, in the said factual and legal

background, the Commissioner of Income Tax (Appeals) held that the 50 per cent share of profit of the Trust out of the 60 per cent share of the

assessee was not by way of application of income but by way of diversion of income on account of overriding title and allowed the appeals.

13. The aforesaid order of the Commissioner of Income Tax (Appeals) was challenged by the revenue before the Income Tax Appellate Tribunal.

The Tribunal vide its order dated 23.4.1990 confirmed the order of the Commissioner of Income Tax (Appeals) and dismissed the appeals. The

Tribunal was of the view that the crucial question in the case was as to whether the assessee''s right to the share in the partnership firm had been

diverted at source. That, for this purpose, it was necessary that both the right to receive the profit and liability for loss should have been transferred

and that for this purpose, the entries in the books of the firm are not relevant. That, what has to be seen is the deed of assignment. The Tribunal,

upon perusal of the deed of assignment found that the assessee had gifted one half of his partnership share out of his 60 per cent share in the firm,

to the Trust. That, is was clarified that the gift of partnership share includes the right to share the profits and/or losses which may result in the said

partnership business. The Tribunal found that half of both the right to share the profits and the liability to share the losses was diverted. The

Tribunal was of the view that the entries in the books would be relevant only in case where there was any ambiguity in the deed of assignment,

which was not so in the present case. The Tribunal also took note of the fact that the gift of the partnership share had been charged to gift-tax as

shown in the assessment order dated 8.10.1982 and the income from this assignment has also been charged by the assessment order dated

22.1.1982. For the aforesaid reasons as well as in view of the decision of this Court in the case of Nandiniben Narottamdas (supra), the Tribunal

dismissed the appeals.

14. Heard, Mr. M.R. Bhatt, learned Senior Standing Counsel for the applicant revenue. Though served, there is no appearance on behalf of the

respondent assessee.

15. Mr. Bhatt assailed the order of the Tribunal contending that the Tribunal had erred in holding that by virtue of assignment of 50 per cent of the

assessee''s share in the partnership firm, an overriding title was created in favour of the Trust whereas the same was merely an application of the

assessee''s income. It was submitted that there was no transfer of the assets from which the income arises; that what was transferred was merely a

right to share the profit and contribute to the deficit when called upon to do so. It was submitted that share in the partnership without transfer of

capital cannot be said to be a transfer of assets. That the transfer in question was a transfer merely of the income generated without transferring the

income generating asset hence, the provisions of Section 60 of the Act were attracted. It was submitted that under the law of partnership, it is only the partner who is entitled to the income coming to his share and that a stranger, even if he were an assignee, does not have any claim to the profits

of the firm. Reliance was placed upon the decision of the Supreme Court in the case of K.A. Ramachar v. Commissioner of Income Tax (supra) in

support of the said proposition.

16. Mr. Bhatt submitted that Section 60 of the Income Tax Act, 1961 has to be read with the provisions of Section 14 and 15 of the Partnership

Act. Reliance was placed upon the decision of the Supreme Court in the case of Addanki Narayanappa and Another Vs. Bhaskara Krishtappa

and Others, to submit that though during the subsistence of the partnership a partner may assign his share to another; the assignee would get only

that which is permitted by Section 29(1) of the Partnership Act, namely, the right to receive the share of profits of the assignor and accept the

accounts of profits agreed to by the partners. That, the transfer by virtue of the deed of assignment was therefore, a restrictive transfer. That even

under the provisions of Section 29(1) of the Partnership Act, it cannot be said that the income-generating asset has been transferred. That the

Assessee is a partner; and under the scheme of the Act we have to look at the partner alone. It was submitted that income had been generated qua

the assessee""s interest in the partnership firm. That, the provisions of Section 29(1) of the Partnership Act have to be read in the context of the

other provisions of the said Act. It was submitted that in the facts of the present case the decision of the Supreme Court in the case of K.A.

Ramachar v. Commissioner of Income Tax, Madras, (supra) would be directly applicable and as such, the income from the gifted share, in law and

in fact was the income of the assessee. That what was paid to the Trust was by way of application of his income after accrual thereof, and that

there was no diversion of income at source by an overriding title.

17. The learned Counsel fairly submitted that the facts of the present case are similar to the facts involved in the case of Commissioner of Income

Tax, Gujarat v. Nandiniben Narottamdas (supra), wherein this Court had decided a similar issue in favour of the assessee. However, he hastened

to add that, in view of the decision of the Supreme Court in the case of Commissioner of Income Tax v. Sunil J. Kinariwala (2003) 259 ITR 10 ,

the said decision would no longer hold the field. That the controversy in issue stands concluded in favour of the revenue by the said decision of the

Supreme Court wherein the Court had distinguished between a case where a partner of a firm assigns his share in favour of a third person and a

case where a partner constitutes a sub-partnership with his share in the main partnership. That in case of assignment of share the assignee gets no right or interest in the main partnership, except to receive that part of the profits of the firm referable to the assignment and to the assets in case of

dissolution of the firm, whereas a sub-partnership acquires a special interest in the main partnership. That the income from the share of the

assessee, which had been assigned in favour of the Trust had to be included in the total income of the assessee. It was submitted that insofar as

applicability of the ratio of the decision of the Supreme Court rendered in the case of Fatehchand Murlidhar and Another Vs. Commissioner of

Income Tax, Calcutta, to the facts of the present case is concerned, no finding had been recorded that any sub-partnership had come into

existence. That in view of the decision of the Supreme Court in the case of Commissioner of Income Tax v. Sunil J. Kinariwala (supra), since no

sub-partnership had come into existence, it cannot be said that there is any diversion of income at source; that the present case is, therefore, one of

application of income, hence, the impugned order of the Tribunal is not in consonance with the principles laid down by the aforesaid decisions and

calls for intervention at the hands of this Court.

18. Reliance was also placed upon a decision of the Bombay High Court in the case of Commissioner of Income Tax Vs. Shri and Smt. Ganesh

G.K. Azrenkar, to submit that in the said case where the assessee had settled 75 per cent of his 80 per cent share in the profits of the partnership

in favour of minor children of his brother, by virtue of a Trust deed, the Court had held that the income derived by the assessee by virtue of his 80

per cent share in the profits of business carried on by the said partnership was his income alone, and that, there was no diversion of his income by

overriding title. That, the facts of the present case are similar to the said case, and as such no overriding title has been created in favour of the

assignee trust, consequently, the income from the whole of the assessee""s 60 per cent share in the partnership firm was liable to be taxed in his

hands.

19. The undisputed facts of the present case are:

The assessee had 60 per cent share in the profits and loss of the business in the firm of Jayantilal & Co.

The Biren Nandish Trust (Trust) was created by the assessee by virtue of a trust deed dated 13th June, 1978.

That by a deed of assignment dated 14th June 1978, the assessee gifted one half of his partnership share in the said firm as well as Rs. 3000/- out

of the amount standing to his credit in the firm to the aforesaid Trust.

That the assessee had filed return under the Gift Tax Act in relation to the gift made vide the aforesaid deed of assignment and had borne charge

under the Gift-tax Act under order dated 8.10.1982.

That the income from the assignment had been charged to tax, by assessment order dated 22.1.1982.

20. In the context of the aforesaid factual matrix, the principal issue that arises for consideration is whether the assignment deed dated 14th June,

1978, has succeeded in diverting the income from the assessee""s share in M/s Jayantilal & Co. to the Biren Nandish Trust. In other words whether

the interest of the Trust in the profits received from the partnership is of such a nature as diverts the income from the original partner to the Trust.

21. For the purpose of determining the controversy in issue it would be necessary to advert to the terms of the deed of assignment to find out the

actual nature of the assignment. The deed of assignment, insofar as the same is relevant for the purpose of the present case, reads as under:

XXXXXXXX

WHEREAS Shri Jayantilal Dahyabhai Patel, party of the first part gifted away one-half of his partnership share out of the said 60 % share above

referred to in the said partnership of M/s Jayantilal & Co to Biren Nandish Trust constituted under the Deed of Trust dated 13th June, 1978. The

said Shri Jayantilal in addition to the gift of the said partnership share has also gifted on that day to the said Trust a cash amount of Rs. 3,000/- out

of the amount standing to his credit in the said partnership firm and delivery of the said gift has been given by him to the Trustees,

WHEREAS the said gift of partnership share includes the right to share in the profit and losses arising from the business of the said partnership firm

to the extent of one half i.e. 30% as also to share in the assets of the said partnership firm on dissolution in the same proportion.

WHEREAS the Accounting year of the said partnership is not yet over, the profits and/or losses which may result in the said partnership business

as on Aso Vad Amas of S.Y. 2034 will belong to the said Trust to the extent of 30% out of the 60% share which the said Jayantilal in the said

partnership prior to the aforesaid gift.

Now this witnesseth as under:

1. That the said gift of the said partnership share alongwith the said cash amount of Rs. 3,000/- has been accepted and delivery taken by the

Trustees of the said Trust comprising of parties of the second part and that in token of the said acceptance and delivery they have joined as a party

of these presents.

2. That on and from the said date when the said Jayantilal gifted away the said partnership share to the extent of 30% out of his share of 60% in

the said partnership and the cash amount of Rs. 3,000/- he had no right, title and interest in the said properties gifted away by him and that the sole

beneficial owner thereof is the said trust.

3. That for the purposes of stamp duty the value of the said partnership is placed at Rs. 27,000/- and in addition to the above, cash of Rs. 3,000/-

gifted will totally amount to Rs. 30,000/- on the basis of which this document is engrossed on the stamp paper of Rs. 1,800/-(Rupees eighteen

hundred only).

4. X X X X X X X X X

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22. Upon perusal of the aforesaid document, it is apparent that what is assigned/gifted under the said deed is :

a half share in the assessee""s 60 per cent share in the partnership firm and a cash amount of Rs. 3,000/- out of the amount standing to his credit in

the said partnership firm;

delivery of the said gift has been given by him to the Trustees

the said gift of partnership share includes the right to share in the profit and losses arising from the business of the said partnership firm to the extent

of one half of the assessee''s 60 per cent share i.e. 30 per cent as also to share in the assets of the said partnership firm on dissolution in the same

proportion.

That the assessee ceased to have any right, title and interest in the said properties gifted away by him and that the Trust is the sole beneficial owner

thereof.

23. Though the learned Counsel for the applicant-revenue has strenuously contended that the issue requires to be answered in favour of revenue by

following and applying the aforesaid decision in case of CIT v. Sunil J. Kinariwala, it is not possible to accept the submission for the reasons that

follow hereinafter.

24. In the present case the Tribunal has specifically held that provisions of Section 60 of the Act cannot be invoked and thus directed the

Assessing Officer to exclude 50% share of profits of Biren Nandish Trust from the income of the assessee. In so far as the second question is

concerned viz. applicability of Section 60 of the Act, during course of hearing a faint attempt was made to contend that the revenue does not wish

to invite a judgment as to applicability or otherwise of Section 60 of the Act and the dispute may be restricted to the issue as to whether there is

any overriding title or not. The said contention cannot be accepted for the simple reason that both the issues are interlinked.

25. In the case of CIT v. Nandiniben Narottamdas (supra) this High Court was called upon to deal with an identical fact situation and identical

contentions. It is laid down :

It was strenuously contended on behalf of the Revenue, however, that even assuming that what was gifted by the assessee in favour of the

beneficiaries of the Panna, Pratiksha and Mamta Trust was the right to receive profits coupled with the liability to contribute to the losses, if any,

incurred by both the firms, there was still no diversion of the asset which produced the income within the meaning of Section 60, inasmuch as the

share of the assessee in the said two firms consisted not only of the right to receive profits and to contribute to the losses but also to receive back

the capital contributed by her as well as the shares in the assets of the firm upon her ceasing to be a partner or upon the firm being dissolved and

that since that part of the share was not transferred by gift, the asset from which the income arose is not transferred. Considerable reliance was

placed in support of this submission on the fact that the amounts standing in the name of the assessee in the capital account of the firms still

continued to belong to her and that it was not even the assessee''s case that anything more than the right to receive profits and contribute to the

losses was transferred to the beneficiaries of the Panna, Pratiksha and Mamta Trust.

Section 60, which finds place in the fasciculus of sections grouped under the heading SIncome of other persons, included in assessee''s total

income, in Chap. V of the Act, reads as under :

60. Transfer of income where there is no transfer of assets. - All income arising to any person by virtue of a transfer whether revocable or not and

whether effected before or after the commencement of this Act shall, where there is no transfer of the assets from which the income arises, be

chargeable to Income Tax as the income of the transferor and shall be included in his total income.

Section 63, which, inter alia, defines the word transfer occurring in Section 60, provides that transfer includes any settlement, trust, covenant,

agreement or arrangement. The object of this section is to overtake or circumvent the tendency on the part of the tax payers to avoid or reduce tax

liability by a device which consists of the disposal by the taxpayer of a part of his property in such a way that the income would no longer be

received by him, while at the same time, he retains certain powers over, or interest in, the property. The section, therefore, provides that in all

cases where by virtue of a transfer (including any settlement, trust, covenant, agreement or arrangement) income arises to any person and there is

no transfer of the assets from which the income arises, the income may be regarded as the income of the transferor and it should be assessed as

such. The fiction operates in cases where the asset which produces the income still remains the property of the transferor but the income lawfully belongs to the transferee. Furthermore, it operates, irrespective of whether such transfer is revocable or not and whether it is effected before or

after the commencement of the Act. Be it noted, however, that the section is attracted only when there is a valid and effective transfer in favour of a

third party as a result of which the income ceases to belong to the transferor. If there is no valid, effective and complete transfer of the right to

receive income, the income would continue to accrue to the transferor under the general law and would be taxable in his hands, even apart from

Section 60. In such a case, there is no need to resort to the fiction to tax the income as the income of the transferor.

The corresponding provision in the Indian I.T. Act, 1922, was Section 16(1)(c) read with its second proviso. The relevant part of the said

provision was to the effect that in computing the total income of an assessee, all income arising to any person, by virtue of a settlement or

disposition, whether revocable or not, and whether effected before or after the commencement of the Indian I.T. (Amendment) Act, 1939, from

assets remaining the property of the settler or disposer, shall be deemed to be the income of the settler or disposer. The second proviso enacted

that the expression settlement or disposition shall for the purposes of Section 16(1)(c) include any disposition, trust, covenant, agreement or

arrangement, and the expression settler or disposer in relation to a settlement or disposition shall include any person by whom the settlement or

disposition was made.

Even assuming, however, that it is possible to examine this contention in the light of the circumstances relied upon by the Revenue, the short answer

to the contention is that the issue is concluded by the decision in Fatehchand Murlidhar and Another Vs. Commissioner of Income Tax, Calcutta, .

As earlier pointed out, there is a close resemblance between the two cases. In both the cases, only the right to receive profits coupled with the

liability to contribute to the losses (and no more) has been transferred. In both the cases, the amount standing to the credit of the assessee in the

capital account has continued to belong to the assessee. If, against the aforesaid factual background, it is found in Fatehchand Murlidhar and

Another Vs. Commissioner of Income Tax, Calcutta, , that an overriding obligation was created in favour of the sub-partnership and that the

income earned by Murlidhar as and by way of his share in the main partnership firm did not belong to him, it is difficult to understand how a

different conclusion can be arrived at in the present case. It was sought to be faintly urged that the decision in Fatehchand Murlidhar and Another

Vs. Commissioner of Income Tax, Calcutta, , did not notice the provisions of Section 16(1)(c) of the Indian I.T. Act, 1922, and that when we are called upon to examine the contention in the present case in the light of the analogous provisions of Section 60, different considerations must weigh.

It is difficult to appreciate, much less to accept the submission. The law declared by the Supreme Court in such clear terms in analogous fact-

situation governed by similar provisions of law is binding on this Court. The Supreme Court is presumed to have applied its mind to the relevant

provisions of law then existing, even though those provisions, in terms, might not have been referred to in the judgment. In other words, it would be

legitimate to presume, nay, we are duly bound to presume, that the decision in Murlidhar''s case was rendered after considering implicitly, if not

expressly, the parallel provisions of Section 16(1)(c). Under such circumstances, in our opinion, it is not open to the Revenue to urge that we

should take a different view of the matter.

As a result of the foregoing discussion, we come to the conclusion that in the instant case, there was not only a valid and effective gift of the income

in favour of the beneficiaries of the Panna, Pratiksha and Mamta Trust but also that the asset giving rise to the income was transferred to those

beneficiaries within the meaning of Section 60. The right to receive profits and to contribute to losses of the two firms in question constituted the

income-producing apparatus or asset and once that stood transferred by way of gift to the beneficiaries, Section 60 cannot be invoked.

26. In the present case admittedly the facts show that the transfer is not revocable. For the purpose of applying Section 60 of the Act, the only

question that requires to be answered is whether there is no transfer of the assets from which the income arises? If the answer is in the affirmative,

all income arising to any person by virtue of such a transfer shall be chargeable to income tax as the income of the transferor and shall be included

in the total income of the transferor. In the facts of the case, there being no dispute, the transfer of 50% share of 60% partnership share has been

gifted away to the trust, whose constitution under Deed of Trust dated 13.6.1978 is not challenged. The gift of the one-half share has been

accompanied by a gift of cash amount of Rs. 3,000/- out of the amount standing to the credit of the donor in the partnership firm. The gift is

complete by way of delivery and acceptance. The Tribunal has found as a matter of fact that the said transaction has been subjected to charge

under the Gift Tax Act and this is based on the Assessment Order dated 8.10.1982 under the Gift Tax Act. The transfer is of the right to share

profits, i.e. right to receive profits and liability to contribute to the losses. Therefore, it cannot be stated that there is no transfer of the asset from

which the income by way of the share in the profits arises to the transferee. The income producing apparatus stands transferred. Provisions of

Section 60 of the Act cannot be attracted in the facts of the present case. It is not even the case of the revenue that there is an intrinsic or

inseparable interconnection between the contribution of capital and right to receive profits. However, even if such a contention could be raised by

the revenue the same stands answered as noted hereinbefore by the decision of this Court in the case of CIT v. Nandiniben Narottamdas (supra).

27. Therefore, on this count the Apex Court decision in the case of CIT v. Sunil J.Kinariwala (supra) cannot carry the case of revenue any further

because at page No. 18 of the reports 259 ITR 10, the Supreme Court has specifically recorded that : Sit is unnecessary to consider alternative

contention based on Section 60 of the Act.

28. Examining the issue from a slightly different angle Full Bench of this High Court in the case of Chhotalal and Co. Vs. Commissioner of Income

Tax, Gujarat, has after referring to various decisions of the Apex Court laid down that under the Income Tax Law revenue is required to bear in

mind the distinction qua a registered partnership firm and the assessment of the partners of the firm because both of them are separate legal entities

for the purpose of the Act. It has been stated:

The position, therefore, is well-settled that there is no impediment in a HUF becoming a partner of a firm through its representative. Such a

partnership will not be invalid or against law, but partnership being a relationship between persons who have agreed to share the profits of a

business carried on by all or any of them acting for all and the relationship of partnership being one that arises from a contract, the persons who

come together in the partnership will be recognized as between them as partners. In a case where one of the partners represents a HUF or is a

trustee of a trust, the members of the family or the beneficiaries in the trust, as the case may be, cannot exercise rights which their representative

can exercise as against the other partners. They cannot sue on behalf of the firm for settlement of accounts and cannot exercise any rights as against

the other partners as if they are themselves the partners in the partnership firm. This is not to say that they have no rights at all arising from the fact

that the partner is their representative. They can make their representative accountable to them. They can seek to enforce his obligations and the

representative will be bound to observe all obligations which law casts on him as such representative. Where one of the partners is really a

representative of others, third parties are not barred from dealing with him in his representative capacity, for, they are not parties to the contract of

partnership. The Revenue is in no way precluded from dealing with the partner as a representative if he is one such, as for instance, where he is a `karta'' of a HUF. The income derived by him as a partner would really be income of the HUF and really derived by the HUF. Of course, when

the ITO has granted registration to the firm, the firm has to be assessed and the next logical step is to assess the partners taking into account also

the income of the partners derived from the firm. In doing so, if the partner is receiving income on behalf of a trust, it is the trust that has to be

assessed on that part of the income, or, in other words, he is to be assessed as a trustee and not in his individual capacity. If it is a HUF on behalf

of which he receives the income, the partner being its representative, it is the income of the family which is ultimately to be assessed.

The Revenue is not precluded from looking into the real character of the partner and the capacity in which he represents himself in the partnership

firm.

29. Once this distinction is borne in mind, viz., that while assessing the partnership firm the requirements prescribed in law for the assessment of the

partnership only have to be looked at, and while assessing the partners individually, the status of the partner, the capacity of the partner and the

obligation of the partner have to be borne in mind, independent of the partner''s status and relations vis-a-vis other partners of the firm, and then

the confusion that repeatedly occurs can be avoided. The present is a classic case of such a mixed up approach while framing assessment of the

partner in his individual capacity. Whatever may be the obligations of the partner qua the other partners of the firm or against third parties as a

partner of the firm under the general law of Partnership, when he is required to be assessed as an assessee simplicitor the revenue is required only

to look at the income which lawfully accrues to him and is taxable in his hands. At that stage revenue is not required to look at his capacity or

obligation qua the partnership firm or other partners of the firm. Howsoever limited, legally there is a distinct taxable entity under the Act viz.a

partnership firm, and the revenue cannot be permitted to import the general principles of partnership law at this stage. Once legislature has

provided for a particular legislative scheme under the Act, the revenue cannot ignore the same on the specious plea that under the law, partnership

is nothing else but a compendious name of persons who have come together to conduct the business. There is a departure, dichotomy when one

looks at the scheme of the Income Tax Act from the scheme of partnership law and the same has to be borne in mind when one is called upon to

decide the legality of action of the assessing officer while assessing an individual who may be a partner in a firm.

30. In the circumstances, the Tribunal was right in law in holding that the 50% partnership share income was assessable in hands of the trust and

could not be included in the income of the assessee. In the result, both the questions are answered in the affirmative , i.e. in favour of the assessee

and against the revenue.

31. The reference stands disposed of accordingly, with no order as to costs.