

(1979) 12 AP CK 0001

Andhra Pradesh High Court**Case No:** Case Referred No. 4 of 1977

Commissioner of Income Tax

APPELLANT

Vs

Dara Seshavataram

RESPONDENT

Date of Decision: Dec. 28, 1979**Acts Referred:**

- Income tax Act, 1922 - Section 25
- Income Tax Act, 1961 - Section 10, 10(2), 143, 144, 171

Citation: (1980) 4 TAXMAN 333**Hon'ble Judges:** Madhava Reddy, J; Jayachandra Reddy, J**Bench:** Division Bench**Advocate:** P. Rama Rao, for the Appellant; M.J. Swamy, for the Respondent

Judgement

Jayachandra Reddy, J.

At the instance of the Commissioner of income tax, Andhra Pradesh-II, Hyderabad, the income tax Appellate Tribunal has referred the following question of law to this court:

Whether, on the facts and in the circumstances of the case, the income from Lakshmi Medical Stores can be included in the hands of the assessee - HUF?

The assessee in this case is an HUF carrying on business in liquors. The family consists of the father and three sons. One of the sons, Mr. Venkatratnam, executed a registered relinquishment deed on July 21, 1969, relinquishing his right in the joint family properties. To his share he took Lakshmi Medical Stores run by the family. On the basis of the relinquishment deed, for the assessment year 1970-71, the income from the medical stores was not returned as the income of the family but it was returned by Mr. Venkatratnam as an individual. The assessment was also made in that fashion. For the assessment year 1971-72, which is the year under reference, Venkatratnam returned the income from the medical stores and it was assessed in his hands. But when it came to the assessment of the family, the ITO took a different

approach and held that the income from Lakshmi Medical Stores cannot be excluded from the income of the family, as there was no order regarding the partition u/s 171 of the income tax Act. The ITO was also of the view that the relinquishment deed operates as a partial partition and since no claim for partial partition had been made and no finding had been recorded, the family should be assessed as joint family and the income from Lakshmi Medical Stores also should be included in the hands of the family. The AAC upheld the finding of the ITO. The assessee preferred an appeal to the income tax Appellate Tribunal. The Appellate Tribunal held that it was a partial partition and having looked into the record it found that there is an endorsement wherein the karta of the HUF in his return has mentioned that his son, Venkataratnam, has gone out of the family. It was contended on behalf of the karta of the HUF, i. e., the assessee, that this constituted a claim for partial partition. The Appellate Tribunal accepted the claim. With regard to the contention of the revenue that unless there is an order u/s 171 the income from that source should be included in the joint family, the Tribunal observed that normally they would have sent back the case to the ITO for passing a proper order u/s 171, but it was unnecessary to do so as the assessee succeeded on the basis of the contention that the property ceased to belong to the family and the income therefrom cannot be included, and accordingly allowed the appeal. On an application by the Commissioner, the Tribunal has referred the question for our opinion.

2. Sri P. Rama Rao, the learned standing counsel for the revenue, contends that unless there is a finding recorded on a claim made by the assessee recognising the partial partition u/s 171 of the income tax Act, the income should be continued to be assessed as belonging to the family. Sri M. J. Swami, the learned counsel for the assessee, on the other hand contends that when once an asset ceases to belong to the joint family, even though no partial partition is recorded, the income from that asset cannot be included in the joint family income.

3. To appreciate these contentions, it becomes necessary to extract section 171 which is in the following terms:

171. Assessment after partition of a Hindu undivided family.- (1) A Hindu family hitherto assessed as undivided shall be deemed for the purposes of this Act, to continue to be a Hindu undivided family, except where and in so far as a finding of partition has been given under this section in respect of the Hindu undivided family.

(2) Where, at the time of making an assessment u/s 143 or section 144, it is claimed by or on behalf of any member of a Hindu family assessed as undivided that a partition, whether total or partial, has taken place among the members of such family, the income tax Officer shall make an inquiry there into after giving notice of the inquiry to all the members of the family.

(3) On the completion of the inquiry, the income tax Officer shall record a finding as to whether there has been a total or partial partition of the joint family property, and, if there has been such a partition, the date on which it has taken place.

(4) Where a finding of total or partial partition has been recorded by the income tax Officer under this section, and the partition took place during the previous year,--

(a) the total income of the joint family in respect of the period up to the date of partition shall be assessed as if no partition had taken place; and

(b) each member or group of members shall, in addition to any tax for which he or it may be separately liable and notwithstanding anything contained in clause (2) of section 10, be jointly and severally liable for the tax on the income so assessed.

(5) Where a finding of total or partial partition has been recorded by the income tax Officer under this section, and the partition took place after the expiry of the previous year, the total income of the previous year of the joint family shall be assessed as if no partition had taken place; and the provisions of clause (b) of sub-section (4) shall, so far as may be, apply to the case.

(6) Notwithstanding anything contained in this section, if the Income- tax Officer finds after completion of the assessment of a Hindu undivided family that the family has already effected a partition, whether total or partial, the income tax Officer shall proceed to recover the tax from every person who was a member of the family before the partition, and every such person shall be jointly and severally liable for the tax on the income so assessed.

(7) For the purposes of this section, the several liability of any member or group of members thereunder shall be computed according to the portion of the joint family property allotted to him or it at the partition, whether total or partial.

(8) The provisions of this section shall, so far as may be, apply in relation to the levy and collection of any penalty, interest, fine or other sum in respect of any period up to the date of the partition, whether total or partial, of a Hindu undivided family as they apply in relation to the levy and collection of tax in respect of any such period.

Explanation.-In this section,--

(a)" partition " means--

(i) where the property admits of a physical division, a physical division of the property, but a physical division of the income without a physical division of the property producing the income shall not be deemed to be a partition; or

(ii) where the property does not admit of a physical division, then such division as the property admits of, but a mere severance of status shall not be deemed to be a partition;

(b)" partial partition " means a partition which is partial as regards the persons constituting the Hindu undivided family, or the properties belonging to the Hindu undivided family, or both.

4. Sri Rama Rao, the learned standing counsel for the revenue, contends that this presumption applies to cases of total partition as well as partial partition. We are unable to agree with the learned counsel. The Explanation gives the meanings of both the words " partition" and " partial partition". Therefore, the law itself contemplates them to be two different situations. The presumption under sub-section (1) is clearly made applicable only to a case of total partition. In the case of a partial partition it is needless to say that the joint family as such continues. Therefore, there is no question of invoking the fiction. If an asset goes out of the family and if the intention of the Legislature was that the income from that item should also be included in the return of the HUF in the absence of an order approving such partial partition by the ITO, then the words " partial partition " also should have found place in sub-section (1) so that it can be said that such legal fiction applies to partial partition also. At any rate, there are no clear words in the section expressing such an intendment and to say that the family is deemed to continue to be an HUF even in relation to a particular source of income which has gone out of the HUF by way of a partial partition, would amount to putting an undue strain on these words. We shall now refer to some of the decisions relied upon by both sides.

5. [Additional Income Tax Officer, Cuddapah Vs. A. Thimmayya and Others](#), is a case where the scope of section 25A of the Indian income tax Act, 1922, was considered. Their Lordships of the Supreme Court observed thus (p. 671);

The scheme of section 25A is therefore clear: a Hindu undivided family hitherto assessed in respect of its income will continue to be assessed in that status notwithstanding partition of the property among its members. If a claim is raised at the time of making an assessment that a partition has been effected, the income tax Officer must make an enquiry after notice to all the members of the family and make an order that the family property has been partitioned in definite portions, if he is satisfied in that behalf.

6. We have already noted that the language of section 25A is different and did not cover a case of partial partition. Therefore, the cases cited by the learned counsel in which the scope of section 25 has been considered may not be of much help. We shall now consider some of the decisions wherein the scope of section 171 has been considered. In *Kalloomnl Tapeswari Prasad v. CIT* [1973] TLR 697, a Division Bench of the Allahabad High Court held thus (p. 701):

Section 171 of the 1961 Act in essence is a re-enactment of section 25A with the difference that it applied not only to cases of total partition but also cases of partial partition. There are some incidental changes as well, e. g., section 171 applies also

for purposes of levying and collecting penalty, fine or interest and in addition requires the income tax Officer to record a finding as to the date on which a total or partial partition took place. The fact that section 171 applies to a partial partition (meaning a partition which is partial as regards the persons or as regards the properties of the family or both) as well shows that a finding of partial partition can be recorded and on such a finding being recorded under subsection (4) the total income of the joint family in respect of the period up to the date of partition is to be assessed as if no partition had taken place and each member of the family was to be liable notwithstanding anything contained in clause (2) of section 10, jointly and severally for the tax on the income so assessed. Thus section 171, like section 25A, seeks to nullify the effect of section 10(2), under which a member was not liable to be taxed on the income received as a member of a Hindu undivided family. The section does not entitle the inclusion of income from an asset which has ceased to belong to the joint family, in the assessment of the joint Hindu family."

(The emphasis is ours)

7. This decision makes it clear that an HUF cannot be assessed in respect of the income of an asset which has ceased to belong to it. In [Income Tax Officer, Assessment V Vs. Smt. N.K. Sarada Thampatty](#), the question that arose for decision was whether an assessment of an HUF as such which in reality had received no income at all during a particular accounting period is permissible in view of the legal fiction created by section 171(1) of the income tax Act, 1961, and the Kerala High Court held thus (p. 75):

There are no express words in section 171 of the Act nor is there any necessary implication arising from the words of the section that the income which was really the income of the members of the family after the division in status of the family must be treated as or deemed to be the income of the Hindu undivided family which has been created by the legal fiction. All that the section says is that the Hindu undivided family would continue to exist for the purpose of the Act.... The only reasonable interpretation that can be placed on the section is that if during an accounting period, or any part of it, a Hindu undivided family had not been disrupted and that during that period it had received income, that income could be assessed even though at the time of the assessment the Hindu undivided family had ceased to exist. The legal fiction resurrects the entity and makes an assessment on the family as such possible. In other words, the section enables by virtue of the legal fiction to assess an entity which had really ceased to exist treating it as in existence. But such assessment must be of the income earned or received by the real Hindu undivided family.

8. The learned judges also observed (p. 74):

If under the section what could be assessed is only the income of a Hindu undivided family as such, that is, the real Hindu undivided family without the assistance of any

legal fiction, we find it difficult to assume that even without the aid of the section and the fiction an income which was really not the income of a real Hindu undivided family-we use the expression " real " fully realising that when a legal fiction has been introduced the unreal must be taken as real, but understanding the expression " real" as a true fact existing without the aid of the fiction-could be assessed as such.

9. In the result, the learned judges gave the decision in favour of the assessee.

10. Sri Rama Rao, however, relied on a decision of this court in [Karri Ramakrishna Reddy Vs. Tax Recovery Officer](#), and another decision of the Supreme Court in [Govind Das and Others Vs. The Income Tax Officer and Another](#), In the former case, it was held that u/s 171 if any member of a HUF set forth a claim of partition that had to be enquired into. In the latter one their Lordships of the Supreme Court dealt with the scope of section 171(6) and incidentally referred to the other provisions and observed thus (p. 131):

Now it is clear on a plain grammatical construction of the language of sub-sections (2) to (5) of section 171 that these sub-sections contemplate a case where at the time of making assessment u/s 143 or 144, a claim is made by or on behalf of any member of a Hindu family that a total or partial partition has taken place among its members. Then the claim would be investigated by the income tax Officer and, if satisfied, the income tax Officer would record a finding that there has been such partition of the joint family property....

11. It is true that, u/s 171(2) to (5), even in a case of partial partition when a claim is made, an enquiry has to be made, but in the present case the assessee has succeeded on two grounds. The first one is that the income from the asset which has ceased to belong to the HUF cannot be added to the income of the HUF. This aspect we have already decided in favour of the assessee. As regards the claim of partial partition, the Tribunal has held that there was" such a claim and it was unnecessary to remand the matter. Sri Ram Rao, the learned standing counsel for the revenue, however, relying on the above two decisions, contends that the Appellate Tribunal should have remitted the matter to the ITO to give a finding with regard to the partial partition. This question has become purely academic now in view of our finding on the first point. However, the relinquishment deed is a registered one and the ITO has assessed Venkataratnam as an individual. Therefore, it is wholly unnecessary to remand the case to the ITO on the second aspect. In the result, the reference is answered in favour of the assessee and against the department. No order as to costs.