

Assistant Commissioner of Vs. Executors of the Estate of Bhagwan

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Court : Income Tax Appellate Tribunal ITAT West Bengal

Decided On : Jul-16-2001

Judge : R Garg, Vice

Appellant : Assistant Commissioner of

Respondent : Executors of the Estate of Bhagwan

Judgement :

1. This is an appeal by the Revenue against the order of the CIT(A) for assessment year 1992-93. An interesting issue has been raised in this appeal, viz., (i) where the instrument providing equal shares in the undivided income and property is an AOP, the shares of whose members are definite and ascertainable; and (ii) whether an AOP whose members' shares are definite and ascertainable is to be assessed under section 167B(2) or the individual members are to be assessed under section 26 of the Act.

2. Five co-owners acquired a property consisting of 8 storeyed building -The ground floor is used as godown and all the upper floors consisting of four flats space in each floor were allotted to and used by the four co-owners. The 5th co-owner has not been allotted any flat for residential purposes. The registered deed provides the equal share of the five co-owners. The Assessing Officer on these facts came to the conclusion that the individual member's residential portion is uneven and, accordingly, it was an AOP, the shares of whose members are not definite and ascertainable. It was only on paper but not in actuality.

He, accordingly, assessed the AOP by applying the provisions of section 167B of the Act at maximum marginal rate. The assessee's claim was that it is an AOP whose shares are specified in the deed itself being 1/5th of the undivided share of each member in the income as well as in the property and the income being income from house property, the provisions of section 26 will apply dealing with the specific case of income from house property and not the provisions of section 167B of the Act, the former being a special provision and is to be given precedence over the latter being a general provision.

3. The CIT(A) after examining the facts of the case and considering the arguments of the assessee advanced before him opined that the conclusions drawn by the Assessing Officer were not reasonable.

According to him, the shares in the property was determined and definite and hence section 26 of the Act is to be applied while computing income in this case. He, therefore, directed the Assessing Officer to apply the same and allocate the income amongst the five members equally.

4. I have heard the parties and considered their rival submissions. The income which is the subject-matter of dispute is income from house property. The provision for computing the chargeable income from house property are contained in sections 22 to 27 of the Act, i.e., Part C of Chapter IV of the Income-tax Act. Section 26 deals with the computation of income from property owned by co-owners. It reads as under :-- "26. Where property consisting of buildings or buildings and lands appurtenant thereto is owned by two or more persons and their respective shares are definite and ascertainable, such persons shall not in respect of such property be assessed as an association of persons, but the share of each such person in the income from the property as computed in accordance with sections 22 to 25 shall be included in his total income.

[Explanation.--For the purposes of this section, in applying the provisions of sub-section (2) of section 23 for computing the share of each such person as is referred to in this section, such share shall be computed, as if each such person is individually entitled to the relief provided in that sub-section.]" If thus provides that where the property consisting of buildings is owned by two or more persons and

their respective shares are definite and ascertainable, such persons shall not in respect of such property be assessed as an association of persons, but the share of each such person in the income from property as computed in sections 22 to 25 are to be included in his total income. In view of the Calcutta High Court decision in the case of *Gorachand Sen v. CIT*[1985] 154 ITR 435', when a property was owned by the co-owners in equal share, the shares are to be taken as definite and ascertainable within the meaning of section 26 of the Act. In that way of the matter, the provisions of section 26 are prima facie applicable in the present case; the property being owned by five co-owners in equal shares. The objection of the Assessing Officer that enjoyment of property was uneven and, therefore, the shares of the members cannot be said to be definite and ascertainable has no force.

What is to be seen is their rights as provided in the deed. The enjoyment if by their mutual consent may vary and it may be detrimental to the one or the other member of the AOP. It would be their inter rearrangement. In my view, therefore, irrespective of the manner of enjoyment when the rights of the co-owners are equal, then the respective shares of the members are to be taken as definite and ascertainable in view of the Calcutta High Court decision aforesaid.

5. The dispute, however, does not end here. There is another provision inserted by way of section 167B introduced in the Act by the Finance Act, 1992 w.e.f. 1-4-1993, whereby an AOP is to be charged to tax at the maximum marginal rate or at the higher rate if any of the members of such association is chargeable at that higher rate. For the sake of brevity it is extracted as under : "167B. (1) Where the individual shares of the members of an association of persons or body of individuals (other than a company or a cooperative society or a society registered under the Societies Registration Act, 1860 (21 of 1860) or under any law corresponding, to that Act in force in any part of India) in the whole or any part of the income of such association or body are indeterminate or unknown, tax shall be charged on the total income of the association or body at the maximum marginal rate : Provided that, where the total income of any member of such association or body is chargeable to tax at a rate which is higher than the maximum marginal rate, tax shall be charged on the total income of the association or body at such

higher rate.

(2) Where, in the case of an association of persons or body of individuals as aforesaid [not being a case falling under Sub-section (1)]- (i) the total income of any member thereof for the previous year (excluding his share from such association or body) exceeds the maximum amount which is not chargeable to tax in the case of that member under the Finance Act of the relevant year, tax shall be charged on the total income of the association or body at the maximum marginal rate; (ii) any member or members thereof is or are chargeable to tax at a rate or rates which is or are higher than the maximum marginal rate, tax shall be charged on that portion or portions of the total income of the association or body which is or are relatable to the share or shares of such member or members at such higher rate or rates, as the case may be, and the balance of the total income of the association or body shall be taxed at the maximum marginal rate.

Explanation.--For the purposes of this section, the individual shares of the members of an association of persons or body of individuals in the whole or any part of the income of such association or body shall be deemed to be indeterminate or unknown if such shares (in relation to the whole or any part of such income) are indeterminate or unknown on the date of formation of such association or body or at any time thereafter." This section provides the assessment in two situations and in both the situations, the tax is charged at the same maximum marginal or higher rate. One situation is where the individual shares of the members are indeterminate and/or unknown and the other situation is where the total income of any of the members exceeds the maximum amount which is not chargeable to tax in the case of that member, but that AOP does not fall under Sub-section (1) of section 167B of the Act. As we have held earlier, the shares of the members of the association are determinate and known, i.e., 1/5th in the income and the property and it was a case which falls under Sub-section (2) of section 167B and the income of one of its members Smt. Ginni Devi Saraogi was more than the maximum amount which is not chargeable to tax, the AOP, has to be assessed at the maximum marginal rate. Apparently, this section also applies in the present case.

6. In view of the aforesaid reading of the provisions of sections 26 & 167B, we are landed in a situation where both the provisions are applicable and neither is excluding the applicability of the other. To solve such a conflict, one has to resort to interpretation of law and the famous dictum is where there is a general provision which, if applied in its entirety, would neutralize a special provision dealing with the same subject-matter, the special provision must be read as a proviso to the general provision and the general provision, insofar as it is inconsistent with the special provisions, must be deemed not to apply. Sir George Jessel, M.R. in *Taylor v. Oldhan Corpn.* 14 Ch. D. 395, 7. *Generalibus Specialia Non Derogantis* the leading maxim and it means that general things will not derogate from special things. In other words, it is also explained as *Generalibus Specialia Derogant*, which means a special provision normally excludes other operation of a general provision. This maxim has been applied time and again by various Courts - Calcutta High Court in the case of *CIT v. Indian Molasses Co. (P.) Ltd.* [1989] 176 ITR 473, Karnataka High Court in the case of *M.L. Vasudeva Murthy & Sons v. Joint CAIT* [1992] 198 ITR 426, *G.B. Belani v. CIT* [1992] 195 ITR 639, Bombay High Court in the case of *Forbes Forbes Campbell & Co. Ltd. v. CIT* [1994] 206 ITR 495, Madras High Court in the case of *N.K.R. Narayanwamy Naidu v. CAIT* [1965] 55 ITR 103, Kerala High Court in the case of *CIT v. Fertilisers & Chemicals (Travancore) Ltd.* [1987] 166 ITR 823; Madhya Pradesh High Court in the case of *CIT v. Ramkishan Bhojraj* [1984] 147 ITR 529 (FB) and by the Supreme Court in the case of *Union of India v. India Fisheries (P.) Ltd.* [1965] 57 ITR 331. Craies on Statute Law, 5th Edition, at page 205, explained this rule as follows :-- "The rule is that, whenever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would override the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply." 8. In *Indian Molasses Co. (P.) Ltd.*'s case (*supra*), the Calcutta High Court dealt with the applicability of section 40(a)(v)/40A(5) and 40(c)(i) in case of allowance of the perquisites to the Director of a company who was an employee and it was felt that a case of the Director was governed by both the provisions section 40(c)(i) because he was a Director and section 40A(5) because he was an employee. In such a situation, Their Lordships of Calcutta

High Court observed that when there is a general enactment as well as a special enactment in respect of the same head in a statute, the particular or special enactment would override the general enactment and it was held that section 40(c) which deals with the disallowance in respect of benefit, etc. to a Director or his relative is a special enactment, whereas section 40(a)(v) which deals with the case of the employees is a general enactment, Consequently, the case of the Director, who is an employee, will be governed by the provisions of section 40(c) of the Act.

9. In the case of India Fisheries (P.) Ltd. (supra), the Supreme Court was dealing with the case of unsecured creditors in the liquidation proceedings whereunder the Department claimed by exercising the right under section 49E of the Indian Income-tax Act, 1922 priority over the other unsecured creditors, whereas sections 228 and 229 of the Companies Act, 1913 provided that an unsecured creditor must prove his debts and all unsecured debts are to be paid paripassu. In that context, their Lordships of Supreme Court observed that there was an apparent conflict between two independent provisions of law and in such a situation it was held that special provision must prevail. It was held that section 49E of 1922 Act was a general provision applicable to all assesseees and in all circumstances, whereas sections 228 and 229 of the Companies Act, 1913 dealt with the proof of debts and their payment in liquidation and it was reconciled by stating that section 49E applies when insolvency rules do not apply.

10. It is, however to be remembered that this rule of construction is not of universal application. It is subject to the condition that there is nothing in the general provision, expressed or implied, indicating an intention to the contrary. This is the rule of Statute by Maxwell on the Interpretation of Statutes, 11 th Edition, at page 168 and was noted by the Supreme Court in the case of Shahzada Nand & Sons [1986] 160 ITR 392 and by Calcutta High Court in the case of Narain Das Paramanand Das v. ITO [1979] 117 ITR 174. On a reading of the general provision of section 167B, I do not find anything expressed or otherwise indicating an intention that this provision will apply even on the assessment of income from house property overriding the provisions of section 26 of the Income-tax Act, The provisions of section 167B deal with the assessment in general of all AOPs. Section 26 also deals with an assessment in the case of an AOP, but only in

respect of a house property income. That way, section 26 is a special provision and section 167B is a general provision and, therefore, section 26 should be made applicable in this case.

11. The another way to sort out this type of problem is that if a case appears to be governed by either of the two provisions and neither of the two provisions is subject to the other, it is clearly the right of the assessee to claim that he should be taxed under that one which leaves him with a lighter burden. In such a situation, the provision beneficial to the assessee must be followed--American Bureau of Shipping v. ITO [1986] 19 ITD 793 (Bom.). In H.C. Kothari v. CIT[1951] 20 ITR 579 (Mad.) which was relied upon in the subsequent decision by Kerala High Court in the case of Safari Industries India (P.) Ltd. v.State of Kerala [1989] 72 STC 264, it was held that if an income falls under more than one head, the assessee has the option of choosing for the purpose of income-tax such head which makes the burden on his shoulders lighter. Section 26 charges the assessee with the lesser burden and, therefore, this section should be made applicable in the present case. In view of the aforesaid, I uphold the order of the CIT(A).

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