

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 174 of 1995

For Approval and Signature:

HONOURABLE THE CHIEF JUSTICE MR. S.J. MUKHOPADHAYA

and

HONOURABLE MR.JUSTICE AKIL KURESHI

and

HONOURABLE MS.JUSTICE HARSHA DEVANI

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| 1 | Whether Reporters of Local Papers may be allowed to see the judgment ? | Yes |
| 2 | To be referred to the Reporter or not ? | Yes |
| 3 | Whether their Lordships wish to see the fair copy of the judgment ? | No |
| 4 | Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? | No |
| 5 | Whether it is to be circulated to the civil judge ? | No |
- सत्यमेव जयते

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COMMISSIONER OF INCOME TAX - Applicant(s)
Versus
HARIPRASAD BHOJNAGARWALA - Respondent(s)

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Appearance :

MR KM PARIKH for Applicant(s) : 1,
 SERVED BY RPAD-(N) for Respondent(s) : 1,

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CORAM : HONOURABLE THE CHIEF JUSTICE MR. S.J. MUKHOPADHAYA
and
HONOURABLE MR.JUSTICE AKIL KURESHI
and
HONOURABLE MS.JUSTICE HARSHA DEVANI

Date : 02/08/2011

CAV JUDGMENT

(Per : HONOURABLE THE CHIEF JUSTICE MR. S.J. MUKHOPADHAYA)

In the Reference u/s.256(1) of the Income Tax Act, 1961, at the instance of the Commissioner of Income Tax, the Income Tax Appellate Tribunal, made a reference of the following question, said to be question of law, for the opinion of this Court :-

“Whether, the Appellate Tribunal is right in law and on facts in holding that the benefit of Section 23(2) is available to a Hindu Undivided Family ?”

2. When the matter was taken up by a Division Bench of this Court, the said Bench, while noticed the decision of the Jammu & Kashmir High Court in the case of Commissioner of Income Tax vs. Mohd. Amin Tyambo reported in 125 ITR 375, the Madras High Court judgment in the case of Commissioner of Income Tax vs. K, Gangiah Chetty And Sons reported in 214 ITR 548, the Delhi High Court judgment in the case of Commissioner of Income Tax, Delhi vs. Dewan Chand Dholan Dass reported in 132 ITR 790, hold that those decisions may go counter to the decision of a Division Bench of this Court in Commissioner of Wealth Tax vs. Ashok Raje Gaekwad reported in 267 ITR 54, though the said case related to Section 7(4) of the Wealth Tax Act, and was of the opinion that the matter deserves to be heard by a Full Bench, as the question is of general importance.

3. The assessee is an Hindu Undivided Family (HUF for short). It derived income from house property.

The claim of assessee for deduction u/s.23(2) of the I.T. Act was rejected by Income Tax Assistant Commissioner (Assessment). In further appeal, the learned CIT (A) also rejected the claim of the assessee. According to CIT (A), the benefits envisaged by Section 23(2) were available only to an individual and not to HUF. For this proposition, the CIT (A) relied upon the decision of J & K High Court in the case of Commissioner of Income Tax vs. Mohd. Amin Tyamboo reported in 125 ITR 375. However, in further appeal, the Income Tax Appellate Tribunal relied upon the decision of Income Tax Appellate Tribunal, Delhi Bench (SMC) in the case of ITO vs. Tarlock Singh & Sons reported in 29 ITD 139 and held that the benefit given u/s. 23(2) would be available to HUF. A copy of the assessment order, which is Annexure-A, order of CIT (A), which is Annexure B and copy of the order of the Tribunal, which is Annexure C formed part of the statement of the case.

4. The learned counsel for the Revenue while referring to Section 23(2) of the Income Tax Act also referred to decisions rendered on the same issue by other High Courts, as discussed hereunder.

5. The relevant provision of Section 23(2) of the Income Tax Act, 1961 as was hold at the relevant time, reads as follows:-

"23. Annual value how determined. -

(1)

(2) Where the property consists of -

(a) a house or part of a house in the occupation of the owner for the purposes of his own residence,-

(i) which is not actually let during any part of the previous year and no other benefit therefrom is derived by the owner, the annual value of such house or part of the house shall be taken to be nil;

(ii) which is let during any part or parts of the previous year, that part of the annual value (annual value being determined in the same manner as if the property had been let) which is proportionate to the period during which the property is in the occupation of the owner for the purposes of his own residence, or, as the case may be, where such property is let out in parts, that portion of the annual value appropriate to any part which was occupied by the owner for his own residence, which is proportionate to the period during which such part is wholly occupied by him for his own residence shall be deducted in determining the annual value.

Explanation. - The deduction under this sub-clause shall be made irrespective of whether the period during which the property or, as the case may be, part of the property was used for the residence of the owner precedes or follows the period during which it is let;"

The said Section has undergone amendment by Finance Act, 2001 which now reads as under:-

"23. Annual value how determined. -

(1)

(2) Where the property consists of a house or part of a house which -

(a) is in the occupation of the owner for the purposes of his own residence; or

(b) cannot actually be occupied by the owner by reason of the fact that owing to his employment, business or profession carried on at any other place, he has to reside at that other place in a building not belonging to him,

the annual value of such house or part of the house shall be taken to be nil."

6. The aforesaid provisions makes it clear that the benefits of the relief in respect of self-occupied property is available only to the owner who can reside in his own residence, that means, the benefit of relief is available to self-occupied property only to an individual assessee and not to an imaginary assessable entity.

7. The case of Commissioner of Income Tax vs. Mohd. Amin Tyamboo reported in 125 ITR 375 related to benefit sought for by a 'partnership firm'. Having noticed Section 23(2) of the IT Act, the Division Bench of J & K High Court observed as follows :-

“A slight consideration of these provisions makes it clear that the benefits of the relief in respect of self-occupied property is available only to an individual assessee. No other assessable entity can claim this benefit. The reference to occupation for the purposes of “his own residence” unmistakably shows that the owner in question must be a natural person, that is, what is known in income-tax law as “an individual”.”

8. The same very provision of Section 23(2), while fell for consideration before Delhi High Court in Commissioner of Income Tax, Delhi vs. Dewan Chand Dholan Dass reported in 132 ITR 790, the Division Bench observed that the expression, “occupation of the owner for the purposes of his own residence” in Section 23(2) of the IT Act, 1961, refers only to a human owner and not a fictional entity. A firm cannot physically reside and so cannot claim the benefit of the provision which is available to an assessable entity only. It is difficult to contemplate residence by some of the partners or even all of them as self-residence by the owner-firm in the context of Section 23(2), the dichotomy between the firm and its partners, who are independent assessable entities for the purposes of the IT Act, should be given effect to. The nature of the relief u/s.23(2) is such that it is not available in the case of a firm just as it is not available in the case of a company.

9. The Madras High Court while dealing with Section 23(2) in the case of Commissioner of Income

Tax vs. Gangiah Chetty (K) and Sons reported in 214 ITR 548 held that for the purposes of both Section 23(2) as well as Section 54, the assessee must be an individual human being. Therefore, the assessee-firm was not entitled to allowance under Section 23(2) and exemption under Section 54 of the Income Tax Act. The house property must be in actual use by assessee or his parents. Thus assessee must be an individual assessee.

10. Under sub-section (4) of Section 7 of the Wealth Tax Act, 1957, a similar benefit is intended in respect of the house belonging to the assessee and exclusively used by him for residential purposes. Sub-section (4) of Section 7 of the Wealth tax Act, 1957 is almost same to that of Section 23(2) of the Income tax Act.

Sub-section (4) of Section 7 of the Wealth Tax

Act, 1957 fell for consideration before a Division Bench of this Court in the case of Commissioner of Wealth Tax vs. Ashok Raje Gaekwad reported in 267 ITR

54. The Division Bench having noticed that Hindu Undivided Family is an assessee held that as the Hindu Undivided Family can own property and reside in such house, it can claim the benefit of sub-section (4) of Section 7 of the Wealth Tax Act.

11. The Income Tax Appellate Tribunal relied upon the earlier decision of Income Tax Appellate Tribunal, Delhi Bench in the case of ITO vs. Tarlock Singh & Sons reported in 29 ITD 139. The Delhi Bench

of the Income Tax Appellate Tribunal having noticed the provisions of Section 23(2) observed that HUF is nothing but a group of individuals related to each other and thereby entitled for the benefit of Section 23(2).

12. From the decisions, as referred to above, and the provisions of law, the following facts emerge :-

- (i) The benefit of Section 23(2) is available if the house is in occupation of the owner for the purpose of his own residence; and
- (ii) A partnership firm, which is a fictional entity, cannot physically reside and so a partnership firm cannot claim the benefit of the provision, which is available to an assessable entity only.

13. The question arises as to, whether an Hindu Undivided Family can be held to be a fictional entity? The answer will be in the negative. A Hindu Undivided Family is nothing but a group of individuals related to each other by blood relations, or in a certain manner. A Hindu Undivided Family can be seen being a family of a group of natural persons.

There is no dispute that the said family can reside in the house, which belongs to Hindu Undivided Family. A family cannot consist of artificial persons. The Income Tax Appellate Tribunal, Delhi Bench in the case of Tarlock Singh (supra) noticed that under Section 13 of General Clauses Act, while the words in masculine gender shall be taken to

include females and words in singular shall include plural and vice versa. Therefore, it rightly held that the word 'owner' would include 'owners' and the words 'his own' would include 'their own'. There is nothing, therefore, in the words used in Section 23(2), which excludes application of such provision to HUF, which is a group of individuals related to each other.

14. It is not a question whether it is Section 23(2) of the Income Tax Act or Section 7(4) of the Wealth Tax Act, the provisions being similar, the interpretation will be the same. The Division Bench of this Court having held that similar benefit is available to HUF, irrespective of decision of other High Court with regard to partnership firm, it was open to the Division Bench to follow its earlier decision even without referring the matter to a Larger Bench.

15. The question referred to this Court is, therefore, answered in the affirmative i.e. in favour of the assessee, but against the revenue. The assessee will be entitled to its costs, Counsel's fee of Rs.1,000/-.

(S.J. MUKHOPADHAYA, C.J.)

(AKIL KURESHI, J.)

(HARSHA DEVANI, J.)

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