

(5413)

In the High Court of Judicature at Madras

Dated: 24.09.2012

Coram

The Honourable Mrs.JUSTICE CHITRA VENKATARAMAN

and

The Honourable Mr.JUSTICE K.RAVICHANDRABAABU

Tax Case (Appeal) Nos.383 and 384 of 2006

K.P.Nachimuthu .. Appellant in both the appeals

Vs.

The Commissioner of Income Tax

Coimbatore

.. Respondent in both the appeals

Tax Case (Appeal) against the order of the Income Tax Appellate Tribunal, Chennai B Bench dated 28.3.2002 in ITA. Nos. 3500 and 3501/ Mds/ 1990 for assessment years 1984-85 and 1985-86.

For Appellant : Mr.Quadir Hoseyn

For Respondent : Mr.N.V.Balaji, Standing Counsel

J U D G M E N T

(Judgment of the Court was delivered by CHITRA VENKATARAMAN,J.)

The above Tax Case (Appeal) is filed at the instance of the assessee against the order of the Income Tax Appellate Tribunal for block assessment period 1984-85 and 1985-86. The above Tax Case (Appeal) was admitted on the following substantial question of law:-

"Whether on the facts and in the circumstances of the case, the Tribunal erred in not dismissing the appeal by the Department in limine in the light of the Revenue not filing an appeal to the Tribunal from the HUF assessment rendered substantive by the order of the first appellate authority ?"

2. The assessment herein relates 1984-85 and 1985-86. The assessee is an individual. He filed returns in his capacity as Kartha of HUF. While passing the assessment order for 1984-85, the Assessing Officer referred to the order of the assessment relating to 1982-83, thereby rejected the claim of the assessee that he was owning an extent of 20.88 acres of agricultural lands at Alamarathupatti Village, Kolathur in the status of HUF. The Officer pointed out that in spite of the opportunity, the assessee had not substantiated its contention that the lands belonged to HUF. The Officer further rejected the claim of the assessee as regards the purchase of lands out of the income from the agricultural lands. The Assessing Officer pointed out that the assessee was asked to produce patta to show that the lands were ancestral. Except the letter from the assessee's father and brothers, filed along with patta, there was no materials to substantiate as regards the holding of the property as HUF property. The Officer pointed out that there was no partition deed executed on 24.2.81 as had been contended by the assessee. Hence, the property were held jointly and not as HUF property holding it as ancestral property. In the absence of any materials to show that the property was Joint family property, the entire income from the lorries and the lands were assessed at the hands of the assessee in the status as individual. The assessment was subsequently taken up for revision. Ultimately, the assessee's agricultural income was proposed at Rs.1,20,000/- and balance income as income from other sources. The assessment for the next assessment year 1986-86, which is involved in T.C.(A).No.384 of 2006 proceeded on the same lines as in the earlier years.

3. The assessee filed appeals before the Commissioner of Income Tax (Appeals) as against the protective assessment in the capacity of HUF as well as substantive assessment made in the status of individual. The

first Appellate Authority granted partial relief. He viewed that inclusion of HUF income at the hands of the individual was not correct. Hence, the same had to be excluded from the individual assessment for the assessment years 1984-85 to 1986-87 and the assessment of the income made in the status of HUF in a protective manner should be treated as a substantive assessment. In so confirming the order of protective assessment on HUF, the first Appellate Authority pointed out that the assessee's agricultural income from 20.88 acres had been accepted upto Rs.1 lakh during the assessment year 1983-84. Taking note of the adangal extract, the Commissioner of Income Tax (Appeals) held that there were no material on the part of the Revenue to contradict the genuineness of the claim. Consequently, the question of adding any income under the head of income from other sources did not arise. Thus, while allowing the assessment of the assessee in the status of HUF, the Commissioner of Income Tax (Appeals) deleted the assessment to that extent at the hands of the individual. Aggrieved by this, the Revenue went on appeal before the Income Tax Appellate Tribunal. The Tribunal in paragraph 8.1 of the order pointed out that in the course of hearing of the appeals, by order sheet entry dated 7.2.2002, the Tribunal directed the assessee to produce materials regarding existence of HUF property before 31.12.1969 or HUF so formed throwing the self acquired properties into the family hotchpot after 31.12.1969. The Tribunal pointed out that the assessee had not complied with the directions of the Bench. In the background of the failure to produce the materials as to the existence of HUF and the partition deed, the Tribunal held that an inference be drawn that the assessee had failed to prove the existence of HUF and that individual property as HUF property before 31.12.1969. The Tribunal also rejected the Commissioner of Income Tax (Appeals)'s view that the property had to be treated as joint family property. Dealing with the question that the Revenue had not filed any appeal against the findings of the Commissioner of Income Tax (Appeals) confirming the protective assessment on the substantial basis, the Tribunal pointed out that the appeals before the Commissioner of Income Tax was relating to the assessee in his individual capacity and not HUF. Thus, the view of the Commissioner of Income Tax (Appeals) treating protective assessment as substantive assessment not being a subject matter of appeal was illegal it being beyond the scope of jurisdiction. The Tribunal held that the assessee had not substantiated that the property in question

belonged to the assessee as HUF property. In the result, the order of the Commissioner of Income Tax (Appeals) was reversed.

4. As regards income from lorry was concerned, considering the decision taken by the Tribunal in the other appeal, which we have narrated in the preceding paragraph, it allowed the Revenue's appeal. Aggrieved by this, the assessee is on appeal before this Court.

4. Learned counsel for the assessee placed before us a petition for filing additional evidence in the form of Encumbrance certificate, which indicated the possession of the property, which is the subject matter of partition, right from 1952 as belonging to HUF. He further referred to the partition deed dated 24.2.1981 which showed the family partition between the assessee and his brother and also providing maintenance for his father.

5. Referring to the recital in the partition deed dated 24.2.1981, learned counsel submitted that the partition was with reference to joint family property and not to the property held jointly. Having regard to the document available, he submitted that the Tribunal ought not to have held that the property was an individual property.

6. Learned standing counsel appearing for the Revenue supported the order of the Tribunal and submitted that even in the absence of appeal filed on confirming the protective assessment as a substantive assessment, yet, in considering the question as to whether particular property is HUF or individual property, the Tribunal was duty bound to go into the materials to give a finding as to whether the particular property has the character of individual property, joint property or HUF property. In so arriving at the finding, the Tribunal is entitled to take note of the materials and that the jurisdiction need not be curtailed by the treatment given by the Commissioner of Income Tax (Appeals) on the protective assessment made on HUF as substantive assessment. The issue before the

Commissioner of Income Tax (Appeals) was as regards the individual assessment and the HUF assessment was never an issue before the Commissioner of Income Tax (Appeals). Thus, when the appeals were with reference to the individual assessment, rightly the Tribunal held that the passing of the order of the Commissioner of Income Tax (Appeals) confirming the protective assessment as substantive assessment was without jurisdiction and without any basis. Learned Standing counsel for the Revenue further pointed out that the encumbrance certificate at best showed whether there was any encumbrance or not. It cannot speak on the nature of holding as to whether the property in question was an individual property or HUF property.

7. Heard learned counsel for the assessee as well as learned standing counsel for the Revenue and perused the materials available on record.

8. As far as the contention that the encumbrance certificate, at best showed only the nature of encumbrance therein and cannot spell on the holding of the property, we agree with the submission of the learned standing counsel for the Revenue that the encumbrance certificate filed before this Court substantiated that right from 1952, 1980 to 1984 to 2000, the property had not been subjected to any encumbrance.

9. As far as the partition deed which was the subject matter of consideration to find out as to whether the property in S.No. 87, 4.63 acres could be treated as joint family property or joint property of the assessee with his brother, a perusal of the partition deed dated 24.2.1981 shows that the partition was between assessee and his brother Ramasamy Gounder and their father Pongaiappa Gounder. Parties to the document decided to divide agricultural property. Thus, under the partitioned deed 'B' Schedule property was given to the assessee herein, 'A' schedule property was given to assessee's brother Ramasamy Gounder and 'C' schedule property was given to the father till his lifetime as by way of maintenance for meeting his maintenance charges. The partition deed further stated that on and from

the date of partition, each individual would be entitled to enjoy the property absolutely and except for the blood relationship, there was no connection to bind them together, that each one was entitled to the income that he might earn, for which other shall not have any claim. The documents also reasoned out as to why the assessee's father Pongaiappa Gounder was provided with a property for his life time. A reading of the 'B' schedule property revealed that the assessee herein was allotted to an extent of 4.63 acres comprised in S.NO. 87 in Alamarathupatti Village and that he was entitled to the well along with motor pump therein. The document further reads that the assessee's brother Ramasamy Gounder was allotted property situated at S.No. 95/4 to an extent of 7.29 acres along with well with motor pump set etc. Out of S.No.95/A and S.NO. 87, 50 cents in each of the survey number was allotted to the father of the assessee.

10. As far as the nature of holding, which was the subject matter of division is concerned, we have no hesitation in coming to the conclusion that this was division of family property and not of joint property. It may be noted that the statement that the expression that parties henceforth would have only blood relationship and nothing beyond are found normally only in partition of HUF joint family and not in respect of division of property held jointly. For proper understanding the averments in the partition deed written in vernacular language, the same need to be extracted, which reads as follows :-

VERNACULAR (TAMIL) PORTION DELETED

11. Reading the above recital, we have no hesitation in holding that the property situated in S.No.87 to an extent of 4.63 acres was originally joint family property. On partition on 24.2.1981, the same was allotted to the assessee herein. It is stated that the assessee has one son and two daughters and with them the assessee formed a HUF.

12. As far as present assessment is concerned, as already noted, it is a case of individual assessment. The extent of the property sought to be assessed at the hands of HUF was to the extent of 20.88 acres at Alamarathupatti Village, Kolathur. Even though the assessee claimed the property in entirety as HUF property, the partition deed allotted an extent of 4.63 acres alone, there are no material to show that the balance extent of 16.25 acres, were, infact, joint family property and not an individual property. Had it been so, the partition deed would have made a reference. Learned counsel does not dispute this fact. In the absence of any material to substantiate that the extent of 16.25 acres property was purchased out of the income from the HUF property, we have no hesitation in confirming the order of assessment, thereby affirming the Tribunal's order too that the said extent is assessable at the individual hands of the assessee only.

13. Even though learned counsel for the assessee made a plea for remand, we do not find any justifiable ground for granting the same. As per the document filed before this Court from the Sub Registrar's Office, we find that the assessee is in possession of property situated in several survey numbers, one of which happens to be the partition property. In this background, we do not find any material to warrant remand to the Assessing Officer for fresh consideration.

14. In the light of the above, we reject the assessee's appeal. In the context of the assessee being an individual, going by the nature of the dispute raised, rightly the Tribunal came to the conclusion that the property in question have to be assessed only in the status of individual and that the assessee being an individual, the Commissioner of Income Tax (Appeals)

was not justified in making the assessment on HUF as substantive assessment.

15. Except to the extent of 4.63 acres of land found as HUF property, the assessment as regards other extent of 16.25 acres in the individual hands is confirmed and to that extent the order of the Tribunal stands confirmed. In the result, the Tax Case (Appeal) partly allowed. No costs.