



HIGH COURT OF DELHI

ITA No. 86 of 2004

(with ITAs 115/2004, ITA 350/2004, ITA 265 /04, 281/04, ITA 288/04, 354/04, ITA 91/04, 351/04, ITA 92/04, 347/04, ITA 93/2004, ITA 114, 147/2004, 149/04, 348/04, ITA 286 /2004, 287/04 ITA 267, 357/2004 ITA 152/2004, 353/04 ITA 153/2004

Date of decision : September /0 , 2004

Commissioner of Income Tax Delhi-VIII

... ..
...

through: Ms Prem Lata Bansal,
with Mr S.C.Sharma,
Advocates.

-VERSUS -

M/s.SAE HEAD OFFICE MONTHLY PAID EMPLOYEES WELFARE TRUST

...

...

through: Mr J.N.Mukhi with
Mr M.K. Garg and
Ms Shakumbhari Singh
Advocates

Coram :-

THE HON'BLE MR JUSTICE B.C.PATEL, C. J.
THE HON'BLE MR JUSTICE BADAR DURREZ AHMED.

- i) Whether Reporters of local papers may be allowed to see the judgment.
- ii) To be referred to the reporter or not ?
- iii) Whether the judgment should be reported in the Digest ?

B.C.PATEL, C.J

1. These appeals are preferred by the Revenue under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as the Act), inter alia, contending that :

- i) The trustees of the assessee trust are not to be assessed in the status of "individual";
- ii) the assessee is not entitled to claim deduction under Section 80L of the Act as an "individual" as also is not entitled for capital gain as is applicable



- iii) the income of the assessee trust under the "income from other sources" is to be taxed at maximum marginal rate as per Section 164(1) of the Act.

2. Facts are taken from ITA No. 86 of 2004. For the assessment year 1995-96 return of income was filed on 30th August, 1995 declaring total income of Rs. 17,85,270/- including long term capital gain of Rs. 17,50,690/-. The case was selected for scrutiny and a notice was issued under Section 143(2) of the Act to the assessee. The assessee claimed the status of "Resident Individual". However, the assessee was assessed in the status of "AOP (Trust)" and the maximum marginal rate of tax was applied. Deduction claimed under Section 80L was disallowed. Application under Section 154 filed by the assessee inter alia requesting for being assessed in the status of an "individual" was disallowed vide order dated 21.3.1997.

3. During the course of hearing before the Assessing Officer various judgments were cited. It was also pointed out that the assessee was assessed in the status as an "individual" in past. The Assessing Officer did not accept the contention and made the assessment order on 29.7.1997 against which the appeal was preferred by the assessee being



Tax (Appeals) who allowed the appeal against which revenue preferred an appeal before the Income Tax Appellate Tribunal being ITA 5426/DEL/1998 for assessment year 1995-96 which was dismissed by the Tribunal by an order dated 3rd July, 2003.

4. In all the appeals facts are identical and therefore, all these appeals are disposed of by this common judgment.

5. Learned counsel for the Revenue submitted that nowhere in the Trust Deed the share of beneficiaries (employees) were determined or made known and therefore, in view of Section 164 of the Act, income-tax is to be charged at the maximum marginal rate. According to the counsel for the Revenue as per proviso (iv) of Section 160(1) of the Act the trustee appointed under a Trust Deed is a representative assessee. According to learned counsel for the Revenue as income is not receivable on behalf or for the benefit of any one person or the individual shares of the beneficiaries are indeterminate or unknown, the tax is to be charged at the maximum marginal rate. According to the learned counsel for the Revenue the decisions reported in the case of Commissioner of Income Tax vs. Deepak Family Trust No. 1 & Ors. 211 ITR 575 and in the case of Commissioner of



not applicable and the CIT (Appeals) and the Tribunal committed an error in relying on these decisions. Learned counsel for the Revenue further submitted that in view of decision of this High Court in the case of Commissioner of Income Tax vs. Escorts Employees Welfare Trust 175 ITR 105 which is identical to the present case the assessee is required to be assessed at a maximum marginal rate. According to the counsel for the Revenue in view of decision of the Apex Court in Gosar Family Trust & Ors. Vs. Commissioner of Income Tax & Ors. 215 ITR 55 the tax must be charged at maximum marginal rate.

6. Section 164 of the Act would come into play only after the income has been computed in accordance with other provisions of the Act. Since the determination of the status of an assessee is a part of the process of computation of income, it is necessary to look into the general principles for determining whether the status of the trustees can be taken to be as "association of persons" or as "individual". Section 164(1) only lays down the rate of tax applicable to discretionary trust. It is not concerned with the manner of computation of the total income. This Section, therefore, is required to be taken into consideration only after the income has been computed in accordance with various other



provisions contained in the Act. It is in this background first we will have to determine the status.

7. It is required to be noted that the Supreme Court in CIT V. Indira Bal Krishna [1960] 39 ITR 546 while considering what constitutes an "association of persons" held that the words "association" means "to join in common purpose" or "to join in an action". Therefore, "association of persons" as used in Section 2(31)(v) of the Act means an association in which two or more persons join in a common purpose or common action. The association must be one, the object of which is to produce income, profits or gains. In Suhashini Karuri v. WTO (1962) 46 ITR 953, the Calcutta High Court had an occasion to examine somewhat similar aspect and has held that joint trustees must be taken to be a single unit in law and not as an "association of persons" and "there is nothing wrong in treating such a unit as an individual". In CIT v. Sodra Devi, (1957) 32 ITR 615, the Supreme Court held that the word "individual" does not mean only a human being, but is wide enough to include a group of persons forming a unit. In Mammed Kayi v. WTO (1966) 60 ITR 737, the Full Bench of the Kerala High Court held (Velu Pillai J dissenting) that the term "individual" in Section 3 of the Wealth-tax Act includes a Moplah Muslim family which is



undivided family. The Full Bench decision of the Kerala Court in Kerala Financial Corporation v. WTO, (1971) 82 ITR 477 held that a statutory corporation was to be assessable as an individual. For the said purpose, the case of Sodra Devi's case (supra) and Andhra Pradesh State Road Transport Corporation v ITO (1964) 52 ITR 524(SC) were considered. In Jogender Nath Nashar v. CIT (1969) 74 ITR 33 the Supreme Court has observed that there could be no reason why the word "individual" in Section 3 of the Indian Income-tax Act, 1922, should be restricted to human beings alone and not extended to juristic entities.

8. It is required to be borne in mind that neither the trustee nor beneficiary could be considered as having come together for earning income. The beneficiaries have not set up the trust. The trustees derive their authority under the terms of the deed of trust. Neither the trustees nor the beneficiary have come together for a common purpose. They are merely in receipt of the income. The mere fact that the beneficiaries or the trustees being representative assessee are more than one cannot lead to a conclusion that they constitute an "association of persons". In absence of element of volition on the part of either the trustees or the beneficiaries, by no stretch of imagination it can be



joined of their own volition in a common effort or endeavor to produce income. These are the incidences of association of persons under the direct tax laws.

9. The aforesaid decisions were considered by the Division Bench of Calcutta High Court in CIT v. Sri Krishna Bandar Trust (1993) 201 ITR 989. According to the Division Bench, Section 164(1) only lays down the rate of tax applicable to a discretionary Trust. It is not concerned with the manner of computation of total income.

10. Thus the real question is the manner of computation of total income and after the income is computed, tax is to be levied.

11. On behalf of the Revenue it was submitted that reading Section 164(1) of the Act tax is to be charged on the relevant income or part of relevant income at the maximum marginal rate, and according to the Revenue the proviso to Section 164(1) of the Act cannot be said to be applicable. While on the other hand, on behalf of the assessee, it is pointed out that the trust is created while carrying on business exclusively for the benefit of persons employed in the business. Therefore, clause (iv) of proviso to sub-section (1) of Section 164 of the Act would be attracted and if that is



so, the question arises as to how total income computation of such trust is to be charged.

12. It is in this background the submission made by the learned counsel that in all cases representative assessee must be assessed at maximum marginal rate is required to be considered and reliance is placed on the decision of the Apex Court Gosar Family Trust and Others v. Commissioner of Income Tax and Others (1995) 215 ITR 55. In that case Apex Court pointed out at page 59 as under:-

“The sub-section contemplates charging of tax at the maximum marginal rate in two situations, viz., (a) where any income, in respect of which the trustees (omitting unnecessary categories of persons) are liable to be assessed as representative assesses, is not specifically receivable on behalf or for the benefit of any one person, and (b) where the individual shares of the persons on whose behalf or for whose benefit such income or such part thereof is receivable are indeterminate or unknown. The first proviso, however, says, inter alia, that where none of the beneficiaries has any other income chargeable under this Act exceeding the maximum amount not chargeable to tax in the case of an association of persons or is a beneficiary under any other trust, tax shall be charged on the relevant income as if it were the total income of an association of persons. In this case, none of the first category beneficiaries has taxable income under the Act within the meaning of the proviso (i), while the second category beneficiaries are also treated as beneficiaries for the purpose of the proviso (i), the trust income is liable to be charged at the maximum marginal rate. If on the other hand, only the first category beneficiaries are treated as beneficiaries (and not the second category beneficiaries) within the meaning of the proviso (i), then the trust



association of persons. For this reason, the assessee's contention has been that only the first category beneficiaries are beneficiaries within the meaning of the proviso (i) while the Revenue contends to the contrary."

13. In that case there were two sets of beneficiaries. The Court pointed out that the recitals in the trust deed are little unusual. The question before the Court was whether the income of the trust taxed in the hands of the trustees is chargeable at the maximum marginal rate or to the rate applicable to the association of individuals within the meaning of Section 164(1) of the Act. The argument was that only the first set of beneficiaries who may receive the income are the class envisaged by sub-section (1) of Section 164 and not the type of beneficiaries who may, ultimately, get the accumulated income on distribution is not warranted by the wording of the provision which includes the entire class of beneficiaries on whose behalf or for whose benefit the income is receivable by the trustee. The Apex Court at page 62 observed that "Be that as it may, we have to answer the question, whether the second category beneficiaries are not 'beneficiaries' within the meaning of proviso (i) to section 164(1) on the above facts?" and the Court pointed out that the second category beneficiaries are also beneficiaries as rightly pointed out by

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the High Court. The important aspect which the C
considered at page 62 is as under:-

“The trustees are expressly entitled to deposit the monies of the trust fund in any firm or joint stock company in which any one or more of them is/are partners/directors shareholders, which means that the trustees could as well have decided not to distribute a single pie but invest all the income and corpus fund for the full period of eighteen years in their own firms and concerns. No less surprising is the provision that the trust started with a mere rupees five hundred and the trustees have been given absolute discretion not only in the matter of distribution of income but also in the matter of the very continuance of the trust. At any time after the expiry of two years they can put an end to it if they so choose.”

14. At page 61 the Court pointed out that “If, in case, the trustees do not choose to put an end to the trust, even then the maximum life of the trust is eighteen years only”. Thus, it is in view of these peculiar facts and circumstances the Court held that the trust income is to be charged at the maximum marginal rate and the assessee is not entitled to the concessional rate of taxes.

15. While in the instant case after computing the income of the trust the income would be within proviso (iv) of sub-section (1) of Section 164 of the Act. Before the Tribunal the question was with regard to the benefit under Section 80L of the Act and the capital gains at the rate of 20% as chargeable under Section 112 of the Act. /



16. In the case of CIT V. Deepak Family Trust (1995) 211 ITR 575, the Court had an occasion to consider a similar question. The question for consideration was whether in a case where the assessee is a discretionary trust, it is entitled to deduction under Section 80L of the Act. The ITO rejected the claim under Section 80L on the ground that the said Section was available only to individuals and/or HUF. The Assistant Commissioner held that the trust should be treated as an individual and thus it would be entitled to relief under Section 80L. The Tribunal relying upon the observations made by the Supreme Court in the matters arising under the Wealth-tax Act, 1967 held that the status of a discretionary trust is that of an individual and, therefore, that would also be the status of the trustees for the purpose of assessment under Sections 161 and 162. The Court pointed out at page 579:

“What was submitted was that if the case of a representative assessee is covered by Section 164, then clause (iv) of Section 160(1) indicates that in such cases one has to proceed on the basis that the income receivable by the representative assessee is the income of the assessee and not the beneficiary. Even this contention cannot be accepted because the fiction created for one purpose cannot be utilised for a different purpose. Section 164 does not provide how the total income of the representative assessee is to be computed. Therefore, obviously, the provisions relating to computation of income would be applicable even in a case where the representative assessee has to be assessed under Section 164 of the Act. Therefore



the benefit of deduction under Section 80L or not, will have to be decided by reference to the provisions contained in that Section.”

17.. The Supreme Court in *N.V. Shanmugham & Co v. CIT (1971) 81 ITR 310* has held that form of persons should not make them an association of persons. In that case the question which had arisen was whether profit should be assessed in the hands of the receivers in the status of an “association of persons”. The Supreme Court held that they were only representative assessee and the fact that there were three receivers did not make them associations of receivers. The three receivers jointly represented the real owners. The Supreme Court after referring to its earlier decision in *CIT v. Indira Bal Krishna* ¹ observed that the association of persons mean an association in which two or more persons joined in a common purpose or in an action and as the words occur in a section which imposes a tax on income the association must be one, the object of which is to produce income, profits or gains.

18. In the case of trustees of a discretionary trust it cannot be said that they have joined in a common purpose of common end and the purpose of association is to earn profits or gains. They became trustees of the trust not because they have mutually agreed to be trustees but because they have



been appointed as such under the trust deed. By no stretch of imagination it can be said that they have joined together in common for the purpose of carrying on activity which would produce income, profit or gains. Persons who come together as trustees must be such that left to themselves they might not on their own even sit together or do anything jointly. Therefore, applying the test laid down in CIT V. Deepak Family Trust No.1 (supra), the trustees cannot be regarded as association of persons.

19.. In the case of CIT V. Harivadan Tribhovandas, (1977) 106 ITR 494, the Court construed the words "body of individuals" as found in Section 2(31) of the Act as the conglomeration of individuals who carry on activity with the object of earning income. In order to construe the said words, the Court referred to the decision wherein the expression "association of persons" came up for consideration after referring to Indira Balkrishna's case (supra), the High Court observed that according to the Supreme Court the form of an association of persons must join together for the purpose of producing income and association of persons can be formed only when one or more members join together for certain purpose. Hence the volition on the part of the members of the Association is an essential ingredient. The



tenant in common cannot be said to be an associatic persons. Similarly, after the partition of HUF by metes and bounds, erstwhile co-parceners who become exclusive owners of separate parcels of land would not constitute an association of individuals merely because they live together in joint mess and one of the coparceners looks after the management of the property.

20.. The Court in CIT v. Hari Balkrishna (supra) pointed out that it is clear that merely because a combination of individuals receives income jointly without anything further, they cannot be regarded as an association of persons. In CIT v. Deepak Family Trust No.1 (supra), the Court's attention was drawn to the Supreme Court decision in WTO v C.K.Mammad Kayi, (1981) 129 ITR 307 wherein it has been held that the expression "individual" in Section 3 of the Wealth-tax Act, 1957, includes within its ambit Mappilla Marumakkathayam tarwads and they are well within the purview of the taxing provisions. Even after their inclusion in the term "individual" Section 3 is not violative of Article 14 of the Constitution of India. In that case, the Supreme Court referred to its earlier decision in CIT V. Sodra Devi² wherein it is held : "the word " individual" has not been defined in the Act (Indian Income-tax Act, 1922) and there is authority for



the proposition that the word "individual" does not mean a human being but is wide enough to include a group of persons forming a (natural) unit". This decision, though not directly on point, does lay down that the term "individual" as used in the Income-tax Act does not mean a single living human being but would include in its ambit a body of individuals constituting a unit for the purposes of the Act.

21.. The Madras High Court in CIT v Venu Suresh Sanjay Trust, (1996) 221 ITR 649 examined the question "whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that the assessee was entitled to deduction under Section 80L". Even while agreeing with the view taken by the department that the income computed in the assessee's case will be liable to tax under Section 164(1) treating such income as total income by an association of persons, the Court held that benefit under Section 80L of the Act would be available.

22.. Almost similar question is raised before this Court by the revenue. We have examined the decisions of Calcutta High Court and Gujrat High Court and reading the judgments it is very clear that Section 164(1) does not provide how the total income of the assessee has to be computed. The Division Bench followed the decisions of the Supreme



and CIT v. Indira Balkrishna (1960) 39 ITR 546, to point out that individuals must voluntarily join together for a certain purpose and there must be use of volition on the part of the members of the association, which is an essential ingredient. The Division Bench in CIT v Venu Suresh Sanjay Trust, (1996) 221 ITR 649, pointed out that Section 164 deals with a Trust for the purpose of charging tax where the share of beneficiary is unknown. A plain reading of Sections 160 to 162 would go to show that representative assessee either has to be "individual" or an artificial juridical person who is equated with an individual. The Court examined the provisions of Sections 161 and 162. The Court pointed out that reading of Section 164(1) would go to show that it is by fiction of law that income of the beneficiary has to be treated as income of association of persons for the purpose of charging tax. This legal sanction is available only for charging tax on the total income in the case of a Trust. The Court emphasised that Section 164 is not concerned with the manner of computation of the total income. In fact, this Section comes into play only after the income has been computed in accordance with other provisions of the Income-tax Act, 1961. Since determination of the status of an assessee is part of the process of computation of income, it is



of the trustee of a discretionary Trust can be taken to be an "association of persons" or "individual".

23.. The Division Bench after examining the case of Deepak Family Trust (supra) and other decisions as also provision of the Act held that the representative assessee in the case of discretionary Trust must be regarded as an "individual" and thus would be entitled to benefit of deductions under Section 80L and the Court relied for this purpose on various decisions some of which we have referred in earlier part of the judgment.

24.. In the case of CIT v. Venu Suresh's case (supra) the Division Bench pointed out that determination of total income depends on various provisions of the Income-tax Act which takes into consideration the deductions to be provided under Section 80L as well. The charge of tax comes into play after the income has been determined. The Court pointed out that "in the present case, the trustee is an individual. His status, therefore, has to be adopted as that of an individual and from his individual income the assessee is entitled to deduction under Section 80L. On the income so computed the tax has to be charged in view of the provisions contained S. 164(1) treating such income as if it was the income of an association of persons "



25.. In the case of Niti Trust v. CIT Gujarat, (1996),

ITR 435, the Division Bench was called upon to decide the question of the assessee, a private discretionary trust and its liability under the provisions of Section 112 of the Income-tax Act, 1961. In that case the assessee was assessed in so far as capital gain is concerned @ 20% in accordance with the provisions of S. 112(1)(a)(ii) on March 28, 1994. After considering the decisions of CIT v. Deepak Family Trust No. 1 (supra) and CIT v. Sri Krishna Bandar Trust (supra), the Court expressed an opinion that since the determination of status of the assessee is a part of the process of computation it is necessary to look into the general principles for determining whether the status of the trustees of the discretionary trust can be taken as association of persons or as an individual. The assessing officer has ascertained before proceeding with the assessment whether the person would fall in which category of persons defined in the Act, meaning thereby that the assessing officer is required to determine the status of the person and that would be the first step to be taken for assessment proceedings. After determining the status of person as an individual or an association of persons as the case may be he will have to proceed further and will have to determine the liability of the assessee. The Court negatived the contention raised on



behalf of the revenue that the assessee may be charge

one provision as an individual and as an association of persons for another provision. The Court pointed out that the views of Calcutta High Court as well as of Gujarat High Court appear that the trustees of discretionary trust are to be assessed in the status of an individual and benefit of Section 80L is thus consequential for conferring status to an individual.

26.. On behalf of the assessee, it was submitted that the provisions contained in S. 164(1) would apply in this case in respect of rates of tax of income, considering proviso (iv) of Section 164(1). It is submitted by the assessee that under Section 112 of the Act the Trust is liable to pay as an individual @ 20%. The taxable income will have to be determined after deductions are allowed as per the law. Clause XII refers to determination of tax in certain special cases. In view of what we have stated hereinabove, considering all the decisions, the assessee will be treated as "individual" in the instant case.

27.. When in the tax matters which are governed by all India statute, there is a decision of another High Court on the interpretation of a statutory provisions, it would be a wise judicial policy and practice not to take a different view



is sub silentio, per incuriam, obiter dicta or based on a concession or takes a view which it is impossible to arrive at or there is another view in the field or there is a subsequent amendment of the statute or reversal or implied overruling of the decision by a higher Court or some such or similar infirmity is manifestly perceivable in the decision. [see *Arvind Boards and Paper Products Ltd. v. CIT*, (1982) 137 ITR 635.]

28.. It must be remembered that it is a general policy in Income Tax matters that whatever the view of the Bench at the time of hearing may be, but the Bench should follow the view taken by another High Court on the interpretation of section. In case of *CIT v. Sarabhai Sons Limited* (1983) 143 ITR 473, 486, the Gujarat High Court observed that "Even though we may be persuaded to take a different view, we are not inclined to do so in view of the settled practice referred to in the decision of Madras High Court and the decisions of Bombay High Court and Madhya Pradesh High Court adverted above."

29.. However, on behalf of the revenue, it was submitted that the decisions of Gujarat, Calcutta and Madras High Courts are impliedly overruled. It may be noted that it is not the case of even the assessee that the assessee is not required to be taxed on income as per Section 164 of the Act.



which reliance is placed by revenue. The trust

undoubtedly a discretionary trust. The only question before

the Court was whether the income of the trust taxed in the

hands of the trustees is chargeable at the maximum marginal

rate or at the rate applicable to an association of persons

within the meaning of Section 164(1)? the Tribunal held that

the rate applicable is the rate applicable to association of

persons by virtue of proviso (i) to Section 164(1). The High

Court was of the view that the proviso (i) was not attracted

and therefore the income is chargeable at the maximum

marginal rate. The High Court was required to consider in

law and on facts new provisions of the trust deed that the

trust cannot be subject to maximum marginal rate of tax. The

income which is chargeable to tax is covered in view of the

first proviso to sub-Section (1) of Section 164. If the cases

are covered by the first proviso then the tax is to be charged

on the relevant income or part of the relevant income as if it

were the total income of the association of persons. The High

Court expressed an opinion that proviso (i) of Section 164(1)

of the Act is not attracted. In the instant case, the Court is

not called upon to examine as to which proviso will be

applicable but is called upon to examine whether in the case

of trustees the trust can be taken as an "association of

persons" or as "an individual"



30.. Before the Tribunal the question was with re_____ to the benefit available under Section 80L of the Act and the capital gains at the rate of 20% as chargeable under Section 112 of the Act. In view of the decisions we have considered hereinabove, we find that no substantial question of law arises in these appeals. Accordingly, the appeals are dismissed.

B. Durrez Ahmed
CHIEF JUSTICE

September 10, 2004
~vsp/rg

Badar Durrez Ahmed
BADAR DURREZ AHMED
(JUDGE)