* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

ITR No.72 of 1990
ITR No. 73 of 1990
ITR No. 74 of 1990

Judgment Reserved On: 29.7.2010
% Judgment Delivered On: 01.9.2010

(1) ITR No.72 of 1990

THE COMMISSIONER OF INCOME TAX . . . APPLICANT
Through : Ms. Prem Lata Bansal, Advocate.

VERSUS

SMT. PUSHPAWATI . . .RESPONDENT
Through: Mr.C.S. Aggarwal, Sr. Advocate with
Mr. Prakash Kumar, Advocate

(2) ITR No. 73 of 1990

THE COMMISSIONER OF INCOME TAX . . . APPLICANT
Through : Ms. Prem Lata Bansal, Advocate

VERSUS

SMT. PUSHPAWATI . . .RESPONDENT
Through: Mr.C.S. Aggarwal, Sr. Advocate with
Mr. Prakash Kumar, Advocate.

(3) ITR No. 74 of 1990

THE COMMISSIONER OF INCOME TAX . . . APPLICANT
Through : Ms. Prem Lata Bansal, Advocate

VERSUS

SMT. PUSHPAWATI . . .RESPONDENT
Through: Mr.C.S. Aggarwal, Sr. Advocate with
Mr. Prakash Kumar, Advocate

CORAM :-

HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MS.JUSTICE REVA KHETRAPAL

1. Whether Reporters of Local newspapers may be allowed

A.K. SIKRI, J.

1. In these three references, we are concerned with identical questions which arise in respect of three assessment years of the same respondent-assessee; assessment years being 1979-80, 1982-83 and 1983-84.

2. These questions are referred by the Tribunal alongwith statement of the case pursuant to the direction given by this Court in its order dated 11.7.1989 on the application preferred by the Department. Before we disclose the exact nature of the questions referred to, we state the relevant facts.

3. The assessee is an Individual. By a trust deed executed on 15.4.1978 the assessee and her husband Shri Bal Kishan Dass created a private trust by the name of U.B. Enterprises Trust. Each of the settlers had settled a sum of Rs. 10,000/- in trust for the benefit of the five beneficiaries, namely, Smt. Shashi Agarwal, daughter-in-law of the settlers, Master Amit, Miss Ujala Agarwal, Master Kapil Agarwal and Miss Anupama, the grand-children of the settlers. The Income-tax Officer making the assessment on the assessee examined the trust deed and held that under the provisions of section 64(1) (vi) of the Act, 50% of the income from the trust was includible in the total income of the assessee. A sum of Rs. 24,855/- was, thus, added in arriving at the total income of the assessee for the assessment year 1979-80.

4. The assessee appealed to the Appellate Assistant Commissioner, who held that on the facts of the case, section 64(1)(vi) of the Income Tax Act, 1961 was not applicable. He, therefore, directed the exclusion of the aforesaid sum.

5. The Revenue then came to Tribunal in I.T.A. No.4513/(Del)/84 assessment year 1979-80 and the Tribunal vide order dated 12.5.1986 upheld the view taken by the Appellate Assistant Commissioner.

6. For the assessment years 1982-83 and 1983-84 the assessee did not include in her return the aforesaid 50% share of the income of the trust. The Income Tax Officer completed the assessments under Section 143 (1). The Commissioner of Income tax thereafter invoked his jurisdiction under section 263 and vide order dated 19.11.1985 setting aside the assessments, he directed the Income-tax Officer to include the said share in the income of the assessee. The assessee then preferred I.T.A. Nos. 6662 and 6663/Del./1985 against the orders of the Commissioner and this Tribunal vide consolidated order dated 12.5.1986 cancelled the order passed by the Commissioner under Section 263. In doing so, the Tribunal followed its own order of date in I.TA No.4513/(DEL)/84 for assessment year 1979-80.

7. The rationale given by the Tribunal was that the transfer of money by two settlers were not made directly or indirectly to the daughter-in-law of the assessee or her grant children, who were minors. On the contrary, transfer of funds had been made to an association of persons for the benefit of assessee's daughter-in-law and her minor grand children. In such circumstances, according to the Tribunal, Section 64 (1) (vi) would not apply. In this backdrop following questions are referred for the opinion of this Court:-

> "1.Whether on the facts and in the circumstances of the case, the ITAT was correct in law in holding that the provisions of sec. 64(1) (vi) were not applicable to the case of the assessee?

in the hands of the assessee under the provisions of sec. 64(1) (vi)?"

8. The answers to the aforesaid questions, naturally depends on the interpretation which is sought to be given to Section 64 (1) (vi) of the Act. In order to appreciate the scope of this provision, we will have to take note of clause (vii) and (viii) prevalent in the relevant assessment years as well. Relevant portion of Section 64 incorporating these clauses reads as under:-

> **"64. Income of individual to include income of spouse, minor, child, etc.**
>
> (1) In computing the total income of any individual, there shall be included all such income as arises directly or indirectly
>
> xxx xxx xxx
>
> (vi) to the son's wife, or son's minor child, of such individual, from assets transferred directly or indirectly on or after the 1st day of June, 1973, to the son's wife or son's minor child by such individual otherwise than for adequate consideration;
>
> (vii) to any person or association of persons from assets transferred directly or indirectly otherwise than for adequate consideration to the person or association of persons by such individual, to the extent to which the income from such assets is for the immediate or deferred benefit of his or her spouse or minor child (not being a married daughter) or both; and
>
> (viii) to any person or association of persons from assets transferred directly or indirectly on or after the 1st day of June, 1973, otherwise than for adequate consideration, to the person or association of persons by such individual, to the extent to which the income from such assets is for the immediate or deferred benefit of his son's minor child or both.

9. All such incomes which arise directly or indirectly as stipulated in clause (vi) would also be included. Clause (vi) mentions that in case the assessee had transferred assets to his son's wife (i.e. daughter-in-law) or his/her grand-children directly or indirectly then income from those assets is

therefore, there was no such provision in the concerned assessment yea Sub-Section (1) of Section 64 of the Act mandates that all incomes whether directly or indirectly, which accrue from such a property shall be included. Here the expression "directly or indirectly" has reference to the income which would arise from the assets. In clause (vi), again the expression "directly or indirectly" is incorporated. This expression, however, refers to transfer of assets directly or indirectly to such persons named in the clause by such individual/assessee. The question, therefore, is as to whether creation of trust and transfer of assets by the assessee to the trust would amount to the indirect transfer?

10. We are of the opinion that the Tribunal was right in its conclusion that transfer of asset to the trust was not even an indirect transfer. It was because of the reason that the trust is an independent legal entity and it is the trustee who is legal owner of the trust property. The persons named therein may be the beneficiaries, but they have right only against the trustee who is the owner of the trust property. This is so held by the Supreme Court in ***W.O. Holdsworth & Ors****. Vs.* ***State of Uttar Pradesh*** *33 ITR 472.*

11. This legal position becomes clear when we read the provisions of clause (vi) in contradistinction to clause (vii) which uses the expression 'person or association of persons'. The expression 'association of persons' is significantly missing in clause (vi). Insertion of clause (viii) makes it clear that the legislature found this omission in clause (vi) and, therefore, incorporated the amendment. With the insertion of this clause even when there is transfer of an asset to a trust, i.e., association of persons, an income generated therefrom shall be included in the total income of the assessee. However, the said clause has been made effective w.e.f.

> "The income derived by the trust would have been includible in the hands of the assessee and the other co-settlor provided the provisions of sec. 64(1) (viii) were made retrospectively applicable to the asstt.year 1979-80 but since these were made applicable only w.e.f. the asstt. Year 1985-86 and since the provisions of sec. 64(1) (vi) do not cover a case like the present one, within their ambit, the order passed by the AAC disapproving the stand point of the ITO has to be upheld".

12. Attempt of Ms. Bansal was to impress us to hold that clause (vi) was clarificatory in nature. We cannot agree with this. Had it been so, it would not have been made effective from 1.4.1985. Few other judgments which are cited of which reference may be made have been discussed by the Tribunal also at length and since we are agreeing with the reasons given by the Tribunal, we reproduce the discussion contained therein:-

> "The other decision of the Hon'ble Supreme Court of India reported in 49 ITR 107 also does not help the case canvassed by the Departmental Representative. That was a case of gross gifts/transfers from father to daughter-in-law and son to mother of equal amounts and it was held by their Lordships that the income derived from property thus transferred was includible in the hands of the two transferors. In the present case, the facts are entirely different. As has been repeatedly said earlier it is a case whether the transfer and been avowedly made by the settlors to trust for the benefit of daughter-in-law and minor grand children but since the transfer had not been made directly or indirectly to the above mentioned beneficiaries, the provisions of sec. 64(1) (vi) would not be applicable. The decision reported in 120 ITR 848 also does not help the case of the department as in that case also the facts were entirely different. In that case, certain amounts held under trust had been transferred to the assessee's wife after the trust had come to an end. Their Lordships of the Hon'ble Bombay High Court had held that when the assessee's wife received the trust funds after the determination of the trust, it amounted to indirect transfer by the assessee to his wife and that the interest received by the wife could be included in the hands of the assessee under the provisions of sec. 16(3) (iii) of the Indian Income Tax Act, 1922. The facts in the

case of the department as in that case also the facts were wholly different. In that case, the assessee husband had settled certain properties on wife who had in turn settled those properties on children born later. It was held that was a case of indirect transfer. In the present case, the transfer had been made to a legal entity and since it had not been made directly or indirectly to the class of persons mentioned in sec. 64(1) (vi), the decision reported in 86 ITR 701 would not apply. Even though we bow to the law laid down by the Hon'ble Supreme Court of India in 154 ITR 148 and 157 ITR 77, we find that the present case does not fall within any colourable device or a subterfuge. The provisions of a taxation law have to be interpreted in a manner so that they counter-act evasion but in the present case where the affairs had been so planned that they do not fall within the provisions of sec. 64(1) (vi), we would not be able to stretch the law and hold that the income derived by the trust was assessable/includible in the hands of the assessee. In these facts and circumstances, the decisions of the Hon'ble Supreme Court reported in 150 ITR 148 and 157 ITR 77 and decision of the Hon'ble Full Bench of the Patna High Court reported in 157 ITR 13 would not stand in the way of the assessee who has succeeded before the AAC. On the other hand, we find that an absolutely similar circumstances, the Madras Bench of the ITAT had held in the case of Smt. N. Muthammal (6 ITO 136) that the income of a trust from the assets transferred by the assessee to the trustees for the benefit of minor grand children would not be includible in the hands of the settler/transferor under the provisions of sec. 64(1) (vi). Respectfully following the decision of the Madras Bench in the above mentioned case and noticing that the decision of the Hon'ble Supreme Court of India reported in 33 ITR 422 squarely supports the stand point taken by the assessee, we would uphold the order passed by the AAC"

13. We thus, answer the questions in favour of the assessee and against the Revenue.

(A.K. SIKRI)
JUDGE

(REVA KHETRAPAL)
JUDGE

SEPTEMBER 01, 2010

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

ITR No. 73 of 1990

Judgment Reserved On: 29.7.2010
% Judgment Delivered On: 01.9.2010

ITR No. 73 of 1990

THE COMMISSIONER OF INCOME TAX . . . APPLICANT
Through : Ms. Prem Lata Bansal, Advocate

VERSUS

SMT. PUSHPAWATI . . .RESPONDENT
Through: Mr.C.S. Aggarwal, Sr. Advocate with
Mr. Prakash Kumar, Advocate.

CORAM :-

HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MS.JUSTICE REVA KHETRAPAL

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

For orders see ITR No. 72 of 1990.

(A.K. SIKRI)
JUDGE

(REVA KHETRAPAL)
JUDGE

SEPTEMBER 01, 2010
skb

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

ITR No. 74 of 1990

Judgment Reserved On: 29.7.2010
% Judgment Delivered On: 01.9.2010

ITR No. 74 of 1990

THE COMMISSIONER OF INCOME TAX . . . APPLICANT
Through : Ms. Prem Lata Bansal, Advocate

VERSUS

SMT. PUSHPAWATI . . .RESPONDENT
Through: Mr.C.S. Aggarwal, Sr. Advocate with
Mr. Prakash Kumar, Advocate.

CORAM :-

HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MS.JUSTICE REVA KHETRAPAL

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

For orders see ITR No. 72 of 1990.

(A.K. SIKRI)
JUDGE

(REVA KHETRAPAL)
JUDGE

SEPTEMBER 01, 2010
skb