

Jan Mohammed, Nainital vs The Commr. Of Income-Tax on 22 October, 1952

Equivalent citations: AIR1953ALL119, [1953]23ITR15(ALL), AIR 1953 ALLAHABAD 119

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Bench: V. Bhargava

ORDER

1. This is a reference under Section 68(1) of the Indian Income-tax Act and the question referred to us for opinion is as follows : "Whether there was material to come to the conclusion that the money with which the bus was purchased was advanced to the wife by the husband so as to attract the operation of the Section 16(3) (a) (iii) of the Income-tax Act?"

2. The assessee carries on business in Haldwani and Naini Tal. There was, however, a bus No. 104 U. S. R. registered in the name of of the assessee's wife. The income from this bus amounting to Rs. 2520/- during the year in question was paid to the wife of the assessee by the Kumaon Motors Union who were running the bus. The Income-tax Officer claimed that the bus belonged to the assessee and his wife was merely a benamidar for him. He treated the income from the bus as the income of the assessee. The assessee, however, denied that the bus belonged to him and asserted that the bus belonged to his wife who had purchased it out of the money which she had received from her father at the time of his death in 1934.

The assessee, however, informed the Income-tax Officer that he could not produce any evidence to prove how and when that money came into the hands of his wife. When the case was heard by the Income-tax Appellate Tribunal, the two learned Members differed an the point whether it could be presumed that the bus belonged to the assGssee, there being no evidence or circumstance to establish the same. The point, on which they differed, was formulated as follows :

"The question for decision is whether in the circumstances, the presumption about the Bus belonging to the appellant could be legally drawn or not."

In accordance with Section 5-A(7) of the Income-tax Act, the point was referred by the President of the Tribunal to the third Member, Shri B. N. Mukerjee, who agreed with S. Kalbe Abbas that the presumption could not be drawn. The finding recorded is in the following terms: "My decision, therefore, as regards the first question is that, in the circumstances, the presumption about the bus belonging to the appellant could not be legally drawn." On this finding, therefore, the majority opinion was that the Income-tax Officer was wrong in presuming that the bus belonged to the assessee and that the presumption could not legally be drawn on the materials on the record. After having recorded that finding, however, the third Member formulated a new point for himself and

held that the bus must have been purchased from the assets transferred directly or indirectly to the wife by the husband. He relied on Section 16(3)(a)(iii) of the Income-tax Act. This point, however, had not been referred to the third Member and, under Section 5-A (7) of the Act, he was competent to decide only the point referred to him. The relevant portion of Section 5-A (7) of the Indian Income-tax Act runs as follows :

"If the members of a Bench differ in opinion on any point.....if the members are equally divided, they shall state the point or points on which they differ, and the case shall be referred by the president of the Tribunal for hearing on such point or points by one or more of the other members of the Tribunal....."

The third Member could, therefore, decide only the point that had been referred to him and he could not formulate a new point for himself on which he could base his decision. It appears to us to be further clear from a reading of the sub-section quoted above that after the decision of the point or points referred to him by the third Member, the case should go back to the original Tribunal because so far as we can see, the third Member has not been given any right to decide the appeal. According to Section 5-A (6) of the Income-tax Act, the appeal must be decided by the Tribunal which must consist of a Bench of not less than two Members.

As we have already said, the point referred to the third Member was whether there could be a presumption legally drawn from the materials on the record that the bus belonged to the 'appellant' and, on that point, the third Member having agreed with Shri Kalbe Abbas that no such presumption could be legally drawn, the majority view was in favour of the assessee. The last part of Section 5-A(7) of the Act provides that the point or points have to be decided according to the opinion of the majority of the Members of the Tribunal who had heard the case including those who had first heard it.

After the opinion of the third Member had been obtained the case should have gone back to the Tribunal for its final orders. We do not know what is the practice followed by the Tribunal. The rules framed by the Tribunal, which have been placed before us by the learned counsel, & which are relevant on this point, throw no light on the point. The rules are as follows: "Rule 33 (1) -- The order of the Bench shall be signed and dated by the members constituting it.

"Rule 33 (2) -- Where a case is referred under Sub-section (7) of Section 5-A, the order of the member or members to whom it is referred shall be signed and dated by him or them as the case may be."

"Rule 34 -- The Tribunal shall, after the order is signed, cause it to be communicated to the assessee and to the Commissioner."

These rules do not, however, show that it was intended that the third Member should finally dispose of the appeal when only some point or points had been referred to him for decision. In our view, the case with the opinion of the third Member should go back to the Tribunal for final decision. The Tribunal, when finally disposing of the appeal, may, no doubt, allow other points to be raised before

it, if they consider it proper. The third Member, however, can only answer the point or points that were referred to him for decision and on which there was a difference of opinion.

The reason is obvious. On the new point based on Section 16(3) (a) (iii) of the Income-tax Act there is only the opinion of the third Member. The two other members of the Tribunal had no opportunity of going into that question and, if the point had been raised before them, they might not have taken the same view as the third Member took. The jurisdiction of the third Member, it appears to us, is clearly defined in Section 5-A(7) of the Income-tax Act and he cannot, therefore, take it upon himself to decide the appeal by either dismissing or by allowing the same.

3. The result, therefore, is that, in our view, the case has never been properly disposed of by the Tribunal and there is no order of the Tribunal from which the reference under Section 66 of the Income-tax Act could arise. The case must, therefore, go back to the Tribunal for decision according to law. In view of the peculiar circumstances of the case, parties should bear their own costs of this case.