IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA.

I.T. Appeal No. 1 of 1999 with I. T. Appeal No. 2 of 1999.

Date of Decision : 23.5.2008

I.T. Appeal No. 1 of 1999

Sarita Vij & Co., …Appellant

Versus:

Commissioner of Income Tax, and another …Respondents.

I.T. Appeal No. 2 of 1999

Sarita Vij & Co., …Appellant

Versus:

Commissioner of Income Tax, and another …Respondents.

***Coram*:**

The Hon'ble Mr.Justice R. B. Misra, Judge.

The Hon'ble Mr.Justice Sanjay Karol, Judge.

Whether approved for reporting?[1] Yes

For the appellants Mr. M. M. Khanna, Sr. Advocate with S/Shri Pawan Gautam and Goverdhan Sharma, Advocates

For the respondents : Mr. Vinay Kuthiala, Advocate with Ms. Vandana Kuthiala, Advocate.

R. B. Misra, J. (Oral).

These two Income Tax Appeals have been preferred by the appellant under Section 260-A of the Income Tax Act, 1961, (in shot called 'Act') against the common order dated 6.1.1999 passed by the Income Tax Appellate Tribunal, (I.T.A.T.), Chandigarh in I.T.A. Case Nos. 2048 and 2049/CHANDI/91 in respect of the assessment years 1986-87

[1] **Whether reporters of Local Papers may be allowed to see the judgment?**

and 1987-88, therefore, both these appeals are being disposed of by a common judgment.

2. While admitting both the appeals, following substantial questions of law were framed by the High Court qua adjudication:-

(c) Whether assessment in the status of body of individuals can be legally sustained especially when the individuals share has already been assessed in the hands of co-owners on substantive basis?

(d) Whether the status of body of individuals can be ascertained, when no return in the status of body of individuals, nor any notice/letter from the ITO regarding his intention to assess the case in the hands of body of individuals had been issued?

(e) Whether Section 26 of the I. T. Act 1961 applies to the A.O.P. or body of individuals also?

(f) Whether in the facts and circumstances of the case the Ld. ITAT was right to disallowing the expenses incurred on account of salaries to the persons employed for upkeep of the said property?

3. For the adjudication of the above questions of law, it is necessary to give brief facts as under:-

The appellant is the wife of Mr. N. K. Vij, who was an Engineer working in the Traffic Engineering Cell SCO 34-40, Sector-C, Chandigarh, who along with other co-owners, namely, Sonia Vij, Monika Vij, Nisha Vij, Ayesha Vij and Babita, had taken the property bearing description as Sudershan Kothi, The Mall,

Dalhausie, Distt. Chamba (H.P.) from Smt. Raj Thakur individually made vide lease deed dated 18.1.1984 and collectively made on 22.6.1984. A copy of lease deed between Chamera Hydro Electric Project of M/s. National Hydro Electric Power Corp. Ltd., and M/s. Sarita Vij & Co., owners dated 19.11.1984 is attached as Annexure P-2. It appears that prior to entering of the lease deed, the said persons had agreed for lease of the said property to Chamera Hydro Electric Project and others for which income from house property was shown individually in their income tax returns from the assessment years 1984-85 to 1988-89. Copies of the agreement between co-owners with National Hydro Electric Power Corporation Ltd. are annexed as Annexures P-3, P-4 & P-5. It appears the individuals were assessed separately, however, the Income Tax Officer, Palampur issued a notice under Section 148 of the Income Tax Act in the name of M/s. Sarita Vij & Co. for the assessment year 1986-87. The appellant was also issued a notice under Section 139(2) of the Income-Tax Act for the assessment year 1987-88, in pursuance of which the assessment was completed under Section 143(3) for the assessment year 1987-88 on 24.12.1990 (Annexure P-6), taking total income of Rs.1,48,960/- in the hands of M/s. Sarita Vij & Co. in the status of Body of Individuals, (in short 'BOI'). Against the said order, the appellants preferred appeals before the Commissioner of Income Tax (Appeals), Shimla on the ground that since there was no

legal entity of the existence of M/s. Sarita Vij & Co. Dalhausie, as such, the assessment could not have been framed in the status of 'BOI' and since the income had already suffered tax in the hands of individuals, therefore, there arose no ground for double taxation for the same income. It appears that the appeals for the assessment years 1986-87 and 1987-88 were disposed of vide order dated 11.10.1991 (Annexure P-8), according to which the assessment of the appellant in the status of 'BOI' was upheld. Being aggrieved, I.T.A Nos. 2048 & 2049/CHANDI/91 were preferred before the Income Tax Appellate Tribunal, Chandigarh, (in short called 'Learned ITAT'), which were decided by a common order dated 6.1.1999 (Annexure P-9), however, upholding the assessment status of 'BOI. A miscellaneous petition (Annexure P-10) preferred under Section 254(2) of the I.T. Act indicating the errors apparent on the face of the record, was rejected vide an order dated 26.4.1999 (Annexure P-11).

4. Being aggrieved by the assessment order, appellate order and the order of learned I.T.A.T. Chandigarh, the appellants have preferred the present appeals under Section 260-A of the Income Tax Act, 1961 on the following grounds:-

(a) There is no entity in the name of M/s. Sarita Vij & Co. in existence and any notice, as such, is illegal.

(b) All the co-owners had since been individually assessed on substantive basis in respect of their 1/6th share in the property in question

and the assessments had become final, therefore, there arose no ground for making the assessment in the status of 'BOI'.

(c) The respective co-owners had given their individual shares on rent collectively through an agreement duly specifying the shares, therefore, the rental income received by Smt. Sarita Vij on behalf of Ms. Sonia Vij, Ms. Monika Vij, Ms. Nisha, Ms. Ayesha Vij and Ms. Babita Vij, could not have been assessed in the status of 'BOI'.

(d) Since neither status was mentioned in the notice nor anything could also be ascertained as to who was the assessee, therefore, it was not clear as to whether it was the addressees or the said association of persons (AOP) or some one individual who was sought to be assessed in reference to the notice under Section 148. As such, the notice was bad in law.

(e) In the present case, six persons took the portions in a property on lease as tenants in common. They gave their own portions in the building on rent in their individual capacities and no business or trade was carried out by them jointly. None of them was engaged in any activity for the purpose of producing an income. There was no common management or enterprises. There was no arrangement or agreement or any common aim or purpose. Thus, they cannot said to have joined to form an AOP or BOI, as in order to constitute 'AOP', there must be joining of together in a common venture to produce income while 'BOI' would

mean association for some common purpose and there must be unity.

(f) The notices under Section 148 of the Income Tax Act issued for the assessment years 1986-87 and 1987-88 were without ascertaining the report and status of the appellants.

5. During the course of arguments, it has been brought to our notice that undisputedly all the individuals owning property and their shares were individually assessed and notice under Section 148 was issued for re-assessment for the respective assessment years taking M/s. Sarita Vij & Co., as body of individuals (BOI).

6. Learned counsel for the parties has very fairly invited the attention of this Court towards the decision of the Supreme Court passed in *Meera and Company, Ludhiana* v. *Commissioner of Income Tax, Punjab, J&K and Chandigarh, Patiala* (1997 (4) SCC 677), wherein the controversy about the association of persons or body of individuals have been settled, whereby the scope of assessing the individuals as 'AOP' and 'BOI' become more evident.

7. For convenience, the relevant paragraphs of *Meera and Company* (supra) are quoted as below:-

> "28. Section 4 is the charging section under the 1961 Act. It has imposed a tax on the income earned by a "person" in the previous year. "Person" has been defined in Section 2(31) of the Act as under:
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> "2.(31) 'person' includes"-

(i) an individual,

(ii) a Hindu undivided family,

(iii) a company,

(iv) a firm,

(v) an association of persons or a body of individuals, whether incorporated or not,

(vi) a local authority, and

(vii) every artificial juridical person, not falling within any of the preceding sub-clauses;"

29. In the definition in clause (v), both "association of persons" and body of individuals" have been included with the added words "whether incorporated or not". Another thing to note is that clause (v) speaks of "an association of persons or a body of individuals". This implies that an "association of persons" is not something distinct and separate from a "body of individuals". It has been added to obviate any controversy as to whether only combination of human beings are to be treated as a unit of assessment. The intention clearly is to hit combinations of individuals and individuals, combinations of individuals and non-individuals and also combinations of non-individuals with other non-individuals who are engaged together in some joint enterprise when such joint enterprise does not fall within any of the other categories enumerated in sub-section (31) of Section 2 of the Act.

37. In the background of these definitions, when several individuals are found to have joined together for the purpose of making profit, the group of individuals may be conveniently described as "a body of individuals". We have been how the controversy arose under the Indian Income Tax Act

> as to the meaning of "association of individuals". There was a conflict of opinion on whether "individuals" include artificial or non-judicial persons. But there can be no scope of any controversy now. "An association of persons" or "a body of individuals", whether incorporated or not, has been brought within the net of taxation. The intention of the legislature is clearly to hit combination of individuals or other persons who were engaged together in some joint enterprise. The combinations may or may not be incorporated. A profit-yielding joint venture has to be taxed as a single unit.
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> 38. In the case before us, we have a widow and her minor sons who are engaged in the business activity which generates income. It does not make any difference that the widow and the minor sons did not start the business. The business was inherited. But the fact that the business has been continued by the widow on her own behalf as well as on behalf of the minor sons after buying the interest of the mother goes to show that there is an organized activity jointly carried on to produce income. It is a clear case of a joint business venture of a few individuals. The income of this business has been rightly assessed in the status of a "body of individuals".

8. After going through the contents of Section 2(31)(v), it becomes clear that "association of persons" or "body of individuals" whether incorporated or not, are included in the definition of "person" and in view of the observations made by the Supreme Court in *Meera and Company* (supra), even minors

income could be assessed in the hands of mother as their guardian. The minors income could not be clubbed with any other income of the mother, as mother being legal guardian and her personal income must be assessed separately. On such proposition, it becomes very clear that the appellants have already separately been assessed, then they cannot be assessed again for their income by way of clubbing their income in order to bring them in the category of 'AOP' & 'BOI'. As such, assessing Sarita Viz and other co-owners as indicated above, would be in derogation to the spirit of Section 26 of the Income Tax Act.

9. For convenience, Section 26 is given as below:-

> "26. Where property consisting of buildings or buildings and lands appurtenant thereto is owned by two or more persons and their respective shares are definite and ascertainable, such persons shall not in respect of such property be assessed as an association of persons, but the share of each such person in the income from the property as computed in accordance with Sections 22 to 25 shall be included in his total income."

10. Mere reading of Section 26, it becomes clear that if a property is owned by two or more persons and their respective shares are definite and ascertainable, even such persons shall not in respect of such property be assessed as an association of persons. However, the share of each such person in the income from the property shall be computed in accordance with Sections

22 to 25, but the share of each of such person in the income from the property has to be computed in accordance with Sections 22 to 25 included in the total income. Undisputedly, in the present case, M/s. Sarita Vij & Co. and other co-owners indicated above have been separately assessed. In these circumstance, provisions of Section 26 are attracted for reassessing them, treating them as an association of persons BOI. Accordingly, the question indicated portion (e) is dealt with and answered accordingly by saying that the provisions of Section 26 of the Income Tax Act in the present facts and circumstances applies to the present appellants.

11. In view of such analysis, the substantial questions of law indicated in (c), (d) & (f), are also dealt with accordingly, in view of the facts and circumstances, the individuals since have already been assessed and in view of the applicability of Section 26, the appellants and other co-owners named above cannot be re-assessed as AOP & BOI.

In view of the above observations, both the appeals are disposed of.

(R. B. Misra),
Judge.

(Sanjay Karol),
Judge.

May 23, 2008
(rana)