IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

ITA No. 66 of 2008

alongwith ITA No. 67/2008

Reserved on: 15.11.2012

Decided on:28.12. 2012

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1. IA No. 66 of 2008

Yashwant Chhajta son of late Sh. Salig Ram, Chhajta Khosla Building Khalini, Shimla.

...Appellant.

Versus

Deputy Commissioner of Income Tax, Circle Shimla, Railway Board Building, The Mall, Shimla.

...Respondent.

2. IA No. 67 of 2008

Yashwant Chhajta son of late Sh. Salig Ram, Chhajta Khosla Building Khalini, Shimla.

...Appellant.

Versus

Deputy Commissioner of Income Tax, Circle Shimla, Railway Board Building, The Mall, Shimla.

...Respondent.

Coram:

Hon'ble Mr. Justice Deepak Gupta, Judge.

Hon'ble Mr. Justice Rajiv Sharma, Judge.

Whether approved for reporting?[1] Yes

(in both the appeals).

[1] Whether reporters of the local papers may be allowed to see the judgment? yes

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For the Appellant. : **Mr. Vishal Mohan and Ashwani K. Lal, Advocates.**

For the Respondent: **Mr. Vinay Kuthiala, Sr. Advocate with Ms. Vandana Kuthiala, Advocate.**

Per Rajiv Sharma, Judge.

Since common questions of law and facts are involved in both these Appeals, the same were taken up together for hearing and are being disposed of by a common judgment.

2. Essential facts necessary for the adjudication of these appeals are that the appellant-assessee (hereinafter referred to as the "assessee" for convenience sake) is engaged in the business of civil construction. He had claimed deduction on account of salary paid to his wife Smt. Nanda Chhajta at ₹ 1,20,000/- for the assessment year 2003-04 and at ₹ 1,44,000/- for the assessment year 2004-05. The assessee was provided an opportunity to show cause why provisions of section 61 (1) (ii) of the Income Tax Act, 1961 may not be invoked to disallow the salary paid to Smt. Nanda Chhajta during the course of assessment proceedings. The Assessee filed reply to the show cause notice. According to him, Smt. Nanda Chhajta is an Engineer by profession and looks after

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plans for execution of the work allotted to the assessee. She also helps in making administrative decisions. The Assessing Officer has disallowed the salary for the assessment years 2003-2004 and 2004-2005 vide order dated 7.11.2006. Assessee preferred an appeal before the Commissioner of Income Tax (Appeals), Shimla against the order dated 11.7.2006. The Commissioner of Income Tax (Appeals) allowed the appeal on 5.10.2007. The Revenue preferred an appeal before the Income Tax Appellate Tribunal, Chandigarh Bench 'A' Chandigarh against the order dated 5.10.2007. The Income Tax Appellate Tribunal Chandigarh Bench 'A' Chandigarh Bench allowed the appeal preferred by the Revenue on 11.7.2008. Hence, these two appeals against the common order dated 11.7.2008 passed by the Tax Appellate Tribunal, Chandigarh Bench in ITA No.1052 of 2007 and 1053 of 2007 for the assessment years 2003-2004 and 2004-2005.

3. The assessee's wife is holding degree of Electronics Telecommunication. The assessee is engaged in the business of civil construction. The assessee has not placed tangible evidence on record to establish that Smt. Nanda Chhajta is actually involved in the business of her husband. He has also not placed

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on record any material to substantiate in what manner his wife is looking after the plans for execution of the work and taking administrative decisions. He has not even filed any affidavit. It was for the assessee to establish that income earned by his wife falls within the ambit of proviso to section 61 (1) (ii) of the Income Tax Act, 1961. Section 61 (1) (ii) reads thus:

> **"64. [(1) In computing the total income of any individual, there shall be included all such income as arises directly or indirectly-**
>
> **(i) [Omitted by the Finance Act 1992 w.e.f. 1.4.1993.]**
>
> **(ii) to the spouse of such individual by way of salary, commission, fees or any other form of remuneration whether in cash or in kind from a concern in which such individual has a substantial interest:**
>
> **[Provided that nothing in this clause shall apply in relation to any income arising to the spouse where the spouse possesses technical or professional qualifications and the income is solely attributable to the application of his or her technical or professional knowledge and experience.]"**

4. The learned Single Judge of the Karnataka High Court in ***Commissioner of Income Tax, Karnataka*** versus ***D. Rajagopal***, (1985) 154 I.T.R. 375 had the occasion to consider section 64 (1) (ii) of the Income Tax Act, 1961. According to the learned Single Judge, the proviso to clause (ii) of section 61 (1) of the Act is an exception to the clause and must be strictly construed. The proviso contemplates two conditions:

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1. the spouse must possess technical or professional qualifications and
2. the income derived by him or her must be attributable to the application of such technical or professional knowledge and experience. The technical professional qualification must relate to the post which he or she occupies and secondly, the salary or fees must be attributable to the application of his or her technical professional knowledge.

These two conditions must be satisfied for excluding the salary drawn by an assessee in his/her assessment and to assess it separately in the individual assessment of the recipients. The learned Single Judge has held as under:

> **"The proviso is an exception to clause (ii). It must, therefore, be strictly construed. The proviso contemplates two conditions : (1) the spouse must possess technical or professional qualification; and (2) the income derived by him or her must be attributable to the application of the such technical or professional knowledge an exprience. The requirement of technical or professional qualification is not general in terms. It must related to the post which he or she occupies and, secondly, the salary or fees must be attributable to the application for his or her technical or professional knowledge. Both these conditions must be satisfied for excluding salary drawn by an assessee in his/her assessment, and to assess it separately in the individual assessment of the recipient.**
>
> **Having regard to the nature of the business in which the assessee is employed and a mere degree qualification which he possesses cannot, in the context, be considered as professional or technical**

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> **qualification and the experience gained in that business shall not be referable to the qualification which he possesses. In this case, the assessee was just a graduate. He was receiving salary as the managing director of the concern in which his wife had substantial interest. His salary cannot, therefore, be taxed in his hands ignoring the provisions s. 64(1)(ii). The Tribunal was, therefore, justified in excluding the income of the assessee from his assessment and directing it to be assessed in the hands of his spouse."**

5. Similar principles have been reiterated by the Division Bench of Bombay High Court in ***Dr. J.M. Mokashi*** versus ***Commissioner of Income Tax***, (1994) 207 I.T.R. 253. The Division Bench has held that in order to claim the benefit of proviso to avoid clubbing of income under section 61 (1) (ii) of the Act, both the conditions specified in the proviso must be fulfilled. The Division Bench has held as under:

> **"In order to claim the benefit of the proviso to avoid clubbing of income under section 64(1)(ii) of the Act, both the conditions specified in the proviso must be satisfied. The first condition relates to the spouse of the individual who must possess "technical or professional qualifications". If this condition is not satisfied, the proviso will not apply and reference to the second requirement will be unnecessary. If the first condition in regard to the qualification of the spouse is satisfied, it will be necessary to refer to the second condition which pertains to the income that will not be clubbed. It may be pertinent to mention that even in the case of a spouse possessing technical or professional qualification, only the income arising to such spouse which is solely attributable to the application of his or her technical or professional knowledge and experience will be out of the purview of section 64(1)(ii) and not the whole of the income**

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of such spouse. It is in this context that the words "technical or professional knowledge and experience" have been used in the latter part of the proviso in contradistinction to "technical or professional qualifications" used in the earlier part. Thus, two different expressions have been used by Parliament in the very same proviso, not inadvertently, but with a deliberate purpose. We shall revert back to this aspect a little later, after discussing the true meaning and import of the first condition, viz., possession of technical or professional qualification.

If we read the expression "technical or professional qualification" used in the proviso to section 64(1)(ii) in the light of the above definitions of "technical" and "professional", it becomes clear that the "qualification" mentioned therein must be such which makes a person eligible for technical or professional work. A person can, therefore, be said to be in possession of requisite technical qualification when by virtue thereof, he is eligible to perform that function. Similarly, professional qualification must mean qualification which is necessary for carrying on the particular profession. Take, for example, the legal profession. The requisite qualifications for carrying on the legal profession have been laid down by the statute. In such a case, a person possessing such qualification alone can be said to be in possession of professional qualification, because such qualification is a must for carrying on the profession. Knowledge of law or experience is not relevant for that purpose. Similarly, a person cannot carry on medical profession unless he possesses the requisite degree. Similarly, there are technical jobs which require degrees and diplomas - whereas, there are a few others where university degree or diploma is not necessary. Adequate training and evidence thereof might be sufficient. Thus, the nature of professional qualification will vary from profession to profession. Similarly, the nature of technical qualification will also vary depending on the nature of the technical job. What is technical or professional qualification, therefore, will have to be decided in each case depending upon the nature of the profession or the technical work. But one thing is certain that it is not any and every qualification, academic or otherwise, which can bring a spouse within the scope and

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ambit of the proviso to take the income out of the clubbing provision. It is the possession of only technical or professional qualification necessary for undertaking the particular technical job or carrying on the profession to which the income is attributed that will meet the requirement of the first part of the proviso. "knowledge and experience" will not be relevant for that purpose. A spouse, well-versed in law and experienced in the working of the legal profession, cannot be said to be in possession of professional qualification for carrying on the legal profession if he or she does not possess the requisite degree or diploma. Payments made to the spouse in such a case for any legal services cannot be brought within the purview of the proviso by reference to the words "knowledge and experience" occurring in the latter part thereof.

26. The second requirement of the proviso, in fact, refers to the income of the spouse from a concern falling under section 64(1)(ii) and restricts the benefit of the proviso even in the case of an eligible spouse only to that part of the income which can be "solely attributed to the application of his or her technical or professional knowledge and experience". This provisions makes it clear that the possession of technical or professional qualification is a condition precedent on fulfilment of which that part of the income which falls in the second part of the proviso is excluded from the operation of the clubbing provision. Take, for example, the case of the wife of an individual who is a qualified legal practitioner. Her professional services are utilised by the assessee and remuneration paid to her by way of salary, fees, etc. In such a case, she fulfils the first requirement of the proviso and she is, therefore, entitled to the benefit of the proviso. But, the benefit is again hedged in with certain conditions and is limited to the extent indicated in the proviso. In that context, her "knowledge and experience" will assume significance. Take for example, the case of the wife of the individual who has just passed the LL. B. examination and enrolled herself as an advocate or having passed the LL. B. examination, did not practice law for long but has started doing so just a year or two back. Her professional services as a lawyer are utilised in the concern of her husband and she is paid remuneration therefor. In

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such a case, when the assessee claims the benefit of the proviso to avoid clubbing of such income of his wife with his own income, he will be required to satisfy that the remuneration so paid to her for her legal services was "solely attributable to the application of her professional knowledge and experience" as a lawyer. If the taxing authorities find that the remuneration paid for the legal services was excessive or high having regard to her limited professional knowledge and experience, he may determine the amount of remuneration which can be solely attributed to the application of her professional knowledge and experience and exclude only that part of her income from the clubbing provision contained in section 64(1)(ii). Thus, the object of the second part of the proviso is to restrict the benefit of the proviso only to reasonable payments for professional services and to put a check on diversion of income to the spouses possessing technical or professional qualifications in the guise of salary, fees, etc., for professional or technical services with a view to reduce the incidence of tax.

The forgoing discussion clearly goes to show that the two conditions mentioned in the proviso are cumulative and not alternative. They deal with two different aspects - one pertains to the eligibility of the spouse to claim benefit of the proviso, the other to the income which would qualify for exclusion from clubbing. Both are relevant and equally important. There is no scope for mixing up the two and diluting the first condition relating to qualification of the spouse by reference to the expression "knowledge and experience" in the second condition. Any attempt to do so will go counter to the clear language, scheme and object of the proviso and the well-accepted rule of interpretation that one part of a section or clause should not be construed in such a manner as to render the other part redundant. It is a cardinal rule of interpretation of statutes that a construction which would leave without effect any part of the statute should normally be rejected. We are, therefore, clear in our mind that there is no conflict between the two requirements of the proviso, each deals with a different aspect and both of them must be satisfied, though the second comes into

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operation only on fulfillment of the first condition, not otherwise."

6. The Division Bench of Gujarat High Court in ***Ashaben Rohitbhai and others*** versus ***Commissioner of Income Tax*** (1999) 237 I.T.R. 561 has held that the proviso contemplates two conditions:

(i) the spouse must possess technical or professional qualifications, and

(ii) income derived by him or her must be attributable to the application of such technical or professional knowledge and experience.

The Division Bench has held as under:

"The proviso contemplates two conditions: (1) the spouse must possess technical or professional qualifications; and (ii) income derived by him or her must be attributable to the application of such technical or professional knowledge and experience. The requirement of technical or professional qualification is not general in terms. It must relate to the post which he or she occupied and, secondly, the salary or fees must be attributable to the application of his or her technical or professional qualification is not general in terms. It must relate to the post which he or she occupied and, secondly, the salary or fees must be attributable to the application of his or her technical or professional knowledge. If these two conditions are fulfilled, the income must be considered to be of that person and should be assessed accordingly. If the job is of a technical nature requiring a degree or diploma, the holding of such degree or diploma would be essential. The nature of professional qualifications, however, varies from profession to profession. Likewise, the nature of technical qualifications also differs depending on the nature of the job."

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7. In the instant case, as noticed hereinabove, the assessee's wife though was in possession of technical qualification but the assessee was required to prove conclusively that his wife Smt. Nanda Chhajta was in fact looking after plans for execution work and was taking administrative decisions. The assessee cannot be given benefit merely on the ground that the deduction has been allowed to the assessment years 2001-2002 and 2002-2003. The order passed by the Income Tax Appellate Tribunal is reasoned and the proviso to section (64 (1) (ii) have been correctly appreciated.

8. Accordingly, in view of the observations and discussions made hereinabove, there is no merit in both the appeals and the same are dismissed. Pending application(s), if any, also stands disposed of. No costs.

(Deepak Gupta),
Judge

(Rajiv Sharma),
Judge

28.12. 2012.
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