

**IN THE INCOME TAX APPELLATE TRIBUNAL  
AHMEDABAD “A” BENCH, AHMEDABAD**

**[Coram: Pramod Kumar (Vice President)  
and Madhumita Roy (Judicial Member)]**

ITA No. 2367/Ahd/16  
Assessment year: 2012-13

**Adhiraj Pranay Shodhan** .....Appellant  
402, 31 Ivy, Opp Grand Bhagwati  
Off S G Highway, Boadakdev,  
Ahmedabad 380 054 [PAN: AJRPS4318R]

Vs

**Income Tax Officer**  
**Ward 5(2) (3), Ahmedabad** .....Respondent

**Appearances by**

**S N Soparkar** along with **Parin Shah** for the appellant

**Satish Solanki** for the respondent

Date of concluding the hearing : September 24, 2019  
Date of pronouncement : September 24, 2019

**O R D E R**

**Per Pramod Kumar, VP:**

1. This appeal, filed by the assessee, is directed against the order dated 23<sup>rd</sup> June 2016, passed by the CIT(A), in the matter of assessment under section 143(3) of the Income Tax Act, 1961, for the assessment year 2012-13.
2. Grievances raised by the appellant is that on the facts of and the circumstances of this case, the assessee should have been taxed on ½ of the capital gains, on sale of three properties held by the HUF headed by his late father, in substantive capacity. In the alternative, it is contended that once entire gain on sale of such properties is held to be taxable in the hands of the HUF, no part thereof should be taxed in the hands of the assessee individual.
3. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.
4. We find that, vide our order of even date, in the case of the assessee's HUF, we have, inter alia, observed as follows:

3. To adjudicate on this appeal, only a few material facts need to be taken note of. The assessee before us is a HUF. During the relevant previous year, the assessee sold three properties. In the income tax return filed by the assessee, however, only the capital gains on sale of  $\frac{1}{2}$  of these properties were shown. When the Assessing Officer probed this apparent discrepancy, it was explained that these properties were purchased by Shri Pranayakumar Shodhan (**Shodhan Sr**, in short) HUF consisting of Shri P H Shodhan, his son Adhiraj P Shodhan, (**Shodhan Jr**, in short) and wife and children of Shodhan Jr, and that Shodhan Sr passed away intestate on 14<sup>th</sup> December 2010. It was explained that in view of the provisions of Section 6(3) of the Hindu Succession Act, 1956, as they stood after the 2005 amendments thereto came into force, when a Hindu dies intestate, his interest in joint hindu family, governed by mitakshara law, shall devolve by intestate succession, and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition in such property has taken place. In view of this legal position, as per the assessee,  $\frac{1}{2}$  of the property was passed on to Shodhan Jr, in his individual capacity as deceased's son, and the other  $\frac{1}{2}$  property was passed on to the HUF headed by Shodhan Jr. The assessee explained that it was in this backdrop that the assessee, HUF headed by Shodhan Jr, was owner of only  $\frac{1}{2}$  of the properties held by HUF headed by Shodhan Sr, and the capital gains on this  $\frac{1}{2}$  share were duly disclosed in the income tax return. It was also explained by the assessee that the other  $\frac{1}{2}$  share belonged to Shodhan Jr in his individual capacity, and, as such, to that extent,  $\frac{1}{2}$  capital gains are disclosed in the income tax return filed by Shodhan Jr in his individual capacity. It appears that the assessee also relied upon certain observations made in some judicial precedents, but these were held to be inapplicable on the facts of this case, and the matter rests there. The Assessing Officer referred to the provisions of Section 171, specially to sub section 9 thereof, to highlight the fact that any partial partition of the HUF, after 31<sup>st</sup> December 1978, cannot be recognized for the purposes of the Income Tax Act, 1961. A reference was then made to Hon'ble Supreme Court's judgment in the case of ACIT Vs Venugopal Irani (239 ITR 514) in support of the proposition that whatever may be the position under the Hindu law, Section 171 has to apply for the income tax purposes. A reference was also made to Hon'ble Supreme Court's judgment in the case of State of Maharashtra Vs Narayn Rao Shyam Rao Deshmukh (163 ITR 31) in support of the proposition that unless there is actual partition in pursuance of a deemed partition, the status of the family continues as joint family. A reference was also made to Hon'ble Supreme Court's judgment in the case of ACIT Vs Maharani Raj Laxmi Devi (224 ITR 582) to support the contention that though, for Section 6 of Hindu Succession Act would govern the right of the parties, so far as income tax proceedings are concerned, section 171 of the Income Tax Act will hold the field. The Assessing Officer finally concluded as follows:

“3.7. From the above it is crystal clear that the contention of the assessee that a deemed partition was took place on the death of his father Pranaykumar Hariprasad Shodhan cannot be acceptable under the Income-tax law. Section 171 of the Income-tax Act makes it clear that when a person is assessed in the status of HUF it shall be deemed to have remained a HUF for the purpose of assessment of tax under the Act unless there is a finding of partition in terms of the provisions of section 171(3) in respect of partition of the properties of such HUF. When a property is acquired with the aid or assistance of a joint family the property so acquired becomes and remains the assets or properties of the HUF unless a partition, subsequent to such acquisition takes place. In view of the above facts and circumstances of the case more particularly the decisions quoted supra, I am of the view that the three properties sold during the year under assessment will be wholly and exclusively considered in the hands of the assessee HUF. Following this, the capital gains earned on the sale of the three immovable properties is hereby taxed in the hands of the assessee HUF.”

4. Aggrieved, assessee carried the matter in appeal before the CIT(A) but without any success. Learned CIT(A) confirmed the action of the Assessing Officer and observed as follows:

“3.5. From Ground Nos.3 to 6, the appellant has objected the additions made by the A.O. in the hands of the assessee HUF. In this regard the appellant has submitted that he is owner in this HUF set with only one half share of the properties and income therefrom and the other half share of the property and incomes belongs to my individual set. It is further submitted that this status for ownership of half share in my HUF set is as per operation of law and Section-6 of Hindu Succession Act. The appellant has submitted that since his father has passed away after 2005 his interest in the property of his joint hindu family governed by the Mitakshara Law, shall devolve by testamentary or intestate succession, as the case may be, under this Hindu Succession Act and not by survivorship. It is further submitted that for this purpose the interest of a Hindu Mitakshara Coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitle to claim partition or not. The appellant has also contended that on notional partition all his HUF properties will be divided into one half share each belonging to him in his individual capacity and in his HUF capacity. The appellant has also submitted that this has also been established by solicitors and advocates H. Desai & Co while issuing the title clearance certificate. The appellant has also contended that as per Section-6 of Hindu Succession Act it is mandatory to deem a partition in the properties having taken place immediately before the death of a Hindu Mitakshara Coparceners and this division has been introduced by way of deeming fiction and upon such notional partition the property would stand divided amongst the coparceners. It is also submitted that on the death of father of the appellant HUF ceased to exist and a total partition of HUF immediately before the death of assessee's father is deemed to have taken place as per the provisions of Section-6 of Hindu Succession Act and there is no question of passing order u/s.171 of the I.T. Act. The appellant has relied upon following judgments:-

- (a) Shalini Raut & Others
- (b) Akhiles & Others (HUF)
- (c) Gurupad Khandappa Magdum & Others
- (d) Anar Devi & Others

3.6. The facts of the case and the submissions are considered. A joint hindu family consists of persons lineally descended from a common ancestor and includes their wives and unmarried daughters. The daughters on marriage ceases to be a member of her father's family and becomes a member of her husband's family. HUF is taxable in respect of income arising/acruing from ancestral properties which is also known as coparceners property. Section 171 of the Act raises a legal fiction that an HUF shall be deemed to continue unless a finding of partition has been given u/s.171 of the IT Act. The appellant has relied upon the provisions of Section-6 of Hindu Succession Act-1956 as amended in 2005. After the amendment of Section-6 of Hindu Succession Act, 1956 w.e.f. 9.9.2005, the daughter of coparcener in joint family is also to be treated as coparceners on the same footing as that of a son. The discrimination between son and daughter disappears after the amendment of Section-6 of Hindu Succession Act. Section-6(3) of Hindu Succession Act creates a

*legal fiction to the effect that a division of property had taken place as a partition had taken place on immediately before his/her death. However, the aforesaid amendment doesn't affect the legal position u/s.171 of the IT. Act. The provisions of Section 171 of the I.T. Act have to be complied with irrespective of the amendment of Section -6 of Hindu Succession Act, 1956. In case of Maharani Rajlakshmidevi 224 ITR 582 the Hon'ble Supreme Court has held that recording of partition u/s. 171 is necessary even in cases falling u/s.6 of the Hindu Succession Act. The Court has further observed that it must be held that though for the purpose of HUF Section-6 of the Hindu Succession Act, would govern the rights of the parties but in so far as I.T. Law is concern the matter has to be governed by Section 171(1) of the Act. The decision cited by the appellant are on different footings and the AO has discussed the facts of all these judgments in the assessment order in detail. Therefore, these decisions are not applicable in the case of the assessee. In the present case, as there was no partition as per the provisions of Section 171 of the Act it cannot be said that the properties have been divided amongst the assessee in his individual capacity as well as in HUF capacity. The property will remain with the HUF as no partition has been taken place as per the provision of Section 171 of the Act. Considering the above discussion, the view taken by the A.O. that the capital gain earned on the sale of these three immovable properties taxed in the hands of the assessee HUF is justified and correct. Thus the ground raised by the appellant are dismissed.”*

5. *The assessee is not satisfied and is in further appeal before us.*

6. *We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.*

7. *We find that section 6(3) of the Hindu Succession Act, 1956, as it stands post 2005 amendment, provides that “**where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place**”. It is thus clear that on the death of Shodhan Sr, who admittedly died intestate inasmuch as he did not make a will before his death, his HUF property is to devolve by intestate succession rather than survivorship of the HUF coparceners. It is also important to note that, for the purpose of devolution of property, a notional partition is to take place. When we assume that fiction, and considering that only Shodhan Sr and Shodhan Jr were coparceners in that HUF, the division of shares has to be one half to each- i.e. Shodhan Sr and Shodhan Jr. As for the share of the Shodhan Sr, that is what would go to Shodhan Jr, and as for the share of Shodhan Jr, that is what would constitute HUF nucleus for the smaller HUF of Shodhan Jr. In effect, thus, the son's share in the HUF will become property of the son's HUF, and the father's share will come to son in his individual capacity. The plea of the assessee thus indeed seems correct.*

8. *In any case, as rightly contended by the learned senior counsel for the assessee, if one is to proceed on the basis that no partial partition of the HUF of Shodhan Sr has taken place as no order under section 171 is passed, the entire gains should have been assessed in the hands of that HUF of Shodhan Sr. The Assessing Officer, however, proceeded to tax entire capital gain in the hands of the assessee of the assessee before us i.e. HUF of Shodhan Jr. That course of action, in our humble understanding, is not permissible in law inasmuch as on one hand the Assessing Officer proceeds on the basis that the larger HUF has come to an end on the death of Shodhan Sr, and, on the other hand, he also proceeds on the*

*basis that entire assets of HUF of Shodhan Sr have also passed on to the HUF of Shodhan Jr. Once the assets of larger HUF are to go to small HUF, that can only be done only so far as ½ of such assets are concerned. The other ½ of the assets of HUF Sr have to essentially go to Shodhan Jr, in individual capacity, as he was the only class I heir to his father, i.e. Shodhan Sr. The stand of the Assessing Officer, which has met approval of the learned CIT(A) as well, cannot, therefore, meet our judicial approval.*

9. *In view of these discussions, and bearing in mind entirety of the case, we uphold the plea of the assessee that the assessee HUF, at best, is taxable only in respect of ½ of the properties acquired by the HUF headed by Shodhan Sr.*

5. In view of the findings in the case of the assessee's HUF, we uphold the plea of the assessee and direct the Assessing Officer to tax ½ of income of sale of the three properties held by the HUF, headed by the father of the assessee, in his hands in substantive capacity.

6. No other issue was raised before us.

7. In the result, the appeal is allowed in the terms indicated above. Pronounced in the open court today on the 24<sup>th</sup> day of September, 2019

Sd/-

**Madhumita Roy**  
(Judicial Member)

Sd/-

**Pramod Kumar**  
(Vice President)

**Ahmedabad, dated the 24<sup>th</sup> day of September, 2019**

<i>Copies to:</i>	(1) <i>The Applicant</i>	(2) <i>The respondent</i>
	(3) <i>CIT</i>	(4) <i>CIT(A)</i>
	(5) <i>DR</i>	(6) <i>Guard File</i>

*True Copy*

*By order*

*Assistant Registrar  
Income Tax Appellate Tribunal  
Ahmedabad benches, Ahmedabad*