

(1985) 03 GUJ CK 0011
In the Gujarat High Court

Case No : Income-tax Reference No. 208 of 1977

Billimora Engineering Mart

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 20-03-1985

Acts Referred:

Income Tax Act, 1961 — Section 184, 184(4), 184(5), 185, 185(2)
Income Tax Rules, 1962 — Rule 22(2)

Citation : (1986) 53 CTR 370 : (1985) 156 ITR 153

Hon'ble Judges : D.H. Shukla, J; B.K. Mehta, J

Bench : Division Bench

Advocate : D.A. Mehta and R.K. Patel, for K.C. Patel, for the Appellant; S.N. Shelat, for the Respondent

Judgement

B.K. Mehta, J.—At the instance of the assessee, the following two questions have been referred to us for our opinion :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the registration application filed by the assessee was invalid and accordingly it was not entitled to seek registration as prayed for ?

2. Whether, on the facts and the circumstances of the case, the Tribunal was correct in law in holding that the assessee had not complied with the requirement of law and relevant Rules for getting itself registered u/s 185 of the I.T. Act, 1961 ?"

2. A few relevant facts need be noticed in order to appreciate, the rival contentions urged in support and opposition of this reference.

3. The assessment year is 1970-71 and the relevant previous year was ended on March 31, 1970. It should be noted that the assessee-firm commenced its partnership business on September 1, 1969. The partners of the assessee-firm filed an application for registration in Form No. 11 as required under rule 22 of the I.T. Rules, 1962, On November 3, 1969. It should be also recalled that it is

common case that the deed of partnership was executed on January 8, 1970. In other words, the application for registration was not accompanied by the original or certified copy of the deed of partnership. It has been found that the assessee-firm had filed the original partnership deed along with the copy thereof after January 8, 1970, and before August 1972, though its exact date was not known as there was no receipt-stamp on the said document. The partnership deed is found to have been drafted on two stamp papers of Rs. 50 each; one of the which was purchased on September 1, 1969, and another was purchased on December 24, 1969. As stated above, the partnership deed was executed on January 8, 1970, i.e., after the application for registration was filed on November 3, 1969.

4. The ITO had issued a show-cause notice to the assessee-firm on August 18, 1972, to show cause as to why registration should not be refused, since the application for registration was not in order, inasmuch as it was not accompanied by the instrument evidencing the partnership.

5. In reply to the aforesaid show-cause notice, the assessee submitted that the evidence in the nature of instrument of partnership need not be contemporaneous and could be executed at any time up to the end of the accounting year provided there was an oral agreement in that decision of the support of this submission, the assessee relied on the decision of the Supreme Court in P.R. Chowdhary and S. Gangoli Vs. The State of U.P., . The assessee also pointed out that under s. 185(2), the ITO ought to have given an opportunity to the assessee to put its application in order within the prescribed statutory period. However, as the assessment was not completed by the time it submitted its reply to the show-cause notice, a fresh application in Form No. 11 enclosing the instrument of partnership was sought to be submitted along with the said reply. It should be noted that inadvertently the assessee did not enclose the application as stated in the said letter, and the fresh application along with the necessary enclosures was actually filed somewhere on March 21, 1973, under cover of a letter of even date. Meanwhile, the ITO by his letter of March 12, 1973, in reply to the explanatory letter aforesaid of the assessee dated November 22, 1972, pointed out that the assessee was under an obligation to comply with the mandatory requirement prescribed under rule 22 of the I.T. Rules 1962, inasmuch as the instrument of partnership was not annexed with the original application for registration filed on November 3, 1969, and therefore, it was liable to be rejected. It is further reply to this letter of the ITO that the assessee pointed in his aforesaid reply to this letter of March 21, 1973, that the necessary requirements of rule 22 have been carried out inasmuch as the application for registration was filed on November 3, 1969, and the partnership deed was brought into existence on January 8, 1970, that is, before the close of the accounting year. It is by way of enclosure to this letter that it filed a fresh application which it has inadvertently failed to enclose with its previous letter of November 22, 1972. The ITO was not satisfied with the explanation of the assessee as he was of the opinion that there was no valid application moved

before him for registration as the failure on the part of the assessee to annex the instrument of partnership constituted a basic defect which rendered the assessee's claim for registration unsustainable. The ITO emphasised that on the day on which the application was made, that is, November 3, 1969, the deed of partnership was not in existence and, therefore, it could not have annexed any instrument to evidence the partnership at the date of the application as required under the rules. He, therefore, rejected the application for registration.

6. The appeal of the assessee, before the AAC as well as its further appeal before the Tribunal met with the same fate with the result that the assessee asked for a reference of the two questions as set out hereinabove which was granted by the Tribunal.

7. What are the requisites for registration is the first question to which we must address ourselves. On a plain reading of s. 184, there are four requisites for obtaining registration of a partnership firm :

1. There should be a valid and genuine partnership in existence during the accounting year.

2. It should be "evidenced by an instrument" of partnership.

3. The instrument should specify the individual shares of the partners.

4. An application for registration together with the prescribed annexures should be made to the ITO ordinarily before the end of the accounting year.

8. It should be also noted that the ITO has been empowered under sub-ss. (4) and (5) of s. 184 of the I.T. Act, 1961, to entertain an application made after the previous year if the assessee is prevented by sufficient cause from making the application and to accept a certified copy in place of the original instrument which an assessee is required to file along with the application for registration. The short question which arises in this reference is : whether the application made by the assessee for claiming registration of the firm on November 3, 1969, can be said to be an application void ab initio, in the sense of it being non-est, so as to justify the order of the ITO as confirmed right up to the Tribunal, refusing registration ? In the opinion of the ITO, and for that matter of the AAC as well as the Appellate Tribunal, the application moved by the assessee on November 3, 1969, without the accompaniment of the instrument of partnership was so materially defective as to be treated as a non-est application. We may have, therefore, to read the material provisions relevant for purposes of this reference. Section 184, in so far as it is material for our purposes, reads as under :

"184. Application for registration. - (1) An Application for registration of a firm for the purpose of this Act may be made to the Income Tax Officer on behalf of any firm, if -

(i) the partnership is evidenced by an instrument; and

(ii) the individual shares of the partners are specified in that instrument.....

(4) The application shall be made before the end of the previous year for the assessment year in respect of which registration is sought :

Provided that if the Income Tax Officer may entertain an application made after the end of the previous year, if he is satisfied that the firm was prevented by sufficient cause from making the application before the end of the previous year.

(5) The application shall be accompanied by the original instrument evidencing the partnership, together with a copy thereof :

Provided that if the Income Tax Officer is satisfied that for sufficient reason the original instrument cannot conveniently be produced, he may accept a copy of it certified in writing by all the partners (not being minors), or, where the application is made after the dissolution of the firm, by all the persons referred to in clause (b) of sub-section (3), to be a correct copy or a certified copy of the instrument; and in such cases the application shall be accompanied by a duplicate copy of the original instrument.

(6) The application shall be made in the prescribed form and shall contain the prescribed particulars.....

9. The prescribed particulars which should be comprised in the application are to be found in rule 22 of the I.T. Rules, 1962, Rule 22, in so far as it is material for our purposes, provides as under :

"22, (1) An application for registration of a firm for the purposes of the Act shall be made in accordance with the provisions of sub-rules (2) to (5).

(2) Where the application is made before the end of the relevant previous year -

(i) and where no change in the constitution of the firm or the shares of the partners has taken place during the previous year before the date of the application -

(a) the application shall be made in Form No. 11; and

(b) it shall be accompanied by the original instrument evidencing the partnership at the date of the application together with a copy thereof. A certified copy of the instrument together with a duplicate copy thereof may be attached to the application if, for sufficient reason, the original instrument cannot be produced;

(ii) and where any change or changes in the constitution of the firm or the shares of the partners have taken place during the previous year before the date of the application -

(a) the application shall be made in Form No. 11A; and

(b) it shall be accompanied by the original instrument or instruments evidencing the partnership as in existence from time to time during the previous year up to the date of the application together with copies thereof. A certified copy of the instrument or instruments together with a duplicate copy thereof may be

attached to the application if, for sufficient reason, the original instrument or instruments cannot be produced...."

Form No. 11 which is the prescribed form for purposes of such application for registration required the applicant that the original/certified copy of the instrument evidencing the partnership together with a copy/ duplicate copy to be enclosed, and also to furnish prescribed particulars as required in the Schedule to the said form. The particulars which are to be furnished in the Schedule are in respect of the firm as constituted at the date of the application, and where the application is made after the end of the previous year, the apportionment of the income of the partners is to be stated. The different columns of the table given in the Schedule require the name of the partner, his address, date of his admission to the partnership, interest on capital or loans given by him, salary or commission, or other remuneration paid to him from the sum and the share in the balance of the profit or loss, and the remarks, if any, to be filled in. It is in the context of these legal requirements that we have to decide as to whether the assessee is entitled to registration. It is nobody's case that there was no valid and genuine partnership in existence during the accounting year. The only controversy between the parties centers round the point as to what is the effect of the failure on the part of the assessee of the non-compliance of the requirement of sub-s (5) of s. 184 read with r. 22(2)(i)(b). In other words, what is the effect of the application for registration not being accompanied by the instrument of partnership. The second requisite as noted above for the purpose of obtaining registration is that the firm should be evidenced by an instrument of partnership. We should remind ourselves that r. 22(2)(i)(b) enjoins that an application for registration shall be in Form No. 11 and shall be accompanied by the original instrument evidencing the partnership at the date of the application. On reading this rule and the main enactment in sub-s. (5), the Income Tax authorities, including the Tribunal, are of the view that the instrument of partnership must be in existence at the date of filing of the application for registration. In this connection, we should remind ourselves of the old scheme in the 1922 Act, where s. 26A which laid down the procedure for registration of the firm enjoined that an application may be made to the ITO on behalf of any firm constituted under an instrument of partnership specifying the individual shares of the partners for the registration for the purposes of the said Act. Sub-s. (2) required that an application was to be made by such person or persons and at such times and containing such particulars and in such form and be verified in such manner as may be prescribed under the rules. Rule 3 of the relevant rules under the said Act required that an application be made in the form annexed to the rule, and that it shall be accompanied by the original instrument of partnership by which the firm is constituted. There was a conflict of judicial opinion amongst the different High Courts as to what should be the precise meaning of the term "constituted under an instrument of partnership" - whether it is tantamount to saying as constituted by the instrument of partnership. One view represented by the Calcutta High Court was that a firm was entitled to

registration if it had come into existence by reason of the instrument of partnership (Vide *R.C. Mitter and Sons Vs. Commissioner of Income Tax, West-Bengal*, . The second view was that registration can be granted to a firm even on embodying the terms of the partnership though executed subsequently to the commencement of the business of the partnership firm. This view was taken in a line of decisions represented by the decision of the Bombay High Court in *Dwarkadas Khetan and Co. Vs. Commissioner of Income Tax, Bombay City, Bombay*, . The third view which was adopted was that a valid partnership can come into existence by an oral agreement and s. 26A did not enjoin that it should not have existed prior to the execution of the instrument of partnership (see *P.R. Chowdhary and S. Gangoli Vs. The State of U.P.*, ; *Commissioner of Income Tax, Bombay North, Kutch and Saurashtra Vs. Patel and Co.*, and *Commissioner of Income Tax Vs. Joseph and George*, . It appears to as that in order to avoid this controversy arising from the expression "partnership constituted under an instrment" as prescribed in the 1922 Act, we find that in the present Act of 1961, the requirement is that the partnership should be evidenced by an instrument and the application shall be accompanied by the original instrument evidencing the partnership at the date of the application. The words "evidenced by an instrument of partnership" do not indicate necessarily that the evidence should be a contemporaneous evidence when the application is made, because, in the ultimate analysis, the purpose of any evidence and, for that matter the instrument of partnership, is to satisfy the authority that there was a genuine and valid partnership in existence in the accounting year. If we closely look at this requirement as prescribed in r. 22(2), it is manifestly clear to us that such evidence in the nature of instrument must be in relation of a partnership as it existed, if any, at the date of the application. We do not think that it is legislative intent that unless there is an instrument of partnership in existence at the date of the application that the assessee concerned would not be entitled to registration. If that had been the legislative intention, the Legislature would have appropriately expressed itself by saying that the application for registration shall be accompanied by the original instrument in existence at the date of the application. The requirement of the original instrument is only for purpose of providing an evidence of the partnership as existing at the date of the application. It has only a limited purpose and the provision as contained in the section or the rule cannot be overemphasised as is sought to be done by the Income Tax authorities. It is no doubt true that the instrument of partnership was not annexed to the application made by the assessee for registration. Sub-section (5) of s. 184 no doubt provides that the application shall be accompanied by the original instrument evidencing the partnership. However, we do not think that this can be said to be such a mandatory provision the breach of which would render the entire application non est.

10. The learned counsel for the Revenue urged that the obligation of annexing the original instrument to the application for registration, having regard to the language in which it has been couched, appears to be mandatory. Even assuming

it to be so, we do not think that the breach of such a provision can render the entire act of the application to be non est. The Supreme Court in *Dhirendra Nath Gorai and Subal Chandra Shaw and Others Vs. Sudhir Chandra Ghosh and Others*, , pointed out the difference between an irregularity and a nullity. Broadly stated, the distinction is that an irregularity is a deviation from the rule of law which does not take away the foundation or authority for the proceeding, or apply to its whole operation, whereas nullity is a proceeding that is taken without any foundation for it, or is so essentially defective as to be to avail or effect whatsoever, or is void and incapable of being validated. The Supreme Court adopted the broad tests indicated by justice Coleridge for purposes of discerning as to whether an act is in irregularity or a nullity. The safest rule to determine what is an irregularity and what is a nullity, as pointed out by, Justice Coleridge in *Holemns v. Russel* [1841] 9 Dowl 487, is to see whether the party can waive the objection. If it can waive it, it amounts to an irregularity; if he cannot, it is a nullity. Subba Rao J., speaking on behalf of the court, summed up the position that a directory provision can obviously be waived but a mandatory provision can only be waived if it is not conceived in the public interest, but in the interest of the party that waives it. Viewed from that angle, it cannot be gainsaid that the provision for accompaniment of the original instrument evidencing the partnership with the application for registration is directory, or, in any case, even if mandatory, is capable of being waived. The legislative intent conferring a right of condonation is an indication in that direction. Such a right of the ITO is to be found in the proviso to sub-s (5) where the ITO, if he is satisfied that for sufficient reason the original instrument is not forthcoming, may accept a certified copy of it as required therein. Similarly, the ITO has been empowered to entertain an application made after the end of the previous year if he is satisfied that the firm concerned was prevented by sufficient cause from making an application in time. Subsection (4) requires that the application is to be made before the end of the previous year for the assessment year in respect of which the registration is sought. It is an admitted position that the assessee in the present case had submitted the original instrument together with the copy before the ITO at any rate before he proceeded to decide this question of registration though it is not clear as to whether the assessee had produced the original instrument as well as its copy before the close of the accounting year. The learned counsel for the Revenue was at great pains to impress upon us that the date of which the application for registration was made, the instrument of partnership was not in existence and assuming that the original as well as the copy of the instrument had been produced before the close of the year, it could have been only after January 8, 1970, when the partnership deed was executed and, therefore, it could not rectify the original defect in the application, even if the court is inclined to view that defect as curable. The submission appears to be attractive but on a close scrutiny, we find ourselves, unable to accept it for the obvious reason that the assessee would have got the registration, if it had made an application on the last day of the accounting year by filling a proper application and annexing all the required documents including the present

instrument of partnership, but only by a fortuitous circumstances that it applied earlier and produced the instrument of partnership later, it could not be deprived of registration which is now a matter of right under the 1961 Act. Apart from this, this would defeat the very purpose of the right of a party to remove the defect in following the procedure prescribed for obtaining a right or a privilege. The procedural law is always to be construed and applied in a manner so as to make it a hand-maid to the cause of justice, and it cannot be treated as a substantive provision so as to defeat the rights of the parties. In our opinion, the contention advanced on behalf of the Revenue would have been perfectly justified, if there had been no partnership in existence in the relevant accounting year, or by a subsequently drawn instrument of partnership after the close of the accounting year, by some fiction, the partnership is brought into existence. As observed above, it is nobody's case. In that view of the matter, we are of the opinion that this reference should be accepted and we answer both the questions in the negative, that is, in favour of the assessee and against the Revenue. However, having regard to the facts of this case, there should be no order as to costs.