

(1972) 09 AHC CK 0049

In the Allahabad High Court

Case No : Civil Miscellaneous Writ No. 2386 of 1972

Chulai Ram

APPELLANT

Vs

Income Tax Officer (Collections)

RESPONDENT

Date of Decision : 07-09-1972

Acts Referred:

Income Tax Act, 1961 — Section 182(4), 189(1), 189(3)

Citation : (1974) 94 ITR 463

Hon'ble Judges : R.L. Gulati, J;C.S.P. Singh, J

Bench : Division Bench

Advocate : R.R. Agarwal and Bharatjee Agarwal, for the Appellant;
Deokinandan, for the Respondent

Final Decision : Dismissed

Judgement

Gulati, J.—This is a petition under Article 226 of the Constitution.

2. The petitioner was a partner in a firm constituted under a deed of partnership dated April 3, 1967. The partnership was formed to run country liquor shops at Varanasi under a licence from the Excise Department valid for one year from April 1, 1967, to 31st March, 1968. There were altogether four partners, one of the partners being Shyam Bihari. The firm was registered under the provisions of the Income Tax Act, 1961, for the assessment year 1968-69. On the expiry of the excise licence the firm was dissolved because it did not succeed in obtaining a licence for the subsequent year. For the assessment year 1968-69, the firm was assessed under the Income Tax Act and it being a registered firm the total income of the firm was allocated to the partners and taxed in their hands. It appears that Shyam Bihari failed to pay the tax assessed on him. The Income Tax Officer passed an order u/s 182(4) of the Act on September 20, 1971, demanding from the petitioner a sum of Rs. 5,178 being the arrears of tax due from Shyam Bihari. The petitioner has challenged that order in this petition.

3. The contention of the learned counsel for the petitioner is that Section 182(4)

of the Act does not contemplate that tax due from one partner may be recovered from another partner of a registered firm.

4. Section 182 deals with the assessment of registered firms. According to the scheme of this provision, the income of the firm is first determined and after subjecting it to firm tax, the income is apportioned between the partners according to their shares and is assessed in their hands along with their income from other sources. Sub-section (4) of Section 182 then provides :

"182. (4) A registered firm may retain out of the share of each partner in the income of the firm a sum not exceeding thirty per cent. thereof until such time as the tax which may be levied on the partner in respect of that share is paid by him; and where the tax so levied cannot be recovered from the partner, whether wholly or in part, the firm shall be liable to pay the tax, to the extent of the amount retained or could have been so retained."

5. Normally, tax due from a partner cannot be recovered from the firm. Every partner has to pay the tax assessed on him. Sub-section (4) of Section 182 makes a departure from that rule and makes the firm liable for the payment of tax due from a partner in respect of his share in the income of the firm. The liability of the firm is, however, limited to 30 per cent. of the defaulting partner's share in the profits of the firm. The firm is entitled to retain a sum not exceeding 30 per cent. of the share of each partner in order to meet this liability. In the instant case, the firm did not retain anything from the share of Shyam Bihari. That circumstance, however, does not absolve the firm from the liability cast upon it u/s 182(4). The provision enabling the firm to retain a part of the income of the partners is meant for its benefit but if it does not avail of the benefit, its liability under this provision is not affected. This position is not altered even if the firm is dissolved or its business is discontinued. Section 189 of the Act provides :

"189. Firm dissolved or business discontinued.--(1) Where any business or profession carried on by a firm has been discontinued or where a firm is dissolved, the Income Tax Officer shall make an assessment of the total income of the firm as if no such discontinuance or dissolution had taken place."

6. Sub-section (3) of Section 189 then provides :

(3) Every person who was at the time of such discontinuance or dissolution a partner of the firm, and the legal representative of any such person who is deceased, shall be jointly and severally liable for the amount of tax, penalty or other sum payable, and all the provisions of this Act, so far as may be, shall apply to any such assessment or imposition of penalty or other sum. "

7. By virtue of these provisions an assessment can be made against a dissolved firm as if no dissolution had taken place and every partner of such a firm becomes jointly and severally liable for the tax assessed on the firm. It may be stated here that if the firm is assessed as a registered firm there will be no liability upon the firm except for the firm tax and the tax assessed against the

partners will be recoverable from them. Reading the provisions of Section 182(4) and Section 189(3) together, the position is like this. A dissolved firm may be assessed u/s 189(1) as if no dissolution had taken place. If it is assessed as a registered firm, the tax assessed on the partners shall be payable by them, but where the tax from a partner cannot be recovered, it shall become the liability of the firm u/s 182(4) and by virtue of Sub-section (3) of Section 189, it shall become the joint and several liability of the partners. In order that Section 182(4) may be invoked, there must exist two conditions; (1) that the tax is not recoverable from the partner on whom it has been assessed ; (2) that the tax sought to be realised under this provision must not exceed 30 per cent. of the defaulting partner's share in the profits of the firm. Both these conditions are satisfied in the present case. There is a clear assertion in the affidavit of Sri J. C. Mathur that the tax sought to be realised from the petitioner is not recoverable from Shyam Bihari and there is no assertion in the writ petition that the tax sought to be recovered from the petitioner exceeds 30 per cent. of the share of Shyam Bihari in the profits of the firm.

8. Shri Raja Ram Agarwal, the learned counsel for the petitioner, has relied upon two decisions of the Supreme Court in which it has been held that the tax due from a partner of a registered firm cannot be recovered from another partner. The first case is that of Income Tax Officer, Agra Vs. Radha Krishan, .. That was a case under the Indian Income Tax Act, 1922. In that case tax assessed upon a partner of the registered firm was sought to be realised from another partner on the ground that the liability of the partners was joint and several. Repelling that contention, the Supreme Court observed :

" Undoubtedly, contractual obligations of a firm are enforceable jointly and severally against the partners, but the liability to pay Income Tax is statutory ; it does not arise out of any contract, and its incidence must be determined by the statute. If the statute which imposes liability has not made it enforceable jointly and severally against the partners, no such, implication can arise merely because contractual liabilities of a firm may be jointly and severally enforced against the partners."

9. The proposition enunciated by the Supreme Court holds good only under the Indian Income Tax Act, 1922 (hereinafter called the " old Act"), which contains no provision analogous to Section 182(4) of the Income Tax Act, 1961 (hereinafter referred to as the " new Act "). This new provision casts statutory liability upon the firm to pay the tax of a defaulting partner, and where the firm is dissolved, the liability becomes the joint and several liability of each partner by virtue of Section 189(3) of the new Act. Section 44 of the old Act corresponds to Section 189 of the new Act, but that provision by itself is not enough to make the dissolved firm or its partners liable for the payment of tax of another partner, who has defaulted in payment. It is Section 182(4) of the new Act which brings about such a situation.

10. In Kalva Suryanarayana Vs. Income Tax Officer, A-3 Ward, Hyderabad, ., the

Supreme Court has merely reiterated its earlier view and has held that when tax is levied upon the partners of a registered firm assessed after its dissolution u/s 23(5)(a) read with Section 44 of the old Act, there is no joint and several liability of the partners in respect of the tax payable by each partner.

11. Mr. Raja Ram then urged that the amount sought to be realised probably includes penalty and interest and Sub-section (4) of Section 182 only provides for payment of tax and not interest and penalty. In the first place no foundation has been laid in the petition for such a contention. Secondly, the contention is palpably without force. The word " tax " in Sub-section (4) of Section 182 has been used in a comprehensive sense so as to include interest and penalty. As observed by the Supreme Court in C.A. Abraham, Uppotttil, Kottayam Vs. The Income Tax Officer, Kottayam and Another, ., penalty is an additional tax. The petition fails and is dismissed with costs.