

(1979) 02 MAD CK 0060

In the Madras High Court

Case No : Tax Case No"s. 379 and 380 of 1975 (References No"s. 276 and 277 of 1975)

Commissioner of Income Tax

APPELLANT

Vs

Abdul Cader Motor Service

RESPONDENT

Date of Decision : 13-02-1979

Acts Referred:

Income Tax Act, 1961 — Section 271(1), 41(2)
Partnership Act, 1932 — Section 32

Citation : (1980) 14 CTR 231 : (1980) 122 ITR 812

Hon'ble Judges : Sethuraman, J;Balasubrahmanyam, J

Bench : Division Bench

Advocate : A.N. Rangaswamy and Nalini Chidambaram, for the Appellant; R. Janakiraman, for the Respondent

Judgement

Sethuraman, J.—These two references have been made u/s 256(1) of the I.T. Act and they raise the following questions:

" 1. Whether, on the facts and circumstances of the case, there was a sale of the bus MDR 3569 by the assessee to Chellappa Chettiar during the relevant previous year ?

2. Whether the Tribunal was right in reducing the penalty levied on the assessee u/s 271(1)(a) of the Income Tax Act, 1961, for the assessment year 1968-69, consequent to its finding that Rs. 32,823 being the depreciation that had been allowed for the bus MDR 3569 in the earlier years could not be brought to tax for this assessment year u/s 41(2) of the said Act ? "

2. The assessee is a firm of four partners, viz., Chellappa Chettiar, R. Abdulla Rowther, Mohamed Abdul Cader and Ahmed Ibrahim, The firm came into existence under a partnership deed dated 10th October, 1962. Partner No. 1, viz., Chellappa Chettiar, was entitled to a half share and the other three partners together had a half share. Their respective shares were defined in the

partnership deed. The partners carried on the business of running transport buses during the relevant previous year ending on 31st March, 1968. Four buses were run by the firm, of which MDR 3569 was one. That bus was run on the route from Karaikudi to Devakottai. There were disputes between the partners and Chellappa Chettiar instituted O.S. No. 73 of 1964 on the file of the Subordinate Judge of Devakottai for dissolution of the partnership and rendition of accounts. There was a compromise in the said suit and a compromise decree was passed on 12th August, 1966. To the compromise decree, the memorandum of compromise executed by the parties is also appended. Under the compromise, Chellappa Chettiar was to be paid a sum of Rs. 85,000 and costs of the suit. The decree further provided that if bus No, MDR 3569 was transferred to him along with the route permit, Chellappa Chettiar would enter full satisfaction of the decree

3. The assessee filed the return for the assessment year 1968-69 on 30th March, 1969, disclosing an income of Rs. 50,598. By his order dated 8th October, 1969, the ITO determined the total income at Rs. 1,12,790 and, in doing so, he brought to tax a sum of Rs. 32,823, being the depreciation that had been allowed for the bus, MDR 3569, in the earlier years. In support of the assessment of Rs. 32,823, the ITO relied on Section 41(2) of the I.T. Act, and he rejected the contention of the assessee that there was a dissolution of the partnership firm and distribution of the assets on such dissolution so that there was no sale of the aforesaid bus with the consequence that the provisions of Section 41(2) did not apply. The ITO initiated penalty proceedings for the belated submission of the return and he levied Rs. 12,309 as penalty u/s 271(1)(a), as he was satisfied that the assessee had no reasonable cause for filing the return on 30th March, 1969, while it should have been submitted on 30th September, 1968. The assessee filed appeals against the assessment and penalty orders before the AAC who held that the provisions of Section 41(2) could not be applied as there was no sale of the bus, MDR 3569, when it was delivered to Chellappa Chettiar in pursuance of the compromise. While agreeing with the ITO as regards the leviability of penalty, the AAC reduced it, consequent on the deletion of the sum of Rs. 32,823. The department filed an appeal challenging the finding of the AAC that there was no sale and that the provisions of Section 41(2) did not apply. It challenged also the reduction of the penalty. The Tribunal held, agreeing with the AAC, that there was no sale involved in the transaction of delivery of the bus to Chellappa Chettiar in full quit of his claim on his retirement from the firm, and that the penalty was properly reduced by the AAC having regard to the reduction in the quantum of tax. It is, against this order of the Tribunal that the two questions set out already have been referred. The reference in the penalty matter is only consequential and does not raise any other issue.

4. Learned counsel for the Commissioner contended that, in view of the finding of the Tribunal that there was no dissolution, this was a clear case where there was a sale of the particular bus to Chellappa Chettiar and that the firm was, therefore, liable to tax u/s 41(2).

5. Section 41(2) runs as follows :

" (2) Where any building, machinery, plant or furniture which is owned by the assessee and which was or has been used for the purposes of business or profession is sold, discarded, demolished or destroyed and the moneys payable in respect of such building, machinery, plant or furniture, as the case may be, together With the amount of scrap value, if any, exceed the written down value, so much of the excess as does not exceed the difference between the actual cost and the written down value shall be chargeable to Income Tax as income of the business or profession of the previous year in which the moneys payable for the building, machinery, plant or furniture became due :..... "

6. There is a proviso to this section and it is not necessary to refer to it. There is an Explanation to Section 41(4) running as follows :

" The expression " moneys payable" and the expression " sold " in subsections (2) and (3) shall have the same meanings as in Sub-section (1) of Section 32."

7. In Section 32, the word " sold " is given the following meaning :

" " sold" includes a transfer by way of exchange or a compulsory acquisition under any law for the time being in force..... "

8. It is unnecessary to refer to the rest of the provisions. In essence, the question here is whether there was a sale or exchange so as to attract liability u/s 41(2).

9. The Supreme Court in Commissioner of Income Tax, Madhya Pradesh Vs. Dewas Cine Corporation, dealt with the corresponding provision of prov. (ii) to Section 10(2)(vii) of the Indian I.T. Act, 1922, In that case; two persons owning cinema theatres formed a partnership to carry on the business of exhibition of cinematograph films and they brought the theatres owned by each one of them in the books of the partnership as its assets. The ITO had allowed depreciation on the theatres. On the dissolution of the partnership on 30th September 1951, it was agreed between the two partners that the theatres should be returned to their respective original owners. In the books of the partnership, the assets were shown as taken over at the original price after deduction of the depreciation allowed. The question was, whether there was a sale within the meaning of Section 10(2)(vii), prov. (ii). The Supreme Court held that on the dissolution of the partnership, each theatre had to be deemed to be returned to the original owner in satisfaction of his claim to a share in the residue of the assets after discharging the debts and other obligations and that thereby the theatres were not in law sold by the firm to the individual partners in consideration of their respective shares in the residue. It was also pointed out that " sale ", according to its ordinary meaning, is a transfer of property for a price, and that adjustment of the rights of the partners in a dissolved firm by allotment of its assets is not a transfer nor was it for a price.

10. Learned counsel for the revenue submitted that this decision would not

apply, because this is not a case of dissolution. The compromise decree does not specifically state as to what is to happen to the firm as such. The suit was between Chellappa Chettiar and the other three partners. The firm as such was not and could not be a party to the suit because of the nature of the relief claimed, viz., dissolution. The relevant clauses in the compromise decree are :

" 1. That the defendants do pay to the plaintiff the sum of Rs. 85,000 with interest thereon at 6 per cent. per annum from this date till date of payment and do also pay his costs of this suit, Rs. 6,392.75.

2. That the 1st defendant do deliver to the plaintiff on or before 12-8-1966 bus MDR 3569 plying between Karaikudi and Manakudi (via) Thondi absolutely and with full rights with all its spare parts and tools and do take all steps to transfer the route permit for the said bus to the plaintiff who may run the bus immediately and appropriate to himself all the income derived from it."

11. In the case of dissolution, there should have been a preliminary decree and then a final decree as contemplated by the CPC read with Section 44 of the Indian Partnership Act. There could be no partial dissolution ; either the firm is dissolved or it is not. We shall thus proceed on the basis that there was no dissolution.

12. This cannot be strictly called a case of retirement of a partner. u/s 32 of the Indian Partnership Act, a partner may retire with the consent of all the other partners or in accordance with an express agreement by the partners, or where the partnership is at will, by giving notice in writing to all the other partners of his intention to retire. Chellappa Chettiar actually filed a suit for dissolution. He did not give any notice for retirement. There was no agreement for his retirement. None of the clauses of Section 32 of the Indian Partnership Act would apply here. It would thus be a curious case of there being neither dissolution nor retirement.

13. There was actually retirement of the partner, Chellappa Chettiar, under the decree, though not in the manner contemplated by Section 32 of the Indian Partnership Act. Even if there is no dissolution, in the case of retirement also the Gujarat High Court has taken the view, following the decision of the Supreme Court in Commissioner of Income Tax, Madhya Pradesh Vs. Dewas Cine Corporation, , that there was no sale, in Velo Industries Vs. Collector, Bhavnagar, . That was a case which arose under the Bombay Stamp Act, 1958, on a reference by the Chief Controlling Revenue Authority. It was held that when a partner retired from the partnership and the amount of his share in the net partnership assets, after deducting liabilities and prior charges on the footing of a notional sale of the partnership assets was given to him, what he received was his share in the partnership, and not any price for sale of his interest in the partnership, and that there is in such a transaction no element of sale within the meaning of Article 25, Clause (b) of Schedule I to the Bombay Stamp Act. We would respectfully agree with this view of the Full Bench of the Gujarat High

Court.

14. Learned counsel for the Commissioner contended that there are decisions of the Bombay High Court which have taken a contrary view. He brought to our notice the decisions in Commissioner of Income Tax, Bombay City-III, Bombay Vs. Tribhuvandas G. Patel, and Commissioner of Income Tax, Bombay City-II, Bombay Vs. H.R. Aslot, . In the latter case, the earlier decision was followed. Both the decisions dealt with the provisions relating to capital gains and in both those cases, it was pointed out that there was an assignment of the interest of a partner who went out of the firm. They were thus decisions on different facts. There is no assignment or- exchange of the interest of a partner in the present case, nor is there any conveyance of any interest of any partner. These decisions cannot apply to a case of mere retirement. If the present case is taken to be a case of dissolution, Commissioner of Income Tax, Madhya Pradesh Vs. Dewas Cine Corporation, would apply. If it is treated as a case of retirement, then also there is no sale, and there was only an adjustment in relation to the assets of the outgoing partner based on the rights he had in the firm, as held in Velo Industries Vs. Collector, Bhavnagar, .

15. We have already extracted Clauses 1 and 2 of the compromise decree. Clause 1 contemplates a sum of Rs. 85,000 being paid to Chellappa Chettiar and Clause 2 provides that in case the bus was delivered in the manner contemplated by it, then the decree in favour of Chellappa Chettiaf would stand satisfied to that extent. The terms of the compromise do not show that there was a sale of any particular item of the assets of the partnership and we do not, therefore, find that the provisions of Section 41(2) of the I.T. Act have any scope for application. The satisfaction of a decree debt cannot be taken as payment of a sale price for taking over the bus. It is only an adjustment of the rights of Chellappa.

16. As pointed out already, the reference in the penalty proceedings does not call for any separate treatment or discussion as it does not raise other points. The result is that the first question is answered in the negative and in favour of the assessee and the second question is answered in the affirmative. The assessee will be entitled to his costs. Counsel's fee Rs. 500, one set.