
(2013) 03 AHC CK 0318

In the Allahabad High Court

Case No : Income Tax Reference No. 140 of 1987

Commissioner of Income Tax

APPELLANT

Vs

Alison Singh and Co.

RESPONDENT

Date of Decision : 18-03-2013

Acts Referred:

Citation : (2013) 358 ITR 458

Hon'ble Judges : Ram Surat Ram (Maurya), J;Prakash Krishna, J

Bench : Division Bench

Advocate : Shambhu Chopra, for the Appellant; Pramod Kumar Jain, for the Assessee, for the Respondent

Judgement

Ram Surat Ram (Maurya), J.—At the instance of the Commissioner of income tax, Agra, the income tax Appellate Tribunal, "B" Bench, New Delhi (hereinafter referred to as "the Tribunal"), has referred the following question, for opinion to this court, u/s 256 of the income tax Act, 1961 (hereinafter referred to as "the Act"): Whether, on the facts and in the circumstances of the case, the Tribunal was right in reading the partnership deed of May 24, 1974, and the memorandum of February 6, 1980, together and, on what basis, in maintaining the order of the Commissioner (Appeals) directing registration to the firm for the assessment year 1980-81?

The facts giving rise to this reference are that M/s. Alison Singh and Co., 174, Baluganj, Agra (the respondent) was a partnership firm, engaged in the business of manufacture of shoe lasts, nails and other articles used in the footwear. The respondent firm came into existence through the partnership deed dated May 24, 1974, duly executed and signed by its all the four partners, namely, Mrs. Zohra Jabeen, Mahendra Pratap Singh, H.N. Sinha and Smt. Nirmala Singh. The firm was registered under the Act for the purposes of payment of income tax and was being regularly assessed. All the aforesaid four partners executed another deed dated February 6, 1980, by which clause 5 of the original partnership deed, which was regarding the distribution of profits/loss of the firm was rectified,

reiterating their intention for sharing the profit/loss of the firm to be in the ratio of their capital investments, i.e., (1) Mrs. Zohra Jabeen -- forty per cent. (2) Mahendra Pratap Singh -- twenty per cent. (3) H.N. Sinha -- twenty per cent. and (4) Smt. Nirmala Singh -- twenty per cent. They filed Form Mo. 11A along with the original partnership deed dated May 24, 1974, and the subsequent deed dated February 6, 1980, for registration u/s 185 of the Act for the assessment year 1980-81. The Inspecting Assistant Commissioner of income tax (Asstt.), Agra (IAC), issued a show-cause notice to the firm as to why its registration may not be refused as the profit/loss was not shared between the partners, according to the ratio stipulated in the deed dated May 24, 1974. The partners submitted their reply on February 10, 1983, stating that in the partnership deed, due to typing error sharing of profit/loss was not incorporated according to the will/agreement of the partners. Throughout, their intention was to share the profit/loss of the business of the firm in the ratio of their capital investments and they actually used to share profit/loss accordingly. In order to rectify the mistake, deed dated February 6, 1980, was duly executed and signed by all the partners and profit was shown in proportion of their capital investments.

2. The Inspecting Assistant Commissioner by order dated October 22, 1983, held that there was no ambiguity in the partnership deed dated May 24, 1974, regarding sharing of profit/loss of the partners. In the accounting year, profit should have been shared according to the term of the deed dated May 24, 1974, i.e., in the ratio of 25 per cent. each. The memorandum dated February 6, 1980, revising the ratio of share could not have retrospective effect. Since the shares of the partners were not according to the terms of the deed dated May 24, 1974, as such registration of the firm was liable to be refused. On these findings registration was refused by order dated October 22, 1983. The respondent filed appeals (registered as the Commissioner of income tax (Appeals) 137, 138/IAC(A)/Agra/1983-84) from the aforesaid order. The appeal was heard by the Commissioner of income tax (Appeals), Jaipur House, Agra, who by order dated December 31, 1984, held that on examining the conduct of the partners right from June, 1976, and application Form No. 11 for the assessment year 1977-78, affidavit of H.N. Sinha, filed along with it, income tax clearance certificate issued in June, 1978, it was proved that all the partners were throughout sharing the profits/loss as (1) Mrs. Zohra Jabeen -- 40 per cent. (2) Mahendra Pratap Singh -- 20 per cent. (3) H.N. Sinha -- 20 per cent. and (4) Smt. Nirmala Singh -- 20 per cent. The memorandum dated February 6, 1980, is in the nature of a revised deed, changing the ratio of the shares of the partners and is admissible u/s 187(2)(b) of the Act, for that purpose the partners had filed Form No. 11A. Accordingly, it was held that share of the partners were shown in the ratio as given in the revised deed, which was throughout followed by the partners from the date of creation of the firm and the registration was wrongly refused. The Revenue filed an appeal (registered as ITA No. 1358/D/1985) from the aforesaid order. The appeal was heard by the Tribunal, who by order dated November 27, 1986, dismissed the appeal. Later on at the instance of the Commissioner of

income tax, Agra, this reference was made.

3. Heard Sri Shambhu Chopra, senior standing counsel for the Revenue. Sri Chopra submitted that the partnership firm was created through a deed dated May 24, 1974, giving all the terms and conditions between the partners. There was no ambiguity in respect of share in profits/loss of the partners in it. The deed could not be rectified by a memorandum dated February 6, 1980. Since share of profits/loss of the partners in the assessment year 1980-81 has not been shown according to the terms stipulated in the deed dated May 24, 1974, as such registration was rightly refused by the Inspecting Assistant Commissioner. In any case, the memorandum dated February 6, 1980, could not have any effect for the assessment year 1980-81. The order of the Commissioner of income tax (Appeals) allowing the appeal of the respondent and the order of the Tribunal dismissing the appeal of the Revenue are illegal.

4. We have considered the arguments of the senior standing counsel. The partnership is governed under the provisions of the Indian Partnership Act, 1932. Section 4 defines partnership as "Partnership is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all". Section 5 provides that the relation of the partnership may be reduced in writing through a contract between them while section 7 provides that where there is no written contract the partnership be treated as partnership at will. In that case, terms between the partners can be examined through their conduct and other circumstances. Under this Act, the only restriction is that the contract should be a lawful contract according to the provisions of the Indian Contract Act. Division of share in profit/loss of the business between the partners is governed by the mutual agreement between the partners and not by any statutory provisions. It was the case of the partners that throughout their agreement was to share profits/loss in the ratio of their share capital but due to inadvertent mistake in clause 5 of the deed dated May 24, 1974, sharing of profit/loss of the business in the ratio of their capital investments in the business was not mentioned, as such the deed dated February 6, 1980, was executed and signed by all the partners in order to rectify this mistake. All the partners admitted that they were sharing profit/loss of the business in the ratio of their capital investments in the business throughout which was also proved by producing the previous income tax records. Thus, the deed dated February 6, 1980, is only a rectification deed. Even otherwise also the partners can change terms and conditions under the law. Since the deed dated February 6, 1980, is a rectification deed and has been executed according to the real agreement between the partners, which is proved from their previous record as such objection of the Inspecting Assistant Commissioner that the deed would have no retrospective effect, is not liable to be accepted.

5. Now, we have to examine the provisions relating to the registration of firm under the income tax Act, which was in existence at the relevant time. The relevant portions of sections 184 and 185 of the Act are extracted below:

184. Application for registration.--(1) An application for registration of a firm for the purposes 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.

(2) Such application may, subject to the provisions of this section, be made either during the existence of the firm or after its dissolution.

(3) The application shall be made to the income tax Officer having jurisdiction to assess the firm, and shall be signed--

(a) by all the partners (not being minors) personally; or

(b) in the case of a dissolved firm, by all persons (not being minors) who were partners in the firm immediately before its dissolution and by the legal representative of any such partner who is deceased.

Explanation.--In the case of any partner who is absent from India or is a lunatic or an idiot, the application may be signed by any person duly authorized by him in this behalf, or, as the case may be, by a person entitled under law to represent him.

(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 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.

(7) Where registration is granted to any firm for any assessment year, it shall have effect for every subsequent assessment year:

Provided that--

(i) there is no change in the constitution of the firm or the shares of the partners

as evidenced by the instrument of partnership on the basis of which the registration was granted; and

(ii) the firm furnishes, before the expiry of the time allowed under sub-section (1) or sub-section (2) of section 139 (whether fixed originally or on extension) for furnishing the return of income for such subsequent assessment year, a declaration to that effect, in the prescribed form and verified in the prescribed manner, so, however, that where the income tax Officer is satisfied that the firm was prevented by sufficient cause from furnishing the declaration which the time so allowed, he may allow the firm to furnish the declaration at any time before the assessment is made.

(8) Where any such change has taken place in the previous year, the firm shall apply for fresh registration for the assessment year concerned in accordance with the provisions of this section.

185. Procedure on receipt of application.--(1) On receipt of an application for the registration of a firm, the income tax Officer shall inquire into the genuineness of the firm and its constitution as specified in the instrument of partnership, and--

(a) if he is satisfied that there is or was during the previous year in existence a genuine firm with the constitution so specified, he shall pass an order in writing registering the firm for the assessment year;

(b) if he is not so satisfied, he shall pass an order in writing refusing to register the firm.

Explanation.--For the purposes of this section and section 186, a firm shall not be regarded as a genuine firm if any partner of the firm was, in relation to the whole or any part of his share in the income or property of the firm, at any time during the previous year, a benamidar--

(a) of any other partner to whom the first-mentioned partner does not stand in the relationship of a spouse or minor child, or

(b) of any person, not being a partner of the firm, and any of the other partners knew or had reason to believe that the first-mentioned partner was such benamidar and such knowledge or belief had not been communicated by such other partner to the income tax Officer in the prescribed manner.

6. Section 184(4) provides that application for registration of the firm shall be made before the end of the previous year for the assessment year. Section 184(8) of the Act requires that on any change in the constitution of the firm fresh registration be obtained. The Explanation to section 185(1) of the Act has limited scope of the inquiry of the income tax Officer to the extent that as to whether any partner stands in relationship of a spouse or minor child or any income of the firm being shared by benamidar. In this case, the respondent moved for fresh registration well within time. The income of the firm was not shared by any benamidar, nor any partner stood in relationship of a spouse or

minor, as such, the application could not be rejected. The income tax authority cannot question the change in the constitution of the firm. In view of the aforesaid discussions question referred in this reference is answered in affirmative, i.e., against the Department and in favour of the respondent.