(1992) 06 AP CK 0008

In the Andhra Pradesh High Court

Case No : Case Referred No. 41 of 1980

Commissioner of Income Tax APPELLANT

Vs

B.R. Constructions RESPONDENT

Date of Decision : 19-06-1992

Acts Referred:
Income Tax Act, 1961 — Section 147, 148, 155, 182, 183

Citation : (1993) 202 ITR 222

Hon'ble Judges : S.S. Mohammed Quadri, J;S. Parvatha Rao, J;N.D. Patnaik, J

Bench : Full Bench

Advocate : S.R. Ashok, for the Appellant; Y. Ratnakar, for the Respondent

Judgement

1. At the instance of the Commissioner of Income Tax, Andhra Pradesh-I, Hyderabad, the Income Tax Appellate Tribunal, Hyderabad, made this reference u/s 256(1) of the Income Tax Act, 1961, for the opinion of the High Court on the following question of law :

"Whether, on the facts and in the circumstances, the assessment made on the assessee for the assessment year 1968-69 was valid."

2. When this reference came up before a Division Bench of this court, it referred the case to a Full Bench to resolve the difference of opinion expressed by two Division Benches in Ch. Atchaiah Vs. Income Tax Officer, ''B'' Ward, and Choudry Brothers Vs. Commissioner of Income Tax, . It, however, added these two questions for the opinion of the Full Bench :

"(1) Under what circumstances can one Division Bench differ from the view of an earlier Division Bench; and

(2) Under what circumstances can the doctrine of per incuriam be applied by a co-ordinate Division Bench for not following the earlier binding precedent of another Division Bench."

3. First, we shall take up the question referred to this court by the Income Tax

Appellate Tribunal. Here it would be appropriate to notice the facts giving rise to the said question. The assessee is a firm carrying on business in contracts. Its status was that of a registered firm till the assessment year 1967-68. As no declaration u/s 184(7) in Form No. 12 was filed, the Income Tax Officer assessed the assessee as an unregistered firm for the assessment year 1968-69. Before the completion of assessment of the assessee, the assessments of some of the partners, taking their share income from the assessee into account, were completed, so the assessment of same income in the hands of the assessee was questioned before the Appellate Assistant Commissioner. It was urged before the appellate authority that the Income Tax Officer would be deemed to have exercised his option of assessing the income in the hands of the partners and as such he could not have assessed the same income over again in the hands of the assessee, an unregistered firm. The appeal was rejected. On further appeal, the Income Tax Appellate Tribunal accepted the said contention of the assessee and allowed the appeal. The Commissioner then got the above said question of law referred to the High Court.

4. Sri S. R. Ashok, learned standing counsel for the Revenue, has contended that whatever might have been the position u/s 3 of the Indian Income Tax Act, 1922, now u/s 4 of the Income Tax Act, 1961, no option is available to the assessing authority either to assess the unregistered firm or its members, therefore, the assessing authority is competent to assess the unregistered firm after completing the assessment of the partners in regarded to their share income.

5. Sri. Y. Ratnakar, learned counsel for the assessee, contended that the Income Tax Act, 1961, did not depart from the position under the 1922 Act, and that the scope of the charging sections under both the Acts continued to be the same; the 1961 Act substituted the word "person" for the taxable entities mentioned in section 3 of the 1922 Act and separately defined "person" in section 2(31) which does not alter the position.

6. In the light of the contentions raised before us by learned counsel for the parties, we shall consider the question referred to us by the Tribunal. It is now well-settled, in view of the judgments of the Supreme Court in Commissioner of Income Tax, U.P.,Lucknow Vs. Kanpur Coal Syndicate, and (1966) 60 ITR 95 (SC) , that, if the Income Tax Officer exercised an option and assessed the share income in the hands of the partners of an unregistered firm or members of the association, he cannot assess the same income in the hands of the unregistered firm or the association of persons. But those decisions were rendered on the interpretation of section 3 of the Indian Income Tax Act, 1922 (hereinafter referred to as "the old Act"). In the instant case, the Appellate Assistant Commissioner declined to follow the judgment of the Supreme Court in (1966) 60 ITR 95 (SC) on the ground that it was u/s 3 of the old Act which was different from the provisions of section 4 of the Income Tax Act, 1961 (hereinafter referred to as "the new Act"). The Income Tax Tribunal followed the judgment of this court in Ch. Atchaiah Vs. Income Tax Officer, ''B'' Ward, , which laid down

that there was no difference between the provisions of section 3 of the old Act and section 4 of the new Act and, in that view of the matter, it held that the judgment of the Supreme Court in (1966) 60 ITR 95 (SC) was applicable. The controversy, therefore, boils down to whether the scope of section 4 of the new Act is different from the ambit of the provisions of section 3 of the old Act. Here it would be useful to read section 3 of the old Act and section 4 of the new Act.

7. Section 3 of the Indian Income Tax Act, 1922 :

"3. Charge of Income Tax - Where any Central Act enacts that Income Tax shall be charged for any year at any rate or rates, tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of this Act in respect of the total income of the previous year of every individual, Hindu undivided family, company and local authority, and of every firm and other association of persons or the partners of the firm or the members of the association individually."

8. Section 4 of the Income Tax Act, 1961 :

"4. Charge of Income Tax - (1) Where any Central Act enacts that Income Tax shall be charged for any assessment year at any rate or rates, Income Tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions including provisions for the levy of additional Income Tax of, this Act in respect of the total income of the previous year of every person :

Provided that where by virtue of any provision of this Act income tax is to be charged in respect of the income of a period other than the pervious year, Income Tax shall be charged accordingly.

(2) In respect of income chargeable under sub-section (1), Income Tax shall be deducted at the source or paid in advance, where it is so deductible or payable under any provision of this Act."

9. It can immediately be noticed that, whereas in section 3 of the old Act, the taxable entities were mentioned in the body of the section, in section 4 of the new Act, the expression "every person" is used. The word "person" is defined in section 2(31) of the Income Tax Act, 1961. It is an inclusive definition. Substituting the definition of "person" in section 4(1), it reads as follows :

"4. (1) Where any Central Act enacts that Income Tax shall be charged for any assessment year at any rate or rates, Income Tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions including provisions for the levy of additional Income Tax of, this Act in respect of the total income of the previous year of every

(i) individual,

(ii) Hindu undivided family,

(iii) company,

(iv) firm,

(v) association of persons or body of individuals, whether incorporated or not,

(vi) local authority, and

(vii) every artificial juridical person, not falling within any of the preceding sub-clauses."

10. On a comparison of the provisions of section 3 of the old Act and section 4 of the new Act it is evident that the words used in section 3 of the old Act, namely, "or the partners of the firm or the members of the association individually", are not to be found in section 4 of the new Act as quoted above. But from this, can it be said that Parliament changed the scope of the charge by enacting section 4 and section 2(31) of the new Act from what it was u/s 3 read with section 2(9) of the old Act ? From a perusal of the relevant provisions of the new Act, it appears to us that Parliament never intended intended to change the scope of the charge of Income Tax by omitting the taxable entities from section 4 and including them in the definition of the word "person" in section 2(31) of the new Act. The change in the phraseology of section 4 is one of form and does not change the substance of charge under the old Act. It continues to be the same. Though section 4 of the new Act is differently worded, it does not take away the option available to the assessing authority u/s 3 of the old Act in regard to the assessment of income of an unregistered firm or the share income of the partners, so also of an association of persons or members of the association individually. There cannot be any dispute that, in any taxation law, the charging section is of paramount importance, but the scope of the charging section cannot properly be understood de hors the machinery provisions. Further, in interpreting a charging section, we must avoid such construction of the provisions which leads to double taxation unless that is expressly provided by the statue or that follows by necessary implication. The charge of Income Tax is on the total income of every person as defined in the Act. If the same income passes hands from one taxable entity to another taxable entity, it cannot be assessed to tax over again. This is general principle which has to be kept in mind while interpreting the provisions of a taxing statute. This is not to say that the Legislature cannot provide for double taxation of the same income. It is open to the Legislature to provided for taxing the same income twice in the hands of different taxable entities as, e.g. in the case of a registered firm. The income of the registered firm is taxable in the hands of the registered firm as well as in the hands of its partners. What is the position in regard to an unregistered firm will be examined now. Section 183 deals with assessment of an unregistered firm. The assessment in question relates to the year 1968-69 and the said provision during the material period read as follows :

"183. In the case of an unregistered firm, the Income Tax Officer -

(a) may determine the tax payable by the firm itself on the basis of the total income of the firm; or

(b) if, in his opinion, the aggregate amount of the tax payable by the partners if the firm were treated as a registered firm would be greater than the aggregate amount of the tax which would be payable by the firm under clause (a) and the tax which would be payable by the partners individually, may proceed to make the assessment under clause (ii) of sub-section (1) of section 182 as if the firm were a registered firm; and, where the procedure specified in this clause is applied to any unregistered firm, the provisions of sub-section (2), (3) and (4) of section 182 shall apply thereto as they apply in the case of a registered firm."

11. From a perusal of this section, it is clear that the Assessing Officer had power to determine the tax payable by the unregistered firm itself on the basis of the total income of the firm under clause (a) or make assessment under clause (ii), sub-section (1) of section 182, by taxing the partner treating the firm as registered firm, if, in his opinion, the aggregate amount of tax payable by them in that event would be greater than the aggregate amount of tax payable by the firm and the partners individually. He did not have power to assess both the unregistered firm as well as the partners. There is no other provisions which authorises assessment of the income of an unregistered firm twice-once in the hands of the unregistered firm as well as in the hands of the partners. Section 4 of the new Act cannot be so construed as to run counter to section 183. They have to be construed harmoniously. Thus construed, the absence of the words "or the partners of the firm or the members of the association individually" in section 4 would not make any difference and the position obtaining u/s 3 of the old act in regard to the assessment of taxable entities remains the same u/s 4 of the new Act.

12. Section 155 of the Income Tax Act, 1961, on which reliance was placed by learned standing counsel for the Revenue does not also support the view that the assessing authority has power to tax the income in the hands of the partners of an unregistered firm as well as in the hands of the unregistered firm. Section 154 deals with rectification of mistakes and section 155 deals with other amendments mentioned therein. A perusal of sub-section (2) of section 155 shows that, in respect of any completed assessment of a member of an association of persons or of a body of individuals which was assessed or reassessed or on any reduction or enhancement made in the income of an association or body u/s 155 section 154, section 250, section 254, section 260, section 262, section 263 or section 264 or consequent upon an order made on the association or body under sub-section (4) of section 245D, the share of the member in the income of the association or body, as the case may be, has not been included in the assessment of the member or, if included, is not correct, the Assessing Officer is empowered to amend the order of assessment of the member with a view to the inclusion of the share in the assessment or the correction thereof. For that purpose, the provisions of section 154 are made applicable.

13. We may also refer to the objects and reasons of the legislation of section 4 as mentioned in the Notes on Clauses of the Income Tax Bill, 1961, to ascertain the intention of Parliament in enacting the said section. The relevant portion is as follows :

"Basis of charge :

Clause 4. - This section corresponds to section 3 of the existing Act with the following changes :

(i) for the different entities, individual, Hindu undivided family, etc. mentioned in the section, the word ''person'' has been substituted;

(ii) the proviso makes it clear that notwithstanding that tax is to be paid in respect of the income of a previous year, tax may be recovered on current income wherever so provided;

(iii) it is made clear that even where tax is deducted at source or paid in advance liability to pay tax arises by virtue of this provisions."

14 .From the Notes on Clauses also, it is clear that section 4 of the new Act corresponds to section 3 of the old Act and the only change made in enacting section 4 is that the word "person" has been substituted for the different taxable entities mentioned in section 3 of the old Act.

15. In Kanga and Palkhivala''s The Law and Practice of Income Tax (Eighth Edition, Vol. I, page 106), the learned authors, while dealing with section 4 of the new Act, write :

"Section 4 (sections 3 and 60B of the 1922 Act), the charging section - The provisions of sub-section (1) are the same as those of section 3 of the 1922 Act except for two changes :

(a). ....,

(b) the old section enumerated the categories of assessees, while this sub-section taxes every "person", and the definition of ''person'' in

Section 2(31) enumerates the categories of assessees including two which were not in the 1992 Act, viz., ''body of individuals'' and ''artificial juridical persons."

16. For all the above reasons, we are of the view that section 4 of the new Act embodies the same principle as contained in section 3 of the old Act and that in spite of some changes in the form and phraseology, the substance of the charging section with regard to the options of the assessing authority to assess the total income of the unregistered firm either in its hands or in the hands of the partners, remains the same and Parliament, while enacting section 4 of the new Act did not contemplate any change in the substance of section 3 of the old Act.

17. The question as to whether the law laid down by the Supreme Court in

(1966) 60 ITR 95 (SC) , would apply in view of the provisions of section 4 of the new Act gave rise to conflict of opinion between different High Courts and also in the same High Court. The learned judges of the Patna High Court and the Andhra Pradesh High Court differed in their views on this question. The Madras High Court, the Madhya Pradesh High Court and the Calcutta High Court took the view that it applies whereas a contrary view is expressed by the High Court of Punjab and Haryana and the Delhi High Court. Before we address ourselves to the judgments rendered by the different High Courts on the above question, we consider it appropriate to make a brief reference to the judgments of the Supreme Court in those cases. Commissioner of Income Tax, U.P.,Lucknow Vs. Kanpur Coal Syndicate, , was a case dealing with an association of persons. The Supreme Court held that section 3 expressly treated an association of persons and the individual members of the association as two distinct and different assessable entities, and, on the terms of the section, the tax could be levied on either of the two entities according to the provisions of the Act.

18. In (1966) 60 ITR 95 (SC) , three persons carried on business in partnership. The Income Tax Officer assessed them in the status of an unregistered firm. The Tribunal held that the Income Tax Officer had the option to assess the individual parties to the joint venture or the unregistered firm and that option having been exercised, it was not open to him thereafter to reassess the same income collectively in the hands of the three parties to the joint venture in the status of an unregistered firm. Referring to the judgment in Commissioner of Income Tax, U.P.,Lucknow Vs. Kanpur Coal Syndicate, , the Supreme Court observed as follows (at page 97) :

"The same principle would apply to the case of assessment of partners individually of an unregistered firm. The partners may be assessed individually or they may be assessed collectively in the status of an unregistered firm : the Income Tax Officer cannot, however, seek to assess the one income twice-once in the hands of the partners and again in the hands of the unregistered firm."

19. In Commissioner of Income Tax Vs. Pure Nichitpur Colliery Company, , which arose under the new Act, the Patna High Court held that the judgments of the Supreme Court in Commissioner of Income Tax, U.P.,Lucknow Vs. Kanpur Coal Syndicate, , and in (1966) 60 ITR 95 (SC) , continued to be applicable and, once the option was exercised by the Income Tax Officer by assessing the share income in the hands of the partners, he had no jurisdiction to tax the total income of the unregistered partnership firm in its hands. The Patna High Court was answering a reference u/s 256(1) of the new Act. The question before the High Court was similar to the one now before us. After noticing section 3 of the old Act and section 4 of the new Act, the Bench observed that the charging section imposed a tax liability on the person and the machinery sections provided, in a given case, who was the person to be assessed to Income Tax - whether a firm or a partner or both. The Bench concluded thus (at page 85) :

"It would thus be clear that even after the amendment brought about in the

1922 Act in the year 1956, which was incorporated in the 1961 Act, the Income Tax Officer had the option in the case of an unregistered firm either to tax the total income in the hands of the firm, treating it was a separate entity, or to tax the share income in the hands of the partners. He could not do both. Neither the charging section 4 nor any other provision of the 1961 Act empowered him to do so. It was still his option to do one or the other and not both. The law, therefore, laid down by the Supreme Court was still goods, the new provisions did not bring about any change in respect of the exercise of the option, and once the option was exercised to tax the share income of the unregistered firm in the hands of the partners then, on computation of the income of the unregistered firm, the assessment of a partner could be rectified u/s 155 of the 1961 Act. But it was not open to the Income Tax Officer to change his option and tax the unregistered firm itself."

20 .In Ch. Atchaiah Vs. Income Tax Officer, ''B'' Ward, , the petitioner challenged the validity of the notice issued by the Income Tax Officer u/s 48(2) of the new Act mainly on the ground that the Income Tax Officer having assessed the share income in the individual hands of the petitioner and another person, had no jurisdiction to assess the same income in their joint hands. The petitioner and that other person purchased certain lands as a joint venture. The lands were acquired by the Government. On receiving compensation and enhanced compensation, each of them was assessed to tax on the capital gains individually. The Income Tax Officer sought to initiate proceedings to assess the same income in the hands of the association of persons. That was questioned in the writ petition filed by the petitioner. After referring to section 3 of the old Act and section 4 of the new Act, the Division Bench held (at page 678) :

"In our view, this change in the wording of the section does not affect the legal position and all the decision under the old Act, referred to above are applicable even today under the present Act. As observed by the Supreme Court in (1966) 60 ITR 95 (SC) , an association of persons and the individual members of the association are two distinct and different assessable entities and u/s 3 of the Indian Income Tax Act, 1922, the tax can be levied on either of the said two entities. The Income Tax Officer cannot seek to assess the one income twice-once in the hands of the partners and again in the hands of the association. This principle holds good even under the present Act."

21. The judgment of the Patna High Court in Commissioner of Income Tax Vs. Pure Nichitpur Colliery Company, , was followed by the Madras High Court in COMMISSIONER OF Income Tax, MADRAS-II Vs. BLUE MOUNTAIN ENGINEERING CORPORATION., . In that case the assessee was an unregistered firm consisting of three partners. It was carrying on business as contractors. The dispute was for the assessment year 1968-69. Assessment of one of the partners was completed taking him share income into account. Thereafter the same income was assessed in the hands of the firm as an unregistered firm. Before the Appellate Assistant Commissioner, the assessee was unsuccessful. However, the Appellate Tribunal

allowed the appeal holding the assessment of the firm as incompetent. On a reference at the instance of the Revenue, the Madras High Court after considering the provisions of the old Act and the new Act and the case law on the point answered a similar question against the Revenue somewhat hesitatingly. The learned judges, however, felt that, in a case where the firm is functioning in one State and the partners are in different parts of the country, if any partner files a return including his share income the Income Tax Officer cannot exclude his share income from the assessment and if he did so, the amount would escape assessment as the provisions of section 147 would not be attracted; but, if he assesses that share income, his conduct would amount to exercise of the option available to him and the firm would not pay tax on its total income and thus the construction of the provisions of the Act as giving options to the Income Tax Officer would tend to a situation of possible tax evasion and might lead to some abuse also. In the doubt expressed by them it was assumed that in the event of exclusion of the share income from the assessment of the partners, the unregistered firm would not be assessed which might not occur as there is no basis for such an assumption. The second doubt expressed by them is that a person with a five paise share in a firm may file his return and get assessed so as to stall the assessment of the firm as such, at any time thereafter, with the result that the Revenue stands to lose the tax due to it. In our view, the fear expressed can perhaps be allayed by the following Departmental instructions issued by the Board in letter F. No. 75/19/191/62-II-J, dated August 24, 1966, wherein, among other things, the Income Tax Officers are directed to give priority to firm''s assessments.

22. In Ramanlal Madanlal Vs. Commissioner of Income Tax, Central, , for the assessment years 1965-66, 1966-67 and 1967-68. The firm was assessed as an unregistered firm subsequent to the assessment of the individual partners. The firm appealed to the Appellate Assistant Commissioner challenging the validity of the assessment on the ground that as the partners were already assessed to tax, as such in respect of the same income there could not be two assessments. The appellate authority followed the judgment of the Supreme Court in (1966) 60 ITR 95 (SC) , and allowed the appeal. The Appellate Tribunal, however, set aside the order of the appellate authority and upheld the assessment. On a reference, the Calcutta High Court held that there was difference between the language of section 3 of the old Act and section 4 of the new Act, but the scheme of taxation in respect of the partners and the firm or members of an association of persons remains otherwise the same, and that the partners of an unregistered firm, until the amendment of the new Act by the Amendment Act, 1970, were distinct assessable units both under the old Act as well as under the new Act and, therefore, one income in the hands of two assessable units should not normally by made to suffer taxation twice unless the clear intention of the Legislature is to tax the same income twice. Sabyasachi Mukharji J. (as he then was), speaking for the Bench, held that though the charging section in any fiscal law is the most important provision, it must be understood and construed in the light of the

machinery provided in the Act.

23. In Commissioner of Income Tax Vs. Karkhana Zinda Tilismath, , a Division Bench of our High Court held that the Income Tax Officer had not authority to ignore the assessments already made on the partners and proceed to assess the firm in the status of an unregistered firm. It followed the judgment of the Supreme Court in (1966) 60 ITR 95 (SC) . To the same effect is the view of the Madhya Pradesh High Court in Ramchand Moolchand Vs. Commissioner of Income Tax, .

24. We shall now refer to the cases taking the contrary view. Another Division Bench of the Patna High Court in Mahendra Kumar Agrawalla Vs. Income Tax Officer and Others, , took the contrary view. It held that, u/s 4 of the new Act, no option of election was available to the Income tax Officer between the two taxable units and he has power to initiate proceedings u/s 147 of the new Act to tax the income of an assessable unit if it has escaped assessment. That case dealt with an association of persons. Though this judgment was delivered a few days after the judgment in Commissioner of Income Tax Vs. Pure Nichitpur Colliery Company, , it appears that the judgment was not brought to the notice of the learned judges who decided Mahendra Kumar Agrawalla Vs. Income Tax Officer and Others, . In that case, two owners of a colliery were being assessed as individuals from the assessment year 1957-58. In 1969 and 1971, the Income tax Officer issued notices u/s 148 of the new Act for the assessment years 1960-61 to 1969-70 to asses them as an association of persons. The legality of the notices was questioned in a writ petition filed under article 226 of the Constitution. For the assessment years 1960-61 and 1961-62, for which section 3 of the old Act was applicable, it was held that the Income Tax Officer had option to assess either the"association of persons" or the members individually and as the option was exercised by assessing the members individually, the same income could not be assessed in the hands of the "association of persons. "For the assessment years 1962-63 to 1969-70, the learned judges relied on the judgment of the Supreme Court in Income Tax Officer, A-ward, Lucknow Vs. Bachulal Kapoor, and held that, u/s 4 of the new Act, the Income Tax Officer had no such option. That was a case dealing with members of a Hindu undivided family, who had been assessed to tax as individuals for different years of assessment. Subsequently, a notice u/s 34 of the old Act was given to the karta of the Hindu undivided family requiring him to file a return of income within the prescribed time for the assessment year 1955-56 stating that the same had escaped assessment. The Allahabad High Court held that the notice was bad as it offended the principle against double taxation. The judgment of the Allahabad High Court was questioned before the Supreme Court. The Supreme Court observed that, in the matter of assessment u/s 3 of the old Act, there was no question of any election between a Hindu undivided family and the members thereof in respect of the income of the family and that while section 3 conferred an option on the Income Tax Officer to assess either the association of persons or the members of the association individually, no such option was conferred on him

in the case of a Hindu undivided family as its existence excluded the liability of its members in respect of the income of the former received by the latter. From the observation of the Supreme Court above referred to, it is clear that the existence of a Hindu undivided family excludes liability of its members in respect of the income of the Hindu undivided family received by its members and, therefore, no option is available to the assessing authority between the members of the Hindu undivided family and the Hindu undivided family. There the fact that the members were assessed did not debar the authority from assessing the Hindu undivided family. Their Lordships did not lay down any principle to the effect that the position of the association of person vis-a-vis its members or that of the unregistered firm vis-a-vis its partners is similar to that of a Hindu undivided family and its members. In our view, the position of a Hindu undivided firm or association of person and its partners/members and there is nothing in common between them and further the existence of a Hindu undivided family excludes the liability of its members whereas the existence of an unregistered firm or association of person does not exclude the liability of its partners/ members but only provides an option to the assessing authority to assess the income either in the hands of the unregistered firm/association of person or in the hands of its partners/members. It may be noted here that that judgment was also rendered u/s 3 of the old Act. Therefore, this judgment cannot be taken as the basis for holding that, u/s 4 of the new Act, no option is available to the assessing authority between the unregistered firm or association of persons and its partners/members for making assessment of income.

25. The view taken by the latter Bench of the Patna High Court was followed by the Punjab and Haryana High Court in RODAMAL LALCHAND Vs. COMMISSIONER OF Income Tax, PATIALA-II., , the Delhi High Court in Punjab Cloth Store Vs. Commissioner of Income Tax, , and our High Court in Choudry Brothers Vs. Commissioner of Income Tax, .

26. We propose to refer to the last mentioned case decided by our High Court, viz., Choudry Brothers Vs. Commissioner of Income Tax, . In that case, the assessee partnership firm had a minor as one of its partners. That was the reason for refusing to grant registration to the firm by the Income Tax Officer. The said minor partner, after attaining majority, elected to continue as partner and continued as such. For the assessment year 1966-67, the firm was assessed in the status of an association of persons. The Appellate Tribunal held that the assessee - firm was entitled to registration. The following questions were referred to the High Court for opinion u/s 256, of which the first question was at the instance of the assessee (at page 226) :

"(1) Whether, on the facts and in the circumstances of the case, the assessment in the status of an association of persons is valid ?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal can direct the assessee to file Form No. 11 and comply with condition u/s 184 and direct the Income Tax Officer to pass orders thereon ?

(3) Whether, on the facts and in the circumstances of the case, the assessee is entitled to the benefits of registration ?"

27. We are not concerned with question Nos. 2 and 3 which were answered in favour of the Revenue and against the assessee. The Division Bench held that the partnership being void, it could not be treated either as a registered partnership or as an unregistered partnership and the same can only be treated as an association of persons, as a group of persons had come together and acted together for doing business and earning profits and that u/s 4 of the new Act, an association of persons is within the meaning of the word"person" as defined in section 2(31). The Bench further held that, u/s 4 of the new Act, the Income Tax Officer was left with no choice except to assess the association of persons or alternatively the individual persons comprising the association of persons and that the discretion which he was enjoying u/s 3 of the old act was withdrawn by the new Act. It relied on Income Tax Officer, A-ward, Lucknow Vs. Bachulal Kapoor, and the judgment of the division bench of the Patna High Court in Mahendra Kumar Agrawalla Vs. Income Tax Officer and Others, and held that, u/s 4 of the new Act, no such option of election between the two taxable units had been given to the Income Tax Officer. Referring to Ch. Atchaiah Vs. Income Tax Officer, ''B'' Ward, , the Bench observed that the distinction between section 3 of the old Act and section 4 of the new Act was brought to the notice of the learned judges and it had been urged on behalf of the Revenue that, under the new Act, there was no option left with the Income Tax Officer to assess the tax either on the members of the association as individuals or the association of persons, but the learned judges summarily dismissed the contention by failing to notice that the last paragraph of section 3 of the old Act contemplated exercise of an option by the Income Tax Officer between the association of persons or the members of the association individually and concluded (at page 233) :

"We are unable to agree with this reasoning of the learned judges which is previously (obviously) based upon the fact that it had not noticed the significant changes the charging section 3 had undergone by the omission of the words"or the members of the association individually". We, therefore, consider the judgment in Ch. Atchaiah Vs. Income Tax Officer, ''B'' Ward, , as on made per incuriam and would not be a binding precedent."

28. It is this observation of the Bench which led to this reference. It may be observed that the question whether, after assessment of the individuals either as partners of unregistered firm or as members of an association of persons, it was competent to the Income Tax Officer to assess the unregistered firm or association of persons, was not one of the questions referred to the High Court for opinion. Therefore, the whole discussion on this question is only judicial dicta. Further, for the reasons already given by us above, we are unable to agree with the conclusions of the Bench that the option available to the Income Tax Officer u/s 3 of the old Act is not available now u/s 4 of the new Act.

29. On a careful consideration of the cases and for the reasons stated above, we

are in respectful agreement with the view expressed by the Division Bench of our High Court in Ch. Atchaiah Vs. Income Tax Officer, ''B'' Ward, and of the Patna High Court in Commissioner of Income Tax Vs. Pure Nichitpur Colliery Company, , of the Madras High Court in COMMISSIONER OF Income Tax, MADRAS-II Vs. BLUE MOUNTAIN ENGINEERING CORPORATION., , and of the Calcutta High Court in Ramanlal Madanlal Vs. Commissioner of Income Tax, Central, , and, for the same reasons, we are unable to agree with the contrary view taken by the latter Bench of the Patna High Court in Mahendra Kumar Agrawalla Vs. Income Tax Officer and Others, , of the Punjab and Haryana High Court in RODAMAL LALCHAND Vs. COMMISSIONER OF Income Tax, PATIALA-II., , of the Delhi High Court in Punjab Cloth Store Vs. Commissioner of Income Tax, and of our High Court in Choudry Brothers Vs. Commissioner of Income Tax, .

30. Sri Y. Ratnakar, learned counsel for the assessee, urged before us that the circular issued by the Central Board of Revenue (referred to above) to the effect that the position as obtaining under the old Act continues to apply and the new Act is binding on the assessing authority and all other authorities under the Act. We do not propose to go into this question as it does not arise out of the reference made to this court. However, we would add that the Central Board of Revenue understood the provision of the new Act in the same way as held by us.

31. For the above reasons, the question referred to this court by the Income Tax Appellate Tribunal, is answered in the negative; against the Revenue and in favour of the assessee.

32. The two questions referred by the Division Bench to a Full Bench are inter-connected and we shall deal with them together.

33. In a country like ours which is governed by rule of law, law has to be certain and uniform which is fundamental to the rule of law. In Mamleshwar v. Kanahaiya Lal AIR 175 SC 907, Krishna Iyer J., speaking for the Supreme Court, observed (at page 909) :

"Certainty of the law, consistency of rulings and comity of courts all flowering from the same principle-converge to the conclusion that a decision once rendered must later bind like cases."

35. In this concurring judgment in State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another, , the observation of Sahai J. on this aspect is :

"Uniformity and consistency are the core of judicial discipline."

34. That is why the doctrine of stare decisis is part of our judicial system. This doctrine means "to abide by former precedents". Blackstone elucidated the doctrine thus :

"For it is an established rule to abide by former precedents, where the same points come again in litigation : as well as to keep the scale of justice even and steady and not liable to waver with every new judge''s opinion, as also because the law in that case being solemnly declared and determined , what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiment..."

35. The ratio decidendi of a judgment is a binding precedent. The hierarchy of authority with regard to binding precedent is summed up in paragraph 28 at page 158 of "Salmond on Jurisprudence", Twelfth Edition, as follows :

"The general rule is that a court is bound by the decision of all courts higher than itself. A High Court Judge cannot question a decision of the Court of Appeal, nor can the Court of Appeal refuse to follow judgments of the House of Lords. A corollary of the rule is that the courts are bound only by decisions of higher courts and not by those of lower or equal rank. A High Court judge is not bound by a previous High Court decision, though he will normally follow it on the principle of judicial comity, in order to avoid conflict of authority and to secure certainly and uniformity in the administration of justice. If he refuses to follow it, he cannot overrule it; both decision stand and the resulting antimony must wait for a higher court to settle."

36. The principles applicable to courts in India were laid down by Subba Rao J. (as he then was) in Dr. K.C. Nambiar Vs. State of Madras and Others, , which were approved by a Full Bench of our High Court in M. Subbarayudu and Others Vs. The State, They are as follows AIR 1955 AP 94 :

"A single judge is bound by a decision of a Division Bench exercising appellate jurisdiction. If there is a conflict of Bench decisions, he should refer the case to a Bench of two judges who may refer it to a Full Bench. A single judge cannot differ from a Division Bench unless a Full Bench or the Supreme Court overruled that decision specifically or laid down a different law on the same point. But he cannot ignore a Bench decision, as I am asked to do on the ground that some observations of the Supreme Court made in different context might indicate a different line of reasoning. A Division Bench must ordinarily respect another Divisional Bench of co-ordinate jurisdiction but if it differs, the case should be referred to a Full Bench. This procedure would avoid unnecessary conflict and confusion that otherwise would prevail."

37. The effect of binding precedents in India is that the decisions of the Supreme Court are binding on all the courts. Indeed, article 141 of the Constitution embodies the rule of precedent. All the subordinate courts are bound by the judgments of the High Court. A single judge of a High Court is bound by the judgment of another single judge and a fortiori judgments of Benches consisting of more judges than one. So also, a Division Bench of a High Court is bound by judgments of another Division Bench and Full . A single judge or Benches of High Courts cannot differ from the earlier judgments of co-ordinate jurisdiction merely because they hold a different view on the question of law for the reason that certainty and uniformity in the administration of justice are of paramount

importance. But, if the earlier judgment is erroneous or adherence to the rule of precedents results in manifest injustice, differing from the earlier judgment will be permissible. When a Division Bench differs from the judgment of another Division Bench, it has to refer the case to a Full Bench. A single judge cannot differ from a decision of a Division Bench except when that decision or a judgment relied upon in that decision is overruled by a Full Bench or the Supreme Court, or when the law laid down by a Full Bench or the Supreme Court is inconsistent with the decision.

38. It may be noticed that precedent ceases to be a binding precedent -

(i) if it is reversed or overruled by a higher court,

(ii) when it is affirmed or reversed on a different ground,

(iii) when it is inconsistent with the earlier decisions of the same rank,

(iv) when it is sub silentio, and

(v) when it is rendered per incuriam.

39. In paragraph 578 at page 297 of Halsbury''s Laws of England, Fourth Edition, the rule of per incuriam is stated as follows :

"A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction which covered the case before it, in which case it must decided which case to follow; or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force."

40. In Punjab Land Development and Reclamation Corporation Ltd., Chandigarh Vs. Presiding Officer, Labour Court, Chandigarh and Others, , the Supreme Court explained the expression "per incuriam" thus (77 FJR 36) :

"The Latin expression per incuriam means through inadvertence. A decision can be said generally to be given per incuriam when the Supreme Court has acted in ignorance of a pervious decision of its own or when a High Court has acted in ignorance of a decision of the Supreme Court."

42. As has been noticed above, a judgment can be said to be per incuriam if it is rendered in ignorance or forgetfulness of the provisions of a statute or a rule having statutory force or a binding authority. But, if the provision of the Act was noticed and considered before the conclusion arrived at, on the ground that it has erroneously reached the conclusion the judgment cannot be ignored as being per incuriam. In Salmond on Jurisprudence, Twelfth Edition, at page 151, the rule is sated as follows :

"The mere fact that (as is contended) the earlier court misconstrued a statute, or ignored a rule of construction, is no ground for impugning the authority of the precedent. A precedent on the construction of a statute is as much binding as any other, and the fact that it was mistaken in its reasoning does not destroy its binding force."

43. In Choudry Brothers Vs. Commissioner of Income Tax, , as noticed above, the Division Bench treated the judgment in Ch. Atchaiah Vs. Income Tax Officer, ''B'' Ward, , as per incuriam on the ground that the earlier Division Bench did not notice the significant changes the charging section 3 has undergone by the omission of the words "or the partners of the firm or the members of the association individually"-. In our view, this cannot be a ground to treat an earlier judgment as per incuriam. The change in the provisions of the Act was present in the mind of the court which decided Ch. Atchaiah Vs. Income Tax Officer, ''B'' Ward, . Merely because the conclusion arrived at on construing the provisions of the charging section under the old Act as well as under the new Act did not have the concurrence of the latter Bench, the earlier judgment cannot be called per incuriam.

44. Though a judgment rendered per incuriam can be ignored even by a lower court, yet it appears that such a course of action was not approved by the House of Lords in Cassell and Co. Ltd. v. Broome [1972] 1 All ER 801, wherein the House of Lords disapproved the judgment of the Court of Appeal treating an earlier judgment of the House of Lords as per incuriam. Lord Hailsham observed (at page 809) :

"It is not open to the Court of Appeal to give gratuitous advice to judges of first instance to ignore decisions of the House of Lords in this way."

45. It is recognised that the rule of per incuriam is of limited application and will be applicable only in the rarest of rare cases. Therefore, when a learned single judge or a Division Bench doubts the correctness of an otherwise binding precedent, the appropriate course would be to refer the case to a Division Bench or Full Bench, as the case may be, for an authoritative pronouncement on the question involved as indicated above. The above-said two questions are answered as indicated above.

46. In the result, the questions referred to us are answered accordingly. No costs.

