
(1985) 04 KL CK 0015

In the High Court Of Kerala

Case No : Income-tax Reference No"s. 210 to 212 of 1979

Commissioner of Income Tax

APPELLANT

Vs

C.A. Ouseph and Sons

RESPONDENT

Date of Decision : 10-04-1985

Acts Referred:

Income Tax Act, 1961 — Section 185, 2(31)

Citation : (1985) 154 ITR 598

Hon'ble Judges : K. Bhaskaran, C.J.;Sivaraman Nair, J;Balakrishna Menon, J

Bench : Full Bench

Advocate : P.K.R. Menon, for the Appellant; T.L. Viswanatha Iyer, for the Respondent

Judgement

Balakrishna Menon, J.—The following question at the instance of the Revenue has been referred to this court by the Income Tax Appellate Tribunal, Cochin Bench, u/s 256(1) of the I.T. Act, 1961 (hereinafter referred to as "the Act "):

"Whether, on the facts and in the circumstances of the case, the income of the firm, M/s. C.A. Ouseph & V.J. Paul, has to be included in the assessment of the assessee-firm (M/s. C. A. Ouseph & Sons) for the assessment years 1972-73, 1973-74 and 1974-75 ?"

2. The partners of the assessee-firm are also partners of another firm by name, M/s. C.A. Ouseph & V.J. Paul, carrying on business in grocery and general merchandise at Trichur. The assessee-firm is carrying on business in jewellery at Trichur.

3. Differing from the views expressed by the Commissioner in respect of the assessments for the years 1972-73 and 1973-74 in proceedings u/s 263 of the Act and by the AAC with respect to the assessment for the year 1974-75, the Income Tax Appellate Tribunal, Cochin Bench, has allowed the appeals relating to the different periods aforesaid, directing deletion of the income of the firm, M/s. C. A. Ouseph & V.J. Paul, from the total income of the assessee-firm. According

to the Appellate Tribunal, both the firms are separate entities falling within the definition of the expression "person" in Section 2(31) of the Act, and the income of both the firms cannot be clubbed together and aggregated for the purpose of assessment of the assessee-firm, even though the partners of both the firms are the same.

4. The Appellate Tribunal has found that both the firms are registered u/s 185 of the I.T. Act. There is no interlacing or interlocking between the businesses carried on by the two firms and the mere fact that the partners of both the firms are the same and they share the profits in the same ratio, does not authorise the Income Tax Department to club together the income of both the firms and assess tax on the income so aggregated. The Appellate Tribunal has followed the decision of a Division Bench of this court in *Dy. Commr. of Sales Tax v. Kelukutty* [1978] 42 STC 108. Since the correctness of the decision in *Dy. Commr. of Sales Tax v. Kelukutty* [1978] 42 STC 108, is challenged by the learned counsel for the Revenue, this case has come up before a Full Bench on reference by a Division Bench of this court.

5. Section 2(23) of the I.T. Act defines "firm", "partner" and "partnership" as having the meanings respectively assigned to them in the Indian Partnership Act, 1932, subject to the exception that the expression "partner" shall also include any person who being a minor has been admitted to the benefits of partnership. The charge of Income Tax u/s 4 of the Act is on every person whose total income of the previous year or years is liable to Income Tax under the Act. The expression "person" as defined in Section 2, Clause (31), of the Act includes also a firm. Chapter XVI of the Act relates to the assessment of firms and Section 185 prescribes the procedure for registration of firms by the ITO.

6. There is no dispute that the assessee-firm as well as the firm under the name and style "C. A. Ouseph & V.J. Paul" are both separately registered u/s 185 of the Act. The Appellate Tribunal has found that both the firms are doing independent business and there is no interlacing or interlocking of the business of both the firms.

7. Counsel for the Revenue relies on the observations of Beaumont C.J., speaking for the court, consisting of himself and Chagla J. (as he then was) in *VISSONJI SONS AND CO. Vs. COMMISSIONER OF Income Tax, CENTRAL.*, :

"In law, a firm has no existence independently of its partners, and if there are two firms consisting of exactly the same partners, the real position in law is that there is only one firm. It may carry on separate businesses, and may carry on those businesses in different names but in fact there is only one firm in law."

8. Those observations of the learned Chief Justice were found to be obiter and not laying down the correct law. In a later decision of the Bombay High Court in *Jesingbhai Ujamshi Vs. Commissioner of Income Tax*, , Chagla C.J., speaking for the Bench consisting of himself and Tendolkar J., stated at page 27 :

"With great respect to the learned Chief Justice, the actual question that he had to consider in that reference was whether a certain item which the assessee claimed as a bad debt was a bad debt or not, and the learned Chief Justice disposed of that reference by coming to the conclusion that this question was really a question of fact and the only question of law that arose was whether there was sufficient evidence to justify the finding of fact by the Tribunal. Therefore, this particular observation on which the Tribunal has relied was not called for the determination of the reference and, therefore, it must be looked upon as a pure obiter."

9. The Division Bench disagreed with the opinion expressed by Beaumont C.J. and held that "there is nothing in law to preclude common partners constituting two separate firms for the purpose of the Income Tax Act". Since, however, the question whether there were actually two firms or only one had not been considered, the Tribunal was directed to determine the question of fact for the purpose of assessment under the I.T. Act. The question of law was answered in favour of the assessee that it is open for common partners to constitute separate firms in respect of different businesses carried on by them for the purpose of the I.T. Act. This decision was followed by a Division Bench of the Punjab and Haryana High Court in PUNJAB CO-OPERATIVE BANK LTD. Vs. COMMISSIONER OF Income Tax, PUNJAB.,

10. Counsel for the Revenue placed considerable reliance on the decision of the Madras High Court in Iyanar Coffee and Tea Company Vs. Commissioner of Income Tax, and of the Andhra Pradesh High Court in Addl. Commissioner of Income Tax Vs. M. Venkata Narasimha Rao and Co., , where the view expressed by Beaumont C.J. in VISSONJI SONS AND CO. Vs. COMMISSIONER OF Income Tax, CENTRAL., was accepted as laying down the correct law on the point.

11. The Madras High Court in Iyanar Coffee and Tea Company Vs. Commissioner of Income Tax, , distinguished the decision in Jesingbhai Ujamshi Vs. Commissioner of Income Tax, , as, in its view, "the learned judges took a different view probably because there was not the identity of business between the two firms having common partners and, in fact, the facts disclose that the sharing of profits also was in different proportions" (page 779). It was, however, stated at page 781 :

"But, as in the case under consideration, if factually the firm and the assessee are one due to their commensality, interlacing and interlocking, then, notwithstanding the fiscal concept which compels an independent recognition of the two concerns as two legal entities, it follows that the affairs of the one ought to be considered and dealt with as the affairs of the other."

12. The decision of the Madras High Court in Iyanar Coffee and Tea Company Vs. Commissioner of Income Tax, , should, therefore, be confined as relating to the peculiar facts of the case.

13. A Full Bench of the Andhra Pradesh High Court in Commissioner of Income

Tax Vs. G. Parthasarathy Naidu and Sons, , has dissented from the view expressed by Beaumont C.J. in VISSONJI SONS AND CO. Vs. COMMISSIONER OF Income Tax, CENTRAL., and has followed the decision in Jesingbhai Ujamshi Vs. Commissioner of Income Tax, and other decisions following the same view. The decision of the Division Bench in Addl. Commissioner of Income Tax Vs. M. Venkata Narasimha Rao and Co., was overruled. Propositions Nos. 4 and 6 laid down by the Full Bench at page 108 are extracted below :

"4. Under the. Income Tax law a firm is an independent and distinct juristic person for the purpose of assessment as well as for recovery of tax as it is a "person" within the meaning of Section 2(31) of the Act, having its own entity and personality. It is also a separate entity under the sales tax law.....

6. In law, there is no prohibition for the creation or existence of two or more separate firms or partnerships by the same partners."

14. Commissioner of Income Tax, West Bengal Vs. A.W. Figgies and Co. and Others, , it is stated, with reference to the provisions of the Indian I.T. Act, 1922, as follows at page 409 :

"The partners of a firm are distinct assessable entities, while the firm as such is a separate and distinct unit for purposes of assessment. Sections 26, 48 and 55 of the Act fully bear out this position. These provisions of the Act go to show that the technical view of the nature of a partnership under English law or Indian law, cannot be taken in applying the law of Income Tax."

15. The Supreme Court in State of Punjab v. Jullundur Vegetables Syndicate [1966] 17 STC 326 :

"The first question is whether a firm is a separate assessable entity for the purposes of the Act or whether it is only a compendious term used to denote a group of partners. The definition of "dealer" takes in three categories of assessable units, namely, person, firm or a Hindu joint family. The substantive and the procedural provisions of the Act prescribe the mode of assessment and realisation of the tax assessed on such a dealer. If we read the expression "firm" in substitution of the word "dealer", it will be apparent that a firm is an independent assessable unit for the purposes of the Act. Indeed, a firm has been given the same status under the Act as is given to it under the Income Tax Act. u/ s 3 of the Income Tax Act also, a "firm" is treated as a unit of assessment and as a distinct assessable entity. Though under the partnership law, a firm is not a legal entity but only consists of individual partners for the time being, for tax law, Income Tax as well as sales tax, it is a legal entity."

16. Whether the same set of partners constituting two different firms can be treated as one firm or as two separate assessable units or entities for the purpose of the General Sales Tax Act came up for decision before a Division Bench of this court in Dy. Cowmr. of Sales Tax v. Kelukutty [1978] 42 STC 108. Following the decision of the Supreme Court in State of Punjab v. Jullundur

Vegetables Syndicate [1966] 17 STC 326, this court held that although in partnership law, a firm is not a legal entity but consists of only persons who are partners for the time being, as far as tax law--both Income Tax and sales tax--is concerned, it is a legal entity, and affirmed the view expressed by the Tribunal that in law the same persons constituting two different partnerships must be regarded as two separate persons or assessable units for the purpose of assessment under the General Sales Tax Act.

17. For the aforesaid reasons, we answer the reference in the negative, i.e., in favour of the assessee and against the Revenue.

18. A copy of this judgment under the seal of the court and the signature of the Registrar will be forwarded to the Income Tax Appellate Tribunal, Cochin Bench.