
(1998) 07 SHI CK 0004

In the High Court Of Himachal Pradesh

Case No : Income-tax Reference No. 3 of 1991

Commissioner of Income Tax

APPELLANT

Vs

Dillo Ram and Co.

RESPONDENT

Date of Decision : 02-07-1998

Acts Referred:

Income Tax Act, 1961 — Section 184, 186(1), 256(2)

Citation : (1999) 156 CTR 570 : (1999) 235 ITR 43 : (1999) 1 ShimLC 178

Hon'ble Judges : D. Raju, C.J.; Kamlesh Sharma, J

Bench : Division Bench

Advocate : Inder Singh, for the Appellant; Ankush Sood and D. Dadwal, for the Respondent

Judgement

D. Raju, C.J.—The above reference arises out of a question referred for the decision of this court, on the directions made by an order dated October 11, 1990, by this court in I. T. Applications Nos. 3 and 4 of 1976 referring the following question :

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the assessee-firm was entitled to continuation of registration for the assessment years under consideration?"

2. The necessary facts relevant for the purpose of answering the question are that the firm consisting of nine partners was said to have been constituted as per deed dated February 19, 1962, which had been accorded registration for the assessment year 1962-63. The said registration had also been effective for the assessment years 1963-64, 1964-65 and 1965-66. While that be the position, the Income Tax Officer learnt that out of nine partners, one Shri Behari Lal had not personally signed, (1) the deed dated February 19, 1962, (2) the Form No. 11 application for the assessment year 1962-63, and (3) the Form No. 12 declarations for the assessment years 1963-64, 1964-65 and 1965-66. After issuing a show-cause notice and considering the objections and also on conducting an inquiry the registration for the assessment years 1964-65 and

1965-66 came to be cancelled u/s 186(1) of the Income Tax Act, 1961. The registration pertaining to the earlier assessment years apparently could not be touched in view of the eight-year period of limitation provided in the proviso to the said provision in the Act. In coming to such a conclusion that there was no signature of one of the partners, Shri Behari Lal, on any one of those documents, the Income Tax Officer relied upon his own observation, the expert opinion of the Government examiner of questioned documents, the testimony of the manager of the State Bank of India, Mandi Branch, and consequently rejected the testimony of the witnesses suggesting a contrary version. The finding recorded by the Income Tax Officer in this regard was also affirmed on appeal at the instance of the assessee by the Appellate Assistant Commissioner. As a matter of fact, as could be noticed hereinafter, no infirmity in the said finding was pointed out to the Tribunal by the assessee. Shri Behari Lal, when the controversy arose, also died on October 25, 1965, and there was no scope for getting an admission or denial from him of his signature said to be on the documents. The Tribunal necessarily confirmed the finding that Shri Behari Lal had not personally signed the said documents.

3. When the matter was pursued by the assessee before the Tribunal, it appears to have been contended for the assessee that even if, as suggested by the Department, some one also had signed Behari Lal partner's name in the partnership deed, Form No. 11 application, and Form No. 12 declaration, the said fact was irrelevant for determining the question as to whether there had been during the previous years concerned in existence a genuine firm "as registered", as contemplated u/s 186(1) of the Act. The Tribunal in dealing with the appeal and the objections of the assessee specifically recorded in paragraph 3 of its order dated July 24, 1975, as follows :

"The finding of the Income Tax Officer in this regard was sustained by the Appellate Assistant Commissioner on appeal. No infirmity in the said finding was pointed out to us. Shri Behari Lal died on October 25, 1965, and was thus not available to admit or deny his signature on the said documents. We confirm the finding that Behari Lal had not personally signed the said documents."

4. Proceeding further with reference to the other objections of the assessee and purporting to apply the principles laid down in the decision of a Division Bench of the Punjab and Haryana High Court in Jagan Nath Pyare Lal Vs. Commissioner of Income Tax, the Tribunal came to the conclusion that since the Department has not gone into the question whether Behari Lal had or had not assented to the partnership in question, its finding as to non-existence of a genuine firm "as registered" arrived at merely on the basis of the signature of Behari Lal on the documents aforesaid alone not being genuine, cannot be sustained. Aggrieved by the finding of the Tribunal and having been unsuccessful in their attempt to get a reference the Revenue approached this court, as noticed earlier, and on the directions of this court, the present reference and the question referred, fall for our consideration.

5. Learned standing counsel for the Income Tax Department while inviting our attention to Section 184(7), as it stood prior to its amendment on April 1, 1993, rule 22 of the Income Tax Rules, 1962 and Forms No. 11 and 12, contended that the Tribunal committed a grave error, despite the fact that neither the finding relating to the genuineness of the signature of the partner, Behari Lal, arrived at by the Income Tax Officer and the first appellate authority was successfully challenged nor was it found to be also erroneous in proceeding to undertake a further exercise on the irregularity or otherwise of the manner of inquiry that has been conducted by the Income Tax Officer with reference to the genuineness of the firm and that such exercise at the instance of the Tribunal was uncalled for and wholly impermissible. Argued learned counsel further that unless the statutory requirement of Section 184(1) has been shown to have been meticulously complied with not only the registration could be denied but by virtue of the provisions contained in Section 186, there is every right in the Department to refuse to continue the benefit of the registration for the subsequent years, as is permissible in law and really the Department has only adopted that course, which was within its legitimate rights and consequently the question referred needs to be answered in the negative and in favour of the Department. Learned counsel also invited our attention to the decisions in *Nani Gopal Biswas Vs. The Municipality of Howrah*, ; *Commissioner of Income Tax Vs. Subash Chand and Co.*, as also *Ratanchand Darbarilal Vs. Commissioner of Income Tax, M.P.*, , in support of the above submissions.

6. Per contra, learned counsel for the assessee with great force and perseverance endeavoured to take us into all the details of the facts as though we are hearing the appeal under the Act, to which at some point of time, learned standing counsel for the Revenue also took strong exception, and invited our attention to the records of inquiry before the Income Tax Officer to make out a grievance that the inquiry by the Income Tax Officer was not on proper lines and that the issues were not considered by him, as was expected, giving due and effective opportunity, too. Learned counsel for the assessee also tried to make a distinction between a cancellation of an original registration and the question of denying the benefit of extension or continuation of the registration and vehemently contended that the question actually referred for our consideration being a pure question of fact does not at all either require to be or is available even for our consideration and opinion. Learned counsel also tried to contend that the conclusions arrived at by the Income Tax Officer on the basis of an extraneous and cryptic expert opinion, which could be of no assistance, are illegal and is not sufficient also to sustain the finding relating to the genuineness of the firm. He even went to the extent of contending that once the genuineness of the firm was accepted at the time of granting or according registration, thereafter, it is not permissible for the Income Tax Officer to go back on it except the Department availing of the remedy available u/s 263 of the Act. Learned counsel for the assessee also placed reliance upon the decisions in *Commissioner of Income Tax Vs. Kirana Traders*, ; *Commissioner of Income Tax Vs. S.M.*

Bhatiya Associates, , in support of his above submissions. Learned counsel was fair enough not to place much reliance upon the decision in Jagan Nath Pyare Lal Vs. Commissioner of Income Tax, strongly relied upon by the Tribunal below, alive to the fact that the said decision, on appeal came to be reversed by the apex court in the decision in Commissioner of Income Tax, Patiala Vs. Jagannath Pyarelal, . Before actually considering and expressing our view, it would be appropriate to refer to some of the decisions relied upon before us by the respective counsel on either side.

7. In the decision in Nani Gopal Biswas Vs. The Municipality of Howrah, it was held while, considering the effect of Section 26A of the Indian Income Tax Act, 1922, and the rules made thereunder that in order that an application for registration could be entertained by the Income Tax Officer and the partnership registered for the purpose of Section 26A read with relevant rules, it was necessary that the application should be signed by all the partners of the firm and it should specify the individual shares of the partners and unless that is done it would not be competent to the Income Tax Officer to entertain the application, even.

8. In the decision in Commissioner of Income Tax Vs. Subash Chand and Co., a Division Bench of this court while dealing with a similar reference held that the requirement of Section 184(7) is mandatory, in the following terms (page 21) :

"The wording of Section 184(7) of the Income Tax Act is mandatory in terms and it contemplates registration to have effect for every subsequent year provided the two conditions mentioned therein are satisfied. In this case there is no dispute that the two conditions mentioned in the proviso to Sub-section (7) of Section 184 of the Act are satisfied and it is not found by the Income Tax Officer that the assessee has failed to fulfil those conditions."

9. In the decision in Ratanchand Darbarilal Vs. Commissioner of Income Tax, M.P., , the apex court while advertng to its earlier decision in P.R. Chowdhary and S. Gangoli Vs. The State of U.P., , in the context of the requirement of even Section 26A of the old Act reiterated the relevant conditions to be satisfied in order that a firm may be entitled to registration, to be as follows (page 728):

"(i) the firm should be constituted under an instrument of partnership specifying the individual shares of the partners ;

(ii) an application on behalf of and signed by all partners and containing all the particulars as set out in the Rules must be made ;

(iii) the application should be made before the assessment of the firm u/s 23 of the Act for that particular year ;

(iv) the profits or loss, if any, of the business relating to the accounting year should have been divided or credited, as the case may be, in accordance with the terms of the instrument ; and

(v) the partnership must be genuine and must actually have existed in conformity with the terms and conditions of the instrument of partnership in the accounting year."

10. The decision in Commissioner of Income Tax Vs. Kirana Traders, is that of a Division Bench of the Karnataka High Court, wherein it has been held that the emphasis in the provisions of Section 186(1) is really with regard to the satisfaction of the Income Tax Officer as to the non-existence of a genuine firm during the previous year and that there is a limitation imposed by the Legislature for cancellation of registration of the firm once it was granted. It was observed by the Division Bench in the said decision that such opportunity is confined to the only ground that a firm that existed during the relevant year was not a genuine firm but that the word "genuineness" in their opinion appears to have been used in contradistinction to the words "sham", "bogus or not real". With respect we cannot subscribe to the limitations read into the provisions by this Division Bench.

11. In the decision in CIT v. Scientific Refractories [1996] 218 ITR 424, a Division Bench of the Madhya Pradesh High Court held that an application for registration cannot be rejected simply because it is not in order and that the Act enjoins that an assessee should be given an opportunity to rectify the defect in the application and if the application was not personally signed by some of the partners, the Income Tax Officer ought to have afforded an opportunity to the assessee-firm to rectify the defect. It was also held therein that the decision of the Tribunal in rejecting the application for reference u/s 256(1) of the Act with reference to the defective nature of Form No. 12 and such defect being a curable one and was, in fact, found to have been cured also by furnishing fresh Form No. 12, signed by all the partners, there was no question of law to be really referred to the decision of the court. We may even at this stage point out that the decision has no relevance either on facts or as to the principle of law involved for our consideration in this case, having regard to the categorical findings recorded by the authorities below including the Tribunal also, as we have noticed earlier.

12. The decision in Commissioner of Income Tax Vs. S.M. Bhatiya Associates, is that of a Division Bench of the Rajasthan High Court, wherein it has been held that the genuineness of the firm or the question relating to the genuineness of the firm is a question of fact and that no question of law arises from a finding regarding the genuineness of the firm.

13. In the decision in Fakhruddin v. State of Madhya Pradesh AIR 1967 SC 1326, the apex court had an occasion to deal with the efficacy and evidentiary value of the opinion of a handwriting expert in deciding the question relating to the proof of writing or the authorship of the writing or the signature. In our view we are not expected in this case to enter into such a controversy, in view of the categorical finding of fact recorded by all the authorities below including the Tribunal in paragraph 3 of its order noticed earlier.

14. We have carefully considered the submissions of learned counsel appearing

on either side. It is by now well settled that the question to be referred to this court for its opinion or the question which can be considered should arise out of the order of the Tribunal. Once the original as also the first appellate authority and the Tribunal held that the signature in the deed dated February 19, 1962, application in Form No. 11 as also the declaration in Form No. 12 for the assessment years 1963-64, 1964-65 and 1965-66 did not actually bear the signature of one of the alleged partners, Shri Behari Lal, it is not permissible for the assessee to argue before us in this reference, at any rate, despite the said view arrived at about the genuineness of the signature or the finding concurrently recorded that those documents did not really bear the signature of the late Behari Lal who happened to die on October 25, 1965, but was signed by somebody else and not by Behari Lal, that no proper inquiry was conducted by the Income Tax Officer or no effective opportunity was accorded to him and on the alleged perfunctory material, such a finding could not be arrived at. Consequently, the only question that requires to be considered by us is as to whether the Tribunal was right in law in coming to the conclusion that the assessee-firm was entitled to continuation of registration for the assessment year under question for the reason that the Department has not gone into the question whether Behari Lal had or had not assented to the partnership in question, as noticed earlier. On the facts it has now become final, as a finding of fact that the deed of partnership as also the application in Form No. 11 or declarations in Form No. 12, did not contain the signature of Behari Lal, as such, or was actually signed by him. To an assessee seeking to have the right of registration as a firm, it is obligatory as also mandatory as per the law declared, to satisfy that the firm has been constituted under an instrument of partnership specifying the individual shares of the partners, that the application and declaration on behalf of and signed by all the partners and containing all the particulars as set out in the rules have been made, and that the application and declaration should be made before the assessment of the firm u/s 23 of the Act for that particular year, besides substantiating the existence of the other requirements noticed in the decision in Commissioner of Income Tax, Patiala Vs. Jagannath Pyarelal, . In our view the essential conditions which are not only mandatory but in our view prerequisite to avail of the right and benefits of registration of the firm should be shown to exist not only at the time when the registration is accorded to the firm but also when the continued benefit of the same is claimed during the subsequent years and it was well within the right of the Department to cancel the registration or deny the benefit of continuation in any subsequent year on being satisfied that the registration accorded was in derogation of law, subject to the power being exercised within the stipulated period of limitation. We may at this stage point out that the grievance espoused by learned counsel for the assessee that the Income Tax Officer had no such power and that if at all the power was with the Commissioner of Income Tax alone to do so by invoking the revisional power u/s 263 of the Act and undo any such mistake, has no merit whatsoever. We do not find from the order of the Tribunal that any such grievance has been made nor that any such question has

been decided by the Tribunal or that any such question has been referred to us for our consideration, to express our opinion on such grievances.

15. We are also of the view that once the finding of fact is that the relevant deed of partnership, the application in Form No. 11 and a declaration in Form No. 12, did not bear the signature of one of the so called partners, Behari Lal, those documents are rendered per se illegal and could not be given any credence in law and could not be relied upon as of any basis to claim or assert in law any right. The Tribunal, in observing and basing its conclusion on such observations that the Department had not gone into the question that Behari Lal had not assented to the partnership in question surmised facts which otherwise need to be proved, in our view, by the assessee by legally acceptable materials. In view of the indisputable factual position that those documents did not bear the signature of Behari Lal, it was not permissible in law for them to prove the further fact as to whether Behari Lal assented to the same or not. The defect sought to be pointed out by the Tribunal as a reason for giving the relief to the assessee in this case is no infirmity or reason at all in the eye of law and consequently could not have been the basis to record any finding in favour of the assessee or grant relief in their favour. Consequently, we cannot approve the conclusion arrived at by the Tribunal in favour of the assessee in this case.

16. We are also unable to agree with the submissions of learned counsel for the assessee that the question of genuineness of a firm is a pure question of fact and no question of law being involved, the reference itself could not have been made out. Apart from the fact that the reference came to be made in this case on the directions of this court u/s 256(2), when the Tribunal is found to have recorded a finding or assigned a reason to grant relief in favour of a party before it without sufficient basis on facts or on law and it proceeded merely on surmises and purports to adopt a perverse approach in utter disregard of the law declared by the apex court, there is no impediment for making such a dispute to be the subject-matter of a reference and such question, in our view, is a question of law too.

17. For all the reasons said above, we overrule the objections of learned counsel for the assessee and we are of the view that the Tribunal was in error in allowing the claim of the assessee by its order dated July 24, 1975. Consequently, we answer the question, referred to us, in the negative that the assessee-firm was not entitled to continuation of registration for the assessment years 1963-64, 1964-65 and 1965-66, in favour of the Revenue.

18. No costs.