

(1999) 04 GUJ CK 0038

In the Gujarat High Court

Case No : IT Application No's. 282 to 286 of 1998

Commissioner of Income Tax

APPELLANT

Vs

D.K. Trading Co.

RESPONDENT

Date of Decision : 13-04-1999

Acts Referred:

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

Citation : (1999) 155 CTR 368 : (1999) 238 ITR 887

Hon'ble Judges : Rajesh Balia, J; Anil R. Dave, J

Bench : Division Bench

Advocate : Manish R. Bhatt, for the Appellant;

Judgement

1. Heard learned counsel for the applicant. These are applications under s. 256(2) of the IT Act, at the instance of the CIT, Gujarat, relating to asst. yrs. 1986-87 to 1990-91. He requires this Court to direct the Tribunal, to submit statement of case and refer the following questions of law which are identical in all applications and said to be arising out of its appellate order relating to asst. yrs. 1986-87 to 1988-89, in appeals filed by Revenue and in relation to asst. yr. 1990-91 in appeal filed by assessee in same set of facts and circumstances :

"1. Whether, the appellate Tribunal is right in law and on facts in confirming the order passed by the CIT(A) directing the AO to adopt the status of the assessee as that of a registered firm ?

2. Whether, the Tribunal is right in law and on facts in directing the AO to exclude the income of the sister concerns clubbed with the income of the assessee ?

3. Whether the Tribunal ought not to have appreciated that the assessee-firm was not genuine and was a ruse or device to avoid tax liability ?"

2. The Tribunal has rejected the application under s. 256(1) on the ground that no question of law arise out of order relating to the assessment orders and all questions are questions of fact.

3. D. K. Trading Company was being assessed as AOP until asst. yr. 1985-86. It was dissolved on 1st July, 1985. Before D. K. Trading company was constituted as a firm w.e.f. 1st May, 1985. The partnership deed was executed on 11th April, 1985. Each partner had 25% of share in profit and loss of the firm. Another AOP Deepkala Silk Palace also stood dissolved on 17th May, 1985 and its business was also taken over by newly constituted firm. The firm was registered. Partners of the firm are members of the same family, so also the members of the AOP. The members of the family to which partners of the newly constituted firm belong were as on the date of constitution of the firm were carrying on independent business. Deepkala Novelty was owned by its proprietor Silvy P. Shah, Deepkala Arts owned by proprietor Silvy P. Shah, Deepkala Economy owned by its proprietor Nilay P. Shah. The other two businesses were being run in the status of AOP in the name of Deepkala Fashion and Deepkala Selection, having other members of the family as members of AOP. The fact that the members had independent capital to contribute for running this business had nowhere been disputed at any stage of the proceedings. A search has been conducted on the premises owned by the family in which all the different business named above were being run. The AO without deciding the application for registration of the firm under the IT Act, without holding an enquiry and giving a finding as to the genuineness of the firm held that the dissolution of AOP was with a view to avoid the tax and considering the material before it primarily on the proximity of relationship between their partners/proprietors, and that different businesses were carried on in the same premises and paying the different rentals to the owner of the property who were also members of the family on the basis of commission of sales and considering that all the apparent different trading interests have a common closing stock and interdependent as to finances, there is interlocking and interlacing of the business activity, clubbed the income of the other six businesses named above, Deepkala Silk Palace-AOP having already been dissolved and acquired by the firm in question, made assessment on that basis in the status of AOP. On appeal by the assessee for the asst. yrs. 1986-87 to 1989-90 CIT(A) found in favour of the assessee holding that the constitution of the firm is genuine. It fulfils all the conditions for grant of registration directed the AO to register the firm and found the business activity of each of the different entities to be genuine and independent and further finding that there is no interlocking and interlacing of the finance of the business activity found against the clubbing of income of different entities.

4. Aggrieved with the order of CIT(A) the Revenue went in appeal before the Tribunal relating to asst. yr. 1986-87 to 1989-90. For the asst. yr. 1990-91. CIT(A) on the very same material decided against the assessee and affirmed the order of AO. That is how for the asst. yr. 1990-91 the assessee was in appeal before the Tribunal.

5. The AO has also assessed all the seven entities separately on protective measure on the basis of return submitted by them. CIT(A) in the case where it found in favour of the assessee further directed to treat the protective

assessment to be substantive assessments and set aside the assessment made in the status of AOP by clubbing different interests of the members.

6. The Tribunal by common order decided all the appeals. After referring to the material placed before it and recording submissions made by respective parties found that the AO had made no enquiry about the genuineness of the firm nor he has given any finding thereon in the order passed. It found that none of the partners at any stage has denied being partner in the firm nor any of them has claimed share in the firm at variance with that specified in the partnership deed. Further there is no evidence brought on record to establish that any of the partner was a benami of another partner or another person. It further noticed that prior to dissolution of AOP the firm had come, into existence disclosing the names of the individuals Who were partners of the firm. From this inference was drawn by the Tribunal that it cannot be considered to be a continuation of old AOP nor dissolution of the AOP which has taken place subsequent to the formation of the firm can be treated as a device. The Tribunal further found that with the dissolution of the AOP all its assets and liabilities were taken over by the assessee-firm and capital of the members of the AOP was brought in the firm by the partners constituting the firm. The business as carried on thereafter was not as per terms of the indenture of AOP, but it was carried on as per terms of the partnership deed. Further, at the close of the year the profit was divided not as per the share ratio provided in the AOP deed but it was divided as per share ratio provided in the partnership deed. It has also found that the firm has constituted on 1st May, 1985 continues till today and that itself proves that the dissolution of the old AOP and constitution of the firm was for bona fide reasons. It also found that all the requisite formalities for getting the firm registered under the IT Act have also been completed and duly complied with. It, therefore, reached the finding that the dissolution of the old AOP and the constitution of the firm was for bona fide reasons and no scheming was involved with the object of evading tax. It thus found no merit in the reasoning given for adopting the status as AOP.

7. Finding as to the existence of the firm as genuine and not as a device for the purpose of avoidance of tax or a part of a scheme, is purely a finding of fact and cannot be said to give rise to any question of law nor it can be said even prima facie for the material which has gone into consideration before the Tribunal that it could give rise to question of law as to the perversity of finding of fact. In these circumstances, we are of the opinion, so far as question No. 1 and relating to the finding about the status of the assessee as that of registered firm and not of old AOP and consequential direction to the AO to grant registration of the firm under the IT Act does not give rise to question of law and the order of the Tribunal refusing to refer to such question cannot be said to be erroneous.

8. The other question which has been required to be referred relates to the clubbing of the incomes of different entities in the hands of the AOP. We find on the close reading of the finding recorded in this respect by the Tribunal that it has considered all the material placed before it in the light of submissions made

before it and the finding as to the existence of different entities independent of each particularly keeping in view the fact that the capital acquisition by the independent entities are genuine and not disputed by the Revenue at any stage, and that while the assessee-firm maintained complete quantity record of the goods purchased and sold evidence by audited accounts though the associate concerns whose income was sought to be clubbed did not maintain quantitative details as it was not practical for them to maintain the closing stock details, quantity and qualitywise that all the entities independently existed prior to the constitution of the firm and were being so assessed; the associated concerns had not only business dealings with the assessee-firm but with the outside agencies; there being no interlocking and interlacing of the funds, it refused to draw inferences of oneness merely on the basis of the fact that the respective proprietors of the different business entities were members of the same family, the business was being carried in the same premises and there were inter se trading activity as well, which was found to be reciprocated by consideration as per market value of the goods purchased or sold.

9. In our opinion, this question too is a question of fact depending upon the appreciation of evidence and inference drawn by the Tribunal. It cannot be said that the inference drawn by the Tribunal from the material before it was such to which no reasonable person could reach the conclusion to which the Tribunal has reached or that the findings of facts have been arrived at by ignoring relevant material before it or by irrelevant consideration, which would vitiate the finding of fact and require reconsideration of the facts of this Court. The contentions raised by the applicants are all in the realm of appreciation of evidence which has been considered by the Tribunal.

10. We, therefore, find that the Tribunal was right in law in refusing to refer all the questions under s. 256(1) of the Act.

11. Accordingly there is no merit in these applications and are hereby rejected.