(1990) 11 AHC CK 0020

In the Allahabad High Court

Case No : IT Reference No. 1095 of 1978

Commissioner of Income Tax APPELLANT

Vs

Jagiwan Patel Co. RESPONDENT

Date of Decision : 20-11-1990

Acts Referred:

Income Tax Act, 1961 — Section 187, 188, 256(1)
Partnership Act, 1932 — Section 42(c)

Citation : (1991) 55 TAXMAN 239

Hon'ble Judges : B.P. Jeevan Reddy, C.J;V.N. Mehrotra, J

Bench : Division Bench

Judgement

B.P. Jeevan Reddy, CJ.

1. The Tribunal, Allahabad has referred the following two questions u/s 256(1) of the income tax Act, 1961 (''the Act'') :

1.Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that on the retirement of the two partners namely S/Shri Jagjiwan M. Patel and Rashik Lal G. Singhavi, there would be succession and not a change in the constitution of the firm?

2.Whether, on the facts and in the circumstances of the case, the Tribunal was legally justified in holding that there should be two separate assessment for the assessment year 1972-73, one for the period 1-4-1971 to 30-6-1971 and the other for the period 1-7-1971 to 31-3-1972?

The assessee is a firm. Prior to 30-6-1971, it comprised three partners, viz. S/Shri Jagjiwan M. Patel, Rasik Lal G. Singhavi and Kirti Kumar Shah. On the date the first two partners retired and the firm was reconstituted under a new partnership deed, consisting of Shri Kirti Kumar Shah and Smt. Ele Ben R. Singhavi. Two returns were filed one for the period 1-4-1971 to 30-6-1971 and the other for the period 1-7-1971 to 31-3-1972. The ITO, however, held that there ought to be one assessment and assessed accordingly.

2. On appeal, the AAC directed that there ought two assessments. He was of the opinion that since after retirement of two partners, only one partner remained, the partnership firm came to an end and that the one constituted later was a new firm which succeeded to the old firm. The department appealed. The Tribunal held following the decision of this Court in 1974 UPTC 644 as well as Dahi Laxmi Dal Mills 1974 UPTC 630, that it is a case of succession falling u/s 188 and accordingly dismissed the appeal to that extent. Thereupon, the revenue obtained the reference of above questions.

3. It may be noticed from the facts stated above that on 30-6-1971 on the retirement of two partners no deed of dissolution was executed; a new partnership deed was executed taking in anew partner. The question is whether this is a case of reconstitution within section 187 or of succession within the meaning of section 188. For this purpose sub-section (2) and in particular clause (a) of section 187 is of crucial significance. Sub-section (2) reads as follows:

187. Change in constitution of a firm.- (1) ******

(2) For the purposes of this section, there is a change in the constitution of

the firm-

(a) if one or more of the partners cease to be partners or one or more new partners are admitted, in such circumstances that one or more of the persons who were partners of the firm before the change continue as partner or partners after the change; or

(b) where all the partners continue with a change in their respective shares or in the shares of some of them:

Provided that nothing contained in clause (a) shall apply to a case where the firm is dissolved on the death of any of its partners.

4. Clause (a) of sub-section (2) clearly says that where one or more partners cease to be a partner in such circumstances that one or more of the persons who are partners of the firm before the change continue as partner or partners after the change, it will be a case of reconstitution of the firm.

5. The present case falls within the said constitution. We must reiterate that there was no dissolution of partnership on 30-6-1971 when two partners retired. May be that under the partnership law the partnership came to an end with the retirement of two partners but in the light of sub-section (2) (a) of section 187 we cannot but say that it is a case of reconstitution. Had there been a deed of dissolution of partnership on 13-6-1971 and anew partnership deed executed thereafter between Kirti Kumar Shah and Smt. Ele Ben R. Singhavi, it would probably have been a case of succession? In this view of the matter the Tribunal was not right in holding that it was a case of succession.

6. The two cases relied upon by the Tribunal are cases of death. In the case of death of a partner the firm gets dissolved as provided by section 42(c) of the

Indian Partnership Act, 1932. In fact that contingency is now provided for by the proviso to sub-section (2) .

7. We are, therefore, of the opinion that the instant case was a case of reconstitution. For the above reasons, the questions referred to us are answered in the negative, i.e., in favour of the revenue and against the assessee.