
(1996) 01 MP CK 0006

In the Madhya Pradesh High Court

Case No : Miscellaneous Civil Case No. 186 of 1988, 23rd January, 1996

COMMISSIONER OF INCOME TAX

APPELLANT

Vs

OMPRAKASH PREMCHAND and CO.

RESPONDENT

Date of Decision : 23-01-1996

Acts Referred:

Income Tax Act, 1961 — Section 186, 255, 256
Partnership Act, 1932 — Section 4

Citation : (1997) 134 CTR 342 : (1996) 134 CTR 342

Hon'ble Judges : A. R. Tiwari, J

Bench : Division Bench

Judgement

A. R. TIWARI, J. :

On the applications, presented by the CIT, Bhopal under s. 256(1) of the IT Act, 1961 and registered as RA Nos. 39, 40 and 41/Ind/86 arising out of the orders passed in ITA Nos. 814, 815 and 816/Ind/86, pertaining to asst. yrs. 1977-78, 1978-79 and 1979-80, the Tribunal, Indore has referred the undernoted question for our opinion :

"Whether, on the facts and in the circumstances, the Tribunal is justified in law in holding that the firm was liable to be assessed as a registered firm in respect of assessment years under consideration ?"

2. Facts lie in a narrow compass. The assessee is a firm. It came into existence for the first time for the accounting period beginning on 1st April, 1975 and ending on 31st March, 1976 with 17 partners constituting it. The said partnership was evidenced by a deed of partnership dt. 15th Sept., 1975. For financial year 1975-76, the firm was granted an excise licence for Ujjain Group of country liquor shops in an auction held in February, 1975. In February, 1976, the aforesaid firm again offered the bid in the auction for the licence in regard to the aforesaid shops which was accepted and the contract to sell country liquor was granted for two financial years beginning on 1st April, 1976 and ending on 31st March, 1978. The bid in February, 1976 was thus for two financial years, i.e., 1st

April, 1976 to 31st March, 1977 and 1st April, 1977 to 31st March, 1978. Licences were issued to the M/s Omprakash Premchand & Company Firm, for these two years on the linchpin of bid of February, 1976. After acceptance of bid, in February, 1976, there came about the changes in constitution of firm effective from 1st April, 1976 and thereafter once again from 1st April, 1977. Firm, despite reconstitution not once but twice as noted above, worked the privilege granted under the licence issued by the MP Excise Authority on the basis of the bid by the unreconstituted firm in February, 1976. Registration was also granted for 1978-79. The ITO refused to grant registration for 1979-80 despite there being no further change. The ITO felt that the firm lost eligibility for registration as a result of change and committed violation of rule of MP Excise Act, ITO invoked s. 186(4) and cancelled registration already granted. On appeal, CIT(A) reversed the order of ITO and directed him to grant registration for asst. yrs. 1977-78, 1978-79 and 1979-80. Aggrieved, the Revenue filed appeals. Accountant Member (AM) held that it was a case of change and not of a new firm and sustained the order of CIT(A). J. M., differed from the view of A. M. and held that it offended r. VI of MP Excise Rules and thus reversed the order of CIT(A). The matter was then referred to Third Member under s. 255(4) by the President of the Tribunal as a result of difference of opinion between A. M. and J. M. on the crucial question of nature of firm. The Third Member agreed with the opinion of A. M. The Bench in conformity with the opinion of the majority passed consequential order rejecting the Departmental appeals. The Revenue then filed applications and the Tribunal referred the aforesaid question for opinion.

3. We have heard Shri D. D. Vyas, learned counsel for the applicant/Revenue and Shri K. R. Mandovara, learned counsel for the non-applicant/assessee.

4. We will notice the legal position first. Sec. 4 of the Indian Partnership Act, 1932 defines Partnership as under :

"4. Definition of "partnership", "partner", "firm" and "firm name". - "Partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.

Persons who have entered into partnership with one another are called individually "partners" and collectively a "firm", and the name under which their business is carried on is called the "firm name".

Dissolution of a firm is regulated by Chapter VI - ss. 39 to 44 of the aforesaid Act.

5. Rule VI, substituted by No. 8, dt. 3rd Sept., 1996, of General Licence Conditions, provided in exercise of powers conferred by s. 62 of MP Excise Act, 1915, lays down that :

"VI. Transfer or sub-lease of licence. - No privilege of supply or sale shall be sold, transferred or sub-leased, nor shall a holder of any such privilege enter into a partnership for the working of such privilege in any way or manner without the written permission of the Collector, which shall be endorsed on the licence. A

partner, sub-lessee, or transferee shall be bound by all the conditions of the licence, but the original licensee shall also continue to be responsible to the State Government for the due payment of the licence fee and proper working of the shop."

6. There is ban against sale, transfer or sub-lease of privilege of supply or sale and against entering into a partnership for the working of such a privilege in any way or manner without the written permission of the Collector to be endorsed on the licence. Rule I also mandates that every licence shall be deemed to have been granted personally named therein.

7. What, however, emerges in the instant case is chronicled below :

(a) Licence was granted to the firm and not to any individual personally as a licensee named therein.

(b) Licensee was the firm which continued to work the privilege granted under the licence without any type of dissolution and without any objection from excise authorities.

(c) The Collector was duly intimated and he granted licence without any objection in regard to violation of r. VI or r. I.

(d) The same firm with same name inspite of changes continued to exist and operate, did not enter, into any agreement of new partnership and did not transfer the licence and business permitted thereunder. The firm did not lose its identity or status of a licensee.

8. Rule VI seems to be concerned with security of due payment of licence fee and proper working of the shop. If occasion arises, Collector can permit transfer of licence even with retrospective effect as held in *Vijay & Co. vs. CIT* (1981) (1) MPWN 87.

9. The core question is whether changes resulted in reconstitution of the firm only or in dissolution, i.e., in disappearance of one firm, as created initially, and in birth of a new firm as a result of changes and whether changes, as effected, amounted to transfer of privilege of supply or sale granted by the Excise Licence ? Reconstitution and dissolution are two distinct legal concepts. Dissolution brings the partnership to an end while a reconstitution means the continuation of the partnership under altered circumstances. Partners may treat it as continuation. In *Commissioner of Income Tax, West Bengal-III Vs. Pigot Champan and Company*, it is held that :

"It cannot be disputed that dissolution and re-constitution are two distinct legal concepts, for, a dissolution brings the partnership to an end while a reconstitution means the continuation of the partnership under altered circumstances."

10. Full Bench of Allahabad High Court in case of *Vishwanath Seth Vs. Commissioner of Income Tax*, , through majority opinion, held that

"reconstitution without dissolution does not bring into existence a new firm. In the case of reconstitution, the same firm continues to exist". The same view was expressed by Calcutta and Madras High Courts in *Sohanlal Pachisia and Co. Vs. Bilasray Khemani and Others*, and *Meenakshi Achi & Anr. vs. P. S. M. Subramanian Chettiar & Ors.* AIR 1957 Mad 8. The apex Court affirmed the view in *Commissioner of Income Tax, West Bengal Vs. A.W. Figgies and Co. and Others*, and held that :

"The reconstituted firm can carry on its business in the same firms name till dissolution."

In *Commissioner of Income Tax Vs. Sant Lal Arvind Kumar*, , Delhi High Court expressed the view as under :

"If one can imagine a partnership as an AOP bound by a legal tie or a *vinculum juris*, a change in the constitution of the firm reflects only an adjustment of this legal tie which binds the partners. It is as if there is a belt which encircles all these partners and the belt either shrinks or expands to accommodate or give effect to an incoming or outgoing partners. A dissolution, on the other hand, is a breaking or a disruption of this legal tie."

11. It is thus beyond the pale of controversy that under the Partnership Act the same firm continues to exist inspite of change in its constitution and that it ceases to exist only on its dissolution. That being so, there is no case of transfer, i.e., violation of r. VI.

12. It is in the area of legislative ambiguities, yet not receding, that Courts have to fill gaps, clear doubts and mitigate hardships. In the words of Judge learned Hand, spoken in *Cabell vs. Markhan* (1945) 148 F 2 d 737, we get enough light to locate correct path :

"It is one of surest indexes of a mature and developed jurisprudence..... to remember that statutes always have some purpose or object to accomplish whose sympathetic and imaginative discovery is the surest guide to their meaning."

13. A subject in a free country does not deserve to be lugged into pettifoggery and registration, once granted, is not liable to be incinerated without proof of dissolution of firm and thus change of identity. Some sort of personality and identity is conceded to a firm in matter of suing or being sued even under Order XXX r. 1 of the CPC.

14. It is trite position that the subject should not be taxed by ignoring the legal position. House of Lords expressly reaffirmed the basic principle, - "A subject is entitled to arrange his affairs so as to reduce his liability to tax". Now if in the instant case the firm permitted exclusion or inclusion of partners without dissolution and transfer in an urge to continue to enjoy the privilege of excise licence and to avoid liability of tax as unregistered firm, it cannot be flagellated on mere assumptions and pre-assumptions. Firm remained firm, not inform on

tax front. New Testament exhorts" Prove all things, hold fast that is good". Tribunal correctly held fast to the order of CIT(A) as it was found to be good and legal. It is not a case of an individual obtaining licence in his name for his use and then entering into an agreement of partnership to transfer or sub-lease the privilege. On the other hand, status remained unaltered in the absence of dissolution. Moreover, transfer is not absolutely prohibited but requires permission of Collector.

15. In the result, we hold that the Tribunal took the logical and legal view and rightly held that the firm was liable to be assessed as a registered firm. No error, illegality or perversity is visible. It is neither a case of conundrum nor of legal acrobates.

16. In the ultimate analysis, we, therefore, answer the question in the affirmative, i.e., in favour of the assessee and against the Revenue.

17. We, however, make no orders as to costs. Counsel fee is, however, fixed for each side as Rs. 750, if certified.