(1984) 07 KL CK 0046

In the High Court Of Kerala

Case No : Income-tax Reference No''s. 21 to 27 of 1979

Commissioner of Income Tax — APPELLANT

Vs

Phair Laboratories — RESPONDENT

Date of Decision : 17-07-1984

Acts Referred:
Income Tax Act, 1961 — Section 186

Citation : (1985) 154 ITR 141

Hon'ble Judges : K. Bhaskaran, Acting C.J.;T. Kochu Thommen, J;K.P. Radhakrishna Menon, J

Bench : Full Bench

Advocate : P.K. Raveendranatha Menon, for the Appellant; Chacko George and Charles George, for the Respondent

Judgement

Kochu Thommen, J.—The following question has been, at the instance of the Revenue, referred to this court by the Income Tax Appellate Tribunal, Cochin Bench :

"Whether, on the facts and in the circumstances of the case, the cancellation of registration for the assessment year 1966-67 and cancellation of continuation of registration for the assessment years 1967-68 to 1972-73 was without jurisdiction and improper ?"

2. When these cases were first heard by a Division Bench, a doubt arose as to the ambit of the power u/s 186 of the I.T. Act, 1961 (the "Act"), and they were accordingly referred to a Full Bench.

3. The assessee is a firm of seven partners. The partnership is evidenced by an instrument dated December 10, 1963. The object of the firm is to carry on the business of manufacture and sale of pharmaceutical products. At the time of execution of the document, C.V. Cyriac, party No. 6, was aged only seventeen years and was, therefore, a minor represented by his father and guardian, who is party No. 1. Cyriac reached the age of majority on July 26, 1964. For the

assessment year 1964-65, the assessee-firm filed a "nil" return on the basis of which the assessment for that year was completed. For the assessment years 1965-66 and 1966-67, the assessee filed applications in Form No. 11 for registration of the firm. It is not disputed that the application for the assessment year 1966-67 had been signed by all the partners, including Cyriac, who had attained the age of majority in the year previous to the assessment year 1965-66. The Revenue has no case that any material particulars had been suppressed by the applicants or that the firm had not in actual fact existed during the relevant accounting years or that its real object was different from its avowed object or that it was a sham or pretence and not intended by the parties to govern their rights and liabilities inter se in relation to their business. It must be noticed that for the assessment year 1966-67, the assessee did not apply for continuation of registration, but for fresh registration. By orders dated November 7, 1966, and November 9, 1967, registration was granted for both the assessment years and the assessment proceedings were completed on that basis. For the subsequent assessment years 1967-68 to 1972-73, the assessee applied for continuation of registration and the same was granted in respect of those years.

4. However, the ITO initiated proceedings u/s 186 for cancellation of the registration on the ground that Cyriac was a minor at the time of execution of the instrument of partnership. Holding that no genuine firm existed for the reason that the instrument of partnership showed that a minor was made a full partner, the Officer by his orders dated March 17, 1976, cancelled the registration for the assessment years 1965-66 and 1966-67 and the continuation thereof for the subsequent years 1967-68 to 1972-73.

5. Aggrieved by these orders, the assessee appealed to the AAC, who by his order dated July 28, 1976, rejected the appeals and confirmed the orders of the Officer. The assessee thereupon appealed to the Tribunal which by its order dated June 21, 1977, accepted the contentions of the assessee, allowed the appeals and set aside the orders of the ITO relating to the assessment years 1966-67 to 1972-73. The assessee did not press its appeal for the assessment year 1965-66.

6. Counsel for the Revenue submits that at the time of registration of the firm, the ITO had overlooked the fact that the instrument evidencing the partnership was invalid for the reason that a minor had been admitted as a full partner in violation of the principle embodied in Section 11 of the Indian Contract Act, 1872 (Act 9 of 1872), and Section 30 of the Indian Partnership Act, 1932. No registration, he says, could have been granted on the strength of such instrument. Such a firm is not a genuine firm. He, therefore, contends that the law does not countenance the continuance of an invalid registration founded on an invalid instrument of partnership and, accordingly, the Officer was entitled to cancel the registration.

7. Counsel for the assessee, on the other hand, contends that registration was validly granted. The application for registration was made in compliance with all

the requirements of Section 184. On the basis of a proper enquiry in terms of Section 185, the ITO was fully satisfied as to the genuineness of the firm. It was on the basis of such satisfaction that he granted registration. Such a registration is not liable to be cancelled. Section 186 does not confer power on the ITO to cancel the registration which had been validly granted. In the absence of any ground to show that no genuine firm existed during the relevant previous year, the Officer exceeded his powers in cancelling the registration.

8. These are the respective contentions of the parties. We shall now consider the relevant provisions.

9. Section 184 provides that an application for registration has to be accompanied by an instrument evidencing the partnership and in which the individual shares of the partners are specified. The application has to be made to the ITO in the prescribed form, that is Form No. 11, as provided under r. 22 of the I.T. Rules, 1962 (the "Rules"). It shall be signed by all the partners and they are required to make a declaration as to the relevant facts. The form together with the instrument evidencing the partnership and a certified copy thereof must be produced before the Officer. These documents together constitute the application. The application shall be made before the end of the previous year relevant to the assessment year in respect of which registration is sought. The ITO, however, has the discretion to condone the delay in filing the application. It is on the basis of such application that registration is granted u/s 184. Such registration for any assessment year shall have effect for every subsequent assessment year provided the conditions laid down in the proviso to Sub-section (7) are satisfied and an application is presented in that behalf in Form No. 12 as required by Rule 24, One of the important conditions for continuation of registration is that no change has taken place in the constitution of the firm or the shares of the partners as evidenced by the instrument of partnership on the basis of which the registration has been obtained. Where, however, any such change has already taken place, the firm is entitled to apply for fresh registration in accordance with the provisions of this section.

10. Section 185 concerns the procedure to be adopted on receipt of an application. It says that the ITO shall inquire into the genuineness of the firm and its constitution as specified in the instrument of partnership. It is only upon his satisfaction that the firm is genuine that he shall grant registration. If he is not so satisfied, it is his duty to refuse registration. A firm will not be regarded as genuine if any partner of the firm was at any time during the relevant previous year a benamidar in the manner described under the Explanation to the section. If the Officer considers that the application is not in order, he shall intimate the defect to the firm and give it an opportunity to rectify the same within a period of one month from the date of such intimation. If the defect is not rectified within that period, the Officer shall reject the application. The same opportunity to correct the defect has to be afforded to the firm in respect of a declaration u/s 184(7) for giving effect to the registration for the subsequent year. On

registration of the firm, the ITO will record a certificate to that effect on the instrument of partnership as stated under Sub-section (4).

11. Section 186 confers power on the Officer to cancel registration. It reads :

"186. (1) If, where a firm has been registered, or its registration has effect under Sub-section (7) of Section 184 for an assessment year, the ITO is of opinion that there was during the previous year no genuine firm in existence as registered, he may, after giving the firm a reasonable opportunity of being heard and with the previous approval of the Inspecting Assistant Commissioner, cancel the registration of the firm for that assessment year :

Provided that no such cancellation shall be made after the expiry of eight years from the end of the assessment year in respect of which registration has been granted or has effect.....

Where the registration of a firm is cancelled for any assessment year, the Income Tax Officer shall amend the assessments of the firm and its partners for that assessment year on the footing that the firm is an unregistered firm....."

12. This section empowers the Officer to cancel registration if he is of the opinion that during the previous year there was no "genuine firm" in existence as registered. Before he passes any such order, a reasonable opportunity of being heard has to be given to the firm and the previous approval of the IAC has to be obtained. Upon cancellation of the registration, the Officer has to amend the assessments of the firm and its partners for the relevant assessment year on the basis that the firm is an unregistered firm. However, no cancellation can be made after the expiration of eight years from the end of the assessment year in respect of which registration has been granted or continued.

13. A firm shall not be regarded as genuine if anyone of the partners was in relation to the whole or any part of his share in the income or property of the firm, a benamidar during the previous year, or that the firm was only a sham and the constitution of which was not intended to govern the mutual business relationship of the parties. In any such case, it is the duty of the Officer to refuse registration or continuation of registration after satisfying himself as to the necessary facts. In a case where registration has been already granted and the Officer is of opinion that there was during the previous year "no genuine firm in existence as registered", he is empowered to cancel the registration. Before the power is exercised, the Officer must satisfy himself that the firm, as registered on the basis of its constitution, evidenced by the instrument of partnership, did not exist during the relevant previous year. The words "no genuine firm in existence as registered," appearing in Section 186(1), refer to the absence of the state of affiairs during the previous year on the basis of which registration was granted to the firm.

14. A firm which does not produce a valid instrument evidencing the partnership does not qualify for registration. If the instrument shows that during the previous

year relevant to the assessment year when registration was sought or granted, the partnership consisted of a minor who was admitted as a full partner, and not merely to its benefits as permitted u/s 30 of the Indian Partnership Act, 1932, such instrument is not valid for the purpose of registration under the Act and any registration granted on that basis is liable to be cancelled. See Commissioner of Income Tax, Bombay Vs. Dwarkadas Khetan and Co., . It is however not necessary that a firm should have come into existence on the basis of a written instrument. A firm which was created by word of mouth, but the constitution of which has subsequently been reduced to writing, can very well qualify for registration. All that is required is that there should be a valid instrument of partnership at the relevant time, i.e., during the year previous to the assessment year when registration is sought. The partnership business should have been carried on in accordance with the terms of that instrument which was operative during the accounting year : See P.R. Chowdhary and S. Gangoli Vs. The State of U.P., It is not necessary that the instrument had been signed by all the partners, provided those who did not sign it assented to it in unmistakable terms by presenting an application in the proper form duly signed by them jointly with the others who are signatories to the instrument : Jagan Nath Pyare Lal Vs. Commissioner of Income Tax, ; Commissioner of Income Tax Vs. R. Dwarkadas and Co., ;Bulchand v. CIT AIR 1930 Sin 301 and In Re: Ramlal Murlidhar, .

15. It must be stated that, in the present case, there is no dispute that in actual fact the firm existed during the relevant previous year. The sole contention of the Revenue, as seen above, is that the instrument on the basis of which registration was granted was invalid in so far as a minor had been admitted as a full partner. There is no doubt that if that contention were right, the instrument would be invalid for the purpose of registration. That, however, is not the case here.

16. From the facts stated above, it is clear that though Cyriac was a minor on the date of execution of the deed, that is on December 10, 1963, he became a major on July 26, 1964, which was during the year previous to the assessment year 1965-66. Undoubtedly, therefore, Cyriac had no disqualification to be a full partner at any time during the year previous to the assessment year 1966-67 when registration was sought and granted on the basis of an instrument containing the names of all the partners and their particulars as well as the full details regarding their individual shares. The instrument was accompanied by an application in form No. 11, signed by all the partners, including Cyriac, thereby indicating that Cyriac accepted all the terms of the instrument and signifying his consent to be a full partner. Similar applications in Form No. 12 had been made for continuation of registration. A perusal of these documents with reference to the relevant dates would have convinced any reasonable authority that none of the partners was a minor at the relevant time. The Revenue has no case that anyone of the partners suffered from any disqualification other than the minority of Cyriac. The Officer who granted registration was apparently fully satisfied as to the existence during the relevant previous year of a genuine partnership consisting of well qualified major partners with their shares clearly specified in

the instrument. The mere fact that Cyriac was not a major on the date of execution of the deed cannot stand in the way of registration if he had become a major, as he did, prior to the relevant accounting year.

17. We are of the view that on the facts found, the partnership was validly registered and that its registration fully qualifies for being given effect to in the subsequent assessment years in terms of Section 184(7) so long as the conditions mentioned under the proviso to that sub-section remain satisfied. In the circumstances, we are also of the view, that on the basis of the facts found, the orders of the ITO cancelling registration were not reasonably supported by any material warranting the exercise of power u/s 186. Accordingly, we answer the question in the affirmative, that is, in favour of the assessee and against the Revenue. We direct the parties to bear their respective costs in these tax referred cases.

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