(1989) 04 CAL CK 0011

In the Calcutta High Court

Case No : Income-tax Reference No. 495 of 1979

Commissioner of Income Tax APPELLANT

Vs

Poddar Properties Development Corporation RESPONDENT

Date of Decision : 11-04-1989

Acts Referred:
Income Tax Act, 1961 — Section 185, 28

Citation : (1989) 180 ITR 111 : (1990) 48 TAXMAN 233

Hon'ble Judges : Bhagabati Prasad Banerjee, J;Ajit K. Sengupta, J

Bench : Division Bench

Advocate : S.K. Mitra and R.C. Prasad, for the Appellant;N.K. Poddar, S.N. De and D. Chowdhury, for the Respondent

Judgement

Ajit K. Sengupta, J.—This reference u/s 256(1) of the Income Tax Act, 1961, relates to the assessment year 1973-74. This reference arises out of the order of the Tribunal in a proceeding u/s 185 of the Act, where the Income Tax Officer refused registration to the assessee-firm. In the order u/s 185, the Income Tax Officer has held as follows :

"The topic ''partnership'' has been dealt with in Section 2(23) of the Income Tax Act where general principles have been laid down. Firstly, the question of validity of partnership is most important. ''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. An association of persons would not constitute a partnership unless they carry on a business. An agreement to share profits is very important and the emphasis has been laid on the word ''business'' and ''profits'' and not on incomings. This is a case of ''co-ownership of leasehold property'' as distinct from ''partnership''. As such, the claim for partnership is rejected and the status adopted is that of association of persons ".

2. The Appellate Assistant Commissioner held that only a single property had been taken on lease by the assessee and it has been let out to a single tenant. This cannot be considered to constitute a business activity.

3. The assessee preferred two appeals--one against the order refusing registration u/s 185 of the Act and the other against the assessment of income.

4. The Tribunal disposed of both the appeals by a consolidated order. The Tribunal, after considering the facts and circumstances of the case, held that there were organised and continuous activities of the assessee to earn more income by devoting time and labour and making additional investment The Tribunal concluded as follows :

"In view of the discussions above, I am of the opinion that the activities of the assessee are business activities and as such, the income of the assessee is to be treated as income from business. As soon as it is held that the income of the assessee is income from business, the firm is to be treated as a partnership firm and as soon as it is held that a partnership firm exists, and the common ground remaining that the assessee complied with the requirements for the purpose of registration, it would be proper for me to direct the Income Tax Officer to grant registration. I order accordingly."

5. It may be mentioned that the Revenue filed an application u/s 256(1) of the Income Tax Act, 1961, challenging the finding of the Tribunal that the activities of the assessee amounted to business activities. The question proposed by the Revenue is as follows :

"Whether, on the facts and in the circumstances of the case and on a proper interpretation of the relevant law, the Tribunal was justified in holding that the activities of the assessee amounted to business activities ?"

6. The said reference application was rejected by the Tribunal. It is stated that no further application u/s 256(2) of the Income Tax Act, 1961, was made before the High Court.

7. At the time of hearing of the present reference, Mr. Mitra, learned counsel appearing for the Revenue, contends that the assessee did not carry on any business at all and the activities of the assessee did not amount to business activities. Mr. Mitra further contends that within the framework of the question which has been referred to this court, he can argue that there was no business in existence. We are, however, unable to accept this contention.

8. In the quantum assessment, the question arose whether the income should be assessed under the head "Business" or under the head "Other sources". Then, the Tribunal adverted to the question whether the assessee was carrying on business activities or not. There the specific finding was arrived at by the Tribunal on the materials before it that the activities of the assessee amounted to business activities and this finding has reached a finality as the said finding was not challenged by an application u/s 256(2) of the Act.

9. A partnership is an association of two or more persons to carry on "business" for profit. The requirement of the law is that the "partnership" must have some business. There is no partnership unless the business is in existence and the

finding of the Tribunal is that the income of the assessee has to be assessed under the head "Income from business" and no income can be assessed under the head "Income from business" unless such income is derived from the business activities. The finding of the Tribunal, as we have mentioned earlier, is that the activities of the assessee are business activities. This question has thus really become academic. Moreover, the question referred to us proceeds on the footing that the income is taxed under the head "Income from business" and, as such, whether the assessee was entitled to registration. We have already referred to the order of the Income Tax Officer who refused registration solely on the ground that the assessee did not carry on any business activities. In view of the finding of the Tribunal that the activities of the assessee amounted to business, there is no other impediment to the grant of registration to the assessee-firm.

10. For the reasons aforesaid, we answer the question in this reference in the affirmative and in favour of the assessee.

11. There will be no order as to costs.

Bhagabati Prasad Banerjee, J.

12. I agree.

