
(1997) 12 MAD CK 0189

In the Madras High Court

Case No : Tax Case No. 862 of 1984 (Reference No. 777 of 1984)

Commissioner of Income Tax

APPELLANT

Vs

Shankar Yarn Traders

RESPONDENT

Date of Decision : 10-12-1997

Acts Referred:

Income Tax Act, 1961 — Section 147, 184(7), 187(2), 28

Citation : (2000) 241 ITR 589

Hon'ble Judges : Janarthanam, J;A. Subbulakshmy, J

Bench : Division Bench

Advocate : Deokinandan, S.V. Subramaniam for C.V. Rajan, for the Appellant;
K.M.L. Majele and R. Venkataraman, for the Respondent

Judgement

M.S. Janarthanam, J.—The Tribunal made a reference and the questions referred are :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal is correct in holding that the reopening of the assessment for the assessment year 1974-75 is not valid ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal's view that consequent on the death of one of the partners, Shri Shyamlal Trivedi on May 31, 1973, the firm got dissolved and the firm that came into existence subsequently is completely a new entity and that two separate assessments have to be made one in the case of the new firm, is sustainable in law ?"

2. Question No. 2 as framed above does not appear to be correct and there is the omission of the words "and the other in the case of the old firm" in between the expressions "new firm" and "is sustainable in law" at the fag end of the question so framed. The omission has to be necessarily rectified and after rectification, question No. 2 is reframed as under :

"Whether, on the facts and in the circumstances of the case, the Tribunal's view that consequent on the death of one of the partners, Shri Shyamlal Trivedi, on

May 31, 1973, the firm got dissolved and the firm that came into existence subsequently is completely a new entity and that two separate assessments have to be made one in the case of the new firm and the other in the case of the old firm, is sustainable in law ?"

3. The assessee-firm was originally constituted by a deed dated October 31, 1970, comprising six partners including one Shyamlal Trivedi, who expired on May 31, 1973. On his death a new deed of partnership was executed on May 31, 1973, comprising the surviving partners and a newcomer Smt. Kaushalya, wife of Shri Tarachandji. Under the new deed of partnership, Shri Khuman Singh was entitled to 15 per cent. share, while the remaining partners were entitled to 17 per cent. each.

The firm filed two separate returns, the first for the broken period ending on May 31, 1973, comprising the old partners and the second for the period between May 31, 1973, and October 25, 1973, in terms of the second partnership deed.

4. The Assessing Officer, on the returns so submitted, passed two separate assessment orders. He also continued the registration to the firm in respect of the first return u/s 184(7) of the Income Tax Act (hereinafter referred to as "the Act") in Form No. 12 by the assessee. The Income Tax Officer also granted registration in respect of the second return with reference to the partnership deed dated May 31, 1973, in Form No. 11A filed before him. Subsequently, he reopened the assessment u/s 147(b) of the Act on the ground that the internal audit party had pointed out that two separate assessments of the two firms were not in order, since there was only a reconstitution of the firm and hence the entire income for the period between November 6, 1972, and October 25, 1973, should be assessed in the hands of the existing firm.

5. The Assessing Officer thus clubbed the income for the two periods in the reassessment.

6. The Appellate Assistant Commissioner dismissed the assessee's appeals.

7. On the assessee's further appeal, the Tribunal noted that the Income Tax Officer had made separate assessments on the two firms after due consideration of the assessee's applications in Form No. 12 and Form No. 11-A and the relevant partnership deeds. The internal audit party's subsequent audit note, on which the Income Tax Officer reopened the assessment u/s 147(b) only amounted to a different interpretation with reference to the materials on record. This amounted to a change of opinion on the part of the Assessing Officer and the reopening of assessment was hence invalid in the light of the decision of the apex court in the case of *Indian and Eastern Newspaper Society, New Delhi Vs. Commissioner of Income Tax, New Delhi*, . The Tribunal also found that the assessee should succeed on the merits.

8. We have heard the arguments of Mr. S. V. Subramaniam, learned senior counsel for the Revenue, and Mr. R. Venkataraman, learned counsel appearing

for the assessee.

9. The rationale or reasoning provided by the Tribunal is getting reflected in paragraph 5 of its order, which reads as under :

"Clause 1 of the partnership deed dated October 31, 1970, recites that "this partnership shall be a partnership at will". Under clause 7 "subject to the foregoing, this partnership shall be governed by the provisions of the, Indian Partnership Act, 1932". However, in the subsequent deed dated May 31, 1973, executed after the death of the partner, Shyamlal Trivedi, inducting a new partner, Smt. Kaushalya, clause 4 reads : "the duration of the partnership will be one at will. Death or retirement of one partner shall not result into the dissolution of the firm". It will thus be seen that the first partnership deed is one at will subject to the provisions of the Partnership Act including section 42. u/s 42(c) "subject to contract between the partners a firm is dissolved by the death of a partner." The legal position thus is that as far as the first partnership deed is concerned the first firm constituted thereunder will be dissolved by the death of a partner. However, as far as the second partnership is concerned it specifically provides that death or retirement shall not result in the dissolution of the firm. In this background, we may refer to the Madras High Court decision in Kaithari Lungi Stores Vs. Commissioner of Income Tax, , in which the Madras High Court observed that a change in the constitution of a firm is different from the dissolution of the firm. If there is a contract to the contrary against the dissolution of a firm by the death of a partner, a change in the constitution of the firm also occurs by reason of the death of a partner provided there are at least two surviving partners. However, where there is no contract to the contrary against the dissolution of the firm by death of a partner, it cannot be stated that death will amount to a change in the constitution of the firm within the meaning of section 187(2). In the present case we are of the view that having regard to the ratio of the above decision, the first partnership should be stated to have been dissolved on the death of Shyamlal Trivedi having regard to the provisions of section 42(c) of the Partnership Act. The position may be different under the second partnership deed dated May 31, 1973, with which we are not concerned in the present appeal. The Revenue relies before us on the Andhra Pradesh High Court decision in CIT (Addl.) v. Visakha Flour Mills [1977] 108 ITR 466. However, respectfully, following the Madras High Court decision, we would accept the assessee's contention on merits also that two separate assessments should be made."

10. It is in this context of the decision of the Tribunal, the reference has arisen.

11. We shall now take up for consideration the second question as reframed. There is no pale of controversy that the firm is a partnership at will and this aspect of the matter is getting reflected by clause 1 of the partnership deed dated October 31, 1970. Clause 7 of the old partnership specifically provides that the partnership shall be governed by the provisions of the Indian Partnership Act, 1932. Therefore, there is no contract between the parties that the death will

have the effect of the dissolution of partnership and in case of death occurring, the provisions of the Partnership Act shall govern the situation. u/s 42(c) of the Partnership Act, 1932, if death occurs, in the absence of a contract between the parties, the firm would automatically get dissolved. Such being the case, by the death of Shyamlal Trivedi on May 31, 1973, the firm consisting of the old partners would automatically get dissolved.

12. It is also not in dispute that a new firm came into existence on May 31, 1973, itself. The new partnership had been constituted by a subsequent deed dated May 31, 1973. Clause 4 of the new partnership deed recited :

"The duration of the partnership will be one at will. Death or retirement of a partner shall not result in the dissolution of the firm."

13. It is just crystal clear that on the death of Shyamlal Trivedi, the old partnership just stood dissolved and the new partnership came into existence comprising the surviving partners and a newcomer Smt. Kaushalya, wife of Shri Tarachandji. Therefore, the view of the Tribunal that two partnerships came into existence and consequently two assessments had to be made, cannot at all be stated to be not sustainable in law, on the face of the decision of the Supreme Court in the case of COMMISSIONER OF INCOME TAX Vs. EMPIRE ESTATE., . In this view of the matter, the second question has to be necessarily answered in the affirmative and in favour of the assessee.

14. Once the second reframed question is answered in favour of the assessee, it goes without saying that the answer to the first question does not at all arise for consideration inasmuch as even if the first question is answered in favour of the Revenue, it is not going to tilt the scales in favour of the Revenue.

15. This tax case is thus disposed of. No costs.