

(1997) 04 SHI CK 0024
In the High Court Of Himachal Pradesh
Case No : IT Ref. No. 1 of 1987

COMMISSIONER OF INCOME TAX

APPELLANT

Vs

SUBASH CHAND and CO.

RESPONDENT

Date of Decision : 01-04-1997

Acts Referred:

Income Tax Act, 1961 — Section 184(7), 185

Citation : (1998) 146 CTR 262

Hon'ble Judges : M. Srinivasan, C.J

Bench : Division Bench

Judgement

M. SRINIVASAN, C.J. :

The Tribunal has referred the following question :

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in ordering that the claim of the assessee-firm for registration under s. 185 of the IT Act, 1961, be accepted ?"

2. The assessee in this case filed Form No. 12 seeking renewal of registration for the year under consideration, namely, 1980-81, on 10th July, 1980. The ITO refused to renew the registration on the ground that the licence to vend liquor had been obtained only in the name of Shri P. C. Anand and he had entered into partnership with others in the assessee-firm. The ITO gave the following reasons for refusing the continuation of registration :

"(a) The right of a licence is a right in person which authorised the licensee to do the thing for which it has been granted. The licence granted to Shri P. C. Anand is not assignable.

(b) In the licence there is no transfer of interest.

(c) If other person who illegally shares the licence does some illegal act, the licensee has no right to sue strangers in his own name.

(d) The Himachal Pradesh Liquor Licence Rules also prohibit a licensee from allowing any person to conduct sales on his behalf unless the name(s) of such person(s) has/have previously been approved by the competent excise authorities.

(e) The learned judges of the Punjab and Haryana High Court have held in the judgment quoted in Commissioner of Income Tax Vs. Hardit Singh Pal Chand and Co., that if a licensee of a liquor contract takes any person a partner or if the licensee is a firm, admits new partners in contravention of the provisions of the Excise Act, the firm will not be entitled to registration."

The ITO did not, however, find as a fact whether the conditions of the licence prohibit formation of partnership by the licensee : nor was there a finding of fact by him whether the other partners had indulged in the activities of purchase and sale of liquor while they were members of the partnership.

There was an appeal by the assessee before the AAC, Patiala Range. The AAC reversed the order of the ITO and granted the prayer of the assessee. While doing so, the AAC placed reliance on the judgment of the Tribunal in Jagdish Rai Monga vs. ITO, ITA No. 575 of 1981 and also the judgment of the Andhra Pradesh High Court in Commissioner of Income Tax, Andhra Pradesh-IV Vs. Nalli Venkataramana and Others, The AAC pointed out that the ITO had nowhere held that the non-licence-holder partners have indulged in the purchase and sale of liquor in any way. The matter was taken on appeal to the Tribunal. The Tribunal simply followed its earlier judgment in Jagdish Rai Monga (1981) 14 TLR 856 and dismissed the appeal. Therefore, the question was referred by the Tribunal at the instance of the CIT to this Court.

3. The position with regard to the partnership in the business of purchase and sale of liquor when the licence has been obtained by one of the partners has been considered in several cases. It is enough if we refer to the judgment of the Supreme Court in Jer and Co. Vs. Commissioner of Income Tax, U.P., . The appellant in that case was a firm with two partners, which was carrying on the business of wholesale merchants and in foreign liquor. The licence was obtained and renewed every year by one of the partners under the provisions of the U.P. Excise Rules, 1910. The licence was obtained and renewed every year by one of the partners under the provisions of the U.P. Excise Rules, 1910. The licence contained no prohibition against entering into partnership for carrying on the business in foreign liquor by the holder of the licence. The firm was registered under s. 26A of the Indian IT Act, 1922, and it was also renewed for the asst. yrs. 1958-59 and 1959-60. But the CIT, under s. 33B, cancelled the registration for those years. The Tribunal, on appeal, held that the firm was entitled to be registered, as there was no subletting or transfer of the business covered by the licence in contravention of cl. 13 thereof. On a reference, the High Court held that the firm was not entitled to registration. On appeal, the Supreme Court reversed the decision of the High Court and held that the licence in Form FL-II did not prohibit the holder from entering into a partnership and it merely

provided that the licence shall not be sublet or transferred. On that footing, the Supreme Court held that the firm was entitled to registration.

4. The question arose again before the Andhra Pradesh High Court in CIT vs. Nalli Venkataramana (supra). Following the reasoning of the Supreme Court in Jer & Co.s case (supra), the Andhra Pradesh High Court held that where an individual, who holds a licence to sell liquor, forms a partnership to run the liquor business, such a partnership would be entitled to registration, provided it fulfils the other conditions stipulated in s. 185 of the IT Act. The Court pointed out that the partnership agreement did not violate any public policy or offend the provisions of s. 23 of the Indian Contract Act. The main reasoning is that there was no prohibition in the rules or the conditions of the licence against the constitution of a partnership.

The above judgment of the Andhra Pradesh High Court as well as the judgment of the Supreme Court in Jer & Co. (supra), came up for consideration before the Supreme Court again in Bihari Lal Jaiswal and Others Vs. Commissioner of Income Tax and Others, . After referring to the relevant rules of licence, etc., the Supreme Court stated the proposition of law in the following terms :

"When the law prohibits the entering into a particular partnership agreement, there can be in law no partnership agreement of that nature. The question of such an agreement being genuine cannot, therefore, arise. Where, of course, the statutory provisions or the conditions of licence do not prohibit the entering into of partnership, it is obvious, such a partnership cannot be held to be illegal, unlawful or void as held by this Court in Jer and Co. Vs. Commissioner of Income Tax, U.P., . But where there is a specific prohibition as in the case before us, any partnership entered into would be an unlawful and void agreement within the meaning of s. 23 and no other law, whether State or Central, can recognize such an agreement. The fact that such a partnership can be permitted by the Collector does not detract from the mandatory character of the clause. As pointed out above, Licence Condition No. 14 expressly provides that for breach of any condition of licence or of the Act or the Rules made thereunder, the licence may be cancelled. The context that it is an excise enactment should not be forgotten. The grant of registration under the IT Act, it must be remembered, confers a substantial benefit upon the partnership firm and its members. There is no reason why such a benefit should be extended to persons who have entered into a partnership agreement prohibited by law. One arm of law cannot be utilised to defeat the other arm of law. Doing so would be opposed to public policy and bring the law into ridicule. It would be wrong to think that while acting under the IT Act, the ITO need not look to the law governing the partnership which is seeking registration. It would probably have been a different matter if the IT Act had specifically provided that the registration can be granted notwithstanding that the partnership is violative of any other law-but it does not say so."

5. The learned Advocate-General has drawn our attention to the order of the Supreme Court in Commissioner of Income Tax, Andhra Pradesh Vs. M/s. B.

Posetty and Co., . In that case another Division Bench had occasion to refer to Bihari Lal Jaiswals case (supra) and another judgment of the Supreme Court in ADDITIONAL COMMISSIONER OF Income Tax Vs. DEGAON GANGA REDDY G. RAMAKRISHNA AND CO. AND OTHERS., where a question arose whether a sub-partnership could claim the benefit of registration under the provisions of the IT Act. The Bench which decided Degaon Ganga Reddys case (supra) took the view that such registration could be given provided the sub-partnership is different from the main partnership. The Division Bench while dealing with B. Posetty & Co.s case (supra) felt that the matter should be considered at length by a Bench of three learned judges so that an authoritative pronouncement should be made on the question which arose therein. In such circumstances, the Bench directed the matter to be placed before the Chief Justice to constitute a Bench of three learned judges to decide the question. Thus, the question which arose before the Division Bench in B. Posetty & Co.s case (supra) does not arise in this case and the order of reference to a three-judge Bench has no relevance in the present case.

6. Our attention is also drawn to the judgment of the Kerala High Court in Narayanan and Co. and K.S. Ramakrishnan, P.K. Narayanan and Co. Vs. Commissioner of Income Tax, . The Full Bench of the Kerala High Court simply followed the judgment of the Supreme Court in Bihari Lal Jaiswals case (supra) and repeated the proposition laid down by the Supreme Court in that case. The ruling will not affect the position in this case. As pointed out already, the necessary factual findings have not been arrived at by the ITO. In the absence of such finding, it is not open to this Court to presume an illegality. It is too well settled that there is no presumption of illegality. In this case there is an additional factor that the firm had been granted registration earlier and they have applied for renewal of registration in Form No. 12. The wording of s. 184(7) of the IT Act is mandatory in terms and it contemplated registration to have effect for every subsequent year provided the two conditions mentioned therein are satisfied. In this case there is no dispute that the two conditions mentioned in the proviso to sub-s. (7) of s. 184 of the Act are satisfied and it is not found by the ITO that the assessee had failed to fulfil those conditions. In such circumstances, we do not find any justification for refusing registration as has been done by the ITO. The view expressed by the Tribunal affirming the order of the AAC is correct and we answer the question referred to us in the affirmative that in the facts and circumstances of the case, the Tribunal is right in law in ordering the claim of the assessee-firm for registration under s. 185 of the IT Act to be accepted.