

(1967) 09 BOM CK 0016

In the Bombay High Court

Case No : Income-tax Reference No. 85 of 1962

Commissioner of Income Tax (Central), Bombay

APPELLANT

Vs

Devidayal and Sons

RESPONDENT

Date of Decision : 25-09-1967

Acts Referred:

Income Tax Act, 1922 — Section 34, 44

Citation : (1968) 68 ITR 425

Hon'ble Judges : V.S. Desai, J;Kotwal, J

Bench : Division Bench

Advocate : G.N. Joshi, for the Appellant; R.J. Kolah, for the Respondent

Judgement

Desai, J.—The question raised on this reference relates to the validity of the assessment made on a firm, which had dissolved and discontinued its business, in respect of its pre-dissolution income, for the assessment year 1952-53, for which the relevant accounting year was S. Y. 2007 ended on 30th October, 1951. The original assessment of the assessee-firm was completed on the 8th November, 1952. The firm, which consisted of the father and his three sons, was dissolved and its business was discontinued as and from the last day of the said accounting year, viz., 30th October, 1951, and the Income Tax Officer, who had made the original assessment, was aware of the said position when he made the said assessment. Subsequently, on the basis of the information received by the Income Tax Officer, he had reason to believe that certain income of the firm had escaped assessment and he consequently decided to take action u/s 34 of the Act. The first notice was given u/s 34(1) (a), in response to which the assessee submitted a return but no assessment was made on the basis of the said notice. Subsequently, another notice u/s 34(1) (b) was served on the 3rd December, 1956. This was a notice issued in the name of the firm of Messrs. Devidayal & Sons and it was served on Amirchand, one of the erstwhile partners. In the said reassessment proceedings the Income Tax Officer made an addition of a sum of Rs. 3,00,926 to the originally assessed income. In the appeal against the said

reassessment, the order of the Income Tax Officer was confirmed by the Appellate Assistant Commissioner. On second appeal before the Tribunal, the assessee for the first time raised a fresh ground that the proceedings initiated by the Income Tax Officer u/s 34(1) (b) were bad in law. In addition to this connection certain other contentions were also raised relating to the quantum and assessability of the profits computed u/s 10(2) (vii) of the Act and also some technical objection to the assessment. The Tribunal accepted the contention raised by the assessee relating to the validity of the proceedings and in what view of the matter did not consider it necessary to apply its assuming and deal with the other contentions, which were raised by the assessee. In the result it allowed the assessee's appeal and set aside the reassessment made by the department u/s 34(1) (b). Thereafter, on an application made by the Commissioner u/s 66(1) of the Indian Income Tax Act it drew up a statement of the case and referred the following question to this court :

"Whether, on the facts and in the circumstances of the case, the notice u/s 34 issued in the name of the assessee-firm and served on one of the partners on December 3, 1956, and the reassessment made in pursuance thereto are valid and legal ?"

2. The contention, which was urged before the Tribunal and accepted by it, was that since the assessee-firm was dissolved in October, 1951, and the business of the firm was discontinued, the assessment should have been made u/s 44 of the Indian Income Tax Act only on the individual partners and since in the present case the assessment had been made on the firm itself, the assessment is invalid, unauthorised and void in law. Reliance, on behalf of the assessee, was placed on *R. N. Bose v. Manindra Lal Goswami*, and *Sumat Parshad v. Income Tax Officer*. In *R. N. Bose v. Manindra Lal Goswami*, there was an unregistered firm of three partners, which did business from 1st April, 1940, to 31st March, 1944. Subsequent to the dissolution of the firm notices were issued u/s 34 of the Indian Income Tax Act to two of the three partners on November 25, 1944. In each of the said two notices, the person, to whom the notice was issued, was described as a partner of the firm and the income, which had been discovered as having escaped assessment, was described as his income and he was required to submit a return of his total income and world income assessable for the year ended on 31st March, 1944. One of the two partners, on whom the notices were served, submitted a return disclosing a loss, which was not accepted and the Income Tax Officer determined the total income of the firm u/s 23(4) and made an assessment on the firm and on the basis of that assessment, proceedings for recovery of tax were initiated. When the said recovery proceedings were sought to be enforced against the third partner, who had not been served with a notice u/s 34, he made a writ petition to the High Court for a writ of certiorari and a writ of mandamus for quashing the assessment orders for restraining the department from taking any further steps in connection with the said recovery proceedings. The contentions raised were that the notices, which were issued u/s 34 to the individual partners, could not form the basis of a valid assessment of the firm or

the firm's income and the partners could not be proceeded against for the recovery of tax under that assessment. The second contention raised was that section 44 of the Income Tax Act was not applicable to the case inasmuch as it did not apply to cases of firms which had been dissolved and assuming that it was applicable to the cases of firms that had been dissolved, an assessment to Income Tax of its pre-dissolution income can be made any on the persons, who were the partners of the firm at the time of the dissolution jointly and severally and cannot be made on the firm itself. Both these contentions were accepted by the Calcutta High Court. This case of the Calcutta High Court was followed by the Punjab High Court in *Sumat Parshad v. Income Tax Officer*. In view of these two decisions, which, in the opinion of the Tribunal, were clearly applicable to the present case, the Tribunal held that the reassessment which was made in the present case on a dissolved firm whose business was discontinued, without notices having been served on each of the individual partner, was invalid and the assessment made was void.

3. It is not doubt true that the cases referred to by the Tribunal support the contentions raised by the assessee with regard to the validity of the reassessments. Mr. Joshi, the learned counsel appearing for the department, however, has pointed out that having regard to certain subsequent decisions of the Supreme Court, the view taken in those cases is not correct. The decisions of the Supreme Court, to which he has invited our attention, are *C. A. Abraham v. Income Tax Officer, Kottayam*, *Commissioner of Income Tax v. Raja Reddy Mallaram and Shivram Poddar v. Income Tax Officer, Calcutta*. In *Abraham v. Income Tax Officer*, the question before the Supreme Court related to the validity of the penalty orders made against the partners of a firm, which had been dissolved and had discontinued its business and the question was whether, if in the process of assessment of the income, profits or gains of a firm, which had discontinued its business any other liability, such as payment of penalty u/s 28 of the Income Tax Act or u/s 25(2) or of penal interest u/s 18A (4), (6), (7), (8) and (9) is incurred, such penalty was by virtue of the provisions of section 44, capable of being imposed on the partners notwithstanding the discontinuance of the business ? The notice for the imposition of the penalty u/s 28 was issued on the day on which the reassessment proceedings in respect of the escaped pre-dissolution income was completed and the said escaped income was brought to tax. In that case, the reassessment was not challenged but the contention urged was that while section 44 might permit the reassessment, it did not permit a further imposition of penalty. It was argued that a proceeding for imposition of penalty and a proceedings for assessment of Income Tax were matters distinct and while section 44 might be respected to for assessing tax due and payable by a firm, business whereof had been discontinued, an order imposing penalty u/s 28 of the Act could not be passed by virtue of section 44. In dealing with the said contention, the Supreme Court had to consider the scheme of section 44, the material portion of which is as follows :

"Where any business..... carried on by a firm..... has been discontinued.....

every person who was at the time of such discontinuance.... a partner of such firm..... shall in respect of the income, profits and gains of the firm.... be jointly and severally liable to assessment under Chapter IV and for the amount of tax payable and all the provisions of Chapter IV shall, so far as may be, apply to any such assessment."

4. Their Lordships pointed out that section 44 of sets up a machinery for assessing the tax liability of a firm which had discontinued its business and provided for the consequence, namely : (1) that on the discontinuance of the business of a firm every person who was at the time of its discontinuance a partner is liable in respect of the income, profits and gains of the firm to be assessed jointly and severally, (2) that each partner is liable to pay the amount of tax payable by the fir, and (3) that provisions of Chapter IV so far as may be apply to such assessment. In the context of the argument, which was advanced before them, namely, that section 44 might be restored to for assessing tax due and payable by a firm, business whereof had been discontinued, an order imposing penalty u/s 28 of the Act could not be passed by virtue of section 44, their Lordships pointed out that, although the liability declared by section 44 was to assessment under Chapter IV, the expression "assessment" used therein did not merely mean computation of income. The joint and several liability to assessment of the partners declared by the section 44 was not restricted to the liability to computation of income u/s 23 but included the application of the procedure for declaration and imposition of the tax liability and the machinery for the enforcement thereof. Their Lordships held that by the expression "all the provisions of Chapter IV shall so far a may be apply to such assessment" the section in terms provided that all the provisions of Chapter IV would apply so far as may be to assessment of firms which had discontinued their business and the words "so far as may" occurring in the expression were merely intended to enact that the provisions of Chapter VI which from their nature had no application to firms would not apply thereto by virtue of section 44. Summarising their conclusion on the analysis and examination of the provisions, their Lordships observed :

"In effect, the legislature has enacted by section 44 that the assessment proceedings may be commenced and contained against a firm of which business is discontinued as if discontinuance has not taken place. It is enacted manifestly with a view to ensure continuity in the application of the machinery provided for assessment and imposition of tax liability notwithstanding discontinuance of the business of firms. By a fiction, the firm is deemed to continue after discontinuance for the purpose of assessment under Chapter IV."

5. In *Shivram Poddar v. Income Tax Officer, Calcutta*, subsequent to the discontinuance and dissolution of an unregistered firm, a notice u/s 34 read with section 22(2) of the Indian Income Tax Act was addressed to a partner at the time of its dissolution calling upon him to submit a return of the income of the firm for the relevant year. The partner, to whom the notice was issued, moved

the High Court for a writ of mandamus restraining the Income Tax authorities from taking any action under the said notice on the ground that the proceedings were invalid. It was argued that after the dissolution of the firm, its income could not be assessed to tax u/s 44 of the Indian Income Tax Act. The Supreme Court, after having referred to its earlier decision in *C. A. Abraham v. Income Tax Officer, Kottayam* held that where the business of the firm was discontinued and the firm was dissolved, the provisions of section 44 were attracted. Their Lordships pointed out that whereas in the case of an association, discontinuance of business of business for whatever cause and dissolution with or without discontinuance of business both attracted the application of section 44, it was only where there was discontinuance of business whether as a result of dissolution or other cause that the liability to assessment in respect of the income of the firm u/s 44 arise. Since the case before them was one of discontinuance of business by dissolution, the Supreme Court held that section 44 was attracted to the case. In dealing with the application of section 44 to a firm after it had discontinued its business, their Lordships observed :

"A firm, after it has discontinued its business, whether it is dissolved or not, will, therefore, be assessed either u/s 25(1) prematurely or in the year of assessment; in both cases the procedure of assessment is as u/s 23(3) and (4) supplemented by sub-section (5). Section 44 provides an added incident that all persons who were partners at the time of discontinuance are jointly and severally liable to pay the tax payable by the firm."

6. With reference to the case before them, they observed :

"Balmukund Radheshyam was an unregistered firm and by the discontinuance of the business it neither ceased to be liable to pay tax on the income earned by it, not could a procedure different from the one prescribed under Chapter IV apply for the assessment of the income of that firm."

7. The other case, viz., *Commissioner of Income Tax v. Raja Reddy Mallaram* was a case of an association, which had been dissolved. After the dissolution of the association and on the said a notice u/s 34 of the Income Tax Act was issued to one of the members of the association to file a return of the pre-dissolution income of the association and on the said member having failed to file a return, the taxable income of the association was determined u/s 23(4) and tax was assessed on the said income. When the order of assessment was sought to be enforced against another member of the association, he applied u/s 27 of the Indian Income Tax Act for cancellation of the assessment. His application was rejected by the Income Tax Officer, but the Appellate Assistant Commissioner allowed his appeal and set aside the order of the Income Tax Officer. In the appeal before the Tribunal, the order was modified to a certain extent and on a reference arising out of the said order of the Tribunal, question as to whether the order of assessment made by the Income Tax Officer u/s 23(4) was bad in law and whether the applicant was liable for the amount of tax payable as determined under that order by reason of the terms of section 44 of the Indian

Income Tax Act, were referred to High Court. The High Court held that the order of assessment made by the Income Tax Officer u/s 23(4) was bad in law (1) absolutely because he had made the assessment of the association and not of those who were members of the association at the time of the dissolution jointly and severally and (2) particularly as against any member on whom notices u/s 34 and 22(4) were not served because of such failure to serve notices on them. According to the High Court, the assessment was not binding on the assessee as no notice u/s 22 was issued to him and as he was not assessed severally or jointly with others referred to above and he was also not liable for the amount of tax payable as determined in the order of assessment dated September 30, 1953, as that assessment was not made in conformity with section 44 of the Indian Income Tax Act. In support of the conclusions arrived at by the High Court, it was urged before the Supreme Court that, in the first place, the assessment on the association could not be made after its dissolution and even assuming that such an assessment could be validly made it was binding only on those persons, who were served with a notice calling for a return. It was urged that u/s 44 it was provided that every person who was at the time of the dissolution a members of the association shall in respect of the income of the association be jointly and severally liable to assessment." Every person" appearing in section 44 it was provided that every persons and by enacting that such persons were to be liable to assessment jointly and severally, it was intended that after the association was dissolved only members at the date of the dissolution could be assessed in respect of the association and consequently all members who were sought to be assessed must be individually served with notices of assessment and those not served would not be bound by the assessment. The Supreme Court held that the arguments urged before them were not tenable. It was pointed out that by section 44 continuity of the firm or association for the purpose of assessment was ensured and, therefore, there was no question of assessing the individual members of the association. All the provisions of Chapter IV of the Indian Income Tax Act, were to be applicable to the assessment made after the dissolution of the association and consequently an association of persons was to be assessed as a unit of assessment, or the individual members were to be assessed separately in respect of their separate respective shares of the income, but there was no provision in Chapter IV for assessing the income received by an association in the hands of its members collectively. The unit of assessment in respect of the income earned by the association was either the association or each individual members in respect of his share of the income. This was so when the association was existing and it would be so even after it was dissolved. Their Lordships pointed out that the effect of section 44 was merely to ensure continuity in the application of the machinery provided for in Chapter IV of the Act for assessment and for imposition of tax liability notwithstanding discontinuance of the business of the association or its dissolution. By virtue of section 44 the personalty of the association was continued for the purpose of assessment and Chapter IV applies thereto. Although the case before the Supreme Court was of an association, the

reasoning adopted by them on the interpretation of the provisions of section 44 was equally applicable to the case of a firm. Having regard to these decisions, there can be no doubt whatsoever that the view expressed in the Calcutta and Punjab decisions followed by the Tribunal cannot be regarded as the correct view. The result of the Supreme Court decision referred to above is that even after the discontinuance of the business of the firm either by dissolution or otherwise, the firm can be treated as continuing so far as the assessment of its pre-dissolution income is concerned and the assessment or reassessment of such a firm after dissolution u/s 44 of the Act could be made in the same manner under Chapter IV as if it had not discontinued its business. In the present case, therefore, the assessment made on the firm could not be treated as invalid as held by the Tribunal.

8. Mr. Kolah, the learned counsel for the assessee, has argued that a firm, which has discontinued its business as a result of its dissolution, is a firm which is dead and no assessment can be made on an assessee that is dead. It is not doubt true, he says, that the discontinuance of the business of the firm will not involve the consequence of escapement of assessment of the pre-dissolution income but in order to bring such income to assessment the provision of the Income Tax Act, which is enacted in section 44, has got to be followed and the income can be brought to assessment only under the said provision. Mr. Kolah's interpretation of the said provision is that the said section provides that the partners shall be jointly and severally liable to assessment under Chapter IV and for the amount of tax payable, and the provisions of Chapter IV shall have to be applied for the assessment of the said partners. In other words, according to him, u/s 44, the process of assessing the pre-dissolution income of a dissolved firm, which has discontinued its business, is not by making an assessment on the firm but by making joint and several assessments on the members of the firm. Mr. Kolah argues that the application of the provisions of Chapter IV for the assessment provided by the said section is not to the assessment of the firms but to the joint and several assessment of the partners of the firm. Mr. Kolah's argument, therefore, is that there can be no assessment on a firm which has discontinued its business after such discontinuance and the view taken by the Calcutta High Court is the correct view. In view of the Supreme Court decision, to which we have already referred, it is not possible to accede to this submission of Mr. Kolah. Although the learned counsel submitted that each of the Supreme Court cases was decided on its own facts, he conceded that the conclusion arrived at by their Lordships on the scheme of the section and its effect are against him. His argument, however, was that the view expressed in the said cases would not accord with the language used in the section itself. We are afraid, we cannot entertain these arguments of Mr. Kolah and he also fairly concedes that we are bound by the decision of the Supreme Court and his only object in raising the arguments was to ensure his being able to agitate them before the Supreme Court if a further appeal is taken to it from our decision. In our opinion, therefore, the contentions of the assessee that the assessment made on the firm

is invalid in law, which was accepted by the Tribunal, in not correct.

9. It is then argued that even though the assessment on the firm may be permissible, the assessment made in the present case is invalid for want of a proper and valid notice as required by section 63 of the Act. Reliance in this connection is placed on *Y. Narayana Chetty v. Income Tax Officer, Nellore* there it has been held by the Supreme Court that the notice prescribed in section 34 for the purpose of initiating reassessment proceedings is not a mere procedural requirement. The service of the prescribed notice on the assessee is a condition precedent to the validity of any reassessment made u/s 34 of the Act. If no notice is issued or if the notice issued is shown to be invalid, then the proceedings taken by the Income Tax Officer without a notice or in pursuance of an invalid notice would be invalid and void. Mr. Kolah's argument is that section 63(1) requires that service of a notice has to be effected in the same manner as if it were a summons issued by the court under the Code of Civil Procedure. Service of notice in the case of firms, therefore, must be effected in the same manner in which service of summons is directed to be made when persons are sued as partners in the name of the firm. Rule 3 of Order XXX of the Code of Civil Procedure, which prescribes for service of summons in the case of firms, provides that the service will be required to be made not only on the firm but also on the partners whom the plaintiff seeks to make liable in cases where the firm is dissolved to the knowledge of the plaintiff before institution of the suit. According to Mr. Kolah, therefore, since the firm was dissolved to the knowledge of the Income Tax Officer before the issuance of the notice and seeks to make every partner liable on the assessment proposed to be made, notice had to be served on every partner. Since that has not been done in the present case, there is no proper and valid service of the notice and the proceedings taken by the Income Tax Officer are invalid and void.

10. We cannot accept the argument advanced by the learned counsel. Under rule 3 of order XXX of the Code of Civil Procedure, to which he referred, service of the summons is to be made as specified in clause (a) or (b) as directed by the court and such service is a good and proper service on the firm. The additional service on the partner individually is a further requirement necessary to be complied with in the case of dissolved firms, if, in a suit brought in the name of such a firm the plaintiff wants a decree not only against the firm but also against the partners personally. The additional service of the summons on the partners individually is a requirement of the procedure prescribed for suits against firms to enable the plaintiff to obtain certain additional reliefs apart from a decree against the firm and is not a part of the service of summons on the firm. Section 63(1) merely prescribes the mode of service of the notice to be the same as if it were summons issued by the court under the Civil Procedure Code. The requirement of the service on the partners individually as provided by the proviso to rule 3 of Order XXX is not a part of the mode of service of summons on the firm but an additional requirement of the suit permitted to be brought in the name of the firm under Order XXX of the Code. Whether the partner are required

to be served individually in the case of the assessment of dissolved firms as in suits brought under Order XXX of the Code, will have to be ascertained from the provisions of the Income Tax Act, which permit assessment to be made in the name of the firm in the case of the firms which are dissolved. That provision is section 44 of the Act, which, as we have seen, makes no distinction between a dissolved firm and a continuing firm. As has been held in the case already referred to, the section in effect has enacted that the assessment proceedings may be commenced and continued as if the firm is continuing. As observed by the Supreme Court in *Abraham's case* : "By a fiction, the firm is deemed to continue after discontinuance for the purpose of assessment under Chapter IV". u/s 44 of the Income Tax Act, therefore, the assessment of a firm which has discontinued its business as a result of dissolution or otherwise, is in precisely the same manner as in the case of a continuing firm and the same procedure has, therefore, to be adopted even on the matter of the service of the notice u/s 63(1) as in the case of a continuing firm. It is not denied that in the case of a continuing and existing firm, service of the notice on a partner of the firm is sufficient. The argument of Mr. Kolah that the service of the notice not having been effected on all the partners individually is not valid and proper, cannot, therefore, be accepted. In our opinion the service of the notice issued in the name of the firm and served on one of the partners is quite valid and proper. The view that we are taking is supported by the decision of this court in *Ramniwas Hanumanbux Somani v. Income Tax Officer*, where it has been held that in a case falling u/s of the Income Tax Act notice of reassessment could be issued against the firm and need not be issued against the persons, who were partners at the relevant time.

11. Mr. Kolah has then argued that the notices do not comply with the requirement of section 63(2) inasmuch as it is not addressed to a partner of the firm as required by the said provision. There is no substance in this contention also. The provision of section 63(2), which requires that in the case of firm the notice to the firm may be addressed to any partner of the firm merely prescribes a permissive mode of service and is not intended to be either mandatory or exhaustive. Consequently, the circumstances that the notice to the firm is not addressed to a partner will not be sufficient to render it invalid when in fact it is served on the partner and accepted by him and a return of the firm submitted in pursuance thereof as in the present case : (See *Ramanathan Chettiar v. Commissioner of Income Tax Ram Khelwan Ugmlal v. Commissioner of Income Tax* and *Law and Practice of Income Tax by Palkhivala and Kanga*, 4th edn., page 830).

12. Our answer to the question referred to us is that the notice issued and the assessment made in pursuance thereof in the present case are legal and valid. The assessee will pay the costs of the Commissioner.