
(1979) 07 KL CK 0020

In the High Court Of Kerala

Case No : Income-tax Referred Case No. 12 of 1978

Excel Motors

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 05-07-1979

Acts Referred:

Income Tax Act, 1961 — Section 184(3), 185, 185(1)

Citation : (1980) 122 ITR 379 : (1979) 2 TAXMAN 368

Hon'ble Judges : V.P. Gopalan Nambiyar, C.J.;G. Balagangadharan Nair, J

Bench : Division Bench

Advocate : Chacko George, for the Appellant; P.K.R. Menon, for the Respondent

Judgement

Gopalan Nambiyar, C.J.—At the instance of the assessee reference of the following two questions of law was compelled by this court u/s 256(2) of the I.T. Act, 1961. The Income Tax Appellate Tribunal, Cochin Bench, had accordingly, sent up its statement of the case and formulated the following questions of law for our opinion, namely :

"(1) Whether, on the facts and in the circumstances of the case, the Appellate Tribunal has erred in treating the order of the Income Tax Officer as one passed in exercise" of his assessment jurisdiction u/s 143(3) of the Income Tax Act, 1961 ?

(2) Whether, in view of the fact that the lower authorities and the parties having proceeded on the basis entirely different from the one adopted by the Appellate Tribunal, the assessee had been denied an adequate opportunity to represent its case on the basis that the order refusing registration is a part of the assessment proceeding u/s 143(3) ?"

2. The assessment year with which we are concerned is 1969-70, that is, the year ending March 31, 1969. The assessee is a firm. From April 1, 1968, to September 30, 1968, it consisted of three partners. On and from October 1, 1968, one of them retired, but three new partners joined the firm. There was

thus a change in the constitution of the firm during the accounting year. The assessee claimed that it had applied for fresh registration on December 31, 1968. It was the case of the I.T. department that this application had not been received by the ITO. On October 13, 1969, the representative of the assessee furnished to the ITO a copy of the application said to have been filed on December 31, 1968. After investigation, the officer found that the assessee had not made any such application on December 31, 1968, within the accounting year. So he passed an order purporting to be u/s 185 of the Act refusing registration. The assessee appealed against the order to the AAC. That officer found that the assessee had, on October 13, 1969, filed an application for registration and that the ITO had entertained that application, though it was made after the end of the previous year. In the circumstances, the AAC was of the view that the ITO's order was one u/s 185(1)(b) of the I.T. Act, 1961. Such an order could be passed only if the officer is satisfied that there was no genuine firm in existence. The officer had not investigated this aspect of the case. Therefore, the AAC set aside the order of the ITO, and remanded the proceedings to the officer for fresh decision after examination of the question of genuineness of the firm. The department appealed to the Appellate Tribunal. It was argued on its behalf that the ITO's order was u/s 184(4) of the Act of 1961 and that no appeal against such an order would lie under the provisions of the Act. Therefore, the AAC's order was illegal and without jurisdiction. The Tribunal rejected this argument of the department, holding that the order in question was not one either u/s 184(4) or under Section 185(1)(b). The Tribunal took the view that the ITO in refusing registration had only decided the status of the assessee as part of the assessment proceedings and that the assessee had the right to question that order before the AAC even in the appeal filed by the assessee against the assessment. But as the officer had chosen to pass a separate order on this matter, the Tribunal was of the view that the separate appeal filed was maintainable and competent. It was then argued by the departmental representative that the assessee had not applied for fresh registration before the expiry of the accounting year. This was countered by the assessee, contending that it had applied in the accounting year itself by making an application on December 31, 1968. On an examination of the facts and the circumstances, the Tribunal came to the conclusion that the assessee had not established that it had so made an application during the previous year. It was then the assessee's contention that the officer should have considered the copy of the application for registration sent by the assessee's representative on October 13, 1969, as itself an application. This was met by the Tribunal on the ground that no such request had been made on behalf of the assessee, and that there was no explanation on the part of the assessee for the delay in filing that application. The Tribunal, accordingly, recorded that the assessment on the assessee in the status of an unregistered firm was correct. The Tribunal, therefore, allowed the department's appeal. It is against the said order of the Tribunal that the questions of law have been referred.

3. Counsel for the assessee before us again strongly contended that in the circumstances the ITO must be deemed to have passed the order u/s 185(1)(b) of the Act. We may briefly notice the relevant provisions of the statute. Section 184(1) provides for the making of an application if two conditions are satisfied, namely, (1) that the partnership is evidenced by an instrument, and (2) that the individual shares of the partners are specified in that instrument. We omit Sub-section (2). Sub-section (3) provides that the application shall be made to the ITO having jurisdiction to assess the firm and shall be signed by all the partners personally. Sub-section (4) provides that the application shall be made before the end of the previous year. The proviso allows the officer to entertain an application made beyond the end of the previous year if he is satisfied that the firm was prevented by sufficient cause from making the application in time. Section 185(1) provides for enquiry into the application regarding the genuineness of the firm and its constitution, and the passing of an order according registration or refusing the same. In the instant case, the officer had been satisfied that no application dated December 31, 1968, had been made as claimed by the assessee. The assessee had forwarded a copy of the application on October 13, 1969, and requested that orders may be passed on the said application. But this would hardly satisfy the requirements of law, because Sub-section (3) of Section 184 requires that the application should be signed by all the partners personally. It is not possible either to regard the order of the officer as having been passed u/s 185(1)(b) of the Act on the ground that he had proceeded to condone the delay in not having made the application within time, and to refuse registration on the merits. We think the view taken by the Tribunal on the assessment of the facts and the circumstances disclosed, was correct. We answer the questions in the negative, that is, in favour of the department and against the assessee. There will be no order as to costs.

4. A copy of the judgment under the signature of the Registrar and the seal of this court will be forwarded to the Income Tax Appellate Tribunal, Cochin Bench, as required by law.