
(2007) 07 CAL CK 0030
In the Calcutta High Court

G.S. Atwal and Co.

APPELLANT

Vs

ITO

RESPONDENT

Date of Decision : 04-07-2007

Acts Referred:

Income Tax Act, 1961 — Section 182(4)

Citation : (2007) 213 CTR 565 : (2007) 292 ITR 561

Hon'ble Judges : Tapas Kumar Giri, J; Ashim Kumar Banerjee, J

Bench : Division Bench

Judgement

Ashim Kumar Banerjee, J.—Messrs G. S. Atwal and Company (Asansol) was a partnership firm carrying on construction business at Asansol. One Surjit Singh Atwal was a partner of the said firm who retired from partnership with effect from December 31, 1961. The said firm, however, continued with the other partners as well as new incoming partners. In November 1965, one of the partners named Surinder Singh Atwal being appellant No. 2 made an application for disclosure of income before the Income Tax authority and offered to pay tax on the said amount. It was disclosed in the said petition that the said income was for the assessment years 1958-59 to 1961-62 during the period when Surjit was a partner. The Income Tax authority allowed the application by accepting such undisclosed income of Rs. 46.15 lakhs and assessed tax accordingly. The Income Tax authority imposed the assessed tax accordingly amongst the partners including Surjit. When the order was served on Surjit, Surjit by letter dated May 12, 1969, informed the revenue that he did not get any benefit of the said sum of Rs. 46.15 lakhs. Since he had retired from the partnership long ago such assessment of tax upon him was illegal. He, however, contended that since he was saddled with the liability he should be given appropriate opportunity to pay the said sum by instalment. He also indicated in the said letter that his monthly income was Rs. 4,000 per month and as such it was not possible for him to meet such tax liability of the partnership firm. The Income Tax authority thereafter asked the existing partners and the firm to discharge such liability. The firm along with its existing partners refused to pay the tax liability imposed upon

Surjit. Series of correspondence were exchanged. Reminders were given from time to time. Even then the firm did not discharge such tax liability. Hence, the authority was compelled to attach the outstanding dues of the firm from the garnishee u/s 182(4) of the Income Tax Act, 1961, which gave rise to the present litigation. Pertinent to note, the firm at one point of time contended that the revenue could realise such arrear tax by attachment and sale of the landed properties belonging to Surjit. It, later on transpired that a suit was filed by the firm and its existing partners against Surjit for a declaration that the landed properties standing in the name of Surjit were nothing but benami of the partnership firm.

2. The firm and its existing partners approached the learned single judge by filing the writ petition inter alia challenging the authority and propriety of the revenue in issuance of such order of attachment for realisation of the tax liability.

3. Before the learned single judge Surjit also filed affidavit reiterating that he did not get any benefit of such alleged undisclosed income of Rs. 46.15 lakhs and such tax liability should be discharged by the firm itself and its existing partners.

4. The learned single judge by his Lordship's judgment and order dated 22-4-2003, dismissed the writ petition inter alia holding as follows :

(i) The partnership deed dated March 3, 1961, shows that the continuing partners took upon themselves the liability of the firm which included liability to sundry creditors amounting to the aforesaid sum of Rs. 46.15 lakhs.

(ii) Respondent No. 5 was not liable according to the said deed of partnership to pay any part or portion of the aforesaid liability.

(iii) Almost 5 years after retirement of respondent No. 5 the firm and the partners thereof disclosed before the department that the aforesaid liability was really an income and that the creditors were mere name-lenders. They, therefore, offered the aforesaid sum, stated to have been earned prior to 1960, for taxation which they proposed to pay in easy instalments over a period of 20 years.

(iv) After conversion of liability into income respondent No. 5 became entitled to Mth share thereof because that was his share in the profits and losses of the firm at the relevant point of time. No evidence has been disclosed by the petitioners to show that any such payment was made to respondent No. 5.

(v) However, acting on the aforesaid disclosure, tax was levied by the department against respondent No. 5. Later on upon realising their mistake the department sought to hold the firm liable for the liability apportioned against respondent No. 5.

(vi) The order dated 11-4-1980, directing the firm to pay Rs. 7,49,488.54 was not objected to by the firm for almost 6 years.

(vii) It is for non-payment of this sum that the attachment has been made.

(viii) The firm has retained the benefit of the disclosure and wants respondent No. 5 to bear the liability of tax on that account.

(ix) Granting any relief to the petitioners would mean unjustly enriching them. In the case of Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, a nine-judge Bench of the Apex Court has held that "power of the court is not meant to be exercised for unjustly enriching a person".

5. Being aggrieved by and/or dissatisfied with the judgment and order of the learned single judge the appellant filed the instant appeal.

6. Dr. Debiprasad Pal, learned senior counsel appearing for the appellant in support of the appeal contended as follows :

(i) Before issuing any order of attachment and before taking a decision to recover the tax liability from the firm u/s 182(4) of the said Act, 1961, the revenue would have to form an opinion that such liability could not be recovered from the partner upon whom it was sought to be imposed.

(ii) Assuming that such tax liability of the firm could be imposed upon the firm and recovered from them such recovery could not be done unless there was a proper demand served u/s 156.

(iii) Before the order of attachment could be issued u/s 226 a proper certificate should have been issued u/s 222 in the name of the firm. In the instant case no certificate was issued u/s 222 in the name of the firm and as such there could not be any corresponding recovery by attaching the dues of the firm u/s 226.

(iv) The agreemental liability by which the outgoing partner was indemnified by the incoming partners against all liabilities was a contractual obligation inter se executants and could not be implemented and/or invoked by the revenue who was not a party.

Mr. Dipak Kumar Shome, learned senior counsel appearing for the revenue on the other hand contended as follows :

(i) The writ petition was itself not maintainable being grossly delayed,

(ii) The writ petitioner did not come with clean hands and as such the petitioner was not entitled to the relief. The writ petitioner/appellant at one point of time contended that the tax could be recovered from the properties belonging to Surjit whereas later on it transpired that the same partners filed a suit for declaration that the properties were benami properties of the firm.

(iii) The show-cause notice was issued on 3-3-1980. After considering the show-cause notice and the contentions of the appellant showing cause the revenue rejected their contentions by order dated 11-4-1980, appearing at pages 116-118 of the paper book. The appellant, however, approached this court in 1990. Such belated challenge was rightly refused by the learned single judge.

(iv) The appellant had an alternative remedy of an appeal against the order of

the revenue. The appellant without exhausting the remedy available in law approached this court and the learned single judge rightly rejected the same.

7. Surjit initially appeared before the learned single judge. However, Mr. Raja Basu, learned advocate appearing for Surjit prayed for leave to retire before us and as such no submission was made on behalf of Surjit before us.

8. In support of their contentions the parties cited the following decisions :

Income Tax Officer, Agra Vs. Radha Krishan, ;

Kalva Suryanarayana Vs. Income Tax Officer, A-3 Ward, Hyderabad, ;

Kethmal Parekh Vs. Tax Recovery Officer and Another, ;

S.N. Santhalingam Vs. Income Tax Officer, Central Circle-II, Bangalore and Another, ;

J.H. Tarapore Vs. Income Tax Officer and Another, ;

Commissioner of Income Tax Vs. Sannanna Chetty and Sons,

K.V. Reddy and Another Vs. Assistant Commissioner of Income Tax, Hyd. and Another, ;

Bhagwandas J. Patel Vs. Deputy Commissioner of Income Tax, ; and

Sri Mohan Wahi Vs. Commissioner, Income Tax, Varanasi and Others, .

9. On the analysis of the facts it appears to us that not only the writ petition was grossly delayed but also the appellant did not come with clean hands. Admittedly the undisclosed income was offered for tax by the existing partners at a time when Surjit admittedly retired from the partnership. Under the deed of retirement the entire liability was taken over by the existing partners and Surjit was indemnified accordingly. The landed properties lying in the name of Surjit were also claimed by the existing partners by filing law suits inter alia claiming declaration that those were benami properties belonging to the firm and/or their existing partners. Considering those facts we are unable to appreciate as to how the appellant could avoid their responsibility to discharge such debt. Repeated reminders were sent by the revenue requesting the appellant to pay off such liability. Despite such repeated reminders, despite rejection of their prayer to the extent that they should be absolved from such liability, the appellant did not discharge such statutory liability. Hence, the revenue was entitled to invoke Section 182(4). The reason for invoking Section 182(4) was clearly spelt in the said order passed by the revenue challenged in the writ petition. In any event, the order of rejection of their contention passed by the revenue on April 11, 1980, directing the firm to discharge the tax liability was not contemporaneously challenged by the appellant and such belated attempt, in our view, is not maintainable.

10. The writ court is a court of equity. The writ court exercises discretion

considering the facts and circumstances involved in the said case. In the instant case we have no hesitation to observe that the appellant had taken an unfair approach to avoid statutory liability. Hence the writ court being a court of equity, rightly did not feel inclined to examine the contention of the appellant on the niceties of law. If we make a rigid construction of these statutory provisions so referred to by the appellant before us and grant relief to them it would be a wrong approach to help the appellant to enrich themselves unjustly.

11. The appeal fails and is hereby dismissed. There would be no order as to costs.

12. Urgent xerox certified copy would be given to the parties, if applied for.

Tapas Kumar Giri, J.

13. I agree.