

(1964) 09 AP CK 0001
In the Andhra Pradesh High Court
Case No : Writ Appeal No. 27 of 1963

Income Tax Officer, Nellore

APPELLANT

Vs

M. Sundararamireddy

RESPONDENT

Date of Decision : 26-09-1964

Acts Referred:

Income Tax Act, 1922 — Section 23(5), 44, 46(2)

Citation : AIR 1965 AP 102 : (1965) 58 ITR 821

Hon'ble Judges : P. Chandra Reddy, C.J.;Narasimham, J

Bench : Division Bench

Advocate : S. Kondaiah, for the Appellant; P. Rama Rao, for the Respondent

Judgement

Chandra Reddy, C.J.

(1) This is an appeal against the order of Justice Jagmohan Reddy accepting a petition of the respondent for the issuance of a writ of Mandamus to prevent the Income Tax authorities from collecting the tax pursuant to a certificate issued u/s 46(2) of the Income Tax Act.

(2) The material facts which lie in a short compass are as follows:

The respondent along with three others was a partner in a mining company called Lakshmi Prasad Mica Mining Co., Gudur, Nellore District. with 24/384 share. In the assessment year 1954-55, on an application by the partnership, its registration was granted by the proper Income Tax Officer. Thereafter the assessment of the firm was made. The total profits of the firm were ascertained and apportioned amongst the partners and this share of the profits was added to the other income of each of the partners and the total income brought of the tax and no tax is due from him to the department. Admittedly, the respondent paid his share of the tax and no tax is due from him to the department. Ramana Reddy, one of the partners, defaulted to pay tax within the prescribed time and so a penalty was imposed on him u/s 46(1) of the Indian Income Tax Act. Meanwhile, the firm was dissolved. Therefore, the department sought to realise

the arrears of tax including the penalty from the respondent. This was resisted by the respondent on the ground that he was not liable to fulfil the demand against one of the partners. So conceive steps were taken against the respondent by the issue of a certificate u/s 46(2) of the Indian Income Tax Act.

(3) At this stage, the respondent had invoked the jurisdiction of this Court under Art. 226 of the Constitution raising a plea that here was not liability on the part of one of the partners of a registered firm to pay the tax due by another partner. The department contended that consequent on the dissolution of the partnership a joint and several liability was imposed on the whilom partners and as such they were authorised to enforce the tax liability of one of the partners against the respondent.

(4) Our learned brother issued the writ as prayed for in the view that as the assessment was made prior to the dissolution the respondent could not be made liable for the arrears of tax due from one of the partners. It is this conclusion of the learned Judge is impugned before us in this appeal brought by the department.

(5) The problem raised by this appeal has to be solved in the light of the relevant provisions of the Income Tax Act (hereinafter referred to as the Act). We will now look at the sections of the Act round which the controversy revolves in this appeal.

(6) Section 23(5) with which we are immediately concerned recites :

"Notwithstanding anything contained in the foregoing sub-sections, when the assessee is a firm and total income of the firm has been assessed, under sub-section (1), sub-section (3) or sub-section (4), as the case may be

(a) in the case of a registered firm,

(i) the Income Tax payable by the firm itself shall be determined ; and

(ii) the total income of each partner of the firm including therein his share of its income, profits and gains of the previous year, shall be assessed and the sum payable by him on the basis of such assessment shall be determined ;

Provided that if such share of any partner is a loss it shall be set off against his other income or carried forward and set off in accordance with the provisions of section 24 :

Provided further that when any of such partner is a person not resident in the taxable territories, his share of the income, profits and gains of the firm shall be assessed on the firm at the rates which would be applicable if it were assessed on him personally, and the sum so determined as payable shall be paid by the firm :

Provided also that if at the time of assessment of any partner of a registered firm, the Income Tax Officer is of opinion that the partner is residing in Pakistan,

the partner's share of income, profits and gains of the firm shall be assessed on the firm in the manner laid down in the preceding proviso and sum so determined as payable shall be paid by the firm;"

(7) This section has been amended in 1956 by introducing a few changes, but we are unconcerned with them as this assessment relates to the assessment year as the section stood prior to its amendment.

(8) Clause (b) of Section 23(5) deals with an unregistered firm and that has no bearing on the present enquiry. So, that need not be extracted here.

(9) It is manifest that under sub-section (5) of Section 23, individual partners have to be assessed separately in regard to their respective shares of income. The tax payable by each of the partners is on his share of the income and not on the whole income of the firm. The income is assessed only in the hands of the individual and the firm as such is not assessed. Thus, it is the individual partner that is the unit of assessment and not the partnership as such. Section 23(5) does not create the machinery for assessing the income earned by the partnership for assessing the income earned by the partnership in the hands of the partners collectively. This concept is emphasised by the first proviso which postulates that if it was a loss, that is allocated amongst the partners and such loss is set off against the other incomes of each of the partners. The other proviso also are pointers in the same direction. By reason of this section, as it existed at the relevant time, the partnership as such was not taxable entity.

(10) Is the situation altered by reason of the dissolution of the partnership (after the assessment was made u/s 23(5) of the Act)? Shri Kondiah, learned counsel for the appellant invites us to answer it in the affirmative, having regard to the provisions of Section 44 has fastened a joint and several liability on the whilom partners for the tax payable by the individual partners in respect of the income earned by the firm. In order to appreciate this contention, it is necessary to turn to Section 44. It says :

"Where any business, profession or vocation carried on by a firm or association of persons has been discontinued or where an association of persons is dissolved, every person who was at the time of such discontinuance or dissolution a partner of such firm or a member of such association shall, in respect of the income profits and gains of the firm 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."

(11) It is obvious that this section has been enacted to ensure continuity in the application of the machinery provided for assessment and imposition of tax liability notwithstanding the discontinuance or dissolution of the partnership. The chief object of the section seems to be authorise the department to impose liability on the partners by invoking the machinery provided in Chapter IV. The personality of the firm, though its business is discontinued - whether by dissolution or for some other cause- is continued for the purpose of initiating

assessment proceedings. The crucial words in this section to be considered by us are,

" shall in respect of the income profits and gains of the firm or association income profits and gains of the firm or association, 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".

These words indicate that the erstwhile partners are jointly and severally liable to assessment in respect of the income and for the amount of tax payable. The expression "and for the amount of tax payable", in our opinion, connotes the tax as determined in the assessment notwithstanding the dissolution. In our concerned opinion, the primary aim of this section being to assess the income derived prior to the dissolution, it does not come into play in respect of assessments made before the discontinuance or dissolution of the association or partnership. In cases where the share of each of the partners was brought to tax prior to its discontinuance or dissolution, the liability of each of the partners is to be traced to that assessment. We do not think that Section 44 seeks to enlarge the liability of individual partners already determined u/s 23(5). The language of the section does not warrant the interpretation that notwithstanding that the prior assessment had computed the tax payable by each of the partners u/s 23(5), it has fastened a joint and several liability of each of the partners. We are not persuaded that this provision has the effect of converting the individual liability into a joint and several liability of each of the partners.

(12) This view of ours is vouched by a judgment of the Supreme Court in Commissioner of Income Tax, Hyderabad Vs. Sri Rajareddy Mallaram, . The Supreme Court observed :

" Since the primary purpose of S. 44 is to bring to tax the income of the association after it is dissolved or its business is discontinued, assessment of an aliquot share of that income is not contemplated by S. 44 of the Income Tax Act.

"The effect of S. 44 is, as we have stated, merely to ensure continuity in the application of the machinery provided in ch. 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 S. 44 the personality of the association is continued for the purpose of assessment and Ch. IV applied thereto."

(13) That it is only the tax as computed under the assessment that could be collected from the partners can be gathered from Section 29 of the Act which postulates :

"When any tax, penalty or interest is due in consequence of any order passed under or in pursuance of this Act, the Income Tax Officer shall serve upon the assessee or other person liable to pay such tax, penalty or interest a notice of

demand in the prescribed form specifying the sum so payable."

(14) The form of notice prescribed under the Act also out the nature of the liability of an assessee under the Act. This form is in these words :

"This is to give you notice that for the assessment year a sum or Rs. as specified in the attached form has been determined to be payable by you etc. etc."

(15) So the terms of S. 29 read in conjunction with the notice of demand support the argument that it is only such amount as is determined under assessment that could be collected from each of the partners. If the assessment has not created a joint and several liability. As stated above, the purpose of Section 44 is to enable the department to start or continue the assessment proceedings despite the discontinuance of the firm. In a case where the assessment has already been made, the liability of each of the partners is not impaired even if Section 44 is not resorted to.

(16) This view of our is vouched by a judgment of the Madras High Court in Al. Sp. Pl. Ot. Pl. Subramanian Chettiar Vs. The Special Deputy Tahsildar, Income Tax Collections and Another, , which bears a close resemblance to the instant case. There an assessment was made prior to the discontinuance of the business of a registered firm u/s 23(5) of the Act. After the dissolution, the department sought to recover, on the ground that Section 44 had fastened joint and several liability on all the partners. The learned Judges accepted the contention of the assessee that where the assessment was completed prior to the discontinuance of the business of the partnership, the individual partners do not incur a joint and several liability and that each of the partners is liable to meet a demand arising under the assessment.

(17) In Velu Gopalan Vs. Income Tax Officer, , a Division Bench of the Kerala High Court ruled that S. 44 of the Act before amendment after the discontinuance of the firm, and that in the absence of an assessment of the firm there was no tax payable by the firm and the petitioner was not liable to pay the amount due from the other partners, and consequently one partner was not liable to pay the amount due from the other partners, and consequently one partner was not liable for the amount due from another partner.

(18) The situation would have been different if u/s 23, the firm as such was assessed and the tax was payable by the firm, in which case under the general law of partnership there would have been a joint and several liability of the partners. But as already observed, it is the individual partners that were assessed in respect of the profits earned by the partnership.

(19) Shri Kondiah, learned counsel for the department has drawn our attention to a few of the decisions which, according to him, support the stand taken by the department.

(20) In CHENGALAVAROYA CHETTIAR Vs. COMMISSIONER OF Income Tax,

MADRAS., a Special Bench of the Madras High Court decided that Section 44 of the Act was not confined in its application to cases where an assessment had been made before the discontinuance of the firm. On the basis of this principle, it is urged by Shri Kondiah that even though the assessment was prior to the dissolution of the firm, Section 44 created a joint and several liability of the partners. We are not satisfied that the above cited case is of any avail to the department as it is based upon Section 44 as it stood at the time differently worded. That section ran as follows :-

"Where any business, profession or vacation carried on by a firm has been discontinued, every person who was at the time of such discontinuance a member of such firm shall be jointly and severally liable for the amount of tax payable in respect of the income, profits and gains of the firm." It is plain that this section talks only of the members being jointly and severally liable for tax in respect of the income, profits and gains of the firm. It does not contemplate the partners being held jointly and severally liable to assessment and for the amount of tax due and payable by reason of the assessment. Therefore, that ruling has no relevancy in the present context.

(21) Nor can the department derive any help from *Iqtida Khan Vs. Income Tax Officer, "A" Ward Central Revenue Building, Lucknow* and *Another*. There, the Allahabad High Court was concerned with a partner of a registered firm who had migrated to Pakistan and was declared an evacuee. His half share of the income vested in the Custodian. The competent officer passed an order directing the sale of the assets of the firm and division of the sale proceeds between the Custodian and the other partner. The assets were purchased in the sale by the other partner free from any encumbrance for any tax payable in respect of the business of the firm. In the meantime, assessment for the year 1951-52 was made on the partners as it was a registered firm, and demand notices were served. In the recovery proceedings, the partner who purchased the assets of the firm claimed that his properties could not be proceeded against and it was realisable from the Custodian in whom the share of the other partner vested. This plea was not accepted by the Allahabad High Court for the reason that under one of the proviso to Section 23(5) when a partner was residing in Pakistan, the share of the income of that partner will be assessed on the firm. That being so, the liability was that of the firm and consequently there was a joint and several liability of the partners.

(22) The case of *Motilal v. Income Tax Officer* (1962) 44 ITR 453 called in aid by the learned counsel for the department is not in point, as it concerned an unregistered firm which was the unit of assessment unlike a registered firm. In such a case the liability was that of the firm and so there was a joint and several liability of the partners. It was there observed :

". but it appears difficult to hold that in absence of any such assessment on the partners themselves they would not be liable to tax at all. A firm may be assessed to tax before its dissolution and the tax assessed may

have to be recovered after dissolution. We find no justification for taking the view that before the tax may be recovered from the partners of the dissolved firm they must against be severally assessed to tax u/s 44 of the Act. Nor has learned counsel drawn our attention to any provision of the Act which would provide for the realisation of tax imposed on but not paid by a firm before its dissolution."

(23) This passage lends some countenance to the proposition that if each of the partners was assessed to tax anything more than that could not be realised from the partners. We, therefore, think that this pronouncement of the Allahabad High Court does not advance the case of the appellant.

(24) The observation of the Supreme Court in Commissioner of Income Tax, Madras, and Another Vs. S.V. Angidi Chettiar, that Section 44 of the Act contained merely a method of collection of tax due from a firm does not indicate the section imposes a joint and several liability in spite of the assessment having been made prior to the dissolution u/s 23(5) determining the tax payable by each of the partners.

(25) The judgment of the Supreme Court in Shivram Poddar Vs. Income Tax Officer, Central Circle II, Calcutta, and Another, is not also helpful to the department, in that, it dealt with an unregistered firm and also that the assessment was made after dissolution.

(26) Thus, there is not decision which has taken a view contrary to the one expressed above. On the other hand, our conclusion is justified not only by two of the decided cases referred to above, but also by terms of the relevant sections of the Act.

(27) It follows that the judgment under appeal cannot be successfully assailed. It, therefore, fails and is dismissed with costs. Advocate's fees Rs. 100/-

(28) Appeal dismissed.