

(1977) 07 GAU CK 0003

In the Gauhati High Court

Case No : Income-tax Reference No. 18 of 1975

Jain and Co.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 08-07-1977

Acts Referred:

Income Tax Act, 1961 — Section 184, 184(1), 185
Income Tax Rules, 1962 — Rule 22

Citation : (1977) 07 GAU CK 0003

Hon'ble Judges : N. Ibotombi Singh, J;Baharul Islam, J

Bench : Division Bench

Advocate : S.L. Sharma and J.P. Sharma, for the Appellant; G.K. Talukdar and D.K. Talukdar, for the Respondent

Judgement

Baharul Islam, J.—The Income Tax Appellate Tribunal, Gauhati Bench, Gauhati (hereinafter called "the Tribunal"), has referred the following question to us for opinion ;

"Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was justified in law in holding that the assessee-firm was not constituted under a valid instrument of partnership and so the assessee-firm was not entitled to registration u/s 185 of the Income Tax Act, 1961, for the assessment years 1965-66 and 1966-67?"

2. The material facts of the case may be briefly stated thus;

3. The assessee-firm, M/s. Jain & Co., Fancy Bazar, Gauhati, was constituted on February, 1964, on which date a partnership deed (annexure C) was executed. The deed of partnership showed that the firm consisted of the following five partners:

(1) Shri Ratan Kumar Bawari,

(2) Shri Sukumar Chandra Jain,

(3) Shri Manikchand Agarwalla,

(4) Shri Jaiprakash Sharma,

(5) Smt. Pushpa Devi Goyal.

They all signed the deed of partnership. They had to share the profits equally, at 20 per cent. each. Shri Sukumar Chandra Jain retired from the partnership with effect from 10th June, 1964. Thereafter the firm continued with the remaining four partners. On April 7, 1965, a memorandum of agreement (annexure D) was executed by the remaining four partners. The memorandum provided: "That the deed of partnership dated 1st February, 1964, shall be read by deleting the name of Shri Sukumar Jain and the terms therein relating to him" (para 1). "The shares of the remaining partners in the profit or loss of the partnership would be 25 per cent. each" (para 2). Para 3 of the memorandum provides : "That the above mentioned modifications (namely, modifications as per paras 1 and 2, referred to above).....are operative from the beginning of the firm's business."

4. The accounting year of the assessee for the assessment year 1965-66 ended on April 9, 1965. On April 9, 1965, the assessee-filed an application u/s 185 of the Income Tax Act, 1961 (hereinafter called "the Act"). The application was signed by the four partners who signed the memorandum and was accompanied by the partnership deed dated 1st February, 1964, and the memorandum dated January 7, 1965, aforesaid.

5. The Income Tax Officer rejected the prayer for registration. He has held that the firm as per Clause 7 of the partnership deed had to follow the Ram Navami year for maintenance of accounts for 2020 R. N. but, instead, closed the accounts of entire 14 months at the closing of 2021 R.N. He has found that there was no application for registration under rule 22 up to June 10, 1964. He has further found that as per Clause 4 of the deed of partnership, Shri Sukumar Chand Jain was entitled to 20% of the profit and loss of the partnership business, whereas, according to the memorandum, he retired from the partnership on no loss no profit basis. He has further found that on the retirement of Sukumar Jain with effect from June 10, 1964, the partnership constituted according to the deed of partnership dated February 1, 1964, stood dissolved, and in the absence of a fresh deed of partnership, amongst the remaining four partners, the application for registration on April 9, 1965, was incompetent. On appeals, the order of the Income Tax Officer was upheld by the Appellate Assistant Commissioner of Income Tax and the Tribunal. At the instance of the assessee, this reference has been made by the Tribunal.

6. Mr. S. L. Sarma, learned counsel appearing for the assessee, submits that the application u/s 185 of the Act was accompanied by the partnership deed dated February 1, 1964, and the memorandum of agreement dated April 7, 1965 ; these two documents read together evidence the constitution of the firm. On mere retirement of one of the partners, a partnership firm is not dissolved; it continues and it has been continuing in the instant case with the remaining four

partners. Alternatively, he also faintly submits that the memorandum by itself is the instrument of the partnership.

7. Section 184 of the Act provides for registration of a partnership firm for the purposes of the Income Tax Act. The material portion of Section 184 may be extracted :

"184. Application for registration.--(1) An application for registration of a firm for the purposes of this Act may be made to the Income Tax Officer on behalf of any firm if-

(i) the partnership is evidenced by an instrument; and

(ii) the individual shares of the partners are specified in that instrument.....

(6) The application shall be made in the prescribed form and shall contain the prescribed particulars.

(7) Where registration is granted to any firm for any assessment year, it shall have effect for every subsequent assessment year ;

Provided that-

(i) there is no change in the constitution of the firm or the shares of the partners as evidenced by the instrument of partnership on the basis of which the registration was granted ; and

(ii) the firm furnishes, along with its return of income for the assessment year concerned, a declaration to that effect, in the prescribed form and verified in the prescribed manner.

(8) Where any such change has taken place in the previous year, the firm shall apply for fresh registration for the assessment year concerned in accordance with the provisions of this section."

8. The material portion of Section 185 of the Act may also be quoted :

"185. Procedure on receipt of application.--On receipt of an application for the registration of a firm, the Income Tax Officer shall inquire into the genuineness of the firm and its constitution as specified in the instrument of partnership, and--....."

9. Chapter XVI of the Act under which Sections 184 and 185 occur, contains special provisions applicable to firms, and Sections 182 and 183 of the Act respectively provide for the assessment of registered and unregistered firms. Section 182 shows that in the case of a registered firm the income of the firm is not assessed, but the share of each partner in the income of the firm is included in his total income and assessed to tax whereas in the case of an unregistered firm, the income of the firm is liable to assessment. These two provisions clearly show that for the purpose of registration of a partnership firm for the purpose of the Income Tax Act, 1961, the Act is primarily concerned with the names and

addresses of the partners and their respective shares in the profit of the firm.

10. An application for registration of a firm has to be made under rule 22 of the Income Tax Rules, 1962, read with Section 184 of the Act. Forms Nos. 11 and 11A are the prescribed forms. The application shall be in Form No. 11 when there is no change in the constitution of the firm or the shares of the partners during the previous year before the date of the application. Where there has been a change (or changes) in the constitution of the firm or the shares of the partners, the application has to be made in Form No. 11A. Both Forms 11 and 11A, require, inter alia, the names of the partners and their respective shares of profits. This is because in the case of a registered firm, the department can know the share of profit of each individual partner and levy Income Tax thereon accordingly.

11. Section 185 of the Act read with rule 22 and Forms 11 and 11A show that a partnership firm has to be registered for one assessment year; and u/s 184(7), the registration shall have effect for every subsequent year, if there has been no change in the constitution of the firm or in the shares of the partners.

12. In the instant case the partnership deed dated February 1, 1964, constituting a firm consisted of five members with 20% share each, in the profits. Sukumar Jain retired with effect from June 10, 1964. The finding is that there was no application for the registration of the firm till that date. The firm now sought to be registered consists of only four partners, each having 25% share in profits. True it is, as submitted by learned counsel for the assessee, that retirement of a partner does not ipso facto dissolve a firm and that the firm continues; but the essential requisites for the registration of a firm under the Income Tax Act, as stated above, are the names of the partners and their respective shares in profits. The firm now sought to be registered consists of four partners with 25% share in profits. The consideration is whether the memorandum of agreement dated April 7, 1965, by itself constitutes a valid firm, as contended by Mr. Sharma. This point was not urged by the assessee before the Tribunal nor is there any finding on the point. Even so, the memorandum does not purport to constitute a deed of partnership. It simply refers to, and contains some modifications in, the deed of partnership dated February 1, 1964. The modifications are, (i) the deletion of the name of Sukumar Jain, and (ii) the raising of the shares of each partner to 25% in the profits of the firm. It has also been expressly provided in the memorandum itself that the modifications were "operative from the beginning of the firm's business", that is to say, with effect from February 1, 1964, on which date the deed of partnership (annexure "C") was executed. This memorandum obviously is not a deed of partnership but is rather a document showing a change in the constitution of the partnership firm and a change in the shares of the partners in the profit. Although the deed of partnership dated February 1, 1964, was an instrument of partnership, the firm constituted by that instrument has not been sought to be registered by the application made under rule 22 of the Rules read with Section 185 of the Act.

13. It must, therefore, be held that the application for registration did not fulfil the requirements of Section 184(1)(i) and (ii) of the Act and was liable to be rejected u/s 185(1) of the Act.

14. In the result, the question is answered in the affirmative and in favour of the department.

Ibotombi Singh, J.

15. I agree.