(1990) 08 CAL CK 0044

In the Calcutta High Court

Case No : Income-tax Reference No. 353 of 1979

Jiwanram Sheoduttrai APPELLANT

Vs

Commissioner of Income Tax RESPONDENT

Date of Decision : 08-08-1990

Acts Referred:
Income Tax Act, 1961 — Section 185

Citation : (1994) 121 CTR 380 : (1994) 208 ITR 712

Hon'ble Judges : Bhagabati Prasad Banerjee, J;Ajit K. Sengupta, J

Bench : Division Bench

Advocate : R.N. Bajoria and J.P. Khaitan, for the Appellant; S.K. Moitra, for the Respondent

Judgement

Ajit K. Sengupta, J.—At the instance of the assessee, the following two questions of law have been referred to this court for the assessment years 1963-64, 1964-65 and 1965-66 u/s 256(2) of the Income Tax Act, 1961 :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in admitting a new ground for the first time before the Tribunal, namely, the question of benami with regard to the share income of Smt. Savitri Debi and Deepak Prakash ?

2. Whether, the finding of the Tribunal that the wife and son of Sri Satyanarain Prasad were really representing the Hindu undivided family and 52 per cent. of the business profits of Messrs. J.S. Distributors was to be added to the income of the assessee is based on any evidence and/ or material and/or partly on irrelevant materials and partly on its failure to consider the relevant materials and/or based on mere conjecture or surmise and perverse ?"

The facts relating to this reference are that the assessee is a Hindu undivided family carrying on business with its head office in Calcutta and a branch office at Varanasi. The assessment years are 1963-64 to 1965-66 and the relevant accounting years ended on Diwali 1962 to 1964, respectively.

2. At all material times, the assessee-Hindu undivided family consisted of Sri Satyanarain Prasad (karta), his wife, Smt. Savitri Debi, and amongst others, his son, Sri Deepak Prakash. Smt. Savitri Debi and Sri Deepak Prakash were also partners in a firm styled Messrs. J.S. Distributors which was constituted under a deed of partnership dated July 7, 1959. On January 15, 1960, the assessee-Hindu undivided family entered into an agreement with the said Messrs. J.S. Distributors under which the said Messrs. J.S. Distributors agreed to execute the business secured by the assessee-Hindu undivided family on payment of commission of two per cent. of the gross sales in terms of Clause 2(a) of the said agreement.

3. In the case of Messrs. J.S. Distributors, right from the assessment year 1962-63, the Income Tax Officer refused to grant registration u/s 185 of the Act on the ground that the said partnership firm was not a genuine entity. In appeals preferred by the said firm before the Appellate Assistant Commissioner in respect of the assessment years 1962-63 to 1967-68, the Appellate Assistant Commissioner held that the said firm was a genuine firm and it should have been granted registration u/s 185 of the Act. Aggrieved by the order of the Appellate Assistant Commissioner, the Revenue preferred appeals before the Tribunal in respect of those years and the Tribunal in its consolidated order dated September 21, 1973, upheld the action of the Appellate Assistant Commissioner.

4. For the assessment years under reference, the Income Tax Officer included the entire income of Messrs. J.S. Distributors in the total income of the assessee as he was of the view that the firm of Messrs. J.S. Distributors was not a genuine firm and the business done by it was really conducted by the assessee.

5. In appeals before the Appellate Assistant Commissioner, the Appellate Assistant Commissioner deleted the income of the said firm from the total income of the assessee as he had already held in the case of the said firm that it was a genuine firm and the business conducted by it was its own business.

6. Against the said orders of the Appellate Assistant Commissioner, the Revenue preferred appeals before the Tribunal while the assessee filed cross-objections (with which we are not concerned in the present reference). At the time of hearing of the appeals, the Revenue took up an alternative contention that in any event such of the partners of Messrs. J. S. Distributors who were related to the karta of the assessee-Hindu undivided family are to be taken as his representatives or benamidars and that their share in the business profits of the years under reference is to be treated as the profit of the assessee.

7. The Tribunal after considering the rival submissions of the parties entertained the alternative stand taken on behalf of the Revenue and held that 52 per cent. of the business profits of Messrs. J.S. Distributors in the year under reference should be added to the total income of the assessee.

8. At the hearing, Mr. Bajoria, learned counsel, has very fairly stated that he does not press question No. 1 and, accordingly, we decline to answer the first

question.

9. So far as the second question is concerned, Mr. Bajoria, learned counsel, has drawn our attention to the finding of the Tribunal in the appeal arising from the refusal to register the firm holding the firm to be not genuine. There the Tribunal observed as follows :

"We have heard the rival submissions made before us. We have also gone through carefully the earlier order of the Tribunal in Income Tax Appeal No. 136 of 1968-69. We are in respectful agreement with the reasonings given therein. The learned Departmental Representative stated before us that the Department has no contention against the genuineness of either the partnership deed or the deed of agreement. As observed by this Tribunal in its earlier order, the various suspicious circumstances pointed out by the Income Tax Officer which we find no need to refer to in detail, are not unexplainable with reference to the terms and conditions in the deed of agreement. Even if we may for the present purpose of argument even without going into that question, take it that the four partners who are related to Sri Satyanarayan Prasad, the karta of the Hindu undivided family, are only his nominees and, therefore, the representatives or the benamidars of the Hindu undivided family, the fact remains that the other three partners are in no way related to any one of the others or to Sri Satyanarayan Prasad. They are residents of Delhi and other places and as we shall see presently have also been actively participating in the affairs and business of the firm. Smt. Vidyavathi Murgai and Sri Pran Krishna Murgai are the wife and son of one who was a deputy secretary in the Government of India. As observed by the Tribunal in its earlier order, if these outsiders had really taken interest in the firm and also participated in its affairs as partners, that would certainly go a long way in proving the genuineness of the firm."

The Tribunal, in dealing with the appeals giving rise to the present reference, however, observed as follows :

"Of the seven partners of Messrs. J.S. Distributors, at least three are absolute strangers, totally unconnected or unrelated with the Hindu undivided family. Two others no doubt are brothers-in-law of Sri Satyanarayan Prasad, the karta of the Hindu undivided family. But for that reason alone we are not prepared to hold that they are the nominees or benamidars of the Hindu undivided family. As taken note of by us in our order on the registration of the firm, the letters produced there on the side of the firm showed that at least Sri Kailash Pathi, one of the brothers-in-law of the karta, was taking active part in the business as a partner. Nothing is placed before us to indicate that the position with regard to his brother was in any way different.

The same, however, in our opinion, cannot be said about the wife and son of Sri Satyanarayan Prasad. Between them they share to the extent of 52 per cent. Though the wife of Sri Satyanarayan Prasad is shown to have invested Rs. 2,731 as her share of the capital, nothing is produced before us to show that she by herself could have contributed the same. Similar is the case with her son in respect of the amount, if any, shown as his capital investment. It was the licences secured by the Hindu undivided family that were made over to the firm to exploit The office of the Hindu undivided family was made available to the firm. Though Sri Satyanarayan Prasad himself was not a partner,, we find him having taken a very active part in conducting the business. Much has been spent on his travelling and hotel expenses in connection with the business of the firm. It is his bank account that is allowed to be operated on behalf of the firm. The business was also being done in the name of the Hindu undivided family and from its office. All these, as we see them, indicate the large measure of interest which the Hindu undivided family was taking in the business. We are not prepared to explain this as only on account of the fixed commission percentage that it was to get under the terms of the agreement. In our view, these rather show a much bigger interest that the Hindu undivided family really had in the business. The same can be explained only if the wife and son of Sri Satyanarayan Prasad are considered as really representing the Hindu undivided family. In this view that we take, we hold that 52 per cent. of the business profits of J.S. Distributors in these years is to be added as the income of the Hindu undivided family. To this extent alone we allow the Department''s appeals."

10. It may be mentioned that subsequently by an order passed by the Tribunal on February 7, 1975, the underlined portion of the aforesaid order has been deleted.

11. It appears that the Tribunal in holding that 52 per cent. of the business profit of Messrs. J.S. Distributors be added to the income of the Hindu undivided family on the ground that the wife and the son of Sri Satyanarayan Prasad who in between themselves held 52 per cent. share of profit of the partnership firm in fact represented the Hindu undivided family, did not consider all the facts of the case which are relevant for the purpose of determining this issue. The Department while admitting the genuineness of the firm as well as the agreement in question contended that even on the basis of the agreement the conclusion follows that the wife and son of Sri Satyanarayan Prasad did really represent the Hindu undivided family in the partnership firm. In our view, the Tribunal did not decide the question in the proper perspective. All the documents and evidence relevant for deciding this issue have not been considered. The Tribunal did not consider the effect of the agreement which had been relied upon before the Tribunal in the case arising out of the registration appeal. It also appears in the subsequent years that further documents by way of affidavits and wills had also been relied upon but no specific finding has been given by the Tribunal. In our view, therefore, it will be just and proper that the Tribunal should rehear the appeal in the light of the evidence which was produced before the Tribunal in the registration appeal as well as the quantum appeals out of which the present reference arises. If necessary, the Tribunal will be at liberty to remand the matter back to the Assessing Officer to consider the variety of evidence or affidavit and after considering the remand report of the Income Tax

Officer, the Tribunal shall give a fresh finding. Parties will be at liberty to adduce such evidence as they may be advised before the Tribunal inasmuch as the Tribunal decided the issue on an alternative contention taken for the first time before the Tribunal and accordingly the parties did not have the opportunity to bring all the evidence which was germane for determining the question whether the wife and son of Sri Satyanarayan Prasad had really represented the Hindu undivided family notwithstanding the agreement or other evidence relied upon by the assessee. It will be for the Tribunal either to examine the deponents of any of the affidavits or refer the same to the Assessing Officer for fresh determination.

12. In that view of the matter, we decline to answer the second question and direct the Tribunal to dispose of the appeal afresh in accordance with the observations made in the judgment.

13. No order as to costs.

Bhagarati Prasad Banerjee, J.

14. I agree.