
(1938) 05 AHC CK 0001
In the Allahabad High Court
Case No : Miscellaneous Case No. 48 of 1936
JUGAL KISHORE MUKAT LAL, IN RE.

Date of Decision : 05-05-1938

Acts Referred:

Income Tax Act, 1961 — Section 66(2)

Citation : (1938) 6 ITR 494

Hon'ble Judges : Collister, J;Cllister, J;Bajpai, J

Bench : Full Bench

Judgement

CLLISTER and BAJPAI, JJ. - This is a reference u/s 66(2) of the Indian Income Tax Act by the learned Commissioner of Income Tax, Central and United Provinces, by which our opinion is sought on one question of law. The statement is dated the 5th January 1936 and the question of law is :-

"Whether, when at the time of assessment, a genuine firm had emerged from the disruption of a Hindu undivided family, the joint income of the account year - whether allocable to a part or the whole of that year - had to be assessed in the manner laid down in Section 25A(2); or whether, in view of the succession to the business of the assessee - an erstwhile Hindu undivided family - by a partnership firm consisting exclusively of the members of the family, the assessment had to be made in the manner laid down in Section 26(2)".

The facts may be briefly stated. The assessment year in question is 1933-34 and the accounting year is the Sambat year 1989 ending roughly with the financial year 1932-33. The assessees Messrs. Jugal Kishore Mukat Lal of Khurja were assessed up to the assessment year 1932-33 as a joint Hindu family. The assessment for the year 1933-34 was made by the Income tax Officer on the 19th December 1934. Prior to this date an application had been made to him that a partition had taken place amongst the members of the undivided family and that a firm had been newly constituted and therefore the Income Tax Officer should proceed to assess under Sec. 26 of the Indian Income Tax Act and should also register the firm under Sec. 26-A of the Act. The Income Tax Officer held in the course of the assessment order itself that actual separation in the family took

place in the beginning of Sambat 1980 corresponding roughly to April 1933. He refused to register the firm under Sec. 26-A and made the assessment on the basis of Sec. 25-A (2).

His order was confirmed in appeal by the Assistant Commissioner of Income Tax. On a joint application for review under Sec. 33 and for a reference to this Court under Sec. 66(2) the learned Commissioner of Income Tax refused to give any relief under Sec. 33, but referred the case to us under Sec. 66(2). In his order under Sec. 33 he observes as follows :

"The real point at issue is whether when, at the time of assessment, a genuine firm has emerged from the disruption of a Hindu undivided family, the income of the account year is to be assessed in the manner laid down in Sec. 95-A or whether in view of the succession to the business of the erstwhile Hindu undivided family by a partnership firm, it is to be made in the manner laid down in Sec. 26(2). The questions of disruption and succession arose simultaneously in the course of the assessment in dispute and were present before the Income Tax Officer at the time of making it. If it is held that in such circumstances the provisions of Sec. 25-A(2) have been eclipsed by those of Sec. 26(2), I have no hesitation in accepting the contention that the emergent firm whose existence has not been disputed should have been registered under sec. 26-A..... If the assessee is successful and the High Court holds that in the simultaneous application of Secs. 25-A and 26(2) the assessment must be made in the manner laid down in the latter section, that is to say, that it must be made on the footing that a succession had occurred, then the assessee would be entitled and I should be prepared to order an assessment in the status of a registered and not an unregistered firm".

It is thus clear that if we answer the question of law formulated by the Commissioner in favour of the assessee, the Commissioner would be prepared to give him adequate relief by passing formal orders.

As we said before, the Income Tax Officer made the assessment on the 9th of December 1934; the disruption on the family took place sometime in April 1933 and, as pointed out by the Commissioner, the question of disruption and succession arose simultaneously. We must therefore take it that at the time of making an assessment a partition had taken place among the members of the family and a firm had been newly constituted.

The question then arises whether under these circumstances the assessment should be made under Sec. 25-A(2) or under Sec. 26(2). As we read the above two provisions of law, we are of the opinion that Sec. 25-A applies only where there has been a partition among the members of the undivided family and nothing more. Sec. 26 would apply where a firm has been newly constituted, and it does not matter whether this firm owes its origin to certain individuals, strangers to each other, entering into a contractual relationship and agreeing to constitute a firm, or whether it owes its origin to a joint family whose members

have divided amongst themselves and who have now entered into an agreement to constitute themselves into a firm. In either case, when at the time of making an assessment a firm has come into existence, the assessment must proceed on the basis of Sec. 26.

It may be mentioned that in the course of the assessment for the year 1934-35 the assessee was assessed as a genuine firm on the 24th January 1935, although the firm had come into existence sometime in April 1933, as found by the learned Commissioner in the present case. The learned Commissioner had before him the authority of a Bench of the Lahore High Court in the case of *Beli Ram and Brothers, Lahore v. Commissioner of Income Tax, Punjab, N.W.F. and Delhi Provinces*, where it was held, "Where on the breaking of a joint family the separated members immediately from themselves into a firm, Sec. 26 will come into operation and the assessment on the firm should be made under that section and not under Sec. 25-A of the Act", but this case was distinguished on the ground that in the Lahore case only some members of the quondam Hindu undivided family formed the partnership and this brought about a change of identity so far that it was possible to say that there had been a succession by another person within the meaning of Sec. 26, but in the case of the present assessee the members of the new firm were the members of the undivided family and thus there was not succession of one person by another person within the meaning of Sec. 26(2). We are unable to agree with this view. Sec. 3 of the Indian Income Tax Act speaks of an Individual, Hindu undivided family, company, firm and other association of individuals" and it is clear that all these expressions are mutually exclusive. u/s 2 clause (9) person includes a Hindu undivided family, but it does not include a firm, and therefore looking into the facts of the present case it can safely be said that a person carrying on a business, profession or vocation (namely, the joint undivided family) has been succeeded in such capacity by another entity (namely, the firm). After the date of the statement by the Commissioner a Full Bench of the Lahore High court in the case of *Messrs. Mittarchand Lakshmidas v. Commissioner of Income Tax, Lahore*, has on almost similar facts, held that the assessment ought to be made on the basis of Section 26, and has pointed out that the mere fact that in the previous Lahore case only some of the members of the joint Hindu family had continued the business on contractual basis while in the case before them all the former members of the family have constituted themselves as a firm on contractual basis makes no difference whatsoever, because the business which was carried on by a joint family is now continued by a firm which has been newly constituted. The matter came up for decision again before the Lahore High Court in *Ram Rakha Mal & Sons Ltd., Amritsar v. Commissioner of Income Tax, Lahore*, and a Bench of that Court reiterated the view held by that Court in the former two cases and observed that Section 25-A of the Indian Income Tax Act "applies only to those cases where the question involved is one of pure and simple disruption of a Hindu undivided family unattended by conversion or transformation into a new entity" and that sub-sections (2) and (3) of Section 26 "is intended to meet

completely those cases which are specified in sub-section (1) and (2) thereof respectively, in whatever way the situation envisaged there may arise."

We are in complete agreement with the view entertained by the Lahore High Court, and our answer to the question referred to us is that the assessment in the present case ought to be made in the manner laid down in Section 26(2) of the Indian Income Tax Act. Let a copy of this judgment be sent to the learned Commissioner of Income Tax under the seal of the Court and the signature of the Registrar. The department must pay the costs of this reference. We fix the fee of the counsel for the department at Rs. 100. He will file the certificate within six weeks.