(2018) 01 KAR CK 0149

In the Karnataka High Court

Case No : 24235 of 2016 c of w WRIT PETITION No 24236 of 2016 (EXCISE)

M/S M.K. SWAMY & SONS APPELLANT

Vs

THE COMMISSIONER OF EXCISE IN KARNATAKA & Anr RESPONDENT

Date of Decision : 08-01-2018

Acts Referred:
Central Excise Act, 1944, Section 61(2)

Citation : (2018) 01 KAR CK 0149

Hon'ble Judges : Vineet Kothari

Bench : Single Bench

Advocate : B.N. SHETTY, RAMESHA G.P., NILOUFER AKBAR

Final Decision : Disposed off

Judgement

1. The controversy in the present case about the levy of Transfer Fee on the change in the constitution of partnership firm has been decided by this

Court in the case of M/s.Shankar Wines & Another Vs. The Commissioner of Excise in Karnataka & Another in W.P.No.30590/2014 c/w

W.P.No.56657/2014 on 22.08.2017.

2. The relevant portion of the said judgment is quoted below for ready reference:-

11. After having discussed the legal position in detail, since the matter was remanded back to the Deputy Commissioner of Excise in view of the

alternative remedy available to the petitioners under Section 61(2) of the Excise Act, in the absence of any specific guidelines laid down by this

Court then, it is felt expedient now that the discretion to be exercised by the Deputy Commissioner in this respect may differ from one officer to

another and this may cause unnecessary litigation on account of different views. Therefore, it is considered expedient and proper by this Court to lay down the guidelines with regard to the same. The learned counsels on both the sides also agreed for the same.

12. It is to be seen first that when such a change in the constitution of partnership firm would effectively result in change in the control and

management of the partnership firm, who is the Excise Licencee in question. If an outright sale of business takes place and entire new set of

partners takes over the business, then there is no difficulty in applying Rule 17-B to such a case and for transfer of Excise Licence in the name of

the new partnership firm, even though, it has continued to carry on the business in old and existing name and style of the partnership firm. But, the

difficulty may arise where the change in the constitution of partnership firm takes place in a phased or staggered manner. Therefore, a thumb rule of

50% or more of the change of the share in the profits and losses of the partnership firm is considered to be appropriate and the said thumb rule of

50% change in the existing partnership firm composition was found to be acceptable to both the sides, the petitioners as well as the Excise

Department, also.

13. The said rule of 50% or more of change in composition would operate in the following in the manner:-

Suppose, the Excise Licencee is in the partnership firm ie., M/s. ABCD, Bangalore with four partners namely A, B, C, D each having 25% of

shares in the partnership firm and the Excise Licence is held during the current year July 2017 to June 2018. On 31.12.2017 , partner with 25%

share retires and a new partner ''X'' is introduced in the partnership firm giving ''X'' 25% of share. Since in the said illustrative case, the partnership

firm of M/s.ABCD does not lose 50% or more of its effective control and ''X'' is introduced in the firm with only 25% of share, this will not attract

the transfer fee and the new partnership firm M/s. ABCX can be given the same Licence upon a transfer being recorded under Rule 17-B of

Rules, 1967, without payment of transfer fees.

14. In the next change in the constitution of partnership firm, if partner ""C"" also retires with 25% share and a new partner say ''Y'' is introduced and

he is also given 25% share in place of ""C"", the new firm M/s.ABXY will be a new firm, where the original partnership firm M/s.ABCD loses 50%

of its stake in the new partnership firm M/s.ABXY . At this stage, a new firm M/

s.ABXY can get Licence transferred in their name only upon

paying the transfer fee in terms of Rules 17-B of Rules, 1967.

15. Taking another example, if two partners at the same time like A and B retire out of the firm M/s.ABCD and 50% is given to the new partners

entering at the same time namely, X and Y with 25% share to each, even then upon such change of licence from M/s.ABCD to M/s.CDXY , it will

attract the transfer fee under Rule 17-B. In terms of the aforesaid thumb rule of 50% or more of the effective control of existing Licencee

partnership firm is divested and given to the newly entering partners.

16. If it is a case of more than 50% of share (effective control) is divested by the existing Licencee firm and such share of 50% or more of the

profits of the partnership firm of the existing partners is given to the newly entering partners, there is no question of any confusion and such a

change in the partnership firm will definitely attract the transfer fee under the Rule 17-B of Rules, 1967.

17. While considering the case of change of partners, it will not matter even if an outgoing or incoming partners are the family members. So, even if

the husband and wife of the partnership firm goes away upon retirement from partnership firm and the new partner who may or may not be a family

member comes in, if the 50% of the existing partners who hold the Licence at a particular relevant point of time is given away to other new

incoming partners, then, it will be a transfer attracting the transfer fee under Rule 17-B of the Rules, 1967.

18. In other words, so long as the existing partners do not divest themselves to 50% or more of the stake in the partnership firm which holds the

Licence in question, the transfer fee applicable under Rule 17-B of the Rules will not be attracted or will not be payable. But the moment, the

change is effected by one or more of the partnership deeds subsequently executed to divest the existing partners divesting of 50% or more and

such 50% or more is the stake given to the incoming partner(s), it will attract the transfer fee under Rule 17-B of Rules, 1967 irrespective of their

relationship with the existing partners.

19. To effectively implement this yardstick of 50% or more, an obligation would be cast upon the existing Licencee firm to immediately inform to

the Excise Department of any change in the constitution of partnership firm which may be effected in the said partnership firm whether it divests the

existing partners of 50% of their stake or less or more, so that the Excise Department can keep a track of every change in the composition of the

partnership firm at all the stages and can apply the aforesaid rule of 50% or more, whenever the said threshold of 50% by the existing partnership

firm Licencee is crossed, the transfer fee may be imposed and collected by the Excise Department.

20. In case, the partnership firm who holds the licence does not inform the fact of change in the constitution of partnership firm within a reasonable

period, say within a period of one month from the change in constitution of partnership firm, the concerned Excise Authorities may even proceed to

initiate action against the Licencee of the partnership firm to impose suitable penalty and even take action for cancellation of the Licence itself.

21. Thus, with the aforesaid illustrative examples of change in the constitution of partnership firm for the purpose of Rule 17-B, it is held that there

would be implied effective change of control and management of the said partnership firm, if 50% or more of its stake in the profit sharing ratio

changes hands and existing strength of group of partners loses 50% or more of the total stake of 100%, then such a change in the constitution of

partnership firm will attract the payment of Transfer Fee under Rule 17-B. Below 50%, it will not attract the payment of transfer fees. The change

of 50% or more will be reckoned with reference to the existing excise licence composition of firm and transferred excise licence under Rule 17-B

and at the every stage of 50% or more of change of stake by exit and entry of partners in the firm it will so attract the transfer fees and for

regulating such change in the constitution of Partnership Firms; every change of the constitution will have to be informed by the licencee firm to the

Excise Department and they will maintain the record of all such changes in the constitution of the partnership firms on regular basis.

22. The said thumb rule of 50% or more will be attracted at each stage of crossing of such stake of 50% or more when compared with the

composition of the firm in whose favour the Excise Licence exists and is sought to be transferred upon the payment of transfer fees under Rule

17B. In other words, when 50% or more of the stake of the licence partnership firm is effected, even in the cases of the transferred Licencee partnership firm a change is further effected again in such partnership firm - composition, divesting the existing partners in such Licencee firm of

50% or more of their stake jointly or severally and the new incoming partners are given such 50% or more of the stake in the partnership firm, then

again it will amount to a ''transfer'' within the meaning of Rule 17-B of Rules, 1967 and will again attract the transfer fee under the said Rule.

23. It is made clear that these guidelines are only for the purpose of imposition, levy and collection of ''transfer fee'' and it has nothing to do with

the compliance with the other conditions given in Rule 17-B, namely, that the transferee firm should be otherwise also eligible to get the Excise

Licence to be transferred in the name of such firm. If there is any other disqualification and ineligibility with the transferee partnership firm, then the

Deputy Commissioner will of course be free to take his own decision and pass appropriate orders depending upon the facts and circumstances of

each case and it is again reiterated that this judgment only lays down the parameters and yardsticks for attracting the transfer fees under Rule 17-B

of Rule of 1967. This is done to avoid different views by different authorities all over the State and to achieve a uniformity in such cases and also to

avoid unnecessary litigation at different forums, may be before the Departmental Authorities or even before this Court as far as the issue of levy of

transfer fee is concerned under Rule 17-B of Rules of 1967.

24. It is also clarified that the aforesaid Rule 17-B will also stand attracted in the cases where there are only two partners. For example, A and B,

each having 50% of shares and one partner B retires, but no new partner is taken in and firm M/s. AB is converted into a proprietorship concern

of Mr.A. This will also attract transfer fee, if the proprietorship concern of Mr.A seeks such transfer of the licence under Rule 17-B. In the same

case, even though the share of Mr.A may be 70% and share of Mr.B is only 30%, but since with the B''s retirement no new partner is taken in, the

change would convert a partnership firm into a proprietorship concern of Mr.A and it will still attract the transfer fee and if Mr.A wants the Licence

to be transferred in the name of Mr.A as a proprietorship concern, A will have to pay the transfer fees. This additional point also requires a

clarification because even if the Excise Licencee does not continue in the form of partnership firm, but such a change converts a partnership firm into a proprietorship concern or vice-versa ie., a proprietorship concern becoming a partnership firm, such cases would also attract Rule 17-B,

irrespective of aforesaid rule of 50% or more of change in share or in other words effective control of the partnership firm.

The petitions are disposed of accordingly.

No costs"".

3. In view of the same, the present writ petitions are also disposed of in the same terms. No costs.

