
(1987) 07 AHC CK 0015
In the Allahabad High Court
Case No : Income-tax Reference No. 168 of 1982

Raj Stores

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 08-07-1987

Acts Referred:

Income Tax Act, 1961 — Section 184, 185, 186, 256(1)

Citation : (1987) 65 CTR 146 : (1988) 170 ITR 119

Hon'ble Judges : Om Prakash, J;A.N. Varma, J

Bench : Division Bench

Advocate : V.B. Upadhya, for the Appellant;

Judgement

Om Prakash, J.—This is a reference u/s 256(1) of the Income Tax Act, 1961 (briefly "the Act, 1961"), by the Income Tax Appellate Tribunal, Allahabad Bench, which at the instance of the assessee has referred to this court the following question for our opinion :

"Whether, on the facts and in the circumstances of the case, the registration already granted to the assessee was rightly cancelled u/s 186(1) of the Income Tax Act, 1961 ?"

2. The assessee, a firm constituted under a deed of partnership dated December 29, 1967, came into being with effect from December 11, 1967, with the following constitution :

Profit

Loss

P.

P.

Chand Ram

28

30

Indra Prakash

28

37

Bhagwas Das

16

26

Pawan Kumar

28

Nil

3. Pawan Kumar was a minor when the aforesaid deed was executed and, therefore, he was simply admitted to the benefits of the partnership. He was not liable to share losses.

4. The firm was granted registration for the assessment year 1969-70 and the registration was continued for the next following years till the assessment year 1975-76 on the basis of declaration filed in Form No. 12 by the firm. For the assessment year 1976-77 also, the assessee-firm filed a declaration in Form No. 12 on June 29, 1976, along with the return. The Income Tax Officer, however, discovered that Pawan Kumar whose date of birth was September 19, 1951, attained majority on June 19, 1969, and that the partnership deed dated December 29, 1967, did not contain any provision as to how the losses would be distributed after the minor attained majority. He also noticed that no Form No. 11A indicating change in the share ratio in losses was filed by the assessee. As the partners had unequal shares in profits and losses of the firm, the Income Tax Officer took the view that the assessee-firm was not entitled to registration in the absence of the redistribution of shares in losses being shown in the partnership deed. He, therefore, by the impugned order purportedly passed u/s 186(1) of the Act, 1961, held that "the continuation of registration granted in earlier year is refused in the assessment year 1976-77".

5. The assessee appealed to the Appellate Assistant Commissioner who accepted the contention of the assessee that the registration could not be cancelled u/s 186(1) on the facts and in the circumstances of the case and he, therefore, annulled the Income Tax Officer's order. He held that registration can be cancelled only on the ground that there was no genuine firm in existence, that Section 186 cannot be invoked when the firm in fact remained in existence and that the registration cannot be cancelled merely on the ground that no codicil was filed after the minor had become a major.

6. The Revenue then appealed to the Tribunal. Relying on the decision of the Supreme Court in the case of P.R. Chowdhary and S. Gangoli Vs. The State of U.P., , the Tribunal took the view that the assessee had failed to fulfill condition No. 5 as laid down by the Supreme Court and, therefore, there was no genuine firm in existence with the constitution specified in the instrument of partnership. It was also held that there was no provision for the distribution of losses amongst the partners when Pawan Kumar attained majority and elected to be a full-fledged partner. In the absence of any new partnership deed having been filed after the minor attained majority, the Tribunal held that Sri Pawan Kumar continued to be a partner only to enjoy the benefits of the partnership and that such a situation was contrary to law, inasmuch as no major partner could be admitted only to the benefits of the partnership. The Tribunal was of the view that when a minor attains majority, either the original partnership deed or a supplementary deed should have spelled out as to how the losses would be shared amongst the partners. The Tribunal, therefore, took the view that there was no genuine firm in existence during the previous year relevant to the assessment year 1976-77. The order of the Appellate Assistant Commissioner was, therefore, reversed and that of the Income Tax Officer was restored by the Tribunal.

7. Before taking up the question referred to us for our opinion, we would like to point out a snag in the reference, There is no case of the parties that the registration for the assessment year 1976-77 was ever granted (but assumed in the question referred to us) by the Income Tax Officer and later such registration was cancelled by the impugned order dated March 18, 1979 (on pages 22-23 of the paper book). u/s 186(1), the Income Tax Officer can cancel the registration of the firm for an assessment year, if he is of the opinion that there was during the previous year no genuine firm in existence as registered. The word "cancel" occurring in Sub-section (1) of Section 186, implies that the registration for the assessment year for which it is sought to be cancelled was already granted. If no registration is already granted for a given assessment year, then the question of registration being cancelled will not arise. What can be cancelled is the registration already granted for a particular year and if no registration was granted, then the question of such non-existent registration being cancelled is irrelevant and meaningless.

8. No doubt, while passing the order dated March 18, 1979, the Income Tax Officer labelled that order as an order u/s 186(1), but at the end of the order in para. 5, he clearly observed that "the continuation of registration granted in earlier year is refused in the assessment year 1976-77." So it is not a case where registration granted for the assessment year 1976-77 was cancelled, but it is a pure and simple case where the Income Tax Officer refused to grant "continuation" of registration granted in the earlier year. The facts as stated by the Income Tax Officer, the Appellate Assistant Commissioner and the Tribunal in their orders and by the assessee in the reference application will not be covered by Section 186(1), though the impugned order is labelled as one u/s 186(1) by

the Income Tax Officer. In the reference application (pages 42-46 of the paper book), the assessee has clearly averred that the registration was granted at the inception for the assessment year 1969-70 and that was continued year after year up to the assessment year 1975-76. It is further averred that "when the assessment for the assessment year 1976-77 was taken up, the then Income Tax Officer refused to allow the continuation of registration of the firm on the ground that no fresh partnership deed along with Form No. 11A was filed on the attaining of majority by Pawan Kumar as required under the Act." (emphasis* supplied)

9. So far as the facts are concerned, it appears that the parties rightly understood them in the sense that the Income Tax Officer refused to allow continuation of registration for the assessment year 1976-77 for which a declaration in Form No. 12 was filed, there being no case of the parties that on the declaration filed in Form No. 12 for the assessment year 1976-77, the Income Tax Officer granted continuation of registration and that was cancelled later by the impugned order. The Tribunal is, therefore, in error in referring to us the question mentioned at the foot of the statement of the case.

10. On the facts having been stated in the orders of the Income Tax Officer, the Appellate Assistant Commissioner and the Tribunal and in the reference application by the assessee, the question for consideration is : whether, on the facts and in the circumstances of the case, continuation of registration for the assessment year 1976-77 was rightly refused. Then, the question is whether this court can reframe the question. Needless to say, there is a chain of authorities on the proposition that the High Court has ample power and indeed it is its duty to recast or amend the question so as to bring out the real controversy between the parties, if that is warranted by the statement of the case. The only condition is that the questions of law should be raised by the reference. The court is not confined to the questions which the Tribunal was directed to submit. Several High Courts have held that where a question in an ambiguous and misconceived form has been referred to the High Court, it is certainly entitled to reframe it or amend the question suitably covering the real controversy borne out from the statement of the case. In *Commissioner of Income Tax, Bombay Vs. Scindia Steam Navigation Co. Ltd.*, , the Supreme Court held that sometimes the questions are framed in such general terms that, construed literally, they might take in questions which were never in issue. In such cases, the true scope of the reference will have to be ascertained and limited by what appears on the statement of the case.

11. Unequivocal facts as stated in the reference application and in the orders of the authorities below are that registration was granted in the beginning for the assessment year 1969-70 ; that was continued year after year for the assessment years 1970-71 to 1975-76 and that declaration in Form No. 12 for seeking continuation of registration was filed for the assessment year 1976-77, but the continuation of registration was not allowed by the Income Tax Officer.

These facts clearly show that no registration was granted for the assessment year 1976-77 and, therefore, the question referred by the Tribunal is misconceived and wholly divorced from facts. These facts fully justify our conclusion that the real question arising from the statement of the case is the one which we have formulated above, viz., whether, on the facts and in the circumstances of the case, continuation of registration was rightly refused for the assessment year 1976-77. We, therefore, take up this question first for decision.

12. The scheme of Sections 184, 185 and 186 of the Act of 1961, is that for seeking registration, a firm can make an application u/s 184 to the Income Tax Officer, if the partnership is evidenced by an instrument ; the individual shares of the partners are specified in that instrument; such application is made to the Income Tax Officer having jurisdiction to assess the firm before the end of the previous year for the assessment year for which the registration is sought ; the application is accompanied by the original instrument of partnership and whether that is made in the prescribed form. u/s 185, on receipt of an application, the Income Tax Officer shall inquire into the genuineness of the firm and its constitution as specified in the instrument of partnership, and if he is satisfied that a genuine firm, with the constitution specified, remained in existence during the previous year, then he shall pass an order registering the firm for the assessment year and if he is not so satisfied, he shall pass an order refusing to register the firm. Once registration is granted u/s 184(7), 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 before the expiry of the time allowed under Sub-section (1) or subsection (2) of Section 139 after furnishing the return of income for such subsequent year, a declaration to that effect in the prescribed form. Then comes Section 186 which empowers the Income Tax Officer to cancel the registration already granted, if he is of opinion that there was during the previous year no genuine firm in existence as registered. From the integrated scheme of Sections 184, 185 and 186, it is manifest that registration would be granted only to a genuine firm, if the Income Tax Officer is satisfied that during the previous year, such firm continued with the constitution specified in the instrument. If for a subsequent year, the Income Tax Officer is of the opinion that there is no change in the constitution of the firm or in the shares of the partners as stated in the instrument and that a declaration in Form No. 12 has been duly furnished within time, then the registration already granted will be continued for every subsequent year under Sub-section (7) of Section 184. The conditions contained in Sub-section (7) of Section 184 are there only to ensure that a genuine firm continued with the constitution as specified in the instrument on the basis of which the registration was already granted, a condition sine qua non for granting of registration u/s 185. If it appears in any subsequent year that a genuine firm for which registration was granted ceased to exist, then the registration already granted will be cancelled by the Income Tax Officer. The

pivotal point of these sections is the genuineness of the firm. So long as the firm remains genuine, it will continue to enjoy the benefit of registration. Once registration is granted, it was considered wholly futile that a firm should undergo the whole drill envisaged by Section 185 for obtaining the registration.

13. Sri V. B. Upadhyaya, learned counsel for the assessee, urged that, in fact, the assessee-firm continued to exist in the assessment year 1976-77, and it was, therefore, entitled to registration. The question is whether continuation of registration can be granted merely on the ground that a legal firm remained in existence in the year for which continuation is sought. For the purposes of Sections 184 to 186, a genuine firm cannot be equated with a legally constituted firm. The concept of a genuine firm for the purposes of these provisions is that a firm seeking either registration or continuation of registration must continue with the identity of partners and the share ratio in the profits and losses, as specified in the instrument. If there is a change in the identity of the partners and in the share ratio either in the profits or losses of the firm, then the firm ceases to be a genuine firm. So, to determine the genuineness of a firm, what is more important to see is whether the identity of partners and the share ratio in the profits and losses remained unaltered and not the legal frame "of the firm. A firm which continued with the same constitution but with the changed ratio in the profits or losses, cannot be said to be a genuine firm for the purposes of Sections 184 to 186, though it may be a legally constituted firm. Similar view was taken by a Division Bench of this court in *Setha Ram Dhanvir Singh Vs. Commissioner of Income Tax*, . In this case, it was held that (p. 154) : "The fact that the firm was actually carrying on business with the same partners, as were specified to be partners in the instrument of partnership, is not enough. The shares in the profits and losses must continue to be as specified in the instrument. Then alone it can be said that there is a genuine firm in existence as registered." Though different expressions to require genuineness have been used in Section 185, in Sub-section (7) of Section 184 and Section 186, their quintessence is that a genuine firm is one which remained in existence in the previous year with the constitution as specified in the instrument and with the same share ratio in the profits or losses, as evidenced in the instrument. If there is any change in either, then a firm ceases to be a genuine firm.

14. In this case, Pawan Kumar (minor), who was admitted to the benefits of the partnership, attained majority. The partnership deed dated December 29, 1967, on the basis of which registration was granted for the assessment year 1969-70 does not visualise as to how the losses will be distributed amongst the partners after the minor had become a major. The losses of the firm as per the said instrument were to be borne by the major partners only. After the minor attained majority, the shares in losses of the partners would surely undergo a change and, in fact, they did undergo a change in this case and it was argued by Sri Upadhyaya that after the minor attained majority, the partners agreed to share the losses in the proportion in which they had agreed to share the profits. The change is not evidenced by any partnership deed. The question is whether

despite the change in the ratio of losses, the assessee-firm was entitled to continuation of registration on the basis of the declaration filed in Form No. 12 for the assessment year 1976-77. In *BADRI NARAIN KASHI PRASAD Vs. ADDL. COMMISSIONER OF INCOME TAX. FANCY STORES v. COMMISSIONER OF INCOME TAX. R. C. GUPTA and SONS v. COMMISSIONER OF INCOME TAX. BENI PD. SIDGOPAL v. COMMISSIONER OF INCOME TAX.*, , a Full Bench of this court held that (p. 862) "the identity of the partners as well as their shares ought to be such as is evidenced by the instrument of partnership. If for any subsequent year there is a change either in the constitution of the firm or the shares of the partners and such change is not evidenced by the instrument, the original registration shall not have effect." Following this decision, we are of the view that it must be held that in the instant case, the assessee-firm ceased to be a genuine firm, as the change in the shares of the partners after the minor attained majority so far as the losses are concerned, was not evidenced by any instrument. The decision of the Full Bench fully clinches the issue.

15. Sri Upadhya, relying on *Mandyala Govindu and Co. Vs. The Commissioner of Income Tax, Andhra Pradesh, Hyderabad*, , urged that after the minor attained majority, no fresh agreement took place, amongst the partners regarding the losses and, therefore, it should be presumed that their shares in the losses and profits would be in like proportions. Referring to Clause (b) of Section 13 of the Partnership Act, 1932, Sri Upadhya argued that thereunder the presumption is that where the partners are entitled to share equally in the profits earned, they shall contribute equally to the losses sustained by the partners. This position will obtain when there is no contract amongst the partners. Since the partners in the instant case agreed to share the profits and losses in a specified ratio, Section 13(b), admittedly has no application, but what Sri Upadhya says is that there is another presumption that when shares in the profits are unequal and when there is no agreement regarding contribution to the losses, then it should be presumed that the partners agreed upon to contribute to the losses in a proportion matching to that of the profits. To support his viewpoint, he relied on *Mandyala Govindu and Co. Vs. The Commissioner of Income Tax, Andhra Pradesh, Hyderabad*, . The Supreme Court observed on page 6 of the said case that : "In the absence of any indication to the contrary, where the partners have agreed to share profits in certain proportions, the presumption is that the losses are also to be shared in like proportions." The opening words of this sentence clearly show that such position may obtain when there is no contract to the contrary, but if the partners had already agreed as to the shares in losses, as it has happened in the instant case in the instrument dated December 29, 1967, the presumption stated by Sri Upadhya on the basis of the Supreme Court decision will not arise. The submission of Sri Upadhya is that the shares in the losses were specified only in the instrument entered into at the inception, but no agreement as to the shares in the losses was arrived at when the minor attained majority. He, therefore, urged that the shares in the profits being unequal and there being no fresh agreement regarding sharing of the losses after the minor attained

majority, it would be presumed that the partners would share the losses in the same ratio in which they agreed to share the profits. This submission is fallacious, because the existence of the agreement is not to be seen with reference to the stage when the minor attained majority but vis-a-vis the stage when the partnership came into being under the instrument. On a minor who was not liable to share the losses attaining majority, a change in the loss-sharing ratio occurred and that was not evidenced by any instrument in this case and, therefore, in view of the Full Bench decision in the case of *BADRI NARAIN KASHI PRASAD Vs. ADDL. COMMISSIONER OF INCOME TAX. FANCY STORES v. COMMISSIONER OF INCOME TAX. R. C. GUPTA and SONS v. COMMISSIONER OF INCOME TAX. BENI PD. SIDGOPAL v. COMMISSIONER OF INCOME TAX.*, , the assessee-firm will not be entitled to continuation of registration for the assessment year 1976-77 on the basis of the registration granted for the earlier years. The contention of Sri Upadhyaya that the statement of Pawan Kumar on attaining majority was recorded by the Income Tax Officer and then he clearly stated that after attaining majority, the partners agreed to share the profits and losses in the like proportions and, therefore, the absence of any fresh agreement deed will not be prejudicial to the case of the assessee, has to be rejected, because the terms of a partnership deed can be altered only by an instrument and not orally. Then, it was submitted that a codicil was filed with the Income Tax Officer. The Appellate Assistant Commissioner recorded a finding of fact that no codicil was ever filed with the Income Tax Officer. In view of this finding of fact which is binding on us, there is nothing on record to show that the change in the partnership terms was evidenced by any instrument.

16. Therefore, we agree with the Tribunal, affirming the decision of the Income Tax Officer, who refused to allow continuation of registration in the assessment year 1976-77, on the basis of the declaration filed in Form No. 12.

17. Let us now take up the question as referred by the Tribunal. The question referred by the Tribunal assumes that registration for the assessment year 1976-77 was already granted, though it is contrary to the facts. We proceed on the assumption that the registration already granted for the assessment year 1976-77 was cancelled by the Income Tax Officer by the impugned order dated March 18, 1979. As already pointed out, on the facts of this case, the assessee-firm ceased to be a genuine firm after the minor attained majority, inasmuch as the change in the shares in the losses was not evidenced by any instrument. The (inn constituted under the instrument dated December 29, 1967, to which registration was granted ceased to be a genuine firm on the minor attaining majority, since the shares of the partners in the losses thereafter which, admittedly, had undergone change, were not specified in any document. Therefore, even if it is assumed but not accepted that registration was already granted for the assessment year 1976-77, the Income Tax Officer, on the facts and in the circumstances of the case, would be fully justified in cancelling the registration. Cancellation would have been bad in law only when the assessee-firm had continued with the constitution as specified in the instrument dated

December 29, 1967, with the same share ratio in the profits and losses as evidenced by that instrument.

18. For the above reasons, we hold that the Tribunal was right in restoring the order of the Income Tax Officer.

19. We accordingly answer the question as formulated by us and the question as referred to us by the Tribunal in the affirmative.