

(1954) 09 OHC CK 0016
In the Orissa High Court
Case No : S.J.C. No. 26 of 1950

Ram Chandra Banshidhar

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 14-09-1954

Acts Referred:

Excess Profits Tax Act, 1940 — Section 15, 21, 7, 8
Income Tax Act, 1922 — Section 26, 66(2)

Citation : (1955) 21 CLT 166

Hon'ble Judges : Panigrahi, C.J.; Rao, J

Bench : Division Bench

Advocate : B.N. Mahanty, M.S. Mahanty and C.K. Ghase, for the Appellant; G.C. Das, for the Respondent

Final Decision : Allowed

Judgement

Panigrahi, C.J.—The points raised in this reference u/s 66(2) of the Indian income tax Act 1922 are as follows

(i) Whether the assumption of the Tribunal in their order dated 22nd March, 1949, viz., that the status of the Assessee as determined in the preceding years for income tax purposes cannot be challenged in the assessment proceedings under the Excess Profits Tax for subsequent years is correct and

(ii) If that assumption be found erroneous in law, whether on the facts and in the circumstances of this case, there has been any change of persons to disentitle the Excess Profits Tax.

2. The facts as found by the Tribunal are that the firm of Ramchandra Banshidhar was being assessed to income tax as a Hindu undivided family for several years prior to 1943, and that in that year Ramnarain Goenka and Narasingha Das entered into a partnership by an instrument of partnership executed on the 24th May, 1943. During the previous income tax assessment years 1939-40 and 1942-43 the Assessee was declaring his status as a firm, and claimed

registration as such, u/s 26(a) of the Indian income tax Act. The Assessee had already got himself registered as a firm on the 16th October, 1939, under the Indian Partnership Act, consisting of two partners, namely, Ramnarain son of Ramchandra Goenka, and Narasingha Das Bhowinka son of Banshidhar Bhowinka. On the strength of this he claimed to be registered as a firm, for purposes of assessment, u/s 26(a) of the income tax Act, but this claim was repeatedly rejected by the income tax authorities as there was no instrument of partnership specifying the individual shares of the partners, as required under that Sub-section. Subsequently, the Assessee was served with a notice, u/s 15 of the Excess Profits Tax Act 1940, for the chargeable accounting period, commencing from 17-3-42 and ending with 4-3-43. The Assessee filed a return declaring a profit of Rs. 65,536/-, but claimed a set-off of the deficiency of the earlier periods. The Excess Profits Tax Officer disallowed the set-off holding that there had been a change in the persons carrying on the business and that therefore the Assessee was not entitled to any relief u/s 7 of the Act. An appeal against this order to the Appellate Assistant Commissioner having proved unsuccessful, the matter was taken up to the income tax Appellate Tribunal, Madras Bench-B in E.P.T.A. No. 247 of 1948-49. The Tribunal, in disposing of this appeal, held that the status of the Assessee who had been described as a Hindu Undivided Family in the Income- Tax Officer's orders of the previous years could not be challenged in the proceedings under the Excess Profits Tax Act. They accordingly agreed with the finding of the Excess Profits Tax Officer, and held that there was a change of persons carrying on the business when the new partnership was constituted on 24-5-43 between the Hindu undivided family and Narasingha Das who was a stranger. The appeal was, therefor, dismissed.

3. The Excess Profits Tax Act of 1940 provides for the levy of a tax on excess profits arising out of a certain business whereas the Income Tax Act aims at charging the income of persons. It has, therefore, to be seen whether the business, as such, that was being carried on by the two persons who got themselves registered as partners during the earlier period has undergone a change. Section 8 of the Excess Profits Tax Act says that a business shall be declared to have been discontinued from the date of any change in the persons carrying on that business. It is found, as a fact, that Ramchandra and Banshidhar had been carrying on the business for at least 50 years, though it was not clear on what terms and conditions they had joined in the business. In the absence of a deed of partnership, specifying those terms, the Income Tax authorities were right in assessing Ramchandra as an H.U.F. (Hindu Undivided Family) but that does not negative the fact that Ramchandra was carrying on business with another person. These very two persons continued the business till the 24th May, 1943 when they defined their respective shares by a deed of partnership. It is nobody's case that Narasingha, son of Banshidhar, came into the business for the first time as a partner in 1943. Having regard to these circumstances, therefore, we must hold that there has, in fact, been no change of persons carrying on the business. The taxing authorities, however, felt that they were

bound by their previous order declaring the Assessee to be a Hindu undivided family and held that it was not open to the Assessee to go back upon that finding and re-agitate the matter. Even if this view were to be accepted, the order of the Tribunal rejecting the Assessee's claim must be held to be incorrect as the change in the person carrying on the business, as evidenced by the deed of partnership of the year 1943, came can be said to have taken place only after the chargeable accounting period. The chargeable accounting period is said to have commenced from 17th March, 1942 and ended on 4th April 1943, whereas the partnership was entered into on the 24th May 1943. Prima facie, therefore, the Assessee was entitled to relief u/s 7 for the chargeable accounting period as there was no change in the persons carrying on the business.

4. It will be noticed that Section 21 of the Excess Profits Tax Act extends certain provisions of the income tax Act to proceedings under the former Act the provisions of the several Sections of the Indian Income Tax Act apply, with modifications, as if they were incorporated in the Excess Profits Tax Act. But Section 26(a) of the Indian income tax Act is not one of those Sections which is made applicable to proceedings under the Excess Profits Tax Act. The intention of the Legislature was that irrespective of the status of an Assessee for purposes of income tax it was open to him to claim relief u/s 7 of the Excess Profits Tax Act. The refusal of the income tax authorities to register the Assessee as a firm is, therefore no bar to a reconsideration of the claim made on his behalf, in the proceedings under the Excess Profits Tax Act i and as such the principle of res judicata, as such cannot apply to orders made by taxing officers in assessment proceedings, as the income tax Officer is not a Court, and his previous orders treating the Assessee as a Hindu family are final only in so far as the assessments for those years are concerned.

5. Nor do we think that the Assessee is estopped from going back upon his previous admission and claiming a new status subsequent to May 1943.

6. It seems to us therefore that the assumption made by the Tribunal that the status of the Assessee in the proceeding years for income tax purposes cannot be challenged in the subsequent proceedings in connection with Excess Profits Tax Act, must be held to be erroneous. The first question is accordingly answered in favour of the Assessee.

7. The second question also must be answered in favour of the Assessee. As has been pointed out already, the chargeable accounting period ended on 4-4-48 and till then there had been no change in the persons carrying on the business. The Assessee was entitled to claim the status of a firm, irrespective of the absence of a deed of partnership and there was no material before the Excess profits Tax Officer to say, for purposes of 1943-44 assessment, that there was a change in the persons carrying on the business and that the Hindu undivided family became a firm. It may be that the Certificate of Registration No. 11 of 1939 under the Indian Partnership act may not by itself be sufficient to justify registration u/s 26(a) of the Indian income tax but there is no reason to hold

that it does not furnish adequate evidence of the constitution of the firm as such. .

8. In the result both the questions are answered in favour of the Petitioner. The Assessee is entitled to the relief claimed u/s 7 of the Excess Profits Tax Act of 1940. This application is allowed with costs. Hearing fee is assessed at Rs. 200/- (Rupees two hundred only).

Rao, J.

9. I agree.