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In the Madras High Court

S.S. Subbier and S.R. Narasimachari, Proprietors, Sri Kothandaram Spinning Mills and Kothandaram Weaving Mills — APPELLANT

Vs

The Commissioner of Excess Profits Tax — RESPONDENT

Date of Decision : 03-09-1958

Acts Referred:
Income Tax Act, 1961 — Section 66(2)

Citation : (1959) ILR (Mad) 391 : (1959) 2 MLJ 78

Hon'ble Judges : Balakrishna Ayyar, J;Balakrishna Aiyar, J

Bench : Division Bench

Judgement

Balakrishna Ayyar, J.—u/s 66(2) of the Indian Income Tax Act read with Section 21 of the Excess Profits Tax Act, the Income Tax

Appellate Tribunal has referred the following question for the decision of this Court:

Whether, on the facts and circumstances of the case, the two partnerships entered into on 23rd June, 1944 and 23rd September, 1944, in respect

of the weaving mills and the spinning mills, respectively, constitute one business carried on by the same person within the meaning of Section 2(5)

of the Excess Profits Tax Act.

2. The material facts are these: In December, 1934, two brothers named Ramudu Iyer and Subbier started a weaving mill called Sri Kothandaram

Weaving Mills. On 19th January, 1938, a deed of partnership relating to this mill and setting out among other things the proportion in which the

profits were to be shared was drawn up and executed by the partners. On 4th September, 1941, this deed of partnership was replaced by a fresh

one.

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3. In January, 1939, these two brothers jointly started a spinning mill called Sri Kothandaram Spinning Mills. Most of the money required for the

erection of the spinning mills came from the Kothandaram Weaving Mills. In March, 1942, a deed of partnership was executed in respect of the

spinning mills. Ramudu Iyer died in December, 1943. The partnership was continued between Subbier and Narasimhachari, son of Ramudu Iyer.

Two fresh deeds of partnership were executed, one on 23rd June, 1944, in respect of the weaving mills and another on 23rd September, 1944, in

respect of the spinning mills.

In the Income Tax assessments for 1941-42 and 1942-43 and the excess profits tax a assessment for the chargeable accounting periods 6th

September, 1940 to 12th April, 1941 arid 13th April, 1941 to 12th April, 1942, the weaving mills and the spinning mills Were held to be separate

concerns though they were owned by the same persons, Ramudu Iyer and Subbier. In the course of the Income Tax assessment for 1943-44, the

income of the two mills was treated as the income of one firm and a single assessment was made. This was upheld on appeal by the Appellate

Assistant Commissioner.

The subsequent Income Tax assessment for 1944-45 and the excess profits tax assessments for the two chargeable accounting periods ending

with 13th April, 1943 and 12th April, 1944, Were also made on the combined results of the two businesses.""--Vide paragraphs 14 and 15 of the

letter of reference by the tribunal.

However, on 4th November, 1945, the Income Tax Appellate Tribunal held that the spinning mills and the weaving mills should be separately

assessed. The Tribunal recorded the view:

We find the businesses are governed by the two different deeds and the terms in each of them are different from the other. Thus, we find the very

terms of the partnership do indicate that the businesses are separate.

4. The Appellate Assistant Commissioner applied that decision to the Income Tax assessment for the assessment year 1944-45 and to the excess

profits tax assessment for the chargeable accounting periods ended 13th April, 1943 and 12th April, 1944.

5. The appeal which the department took to the Appellate Tribunal was dismissed on 13th December, 1946. In dealing with the excess profits tax

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assessments, the Tribunal wrote.

The question, therefore, before us is to determine whether the two businesses (i.e.) Kothandaram Weaving Mills and Kothandaram Spinning Mills

are being carried on by the same person. Looking at the partnership deed, it is clear to us that the partnership is of one firm between two partners

individually whereas the other partnership is between two partners as representatives of their respective Hindu undivided families. In other words,

so far as Kothandaram Spinning Mills are concerned, it is a partnership entered into between the two Hindu undivided families through their kartas.

It cannot therefore be said that they are carried on by the same persons. We are therefore, not prepared to accede to the argument of the

authorised representative of the Department.

6. For the chargeable accounting periods ended 12th April, 1945 and 31st March, 1946, the Excess Profits Tax Officer amalgamated the income

of the two mills. He observed:

For excess profits tax, the unit of assessment is the business and not the person.... In this case, there is no doubt that both the Sri Kothandaram

Spinning Mill and the Sri Kothandaram Weaving Mill are carried on by the two persons, Messrs. S.R. Narasimhachari and S.S. Subbier jointly.

Hence, whatever may be the position for Income Tax, as regards the excess profits tax assessment is concerned, under the second proviso to

Section 2(5) of the Excess Profits Tax Act, the two businesses have to be treated as one business for assessment.

As the facts, however, show that both in the Kothandaram Spinning Mills and in the Kothandaram Weaving Mills the partners were the same, viz.,

the undivided families, represented by the two individuals, S.S. Subbier and S.S. Narasimhachari, I am making this assessment jointly on the two

partners combining the profits of the two businesses.

7. The Appellate Assistant Commissioner confirmed this decision.

8. On appeal the Tribunal, reversing the conclusion it had reached on 4th November, 1945 and 13th December, 1946, held:

that the weaving and spinning mills were parts of the same business carried on by the two partners Subbier and Narasimhachari for purposes of

Section 2(5) of the Excess Profits Tax Act.

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9. The assessees then came to this Court, and, in accordance with the directions issued to it, the Tribunal, has referred the question quoted above

for the determination of the Court.

10. It is not controverted that the partners who were parties to the deed dated 23rd June, 1944 and to the deed dated 23rd September, 1944, are

in both cases the very same persons. The learned Advocate-General who appeared for the assessee contended that notwithstanding the fact, the

firm created by the partnership deed of 23rd June, 1944, is different from the firm created by the partnership deed of 23rd September, 1944. He

pointed out that though a firm is not a juristic person for all purposes it is an assessable entity under the Indian Income Tax Act. Two persons may

enter into a partnership to trade, say in rice in Tanjore. The very same persons may enter into another partnership to trade in cotton seed in

Coimbatore. For the purpose of the Indian Income Tax Act the firm in Tanjore would be one entity and the firm in Coimbatore would be another

entity. The two would be wholly distinct. It would be only logical and proper to carry this concept into the Excess Profits Tax Act also, and, if we

do that, it will have to be held that the Kothandaram Weaving Mills and the Kothandaram Spinning Mills have each to be assessed separately:

In the course of his arguments the learned Advocate-General referred to Income Tax Commissioners v. Gibbs (1942) 10 ITR 121 : L.R. (1942)

A.C. 402. The material facts in that case are set out in the second paragraph of the speech of Lord Chancellor:

The firm of Sir R. W. Garden & Co., at the time when the assessment Was made, consisted of four partners who for the present purpose may be

designated, A, B, C and D, and this continued to be the composition of the firm on 1st January, 1938, when the first half of the Income Tax

resulting from the assessment became due. On 7th February, 1938, however, the composition of the firm changed, owing to the taking in of a fifth

partner, who may be called E. On 27th July, 1938, the Inspector of Taxes, purporting to act in accordance With Rule 9(1) of Cases I and II of

Schedule D certified to the General Commissioners particulars of the change which has taken place and the Commissioner thereupon purported to

adjust the assessment by charging to the firm of five persons, out of the total assessment of ï¿½69,355, the apportioned amount of ï¿½11,078,

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with the result that the firm of four persons Would be relieved of liability for tax on this latter figure, but would be left answerable for tax on the

balance of ï¿½ 58, 277.

The point for determination is set out in paragraph 3 of his speech.

But though the apportionment is correctly worked out, the respondents have thoughout insisted that no such apportionment under Rule 9 could

lawfully be made, since, according to them, the change during the year of assessment in the composition of the firm does not constitute a cessor in

carrying on the trade by A, B, C and D, and the succession "" by another person "", namely, A.B.C, and E in that trade. It is as to the validity of this

contention, and as to the proper construction and application of Rule 9, that the house has now to pronounce.

The Court of Appeal held that there had been no cesser in the carrying on of the trade by A, B, C and D. In the Court of Appeal Clauson, L.J.,

had reasoned,

that it is not a partnership firm which carries on trade, but its individual members who carry it on in partnership, and that the old partnership is not

to be regarded as ceasing to carry on trade, and the new partnership is not to be regarded as succeeding, when members of the old partnership

are also some of the members of the new and thus do not individually cease to carry on the trade at all.

This decision was reversed by the House of Lords. On pages 136 and 137 Lord Macmillan stated as follows:

The important thing to ascertain is the meaning of the Word ''person'' in the vocabulary of the Income Tax Acts. The word constantly occurs

throughout the Acts, and I think that it is most generally used to denote what may be termed an entity of assessment, that is, the possessor or

recipient of an income which the Acts require to be separately assessed for tax purposes. Rule 10 provides that ""where a trade or profession is

carried on by two or more persons jointly the tax in respect thereof shall be computed and stated jointly and in one sum, and shall be separate and

distinct from any other tax chargeable on those persons or any of them and a joint assessment shall be made in the partnership name"". The profits

of a business carried on by a partnership are thus treated as a separate subject of assessment and the assessment is made in the partnership name.

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The personification of partnerships is even more manifest in Rule 12, by which in certain circumstances a ''''partnership shall be deemed to reside

outside the United Kingdom notwithstanding that some of the members of the said partnership are resident in the United Kingdom."" That rule used

the expressions "" the trade or business of a partnership firm "". ""The said firm shall be chargeable"", ""an assessment may be made on the said firm in

respect of the said profit in the name of any partner resident in the United Kingdom"". Justification is thus not wanting for the view expressed by

Romer, L.J., that for taxing purposes ""a partnership firm is treated as an entity distinct from the persons Who constitute the firm"" Watson and

Everitt v. Bhinden 18 Tax Cas., at page 409. Having regard to the special vocabulary of the Income Tax legislation, I find no difficulty in

interpreting the words "" a person charged "" in Rule o to include the case of several persons associated together in partnership for the purposeof

carrying on a trade in common whose profits are by the Acts made the subject of separate assessment and separate charge.

Reference was also made to Jesingbai Ujamshi v. Commissioner of Income Tax (1949) 18 ITR 23 : 52 Bom. L.R. 49. That was a case in which

three persons carried on a business in partnership in Ahmedabad in insurance, brokerage, cotton, etc. The very same persons carried on another

business in Bhavanagar, and, the question was

whether these two partnerships constitute two different firms or Whether the three partner carry on the same firm and the same business at

Ahmedabad and Bhavnagar.

11. The Court held that they formed two different firms.

12. The instant case, however, is not one under the Indian Income Tax Act but under the Excess Profits Tax Act. Section 2(5) of that Act, so far

as is material, runs as follows:

''Business'' includes any trade, commerce or manufacture.... Provided further that all business to which this Act applies carried on by the same

person shall be treated as one business for the purposes of this Act.

13. The question, therefore, is what does the word ""person"" in this proviso meant. The definition in Section 2(17) of ""person"" is not helpful since all

it says is that

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''Person'' includes a Hindu undivided family.

14. We have, therefore, to fall back on the General Glauses Act to find out what the word ""person"" means. Clause (42) of Section 3 of that Act

gives this definition:

''Person'' shall include any company or association or body of individuals, whether incorporated or not.

15. The association of persons who owned the Kothandaram Weaving Mills is the same association of persons who owned the Kothandaram

Spinning Mills. Both are, therefore, the same "" person "". It is well established that while a corporation is one artificial whole

with partnerships the case is otherwise ; the members of these do not form a collective whole, distinct from the individuals composing it ; nor are

they collectively endowed with any capacity of acquiring rights or incurring obligations. The rights and liabilities of a partnership are the rights and

liabilities of the partners and are enforceable by and against them individually.

16. See pages 23 and 24 of the Eleventh edition of Lindley on Partnership.

17. In VISSONJI SONS AND CO. Vs. COMMISSIONER OF Income Tax, CENTRAL., it was observed:

In law a firm has no existence independently of its partners, and if there are two firms consisting of exactly the same partners, the real position in

law is that there is only one firm. It may carry on separate businesses, and may carry on those businesses indifferent names but in fact there is only

one firm in law.

18. We must, however, mention that this statement of the law was commented on as obiter in Jesingbhai Ujamshi Vs. Commissioner of Income

Tax, .

19. In the case reported in Shantikumar Narottam Morarji Vs. Commissioner of Income Tax, Bombay City, , the assessee claimed deduction u/s

10(2) of the Indian Income Tax Act and the question that the Court had to consider was whether Section 10 had any application to the case of an

assessee who is a partner of a registered firm. The contention of the Department and the decision of the Court in respect of that contention will

appear from the following passage:

Mr. Joshi''s contention is that Section 10 has no application at all because Section

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10 deals With the profits of a business carried on by the

assessee and according to Mr. Joshi the business in this case, is not carried on by the assessee but is carried on by the assessee along with a

partner or partners. Mr. Joshi says that a firm under the Indian Income Tax Act is an assessable entity and therefore a distinction must be made

between a business carried on by a firm and a business carried on by an individual. Although a firm is an assessable entity under the Indian Income

Tax Act a firm is not a legal entity. In the eye of the law a firm is a compendious expression used to indicate that several persons constituting that

firm are carrying on a business. But that compendious expression cannot give to the firm a legal entity or a legal existence. In law it is only the

partners who exist and who carry on the business. It is equally true that looking to the definition of ""partnership"" in Section 4 of the Partnership

Act, when you have a partnership business, the business is carried on by each of the partners, and the definition of a partnership in the Partnership

Act has been incorporated in the Indian Income Tax Act in Section 2(6)(b). Therefore the contention that Section 10(1) cannot apply to a partner

in a registered firm is untenable because he does carry on the business although that business happens to be a partnership business, and therefore if

any profits and gains are derived by the assessee from the business carried on by him, those profits and. gains must be brought to tax only under

this head, viz., the head falling u/s 10(1) which is the head of business.

20. That decision was followed by a Bench of this Court in P.M. Muthuraman Chettiar and Another Vs. The Commissioner of Income Tax,

Madras, .

21. From all this it is reasonable to conclude that though a business in carried on in the name of a firm, the persons carrying on the business are the

partners themselves and not the firm. The persons carrying on the business within the meaning of the second proviso to Section 2(5) of the Excess

Profits Tax Act would, in this view and in the present case, be Subbier and Narasimhachari. No doubt under the Indian Income Tax Act a firm is

an assessable entity, but, it acquires that status by virtue of the explicit provisions contained in that Act, and, there are no provisions in the Excess

Profits Tax Act justifying the carrying forward of this concept into the latter Act.

22. The very same question which the learned Advocate-General raised before us

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has been dealt with in R.C. No. 21 of 1951. The facts there

were remarkably similar The members of a Hindu family, six in number, effected a division in status in 1936. A deed of partnership was drawn up,

in October, 1938. Thereafter the same members carried on business at two different places under two different names. One business was in

Nandyal and the other was in Hindupur. Both the firms were registered u/s 26-A of the Income Tax Act and so far as the Income Tax was

concerned, they were assessed separately. But, for purposes of the Excess Profits Tax Act, the profits of the two business were combined and

assessed as a whole. The assessee contended that this was not correct as the two firms were different legal persons and the business must be

treated as having been owned by two different entities. This conention was negatived by the Department and also by the Appellate Tribunal. On a

reference made to this Court it confirmed the views of the Department and the Tribunal. The Court observed:

The same association of persons commenced two businesses, one at Nandyal and the other at Hindupur. In other words, the ownership of the two

businesses is vested in the same association of persons....There is only one combination of persons that carried on business both at Nandyal and

Hindupur. So long as the partnership is not a legal entity and has no corporate existence in the eye of the law it is impossible to treat the same

association of persons as two different legal entities merely because they Were carrying on businesses at two different places under different styles

and names.

23. The Court further explained how the position under the Indian Income Tax Act was different.

24. The learned Advocate-General did not dispute that this decision being that of a Division Bench of this Court is binding on us. But, he suggested

that the matter required reconsideration. We are, however, of the opinion that this decision lays down the law correctly. We see no justification for

referring the matter to a Full Bench.

25. It was next pointed out on behalf of the assessee that in November, 1945 and again in December, 1946, the Tribunal took the view that the

businesses were not carried on by the same persons and that it was not justified in reversing its view in respect of another year. No doubt it was

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not contended that the rule of res judicata applied to the Income Tax Appellate Tribunal, but, it was suggested that the principles of res judicata

should have been respected.

26. So far as this argument is concerned, it is sufficient to refer to the decision in Trustees, Nagore Durgah Vs. Commr. of Income Tax, Madras, .

At pages 814 to 816 the question is discussed at length and reference is made to the relevant English and Indian decisions. That decision is against

the contention of the assessee.

27. In the result, we would answer the question referred to us in the affirmative and against the assessee. The Department will get its costs.

Counsel''s fee Rs. 250.

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