(1998) 06 BOM CK 0051

In the Bombay High Court

Case No : Income-tax Reference No. 444 of 1984

S.T. Hatim and Co. APPELLANT

Vs

Commissioner of Income Tax RESPONDENT

Date of Decision : 09-06-1998

Acts Referred:
Income Tax Act, 1961 — Section 185

Citation : (1999) 151 CTR 355 : (1998) 234 ITR 358 : (1999) 106 TAXMAN 516

Hon'ble Judges : B.P. Saraf, J;A.Y. Sakhare, J

Bench : Division Bench

Advocate : Atul Jasani and Vasanti Patel, for the Appellant; Rajni Iyer, for the Respondent

Judgement

A.Y. Sakhare, J.—By this reference u/s 256(1) of the Income Tax Act, 1961 (the "Act" for short), the Income Tax Appellate Tribunal has referred the following questions of law to this court for opinion at the instance of the assessee ;

"(i) Whether, on the facts and in the circumstances of the case, the Tribunal was correct in coming to the conclusion that the present case is a case of change in the constitution of the assessee-firm in the year under consideration ?

(ii) Whether, on the facts and in the circumstances of the case, the Tribunal was correct in holding that u/s 185(3) of the Income- tax Act, 1961, the assessee was not entitled to substitute the declaration as contemplated u/s 185(7) of the Income Tax Act, 1961, by an application for registration referred to in Section 185(2) of the Act ?

(iii) Whether, on the facts and in the circumstances of the case, the assessee was entitled to registration under the Income Tax Act, 1961 ?"

2. In view of the decision of the Supreme Court in the case of Wazid Ali Abid Ali Vs. Commissioner of Income Tax, Lucknow, , learned counsel for the assessee has restricted his case for the grant of limited reliefs to the assessee. In view of the submission of learned counsel question No. 3 is redrafted as follows :

"(iii) Whether, on the facts and in the circumstances of the case, during the assessment year 1972-73, the assessee was entitled to the benefit of the registration of the partnership u/s 185 of the Income Tax Act, 1961, till the death of one of the partners on October 3, 1971 ?"

3. The facts relevant for the disposal of the reference application are as under :

The reference pertains to the assessment year 1972-73 for which the previous year is Samvat year 2027 ending on October 19, 1971. The asses-see-partnership firm was constituted under a deed of partnership dated January 28, 1970, with effect from November 10, 1969. At the time of its constitution, there were five partners, viz.,

(i) Shri Shaikh Turabhai Musani Malla (father)

(ii) Shri Sadikbhai Shaikh Turabhai Malla (son)

(iii) Shri Taherbhai Shaikh Turabhai Malla (son)

(iv) Shri Hatimbhai Shaikh Turabhai Malla (son)

(v) Shri Mohmed-Ul-Bakir Shaikh Turabhai Malla (son).

4. Each partner had 20 per cent, share in the profit and loss. The partnership was at will. As per clause No. 5 of the partnership deed, on the death, insolvency or retirement of any of the partners, the partnership was not to dissolve but was to be continued by the remaining partners after adjusting their shares by mutual agreement. Clause No. 5 of the partnership deed reads thus :

"Clause 5.--Death, insolvency or retirement of any one of the partners shall not dissolve the partnership firm but the same shall be continued by the remaining partners after adjusting their shares by mutual agreement."

5. For the assessment year 1972-73, the partnership firm was registered u/s 185 of the Act. Sixteen days prior to the end of the assessment year under consideration one partner died. The remaining four partners executed a new partnership deed dated June 23, 1972, effective from October 3, 1971, and continued the same business. For the subsequent assessment year, i.e., 1973-74, an application for registration in Form No. 11A of the Act was filed and the partnership firm was registered u/s 185 of the Act. As per the new partnership, the ratio of profit and loss amongst the four partners was 25 per cent. each. For the assessment year under consideration (1972-73) though one partner died on October 3, 1971, the partnership firm along with its return filed a declaration in Form No. 12 for renewal of registration u/s 184(7) of the Act. Admittedly, after the death of one of the partners, the assessee did not file an application for registration in Form No. 11A.

6. Upon query by the Income Tax Officer, as to whether a change in the constitution of the partnership has taken place, the assessee replied that during the relevant assessment year there was no change in the constitution. This

explanation was not accepted by the Income Tax Officer and the assessee was assessed as unregistered firm. In appeal filed by the assessee before the Appellate Assistant Commissioner of Income Tax, it was conceded that a change in the constitution of the partnership firm had occurred due to the death of one partner but the explanation was tendered that due to short time available of 16 days (as the assessment year was to end on October 19, 1971), it was not possible for the assessee to file an application in Form No. 11A for registration. It was submitted by the assessee that the Income Tax Officer ought to have called upon the assessee to submit Form No. 11A in place of Form No. 12 for the relevant assessment year and ought to have condoned delay in filing Form No. 11A. The Appellate Assistant Commissioner allowed the assessee''s appeal by holding that non-filing of the registration Form No. 11A for registration was a bona fide mistake ; the assessee was an old firm for whom the registration has been given all along ; in view of the death of one partner there was change in the constitution of the firm and the said change occurred at the end of the assessment year, It was further held that the firm is genuine and other partners continued the business. On these reasons, the Appellate Assistant Commissioner directed the Income Tax Officer to permit the assessee to submit Form No. 11A to condone the delay and, thereafter, pass an order of registration u/s 185 of the Act.

7. Against the order passed by the Appellate Assistant Commissioner, the Revenue filed an appeal before the Income Tax Appellate Tribunal. Before the Tribunal several questions were raised and decided. However, as the advocate for the assessee has restricted his arguments for limited relief, it is not necessary to refer to all the submissions made and findings recorded thereon by the Tribunal. The Tribunal came to the conclusion that in view of the change in the constitution of the firm, the direction of the Appellate Assistant Commissioner to give the assessee an opportunity to rectify the defect was not proper. The Tribunal was of the opinion that the assessee having filed an application in Form No. 12 for renewal of registration, now cannot file application for registration in Form No. 11A, The Tribunal, thus, held that the Appellate Assistant Commissioner was not right in directing the Income Tax Officer to permit the assessee to file Form No. 11A for registration.

8. The facts narrated above will show that relevant assessment year is 1972-73 of which previous year is Samvat year 2027 ending with October 19, 1971. Under a deed of partnership dated January 28, 1970, the partnership firm was constituted with effect from October 10, 1969. At the time of constitution, there were five partners each having 20 per cent, share in the profit and. loss. The partnership was at will. In the event of death of one of the partners, other partners were eligible to continue the partnership. The assessee was registered for the relevant assessment year u/s 185 of the Act. One partner died on October 3, 1971, i.e., 16 days prior to the end of the assessment year, ending on October 19, 1971. Thus, change in the partnership occurred 16 days prior to the end of the assessment year under consideration. The assessee conceded before the

appellate authority that the change in the constitution of the partnership firm had occurred on account of death of one of its partners and instead of applying for registration by filing Form No, 11A, the assessee has filed Form No. 12 for continuation of registration.

9. Learned counsel for the assessee submitted that in view of the decision of the Supreme Court in Wazid Ali Abid Ali Vs. Commissioner of Income Tax, Lucknow, the assessee will be entitled to avail benefit of registration during the assessment year 1972-73 up to the date of death of the partner on October 3, 1971. Learned counsel submits that the Income Tax Officer ought to have granted benefit of registration u/s 185 of the Act for the period between October 20, 1970, to October 3, 1971.

10. The Supreme Court in Wazid Ali Abid Ali Vs. Commissioner of Income Tax, Lucknow, has considered the effect of death of one of the partners during the assessment year and has held that the earlier registration will be available for part of the year, i.e., till the date of death of the partner. In Wazid Ali Abid Ali Vs. Commissioner of Income Tax, Lucknow, during the assessment year one partner died, and a new deed of partnership evidencing the change in the constitution of the firm was not executed before the end of the assessment year. The assessee filed declaration in Form No. 12 for continuation of the registration. Similar submissions which are advanced in the present reference were advanced before the Supreme Court, that there was no necessity to file fresh application for registration, in the alternate it was submitted that the assessee was entitled to the benefit of registration for at least that part of the previous year during which all the partners were alive. While accepting the alternate submission, the Supreme Court has observed that death of the partner during the assessment year does not make the registration up to the date of death of the partner invalid and that the asses-see is entitled to the benefit of registration up to that date. The relevant observations on page 776 are as follows :

"In the background of the facts of this case, we are of the opinion that the High Court was right that in such circumstances, the course open was to seek registration to execute a new deed of partnership and to apply for the registration of that deed. But that does not make the registration up to the date of death of the deceased partner invalid and, in our opinion, subject to any express prohibition indicating the same, the firm is entitled to the benefit of registration. We have found no such express prohibition, as the analysis of the various Sections indicates. On the other hand, it would be just and equitable that the assessee should have that limited benefit. We are of the opinion that the Tribunal took the correct view in the first case."

11. In view of the decision of the Supreme Court in Wazid Ali Abid Ali Vs. Commissioner of Income Tax, Lucknow, it must be held that in the present case, the assessee will be entitled for the benefit of registration till the death of the partner on October 3, 1971. Thus, for the assessment year 1972-73 (Samvat year 2027) which ended on October 19, 1971, the assessee will be entitled to the

benefits as a registered firm u/s 185 of the Act from October 20, 1970, to October 3, 1971.

12. In view of the decision of the Supreme Court in Wazid Ali Abid Ali Vs. Commissioner of Income Tax, Lucknow, and conclusion arrived at by us as above the answer to question No. 3 will be in the affirmative and in favour of the assessee. In view of the answer on question No. 3, it will not be necessary to answer questions Nos. 1 and 2.

13. In the result, questions Nos. 1 and 2 are returned unanswered. Question No. 3 is answered in the affirmative and in favour of the assessee.

14. Reference to stand disposed of accordingly with no orders as to costs.