
(1989) 11 KAR CK 0007
In the Karnataka High Court
Case No : Writ Appeal No. 328 of 1986

V.B. Kori

APPELLANT

Vs

Assistant Professional Tax Officer

RESPONDENT

Date of Decision : 10-11-1989

Acts Referred:

Karnataka Tax on Professions, Trades, Callings and Employments Act, 1976 — Section 3

Citation : (1990) 81 CTR 20 : (1991) 192 ITR 278 : (1990) 51 TAXMAN 331

Hon'ble Judges : S. Rajendra Babu, J;K. Shivashankar Bhat, J

Bench : Division Bench

Advocate : G. Sarangan, for the Appellant; M.R. Achar, for the Respondent

Judgement

S. Rajendra Babu, J.—The appellant herein is a partner of a firm which carries on the business of tax consultancy. The firm is enrolled as an assessee under the provisions of the Karnataka Tax on Professions, Trades, Callings and Employments Act, 1976 (hereinafter referred to as "the Act").

2. The respondent issued a show-cause notice dated May 28, 1980, calling upon the appellant to show cause why penalty should not be levied on him inasmuch as, though being liable to registration under the Act, he had not done so. The appellant, in reply to the said notice, contended that he had no liability in his personal capacity and the partnership firm of which he is a partner had already been enrolled as an assessee under the Act and, therefore, the payment of professional tax by the firm is to be construed as payment by the partner. He further submitted that a separate demand on an individual partner would not arise inasmuch as the same would result in double taxation which is not contemplated under the Act. The respondent, however, made an order on June 13, 1980, holding that the appellant had liability in two capacities one as an individual under entry 2(c) and the other as a firm under entry 20 of the Schedule to the Act and, therefore, called upon the appellant to enrol himself within three days from that date.

3. Those proceedings came to be challenged in a writ petition before this court and the learned single judge (see V.B. Kori Vs. Assistant Professional Tax Officer, before whom the matter came up, held that a partner of a firm is different from the firm and, being a separate and distinct legal entity, was liable to be taxed in both capacities, namely, one as a partner of the firm and the other in his individual capacity. He also took the view that, under the scheme of the Act, the tax is levied on the profession, trade or calling pursued by a person and such person would include a firm as well. When the appellant was pursuing his profession as a tax consultant and also as a partner of the firm, the appellant could be subjected to tax in both capacities and such levy of tax would not result in double taxation as contended by the appellant. He also relied upon a decision in Munshi Ram and Others Vs. Municipal Committee, Chheharta, in support of his conclusion as aforesaid. Aggrieved by this order of the learned single judge, the appellant has preferred the present appeal.

4. Learned counsel for the appellant contended that the view of the learned single judge (see V.B. Kori Vs. Assistant Professional Tax Officer, is not warranted by the provisions of the Act and the conclusions reached by him are opposed to the decisions of the Supreme Court.

5. Section 3 of the Act is the charging section. Clause (1) thereof provides for levy and collection of tax on professions, trades, callings and employments for the benefit of the State. Sub-section (2) thereof provides that every person who exercises any profession specified in the second column of the Schedule shall be liable to pay tax at the rate mentioned therein. Under the charging section, the levy of tax is upon persons who are enumerated in the Schedule and who are carrying on a profession. Undoubtedly, the definition of the word "person" includes not only natural persons but also body corporates, firms, Hindu undivided families and associations. Thus, a firm also becomes a person liable to be charged to tax under the Act by reason of the definition referred to above. Under entry 20 to the Schedule, a firm which is engaged in any profession, trade or calling is liable to tax at a particular rate. Entry 2 of the Schedule refers to persons who carry on the profession of tax consultants. Entry 21 provides that persons other than those mentioned in the preceding entries who are engaged in professions, etc., are exigible to tax at a particular rate. Explanation I to the Schedule clearly sets out that, notwithstanding anything in the Schedule, where a person is covered by more than one entry in the Schedule, he shall be liable to pay tax at the highest rate specified in any of those entries. Thus, the scheme of the Act is that, when a profession is carried on by an individual person in his individual capacity, entry 2 is attracted and, when he carries on a profession through a firm, entry 20 is attracted. But, for any reason, if a person is held to be carrying on a profession falling under more than one entry, he cannot be taxed under both entries but only under one entry which entails the highest rate of tax as provided in the Explanation, while entry 21 covers the residuary class of persons.

6. It is the specific case of the appellant that he is carrying on his profession of tax consultancy only through the firm as a partner and not in his individual capacity at all. It is not the case of the Revenue that the appellant is carrying on his profession apart from the profession of the firm. Therefore, he could be taxed either under entry 2 or under entry 20 of the Schedule to the Act. But, when he is not carrying on his profession as an individual but only as a member of the firm, then entry 20 is attracted. If he is carrying on his profession as a partner of a firm and that is to be taxed, there is no separate provision attracting tax under the Act, as it stood then. Whatever may be the definition of the term "person", which includes artificial persons such as firms, etc., it does not create any charge in respect of a firm as well as a partner of that firm and the charging section covers only persons enumerated in the Second Schedule which specifically provides for levy of tax on firms carrying on a profession. Therefore, it is clear that under the scheme of the Act when a firm is taxed, a partner of that firm cannot be taxed separately. But the learned single judge (see V.B. Kori Vs. Assistant Professional Tax Officer, was persuaded by a decision of the Supreme Court in Munshi Ram and Others Vs. Municipal Committee, Chheharta, to hold otherwise. As for this decision, the situation there is converse to the one with which we are concerned in this case. There, the definition of "person" did not include in its sweep a "firm". The contention raised was that, when a person carries on a profession through a firm, he could not be taxed at all inasmuch as a firm was not one of the entities which was to be taxed. This contention was repelled by the Supreme Court. In our view, the ratio of that decision can have no application to the facts of the present case. The Supreme Court in that case held that, to attract liability under that Act, it was sufficient that the person concerned was carrying on a trade either individually or in partnership with others, for a firm is only a compendious expression for all the persons put together. There is no separate existence for the firm apart from its partners. But for the special provisions of the Income Tax Act, the position in law would be that a firm and its partners do not constitute separate entities. Either the firm or the partners can be taxed, but the same income in the hands of both cannot simultaneously be subjected to tax. When a profession is carried on by an individual only through a partnership, what can be subjected to tax under the Act is only the firm and not the partner. For this proposition, we derive support from the decision of the Supreme Court in Jain Bros. and Others Vs. The Union of India (UOI) and Others, . That, unless specific provisions are made and a clear intention is set out in the Act resulting in double taxation by inference, such a result cannot be achieved at all. Explanation I to the Schedule to the Act itself provides for a rule against double taxation. The principle in that regard is that, when a profession carried on by one entity is the subject-matter of tax, the same cannot be subjected to tax in the hands of the same person in another capacity. Thus, if a firm is taxed in respect of its profession, the same profession cannot be brought to tax again in the hands of an individual member thereof and vice versa because the charging provision of the Act does not provide for the same. On the other hand. The Explanation referred to above indicates to the contrary.

Subsequent to April 1, 1989, the law stood amended and entry 20 to the Schedule of the Act has been substituted by making a partner of a firm liable to tax. This amendment further strengthens our view that, prior to April 1, 1989, the partner was not liable to pay tax at all and was not covered by entry 2 of the Schedule.

7. Therefore, with great respect to the learned single judge (see V.B. Kori Vs. Assistant Professional Tax Officer, we are unable to share the view taken by him and we set aside the order under appeal, with the result the proceedings of the respondent calling upon the appellant to register himself as an assessee under the Act shall stand quashed. The writ petition is allowed and the rule made absolute.

8. In the result, the writ appeal is allowed.