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**(1983) 11 AHC CK 0026**

**In the Allahabad High Court**

**Case No : Income-tax Reference No. 549 of 1977**

Vishwanath Seth

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

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**Date of Decision : 23-11-1983**

**Acts Referred:**

Income Tax Act, 1961 — Section 187, 271(1)

**Citation : (1984) 146 ITR 249**

**Hon'ble Judges :** Satish Chandra, C.J.; R.M. Sahai, J.; H.N. Seth, J.; A.N. Verma, J.; A. Banerji, J

**Bench :** Full Bench

**Advocate :** S.B.L. Srivastava, for the Appellant; M. Katju, for the Respondent

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## **Judgement**

Satish Chandra, C.J.—Being of the opinion that the Division Bench decision of this court in Commissioner of Income Tax Vs. Shiv Shanker Lal Ram Nath, and a Full Bench decision 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., , may require reconsideration, a Bench has sent the reference made by the Tribunal to a larger Bench. That is how the case has come before this Full Bench.

2. In substance, the question of law is whether on reconstitution of a partnership firm a new taxable entity comes into existence. The two aforesaid decisions have held in the affirmative with the result that according to these decisions two assessments have to be made on the firm : one, as it stood prior to reconstitution and another on the reconstituted firm.

3. In the present reference, the question is of levy of penalty u/s 271(1)(c) of the I.T. Act, 1961. The submission on behalf of the assessee was that since a new assessable entity comes into existence after reconstitution of a partnership firm, penalty cannot be levied on the reconstituted firm for the default committed by the old firm. Before we deal with this question we may state the material and

relevant facts.

4. Initially M/s. Vishwanath Seth carried on business in silver, bullion and speculation, etc. Their income was assessed to tax in the status of HUF. After a partition in the family the business was converted into a partnership firm with effect from August 1, 1955, relevant to the assessment year 1957-58. This partnership consisted of Vishwanath Seth and his three sons as partners. His two minor sons were admitted to its benefits. The two minor sons became major in 1958. They elected to remain as partners. The firm, thereafter, consisted of six partners, Vishwanath Seth and his five sons.

5. Vishwanath Seth died in 1964. His five sons continued the partnership business in the same firm name. No outsider was, at any stage, a partner in this firm.

6. The business premises of the firm were raided by the I.T. authorities on February 10, 11 and 12, 1965. Incriminating material was found. Investigation and negotiations for settlement followed. Eventually, the firm surrendered a total sum of Rs. 15,62,326 as undisclosed income. It was agreed that this amount be added to the income of the firm already returned in respect of assessment years 1957-58 to 1966-67. The break-up of the amount in respect of each assessment year was also agreed upon. It was agreed that the firm shall be treated as a registered firm for all these assessment years. The assessee further agreed that in all Rs. 3,00,000 be imposed as penalty. The assessments were revised accordingly.

7. The IAC by orders made on June 7, 1972, and October 4, 1972, imposed penalties on the firm for various years as follows:

Rs.

1957-58

22,800

1958-59

24,600

1959-60

26,700

1960-61

5,400

1961-62

48,950

1962-63

47,000  
1963-64  
27,200  
1964-65  
22,600  
1965-66  
26,500  
1966-67  
30,500  
Total  
2,82,250

8. The assessee felt aggrieved and went up in appeal to the Tribunal. One of the submissions made by the assessee before the Tribunal was that after the death of Vishwanath Seth in 1964 there was a change in the firm. Previously it had six partners and after his death it was constituted by five partners only. Since the two firms were different no penalty could be imposed on the new firm for the period prior to the reconstitution. The Tribunal repelled this submission. It held that in the present case there was no dissolution of the firm in 1964. The same business was continued by the five sons in partnership. The appeals were dismissed.

9. At the instance of the assessee this Court required the Tribunal to refer the following question of law for its opinion :

"Whether the Tribunal is right in confirming the penalty levied on the reconstituted firm when the concealment was by the previous firm ?"

10. The finding recorded by the Tribunal that in the present case there was no dissolution of the firm has not been questioned in this reference. Under the Partnership Act it is not necessary that on the death of a partner a firm must dissolve. It depends upon the terms in the contract of partnership.

11. The question, therefore, is whether in a case of a change of constitution of the firm (as envisaged by Section 187 of the I.T. Act), a new firm having a different assessable entity comes into existence.

12. Section 271 of the I.T. Act, 1961, postulates imposition of penalty on any "person" who has, inter alia, concealed the particulars of his income. If after the reconstitution of a partnership firm a different assessable person comes into existence then it may be argued that penalty cannot be imposed on such a person in respect of default committed by some other person, namely, the old

firm, which was in existence before the reconstitution.

13. The position under the partnership Act has been discussed in several decided cases. In *Keshavlal Lallubhai Patel v. Patel Bhailal Narandas* AIR 1968 Guj 157, Bhagwati J. (as he then was) observed (p. 160):

"It is undoubtedly true that under the law of partnership in India, as in England, a firm has no legal existence apart from the partners composing it and it is merely a compendious name to describe the partners collectively and, therefore, according to the strict view of the law, on any change amongst the partners comprising a firm, there would in fact be a new firm."

14. His Lordship then went on to hold (p. 160):

"But the law has, in conformity with mercantile usage which recognizes a line as a distinct person or quasi-corporation, departed from the strict legal view and extended a limited personality to a firm so that a firm continues to exist despite changes in its constitution brought about by introduction, retirement, expulsion, death or insolvency of a partner. Chapter V contains provisions relating to introduction, retirement, expulsion, death or insolvency of a partner without dissolution of the firm."

15. So, reconstitution without dissolution does not bring into existence a new firm. In the case of reconstitution the same firm continues to exist. The same view was expressed by the Calcutta and Madras High Courts *Sohanlal Pachisia and Co. Vs. Bilasray Khemani and Others*, , *Meenakshi Achi v. Subramanian Chettiar* AIR 1957 Mad 8.

16. Similarly the Supreme Court affirmed this view in *Commissioner of Income Tax, West Bengal Vs. A.W. Figgies and Co. and Others*, . It held (p. 408):

"The reconstituted firm can carry on its business in the same firm's name till dissolution."

17. The Delhi High Court in *Commissioner of Income Tax Vs. Sant Lal Arvind Kumar*, , held : (at p. 388).

"Where a partner retires or is expelled from the firm, the firm itself continues as before with only what may be described as a change in its constitution. The insolvency or death of a partner does not necessarily result in the dissolution of the firm."

18. It was observed (p. 388):

"If one can imagine a partnership as an association of persons bound by a legal tie or a *vinculum juris*, a change in the constitution of the firm reflects only an adjustment of this legal tie which binds the partners. It is as if there is a belt which encircles all these partners and the belt either shrinks or expands to accommodate or give effect to an incoming or outgoing partner. A dissolution, on the other hand, is a breaking or a disruption of this legal tie."

19. It is thus clear that under the Partnership Act the same firm continues to exist in spite of change in its constitution. It ceases to exist on its dissolution.

20. In the present case the finding is that there was no dissolution. There was only reconstitution. Since this finding is unchallenged, we proceed on its basis alone. Hence the same partnership firm will be deemed to continue in spite of its reconstitution in 1964. The I.T. Act clothes the firm with a distinct assessable entity apart from its partners. This question came up for consideration under the Indian I.T. Act, 1922, in Commissioner of Income Tax, West Bengal Vs. A.W. Figgies and Co. and Others, , mentioned above. The Supreme Court while dealing with Section 25(4) of the Indian I.T. Act, 1922, held (p. 408) :

" It follows from the provisions of the section that a mere change in the constitution of the partnership does not necessarily bring into existence a new assessable unit or a distinct assessable entity.... "

21. In the case of Shivram Poddar Vs. Income Tax Officer, Central Circle II, Calcutta, and Another, , the Supreme Court reiterated the principle. It held (p. 827):

" .....by reconstitution of the firm no change is brought about in the personality of the firm. "

22. Later on, it observed (p. 828):

" But the Income Tax Act recognises a firm for the purposes of assessment as a unit independent of the partners constituting it, it invests the firm with the personality which survives reconstitution. "

23. Thus, under the I.T. Act, on reconstitution of a firm the personality of the firm does not change. It remains the same person. Hence, penalty u/s 271 of the I.T. Act, 1961, could be imposed on the firm after its re-constitution for defaults committed by it prior to its reconstitution.

24. Section 187 of the I.T. Act, 1961, provides for the assessment of a firm where at the time of making the assessment it is found that a change in the constitution of the firm has taken place. Section 188 of the Act provides for the assessment where the firm carrying on its business is succeeded by another firm. In the case covered by Section 188, the assessment is made in accordance with Section 170. u/s 170 two assessments are made, one on the predecessor firm and another on the successor firm, the dividing line being the date of succession. The normal rule under the I.T. Act is a single assessment for an assessment year. Section 188 is an exception wherein with reference to Section 170 it contemplates the making of two assessments in the case of succession to a firm. Section 187 which deals with reconstitution does not provide for the making of two assessments. In a case covered by Section 187 one assessment shall have to be made for the entire assessment year. This question came up for consideration before a Full Bench of our Court in Dahi Laxmi Dal Factory Vs. Income Tax Officer and Another, . On facts it was a case of death of a partner

resulting in dissolution of the firm. The majority held that the case was not covered by Section 187 but by Section 188 of the Act and hence two assessments were required to be made. They, however, observed (p. 523):

"A firm in order, to be reconstituted must remain in existence."

25. The learned judge, in the minority, held that Section 187 applies to the reconstitution of a firm after its dissolution. He then went on to consider whether in the case covered by Section 187 there should be two assessments, one on the old and the other on the reconstituted firm. The learned judge observed (p. 534):

"The question whether after the constitution of a firm undergoes a change of the nature described in Section 187 of the Income Tax Act, 1961, which corresponds to Section 26 of the 1922 Act, the newly constituted firm is the same firm or not, is concerned, the Supreme Court in the case of Commissioner of Income Tax, Mysore Vs. Bharat Engineering and Construction Co., observed :

"Even though under the Act an unregistered firm is assessable as such but, as could be seen from Section 26(1), in the matter of assessment, it is the firm as constituted at the time of making the assessment that has to be assessed. In other words, if it is found that a change has occurred in the constitution of the firm, assessment will have to be made on the firm as constituted at the time of making the assessment and not on the firm that was in existence earlier. From this it follows that, for the purposes of assessment, every change in the constitution of the firm brings into existence a new firm.

It follows that after a firm undergoes a change in its constitution, a new firm, though for certain purposes reflecting the personality of the erstwhile firm, comes into existence. This new firm becomes a distinct assessable entity different from the firm before its reconstitution."

26. The learned judge basing himself on this fundamental principle went on to hold that even in the case of reconstitution, different assessment orders should be passed in respect of the income derived by the old firm and the new firm.

27. A Division Bench of this Court in Shiv Shankar Lal [1976] 106 ITR 342 , took the same view as was expressed by the minority judgment in Dahi Laxmi Dal Factory Vs. Income Tax Officer and Another, . Unfortunately the attention of the Bench was not invited to the Full Bench decision in Dahi Laxmi's case. In this decision relying upon the Mysore High Court decision in Commissioner of Income Tax, Mysore Vs. Bharat Engineering and Construction Co., , it was held that the reconstituted firm becomes a distinct assessable entity different from the firm before its reconstitution.

28. In the Full Bench 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., , one of the questions canvassed in Reference No. 854 of 1972, was, whether, the reconstituted firm was liable to

be assessed on the income earned by the firm prior to the reconstitution, namely, prior to the death of the partner. The Full Bench observed (p. 871) :

"In Commissioner of Income Tax Vs. Shiv Shanker Lal Ram Nath, , a Division Bench of this court held that Section 187 merely makes a new firm liable to be assessed in respect of the income derived by the old firm. But this section, even by implication, does not create a fiction that the income derived by the old firm becomes the income of the reconstituted firm, The income of the-old firm cannot be clubbed with the income of the reconstituted firm. After reconstitution the firm becomes a distinct assessable entity, different from the firm before its reconstitution. Therefore, two different assessment orders have to be passed against the reconstituted firm,--one in respect of the income derived by it before reconstitution, and the other in respect of the income derived by it after reconstitution. The Bench drew support for this view from the decision of the Mysore High Court in Commissioner of Income Tax, Mysore Vs. Bharat Engineering and Construction Co., ."

29. It thus expressed its agreement with the decision in Shiv Shanker Lal's case.

30. Bharat Engineering Co.'s case is not a decision by the Supreme Court. It was a decision of the Mysore High Court. But unfortunately the minority opinion in Dahi Laxmi Dal Factory Vs. Income Tax Officer and Another, , in Shiv Shanker Lal's case as well as 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., , treated it as a decision of the Supreme Court and as laying down a binding declaration of law.

31. Since in fact it was not a Supreme Court decision, but a decision of the Mysore High Court, it cannot be treated as a binding precedent. The observation of the Mysore High Court in Bharat Engineering Co.'s case to the effect "for the purpose of assessment, every change in the constitution of a firm brings into existence a new firm" came up for consideration before that High Court in Karupukula Suryanarayana Shetty and Sons Vs. Commissioner of Income Tax, Mysore, . In this case the Mysore High Court held (p. 143):

"That case did not lay down that whenever there is a change in the constitution of a firm separate assessment orders shall be made."

32. It relied upon a decision of the Kerala High Court in Excel Productions [1971] 80 ITR 356, for the proposition and held that if the case falls u/s 187 separate assessment u/s 188 was ruled out.

33. In Sangam Silks Vs. Commissioner of Income Tax, Karnataka, , the Karnataka High Court (successor to the Mysore High Court) held (p. 486) ;

"Section 187 treats the firm before its reconstitution and as reconstituted as one and the same "person." for purposes of making the assessment. Thus, under the provisions of the Act, the firm is treated as a separate and distinct entity and

independent from its partners and it continues to exist notwithstanding the change in its composition if such change is one of the types mentioned in Section 187(2)."

34. It dealt with its earlier decision in Commissioner of Income Tax, Mysore Vs. Bharat Engineering and Construction Co., , especially to the observation that every change made in the constitution of a partnership brings into existence a new firm. Referring to this observation, it held (p. 488) :

"We do not think that the said observation is of any assistance to the assessee. Sub-section (2) of Section 187 specifically states the circumstances which should be treated as bringing about only a change in the constitution of the firm. In view of the provisions of Section 187(2), it cannot be contended that any of the changes in the constitution of a firm of the nature mentioned therein brings into existence a new firm."

35. It may be observed that this decision of the Mysore High Court differed from the decision of this court in Commissioner of Income Tax Vs. Shiv Shanker Lal Ram Nath, .

36. The view taken by this court in Shiv Shanker Lal's case and followed, up in the Full Bench 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., has also been dissented from by the Punjab and Haryana High Court in Hoshiarpur Electric Supply Co. Vs. Commissioner of Income Tax, , the Andhra Pradesh High Court in Visakha Flour Mills [1977] 108 ITR 466 and also by the Delhi High Court in Commissioner of Income Tax Vs. Sant Lal Arvind Kumar, . In all these decisions it has been held that in cases of reconstitution u/s 187 the same firm continues and is assessable in respect of the income for the entire previous year. In our opinion, this is the correct legal position.

37. It thus appears that under the general law of partnership under the Indian Partnership Act as well as under the I.T. Acts, the position is that a firm retains its identity and assessable entity in case of its reconstitution. It is hence the same person. If the firm, prior to its reconstitution, concealed particulars of its income in the return filed by it, penalty could validly be imposed upon the reconstituted firm u/s 271(1)(c) of the Act. This provision postulates that if the ITO or the AAC, in the course of any proceedings under this Act, is satisfied that any person has concealed the particulars of his income or deliberately furnished inaccurate particulars of such income, he may direct that such person shall pay by way of penalty... Under this provision, the person who has concealed, is liable to pay the penalty, provided the default comes to light in the course of any proceedings under this Act. Proceedings for assessment to Income Tax are proceedings under the I.T. Act. Hence, if the relevant officer is satisfied about the default in the course of the proceedings for assessment of income- tax penalty

could be imposed on the person in respect of whom the assessment proceedings were being conducted. If, in case where the person who has been assessed to Income Tax (e.g., the reconstituted firm) is the same person who had committed the default by concealing the income, etc., there is no difficulty. The person being the same, penalty could be imposed on the person, namely, the firm after its reconstitution. This is what has been done in the present case.

38. The Tribunal has submitted a statement of the case and referred the following question of law for the opinion of this court :

"Whether the Tribunal is right in confirming the penalty levied on the reconstituted firm when the concealment was by the previous firm ?"

39. Our answer to the question is in the affirmative in favour of the Revenue and against the assessee. The Commissioner shall be entitled to his costs, which are assessed at Rs. 1,000. The fee of the learned counsel for the Department is certified at Rs. 200.

R.M. Sahat, J.

40. Vishwanath Seth and his five sons were partners of a firm. In 1964 Vishwanath died. His sons entered into fresh agreement and executed a new partnership deed. The question is if this reconstituted firm could be penalised u/s 271 of the I.T. Act (hereinafter referred to as "the Act") for concealment of income or filing of inaccurate particulars, etc., by the firm of which the father was one of the partners. It was urged before the Tribunal that "after the death of the father in 1964, there was change in the constitution of the partnership firm, therefore, penalty, in view of the decision in Commissioner of Income Tax, Bihar and Orissa Vs. Kirkend Coal Co., and KIRKEND COAL CO. Vs. COMMISSIONER OF Income Tax, PATNA., , was illegal". It was repelled as there was no dissolution of the firm in 1964. Moreover, the partners are not different than who were in 1964. On the other hand, this was a family partnership which came into existence after the partition of the HUF business and was carried on by the father and his five sons. After the death of the father the business was continued by the five sons in partnership. The Tribunal, however, on the direction of this court referred the following question of law for opinion of this court:

"Whether the Tribunal is right in confirming the penalty levied on the reconstituted firm when the concealment was by the previous firm ?"

41. When the reference came up for hearing before the Division Bench it was urged that due to death of the father the firm stood dissolved and after a new partnership deed was executed a new firm came into being which succeeded to the business of the earlier firm. The Bench did not examine this argument, "as it was assessee's own case that after the death of Vishwanath Seth there was a change in the constitution of the firm, and that the submission made by the assessee was examined on that basis. The question as to whether for purposes of levy of penalty the firm that came into being after the death of Vishwanath

Seth was a new firm, otherwise than as a reconstituted firm, was neither canvassed nor dealt with by the Tribunal". Thereafter, the Bench noted the submission advanced by the learned counsel for the parties thus : Main controversy before us, however, centres round the question as to whether after a firm is reconstituted its identity undergoes a change and it becomes a different assessable person. Whereas the submission of the Revenue is that notwithstanding the change in the constitution of the firm the identity of the firm as an assessable unit continues and it does not undergo any change, the firm as reconstituted remains the same person as it was before its reconstitution and can be made liable for the lapses committed by the firms, as it stood prior to its reconstitution, the case of the assessee is that such reconstitution effects a change in the identity of the firm and brings into existence a totally different person and entity for purposes of assessment. And relying on two decisions of the Supreme Court in Commissioner of Income Tax, West Bengal Vs. A.W. Figgies and Co. and Others, and Shivram Poddar Vs. Income Tax Officer, Central Circle II, Calcutta, and Another, observed:" that for purposes of assessment under the I.T. Act, a firm is a distinct entity and has its own personality which does not undergo any change as a result of its re-constitution by incoming of new partners or by outgoing of its partners". But as these observations even in a case where reconstitution was preceded by death of one of the partners ran counter to two Full Bench decisions of this court in Dahi Laxmi Dal Factory Vs. Income Tax Officer and Another, and 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., and further, according to the Bench, as those decisions had not considered the impact and implication of the observation made by the Supreme Court in Commissioner of Income Tax, West Bengal Vs. A.W. Figgies and Co. and Others, , the papers of the case were directed to be laid down before the Hon"ble Chief Justice for constituting a larger Bench.

42. In Dahi Laxmi Dal Factory Vs. Income Tax Officer and Another, , one of us (Hon"ble H. N. Seth J.) was in minority. Relying on Shivram Poddar Vs. Income Tax Officer, Central Circle II, Calcutta, and Another, , the Hon"ble judge was of the opinion that, "merely because a firm stands dissolved on the death of one of the partners constituting it, its constituent cannot undergo a change for the purpose of Section 187 of the I.T. Act". Thereafter, the Hon"ble judge observed that as he was of opinion that in the case of reconstitution of a firm as envisaged by Section 187 of the 1961 Act it becomes necessary for him to discuss, whether, in such circumstances, the income of the erstwhile and the newly constituted firm can be clubbed together in one assessment. And relying on Commissioner of Income Tax, Mysore Vs. Bharat Engineering and Construction Co., , the Hon"ble judge held (p. 535):

"Accordingly, even though the firm after its reconstitution may be liable to be assessed in respect of the income derived by the firm before reconstitution, the

income of the old firm cannot be added to the income of the new firm. It necessarily follows that, in such a case, it becomes necessary to pass different assessment orders though against the newly constituted firm in respect of income derived by the old firm and that derived by it."

43. In Commissioner of Income Tax Vs. Shiv Shanker Lal Ram Nath, , the controversy about one or two assessment orders on reconstitution of a firm again came up for hearing and it was held by the Division Bench of this court, of which two of us were members (Hon"ble the Chief Justice and the Hon"ble Justice H.N. Seth) (p. 348), "that after a firm undergoes a change in its constitution, a new firm, though for certain purposes reflecting the personality of the erstwhile firm, comes into existence. This new firm is a distinct assessable entity different from the firm before its reconstitution". It appears, the majority view in Dahi Laxmi Dal Factory Vs. Income Tax Officer and Another, was not placed before the Bench. This decision was followed by a Full Bench of this court 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., , of which two of us were members (Hon"ble Chief Justice and Hon"ble R.M. Sahai J.). The reference was primarily made by the Division Bench because, in none of these cases of this court mentioned above, has any other case than that of Commissioner of Income Tax, Mysore Vs. Bharat Engineering and Construction Co., , been cited to support the view that for the purposes of the Income Tax Act, reconstitution of a firm brings into existence a distinct and separate assessable entity.

44. From what has been narrated above it is apparent that reference has been made because of the view taken by this court that even in reconstitution of a firm there should be two assessment orders.

45. As firm and partners under the I.T. Act have to be understood in the sense assigned to it under the Indian Partnership Act (s. 2(23) of the I.T. Act), it may be examined whether a firm stands reconstituted or dissolved on death of a partner. Section 4 of the Indian Partnership Act defines partners and firm thus : " persons who have entered into partnership with one another are called individually, "partners" and collectively, "a firm"." Therefore, a firm has no legal existence apart from its partners and it is merely a compendious name to describe its partners: Commissioner of Income Tax, West Bengal Vs. A.W. Figgies and Co. and Others, , Reconstitution, according to dictionary, means to constitute again. The question is how should it be understood in relation to a firm. As a firm is a compendious name for its partners only, its constitution and reconstitution depends on their incoming, outgoing, death, etc. All this, however, is subject to agreement, as a partnership is nothing but the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all (s. 4 of the Indian Partnership Act). Incoming, outgoing, expulsion, insolvency, etc., of a partner are dealt with in Chap. V of the Indian Partnership

Act whereas death of a partner, unsoundness of mind, incapability to perform duties, etc., are dealt in Chap. VI. Consequences of these are also different. Any event which takes place, as provided in Chap. V, does not affect continuity of the firm because it is with consent of all the partners. And, therefore, it is described as reconstitution. It is also recognised as a mercantile view of partnership. But events mentioned in Chap. VI result in dissolution of a firm except where there is an agreement to the contrary. Death of one of the partners is one such event mentioned in Section 42(c) of the Act. By death of a partner the relationship created by agreement comes to an end. In the absence of contract the result is automatic. The law leaves no option. Reconstitution may be there in the sense that remaining partners continue the business. But, in law, unlike events in Chap. V, the continuity is broken. The relationship is snapped. It is not optional. In *Keshavlal Lallubhai Patel v. Patel Bhailal Narandas* AIR 1968 Guj 157, it was observed (p. 159):

"The law of partnership draws a distinction between retirement of a partner and dissolution of a firm. Section 39 defines dissolution of a firm as dissolution of a partnership between all the partners. Partnership is the jural relation between partners who are collectively called a firm and when this jural relation is snapped between all the partners inter se, that constitutes dissolution of the firm. But there may be cases where a partner may wish to withdraw from the firm without affecting the jural relation subsisting between the other partners. He may wish to sever his relations as a partner with the other partners leaving the jural relation to the other partners inter se unaffected."

46. A firm under the I.T. Act can be charged as a distinct assessable entity as distinct from its partners who can also be assessed individually Commissioner of Income Tax, West Bengal Vs. A.W. Figgies and Co. and Others, . The word "reconstitution" thus indicates that the firm which was carrying on business is still continuing in business with the change in the personnel but its effect in law is different. Reconstitution, under Chap. V, maintains the continuity of the firm. But if after death of one of the partners the surviving partners resolve to continue the business and reconstitute themselves then merely because the partners are the same as they were in the earlier firm the reconstitution cannot be taken as a reconstitution as visualised in Commissioner of Income Tax, West Bengal Vs. A.W. Figgies and Co. and Others, or *Keshavlal's* case, AIR 1968 Guj 157 or *Sohanlal Pachisia and Co. Vs. Bilasray Khemani and Others*, , or *Meenakshi's* case, AIR 1957 Mad 8, were not concerned with the business carried on by the remaining partners after death. In these cases, reconstitution was as a result of incoming or outgoing of partner, that is, reconstitution contemplated in Chap. V of the Act, Reconstitution after death brings into being a different firm as what has been dissolved disrupts the unity and continuity. The reconstitution of a firm after dissolution cannot be considered to be reconstitution under Chap. V. It would be contrary to law. In reconstitution under Chap. V personality continues. But reconstitution under Chap VI is only a reflection of earlier personality. Business may continue, surviving partners may

be the same, firm's name may remain but in law reconstituted firm is not the same.

47. It may now be examined if under the I.T. Act a firm which has been reconstituted after death can be saddled with penalty for concealment done by the earlier firm. As has been seen earlier it was observed in Commissioner of Income Tax, West Bengal Vs. A.W. Figgies and Co. and Others, , that although the concept of partners and partnership is the same as in the Partnership Act yet the position under the I.T. Act is not the same. It was observed, after considering Sections 26, 48 and 55 in the Indian I.T. Act, 1922, which are analogous to Sections 187, 188 and 189 of the I.T. Act, 1961, that these provisions go to show that the technical view of the nature of a partnership under the English law or the Indian law, cannot be taken in applying the law of Income Tax. The true question is one of the identity of the unit assessed. In respect of a reconstituted firm that identity is maintained both under the Partnership Act and the I.T. Act. Section 187 of the Act provides that: "where at the time of making an assessment u/s 143 or Section 144 it is found that a change has occurred in the constitution of a firm, the assessment shall be made on the firm as constituted at the time of making the assessment". The expression "change in the constitution of a firm" has been explained in Sub-section (2) to mean :

"(2) For the purposes of this section, there is a change in the constitution of the firm--

(a) if one or more of the partners cease to be partners or one or more new partners are admitted, in such circumstances that one or more of the persons who were partners of the firm before the change continue as partner or partners after the change; or

(b) where all the partners continue with a change in their respective shares or in the shares of some of them."

48. The word "cease" used in Sub-clause (a) has to be understood as retirement or outgoing of a partner. It cannot include death because death results in dissolution. In the absence of any language it cannot be assumed that the I.T. Act which adopts the meaning of "partnership" and "firm" as assigned to it under the Partnership Act intended that reconstitution and dissolution should be understood in the sense other than that in which it has been used in that Act. In Dahi Laxmi Dal Factory Vs. Income Tax Officer and Another, , it was observed (p. 522):

"Sub-section (2) of Section 187 does not contain a definition of the "reconstitution of a firm". It merely, and by way of abundant caution, provides in Clause (a) that even where the reshuffling of partners is so drastic that in the reconstituted firm only one of the partners of the original firm is left, it shall still be treated to be a case of reconstitution and Clause (b) provides that where there is no change in the partners but their shares are altered that will still be a case of reconstitution. But this provision does not change the concept of

reconstitution of a firm as understood in the Indian Partnership Act nor does it obliterate the distinction between reconstitution and dissolution."

49. Similarly in Commissioner of Income Tax Vs. Sant Lal Arvind Kumar, , it was observed (p. 390):

"In our opinion the purpose of Sub-section (2) is not by way of expansion of the normal concept of a change in the constitution. It appears to be really a purpose of limitation. The purpose of the definition in Sub-section (2) appears to be not to say that a firm will continue in spite of dissolution but rather to say that even in a case where there is only a change in the constitution the provisions of Sub-section (1) will not apply even if the partners before and after the change are not common."

50. Reliance was placed by the learned standing counsel on Shivram Poddar Vs. Income Tax Officer, Central Circle II, Calcutta, and Another, , and it was urged that it was held by the Supreme Court in the decision, while considering Section 26 of the I.T. Act, a provision analogous to Section 187 that (p. 828):

"Where the firm is dissolved, but the business is not discontinued, there being change in the constitution of the firm, assessment has to be made u/s 26(1), and if there be succession to the business, assessment has to be made u/s 26(2)."

51. Learned counsel urged that this decision was an authority that continuance of business by the firm, even after dissolution due to death of a partner, results in only reconstitution of a firm and the identity of assessable unit being same the reconstituted firm was not only liable to assessment u/s 187 but also responsible for concealment, etc. This decision has been explained in numerous decisions including Dahi Laxmi Dal Factory Vs. Income Tax Officer and Another, and Commissioner of Income Tax Vs. Sant Lal Arvind Kumar, . Apart from the detailed reasons given in those decisions the expression "change in the constitution of a firm" used in Section 187 cannot have that wider meaning as in Section 26 of the earlier Act for the simple reason that unlike Section 26, Sub-section (2) of Section 187 explains the sense in which this expression has to be understood in the Act. Change in the firm may include change by death as well, but in the present Act, it having been explained, the scope cannot be widened. In fact in cases where there is an agreement between partners that the firm shall continue after a death it shall be covered even now. Due to Sub-section (2), only those cases stand excluded in which change occurs due to death as there is nothing in the Act which may indicate that reconstitution of a firm has to be understood in any sense other than in which it is understood in the Partnership Act. Ratio of Shivram Poddar Vs. Income Tax Officer, Central Circle II, Calcutta, and Another, , is not available for holding that continuance of business by surviving partners after death of one results in change of firm within the meaning of Section 187 of the Act. Therefore, a change in the constitution of the firm by the ceasing of one or more of the partners by incoming or outgoing does not result in change of personality and assessment can be made u/s 187 on the reconstituted firm. That

is, in reconstitution contemplated in Section 187, the assessable unit is one. But reconstitution of the firm preceded by death of one of the partners, in the absence of any agreement, brings into being another firm irrespective of the business and partners being the same.

52. Coming to the facts of the case after death of Vishwanath Seth his sons who were partners reconstituted the firm, and continued the business. In 1965, business premises and residential houses of partners were searched. Lot of incriminating material was found. Investigation revealed huge suppression and unexplained deposits. Assessee, therefore, made a settlement petition which was accepted by the Commissioner and the concealed income was spread over between 1957-58 to 1966-67. The assessee's request for not levying any penalty was not accepted. As noticed earlier, this reference is concerned only with penalty. Penalty u/s 271(1)(c) of the Act could be levied for concealment of income by a person. In view of the legal position discussed above the person on whom penalty is being levied is not the same who had concealed the income. The Tribunal has no doubt held that the firm was reconstituted. But this was erroneous. Even if the assessee has not challenged this finding the reconstituted firm being not the same person could not be saddled with penalty for acts done by the previous firm. The Tribunal did not record any finding nor there is any material on record from which it can be held that there was any agreement between the partners that after the death of one of them the firm shall continue. In the absence of this agreement, express or implied, the law applies by its own force. It was vehemently argued by the learned standing counsel that the Tribunal having found that the firm was reconstituted and the finding having not been challenged, cannot be examined. True, but even before the Tribunal it was urged that the reconstituted firm was not the same firm. It was not accepted, not because there was any factual basis for it, but as a matter of law. As the copy of the application filed u/s 256(2) is not available it is not possible to ascertain what questions the assessee desired to be called. It is well settled that a question raised before the Tribunal can be raised before this court in reference. And if a question of law has been raised then all aspects arising out of it can be examined. The question being wide enough the assessee cannot be precluded from urging that the reconstituted firm was not the same which concealed the income. In fact the frame of the question presupposes it.

53. For reasons stated above the question referred is answered in the negative, in favour of the assessee and against the Department. The assessee shall be entitled to its costs.

BY THE COURT

Satish Chandra, C.J.

54. In view of the majority opinion our answer to the following question of law referred by the Tribunal for the opinion of this court is in the affirmative in favour of the Revenue and against the assessee.

"Whether the Tribunal is right in confirming the penalty levied on the reconstituted firm when the concealment was by the previous firm?"

55. The Commissioner shall be entitled to his costs, which are assessed at Rs. 1,000. The fee of the learned counsel for the Department is certified at Rs. 200.