

Commissioner of Income Tax

Vs

Empire Estate.

Tax Ref. Case Nos. 13-14 of 1983

(J. S. Verma, S. P. Bharucha, Sujata V. Manohar JJ)

29.01.1996

JUDGMENT

S. P. BHARUCHA, J. :

There being a conflict in the decisions of the High Courts, the Tribunal has referred to this Court, under s. 257 of the IT Act, 1961, the following question :

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that there should be two assessments; one for the period from 1st June, 1973 to 12th Jan., 1974 and the other for the period from 13th Jan., 1974 to 30th June, 1974, as the assessee's case did not fall within the provisions of s. 187(2) of the IT Act, 1961?"

2. The relevant assessment year is asst. yr. 1975-76. The relevant accounting year ended on 30th June, 1974.

The assessee is a partnership firm. It was constituted under a deed of partnership dt. 18th July, 1968. Its three partners were Mrs. Ellen Keki Modi, Mr. Rustom Keki Modi and Ms. Maneck Keki Modi. Mrs. Ellen Modi died on 12th Jan., 1974. There being no provision in the deed of partnership contemplating the continuance of the partnership in the event of the death of a partner, the partnership stood dissolved. No deed of dissolution was executed but the surviving partners executed a fresh deed of partnership for carrying on the business on and from 13th Jan., 1974, and it mentioned that the earlier partnership had stood dissolved on 12th Jan., 1974.

The assessee filed two returns of income for the relevant previous year, one for the period 1st June, 1973 to 12th Jan., 1974 and the other for the period 13th Jan., 1974 to 30th June, 1974. It contended that the earlier partnership had stood dissolved on the death of Mrs. Ellen Modi on 12th Jan., 1974 and that, therefore, this was a case of succession contemplated by s. 188 of the Act and not a case of reconstitution of the partnership within the meaning of s. 187. The ITO rejected the contention. The appeal to the CIT(A) failed. The assessee thereupon appealed to the Tribunal. The Tribunal noted that there was a difference of opinion between the Allahabad High Court [CIT vs. Kunj Behari Shyam Lal (1977) 109 ITR 154 (All) (FB)], the Andhra Pradesh High Court [Addl. CIT vs. Vinayaka Cinema (1977) 110 ITR 468 (AP)], the Gujarat High Court [Addl. CIT vs. Harjivandas Hathibhai (1977) 108 ITR 517 (Guj)] and the Calcutta High Court [Mathuradas Goverdhandas vs. CIT (1980) 125 ITR 470 (Cal)] on the one hand and the Punjab High Court [Nandlal Sohanlal vs. CIT (1977) 110 ITR 170 (P&H) (FB)] and the Karnataka High Court [Sangam Silks vs. CIT (1980) 122 ITR 479 (Kar)] on the other hand. The Tribunal followed the view of the High Courts earlier

mentioned. It held that the case of the assessee did not fall within the expression "change in the constitution of the firm" under s. 187 and directed the ITO to make assessments for the two aforementioned periods of the relevant previous year.

3. Sec. 187, so far as is relevant, reads thus :

"187(1) Where at the time of making an assessment under s. 143 or s. 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.

(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."

Sec. 188 reads thus :

"188. Where a firm carrying on a business or profession is succeeded by another firm, and the case is not one covered by s. 187, separate assessments shall be made on the predecessor firm and the successor firm in accordance with the provisions of s. 170."

It needs to be noted that a proviso was inserted in s. 187 by the Taxation Laws (Amendment) Act, 1984, with retrospective effect from 1st April, 1975, which reads thus :

"Provided that nothing contained in cl. (a) shall apply to a case where the firm is dissolved on the death of any of its partners."

Mrs. Ellen Modi having died on 12th Jan., 1974, the assessee's case is not affected by the proviso.

Sec. 42 of the Indian Partnership Act, 1932, so far as it is relevant, reads :

"42. Subject to contract between the partners a firm is dissolved -

(c) by the death of a partner; and....."

The deed of partnership between Mrs. Ellen Modi and the partners who survived her did not provide that the death of a partner would not dissolve the partnership. Therefore, by reason of s. 42 of the Partnership Act, the partnership stood dissolved on 12th Jan., 1974, by reason of Mrs. Ellen Modi's death. This the Tribunal rightly found.

4. Sec. 188 states that where a firm carrying on a business is succeeded by another firm and the case is not covered by s. 187, separate assessments have to be made on the predecessor firm and the successor firm. Sec. 187 says that where, at the time of making an assessment, it is found that a change has occurred in the constitution of a firm, the assessment shall be made on the firm as it is

constituted at the time of making the assessment. "Change in the constitution of the firm" is defined for the purpose. The relevant part of the definition states that if one or more of the partners cease to be partners in such circumstances that one or more of the persons who are partners of the firm before the change continue as partner or partners after the change, there is a change in the constitution of the firm. These provisions would apply to a firm which survives upon the death of a partner. They would apply to the case of a partnership where a partner dies and the partnership deed provides that death shall not result in the dissolution of the partnership. Such provision is lawful because s. 42 of the Partnership Act contemplates it. If there is no such provision and a partner dies, the partnership stands dissolved. The partnership does not then survive upon the death of the partner. The case is not one of a change in the constitution of the partnership. It falls outside the scope of s. 187. When the surviving partners in such a case continue the business in partnership, s. 188 is attracted for there is a succession of one by another partnership.

5. It is unnecessary to refer to the judgments of the High Courts by reason of which the Tribunal made the reference directly to this Court for we find the issue covered by the judgment of this Court in *Wazid Ali Abid Ali vs. CIT* (1988) 169 ITR 761 (SC). The relevant paragraph of the judgment reads thus :

"So far as Civil Appeal No. 609 of 1975 is concerned, the question is whether, on the facts and circumstances of the case, there was any dissolution of the partnership on the date of the death of Shri Sarabhai Chimanlal and there should be two separate assessments or whether, on the facts and circumstances of the case, the provisions of s. 187(2) apply to the facts of this case. There, the High Court found on examination of the facts of that case, that the assessee's contention was right that the firm as found by the Tribunal was dissolved and the transactions were carried on with the remaining parties in the course of the winding up and for realisation of its dues. The High Court accordingly answered rightly in the affirmative and in favour of the assessee. There was, in fact, a dissolution as found by the Tribunal and on the facts and circumstances of that case and after the dissolution, the firm ceased to exist and there should be two separate assessments. The High Court was right in answering the question as it did. It appears to us that the High Court was also right in answering the second question, in view of the fact that there was a death and as such dissolution of the firm by the manner in which the parties acted, that there is no question of the same firm being continued and the provisions of s. 187(2) could not be said to apply in the light of the facts."

6. Learned counsel for the Revenue cited two judgments of the Allahabad High Court in which the judgment of *Wazid Ali Abid Ali* was cited. In *CIT vs. Basant Behari Gopal Behari & Co.* (1988) 172 ITR 662 (All), it had been found by the Tribunal that the partnership deed provided that the partnership would not dissolve on the death of any partner and that there was no evidence to suggest that the partnership had actually stood dissolved on the death of a partner. Accordingly, it was held that there had been a change in the constitution of the partnership on the death of that partner and only one assessment for the entire assessment year could be made. In *CIT vs. Indralok Picture Palace* (1991) 188 ITR 730 (All), also, the partnership deed provided that the death of a partner would not result in the dissolution of the firm. A partner died. The assessee filed two returns. The ITO took the view that this was a case of reconstitution of the partnership and, clubbing the periods, made one assessment. The High Court upheld his view. In both these cases, the partnership deeds provided that the death of a partner would not dissolve the partnerships. The death of a partner, therefore, did not dissolve the partnerships and the businesses were continued by reconstituted

partnerships.

7. In the result, we answer the question in the affirmative and in favour of the assessee. There shall be no order as to costs.