

PATNA HIGH COURT

Jittanram Nirmalram

Vs

Commr. of Income-Tax

(Ramaswami, C.J. S Prosad, J.)

27.11.1952

ORDER

Ramaswami, C.J.

1. Under Section 68(1), Income Tax Act, the Appellate Tribunal had referred the following question of law for the determination of the High Court, viz., "whether on the facts and in the circumstances of this case the Tribunal was right in holding that there was neither a discontinuance in, nor any succession to, the appellant's business as contemplated by Section 25(3) and Section 25(4) of the Income Tax Act."

2. The material facts leading up to this reference are not in dispute. The assessee was a firm named Jittanram Nirmalram constituted of four partners, viz., Rai Bahadur Ramchandram, Lakshmi Narain Bhadani, Vishnu Prasad Bhadani and Bhagwandas Bhadani. It is stated that on 9-11-1942, Bhagwandas gave a notice severing his connection with the firm and commencing a new business of his own Known as Nirmalram Hariprasad. At the time when Bhagwandas gave the notice and severed his connection his share in the profits and assets was computed to be over one and a half lacs which amount was paid to him partly in, cash and partly by allotting to him a cloth shop previously carried on by the firm. It is conceded that after 9-11-1942 the firm continued to deal in grain, hardware, sugar, petrol, kerosene oil and also carried on money-

lending business as before. The assessee claimed before the income-tax department that on account of the circumstance that Bhagwandas had severed his connection with the firm there was a discontinuance of business within the meaning of S. 25(4) of the Income-tax Act. This argument was rejected by the Income-tax Officer. The assessee made an appeal to the Appellate Assistant Commissioner and also to the Income-tax Tribunal. His appeal was unsuccessful. At his instance the Appellate Tribunal has referred the question of law which has been formulated above.

3. When the case first came before the High Court, Mr. Jain on behalf of the assessee conceded that he would not press the argument that there was discontinuance of business within the meaning of Section 25(3), Income-tax Act. But the learned counsel laid stress on the argument that there was succession within the meaning of Section 25(4) and the Income-tax authorities have misapplied the law in refusing to grant relief to the assessee under Section 25(4), Income-tax Act. The High Court was not however satisfied that the statement of the case was sufficient to enable it to determine the question. For this reason the High Court referred the case back to the Appellate Tribunal to make a further statement on two questions of fact, viz., (1) whether the business of the firm Jittanram Nirmalram as constituted before 9-11-1942 was at any time charged under the provisions of Income-tax Act of 1918 (Act 7 of 1918); and (2) whether upon the facts proved the firm Jittanram Nirmalram was dissolved on 9-11-1942 as a result of the severance of Bhagwandas Bhadani, or, in the alternative, whether there was no dissolution of the partnership but Bhagwandas Bhadani merely retired from being a partner of the firm.

4. We have now before us the additional statement of the case sent by the Appellate Tribunal and we have heard further arguments on behalf of the assessee and on behalf of the department on the manner in which the question referred to us should be answered.

5. It was contended by the learned Standing Counsel that there was no case of succession within the meaning of the statute since Bhagwandas Bhadani having severed his connection with the firm was granted the Gaya cloth branch of the business partly in lieu of his share of the assets. The argument was stressed that in order to claim the benefit of Section 25(4) there must be a succession to the entire quantum of business. It was pointed out that in the present case there was not only a change in the constitution of partnership but the Gaya cloth branch did not constitute a portion of the business of the assessee firm after Bhagwandas Bhadani severed his connection with it in support of his argument learned counsel relied upon *In Re -- 'Commr. of income-tax, Burma v. N. N. Firm'*, (A) in which it was held by the Rangoon High Court that one person succeeds another person in carrying on a business, profession, or vocation, when he succeeds his predecessor in carrying on the business as a whole and where a business was split up and thereafter another person carried on part of the business he did not succeed his predecessor in carrying on the business within Section 26(2), Income-tax Act. The principle of that case cannot however be applied to the present case for the material facts are different. In the Rangoon case it was found not merely that the business was split up but also that there was no continuity in carrying on the business. It was actually found, by the Income-tax authorities that there was an

actual cessation of business for sometime before the new firm commenced to function. Upon these facts the Rangoon High Court was obviously right in concluding that there was no case of succession made out within the meaning of Section 26(2), Income-tax Act. In the present case, however, it is not alleged on behalf of the department that there was no continuity in carrying on the business. For the application of Section 28(2) or Section 25(4) it is not essential in every case that the successor firm should have mathematically the same extent of business as the predecessor firm or that it should have taken over the same extent of trade or the same line or set of customers as belonging to the predecessor firm; nor does it mean that the successor firm should have taken over all the different businesses which the predecessor firm had carried on. In our opinion it is sufficient if there is substantial identity or similarity in the nature and extent of the activities carried on between the two firms. This principle is supported by a decision of this Court in --'Hassan Kassam v. Commissioner of Income-tax B & O', (B) in which there was evidence to show that some of the assets and liabilities of the old firm were retained by one of the partners Kassam Manji and fresh capital was introduced by the sons into the new partnership firm. The same business was however carried on the same place by a successor firm. In view of this circumstance, the High Court rejected the argument that there was any alteration in the identity of the business or that there was no succession to the business which was being carried on by the deceased Kassam Manji under the old partnership. The same matter is put clearly by Rowlatt, J. in an English case -- '*James Shipstone & Sons, Ltd. v. Morris*', "Another point Mr. Lattier laid some stress on was this. He said you cannot be successor to a part of a trade. He cited Mr. Justice Bray's remarks in a case in the "Law Times", the name of which I forget for the moment. I think that is quite sound when you get two parts of a trade, as an omnibus business separate from a tramway business, as it may very well be, but I do not think it means that if what is succeeded to is not the same extent of trade or even does not include a particular line of customers, it necessarily follows that there cannot be a successor to the trade, looking at it broadly. There must be two businesses, one left and the other taken. It does not mean to say you have only taken part of the business in the sense that what you have got is not quite so extensive as what went before". Coming to the facts of the present case the Appellate Tribunal has found that apart from the circumstance that Bhagwandas Bhadani was allotted the Gaya cloth branch the old business of Jittanram Nirmalram had continued retaining its good will and the balance of its assets and its own activities. To quote the language of the Appellate Tribunal "there had been no break in or discontinuance in the business of the firm". The Income-tax Appellate Tribunal's order dated 23-2-1943, also shows that in spite of the fact that Bhagawandas severed his connection with the firm the old business had continued on retaining its goodwill and the balance of its assets and its manifold activities in grain, hardware, sugar, petrol and kerosene oil and also its money-lending business. Upon the facts found by the Tribunal and reiterated in the statement of the case we think that there was substantial identity of the business which was carried on by the predecessor firm & by the newly constituted firm after Bhagwandas Bhadani had severed his connection. The argument of the learned Standing counsel on this point must fail.

6. But the question formulated by the Tribunal cannot be answered in favour of the assessee until there is a further finding that the successor firm is a "different person" within the meaning of Section 25(4), Income-tax Act. The material part of the section states:

"Where the person who was at the commencement of the Indian Income-tax (Amendment) Act, 1939 (VII of 1939), carrying on any business, profession or vocation on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1913 (VII of 1918), is succeeded in such capacity by another person the change not being merely a change in the constitution of a partnership, no tax shall be payable by the first mentioned person in respect of the income, profits and gains of the period between the end of the previous year and the date of such succession, and such person may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period It is also necessary to consider the provisions of Section 26(2) in this context. Section 26(2) states:"Where a person carrying on any business, profession or vocation has been succeeded in such capacity by another person, such person and such other person shall, subject to the provisions of Sub-section (4) of Section 25, each be assessed in respect of his actual share, if any, of the income, profits and gains of the previous year". On this question the additional statement submitted by the Appellate Tribunal contains a finding that the firm of Jittanram Nirmalram was not dissolved on 9-11-1942 taut Bhagwandas Bhadani merely retired from being a partner. On the basis of this finding, it was argued by the learned Standing Counsel that there was no break or discontinuance in the existence of the firm Jittanram Nirmalram and there was no case of succession within the meaning of Section 25(4) or Section 26(2), Income-tax Act. The argument cannot possibly be accepted for in reaching the finding that the firm was not dissolved on 9-11-1942 the Appellate Tribunal has committed an error of law. On behalf of the assessee our attention was drawn to the notice given by Bhagwandas Bhadani, printed at page 1 of the paper book. From this notice it appears that there was a clause in the deed of partnership which empowered each of the partners to exercise the right of dissolving partnership at will. In accordance with this clause Bhagwandas Bhadani exercised his right of dissolving partnership on the Divali day of 'Sambaf 1999 corresponding to 8-11-1942.

Section 43 (1) of the Indian Partnership Act states that where the partnership is at will, the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm. Section 43(2) provides that the firm is dissolved as from the date mentioned in the notice as the date of dissolution or, if no date is (so?) mentioned as from the date of the communication of the notice. Applying the section it is clear that in the present case the partnership was dissolved when Bhagwandas Bhadani gave notice and that the date of dissolution was 8-11-1942. It was nevertheless contended by the learned Standing Counsel that even after the dissolution of the partnership all the partners with the exception of Bhagwandas Bhadani carried on the same old business retaining its goodwill and the balance of its assets and its own activities.

Learned Standing Counsel based the argument on the finding of the Appellate Tribunal that there was no break or discontinuance of the business of the firm. The contention is that the newly registered firm of partners to the exclusion of Bhagwandas Bhadani was not a different entity but the same old entity continued and there was no warrant for the application of Section 25(4), Indian Income-tax Act. The case therefore resolves itself into the Question whether the newly constituted firm consisting of Ramchandram, Lakshmi Narain Bhadani and Vishnu Prasad Bhadani was a different entity to that of the old firm which consisted of these partners and also Bhagwandas Bhadani. It is true that the Appellate Tribunal has found that the old business continued retaining its goodwill and the balance of its assets and the activities of the new firm were in grain, hardware,

sugar, petrol, kerosene oil and money lending business just as the old firm continued its activities.

It is also true as the learned Standing Counsel pointed out that the new firm carried on the business in the name of the old firm, viz., Jittanram Nirmalram. But these considerations are not material in deciding whether the new firm was an entity different in character from that of the predecessor firm Jittanram Nirmalram. As already observed the old firm of Jittanram Nirmalram stood dissolved from 9-11-1942 as a result of the notice given by Bhagwandas Bhadani. The new firm consisting of the remaining partners must have been registered on a subsequent date and though it was named Jittanram Nirmalram it must be held to be a "different person" since a new partnership of three persons is a different entity from a dissolved partnership of four persons though three of the partners may be common. It is necessary to remember in this connection that a partnership is not in English law or in Indian law a single juristic person and a firm as such has no legal personality or existence. The partners merely carry on the business both as principals and as agents for each other within the scope of the partnership business. A firm's name is a mere expression and not a legal entity although for procedure and convenience it may be used for the sake of using and being sued.

But in the context of the Income-tax. Act a partnership as such is a distinct legal entity. Section 3 which deals with charge of income-tax states that income-tax shall be charged for any year in respect of the total income of the previous year of every individual, Hindu undivided family, company and local authority, and of every firm and other association of persons or the partners of the firm or members of the association individually. Reference should also be made to Section 48 which mentions "any individual, Hindu undivided family, company, local authority, firm or other association of persons or any partner of a firm or member of an association individually."

Section 55 which is the charging section as regards super-tax makes reference to any individual, Hindu undivided family, company, local authority, unregistered firm or other association of persons, not being a registered firm, or the partners of the, firm or members of the association individually. On the examination of these provisions, it is clear that for the purpose of income-tax a firm is regarded as having its separate juristic existence apart from the partners who carry on the business. This view finds support from the decision of the Madras High Court in -- '*Commissioner of Income-tax Madras v. Karupiah*'⁴, in which a partner carried on business of partnership after the dissolution and it was contended on his behalf that there was succession to the business within the meaning of Section 26 (2), Income-tax Act. The contention was accepted by the High Court and it was held that for the purpose of assessment of income-tax, a firm and its partners were different persons, and a person who carried on a business as sole owner after dissolution of partnership did so as a different person from the firm. The same principle is laid down in -- '*Income Tax Commissioners' for City of London v. Gibbs*'⁵, in which the question arose whether partnership of four stockbrokers who took in a fifth partner, ceased to carry on business and was succeeded by the partnership of five within the meaning of Sub-rule 1 of rule 9, schedule D to the Income-tax Act, 1918, which provided that if a person charged under schedule D ceased within the year of assesment to carry on to trade in respect of which the assessment was made and was succeeded by another person, the commissioners shall adjust the assessment as directed. It was held by the House of Lords reversing the decision of the Court of Appeal that though in English law a partnership was not a single juristic person, the scheme of the Income-

tax legislation treated the partnership as a legal entity for the purpose of assessing revenue and there was succession to the business within the meaning of Rule 9, Sub-rules 1 and 2. Applying the principle of these authorities, it is clear that in the present case there has been succession to the business within the ambit of Section 25 (4), Income-tax Act, and the argument on behalf of the assessee on this part of the case must prevail.

7. For the reasons we have expressed we hold that the Tribunal was right in holding that there was not a discontinuance of the business but that the Tribunal was not right in holding that there was no succession to the petitioner's business as contemplated under Section 25 (4), Income-tax Act.

8. The reference is accordingly answered in favour of the assessee. But since the question of discontinuance has been answered in favour of the department there will be no order as to costs. The assessee is entitled to withdraw the amount of Rs.

100 which he has deposited with the Appellate Tribunal.

Cases Referred.

1AIR 1934 Rang 13

2AIR 1949 Pat 178

3(1929) 14 Tax Case 413 (C)

4AIR 1941 Mad 255 (D)

5(1942) A. C. 402 (E)