

A THE COMMISSIONER OF INCOME TAX CENTRAL-I, BOMBAY  
v.  
MESSRS EMPIRE ESTATE, BOMBAY

JANUARY 29, 1996

B [J.S. VERMA, S.P. BHARUCHA AND SUJATA V. MANOHAR, JJ.]

*Income Tax Act, 1961—Sections 187(2) and 188—Assessments—Partnership firm—Partnership deed did not provide that death of a partner would not dissolve the partnership—Death of a partner—Dissolution of partnership—When surviving partners continue business under fresh partnership deed—Section 188 attracted—Section 187(2) held not applicable.*

The assessee, a partnership firm had three partners. One of partners died on 12.1.1974 and 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 13.1.1974 where it was mentioned that the earlier partnership had stood dissolved on 12.1.1974. The assessee filed two returns of income for the relevant previous year, one for the period 1.6.1973 to 12.1.1974 and the other for the period 13.1.1974 to 30.6.1974, submitting that the earlier partnership had stood dissolved on the death of one of its partners and, therefore, this was a case of succession contemplated by Section 188 of the Income Tax Act and not a case of reconstitution of the partnership within the meaning of section 187. The Income Tax Officer rejected the assessee's case. The appeal to the Commissioner of Income Tax (Appeals) failed. In appeal to the Income Tax Appellate Tribunal, there being a conflict in the decision of the High Courts, the Tribunal referred to this court the question as to whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in holding that there should be two assessments as the assessee's case did not fall within the provisions of section 187(2) of the Act.

Answering the question in the affirmative while dismissing the appeal, this Court

H HELD : 1.1. The deed of partnership between the partner who died

and the partners who survived, did not provide that the death of a partner would not dissolve the partnership. Therefore, by reason of Section 42 of the Partnership Act, the partnership stood dissolved on 12.1.1974, by reason of death of one of the partners. The case was not one of a change in the constitution of the partnership. It falls outside the scope of section 187 of Income Tax Act as that provision would apply to the case of a partnership where a partner died and the partnership deed provided that death would not result in the dissolution of the partnership. When the surviving partners in such a case continued the business in partnership, Section 188 was attracted for there was a succession of one by another partnership. [1008-B; 1009-F-H; 1008-G]

*Wazid Ali Abid Ali v. CIT, Lucknow*, 169 I.T.R. 761 SC, relied on.

*C.I.T. v. Basant Behari Gopal Behari & Co.*, 172 I.T.R. 662 and *C.I.T. v. Indralok Picture Palace*, 188 I.T.R. 730, distinguished.

CIVIL ORIGINAL JURISDICTION : Tax Reference Case Nos. 13-14 of 1983.

(Under Section 257 of the Income Tax Act, 1961.)

Dr. R.R. Mishra, Ranbir Chandra and S.N. Terdol for the Appellant.

The Judgment of the Court was delivered by

**BHARUCHA, J.** There being a conflict in the decisions of the High Courts, the Income Tax Appellate Tribunal has referred to this Court, under Section 257 of the Income Tax Act, 1961, the following question :

"Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in holding that there should be two assessments, one for the period from 1.6.1973 to 12.1.1974 and the other for the period from 13.1.1974 to 30.6.1974, as the assessee's case did not fall within the provisions of Section 187(2) of the Income Tax Act, 1961."

The relevant assessment year is A.Y. 1975-76. The relevant accounting year ended on 30th June, 1974.

- A The assessee is a partnership firm. It was constituted under a deed of partnership dated 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 January, 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 January, 1974, and it mentioned that the earlier partnership had stood dissolved on 12th January, 1974.
- B
- C The assessee filed two returns of income for the relevant previous year, one for the period 1st June, 1973 to 12th January, 1974 and the other for the period 13th January, 1974 to 30th June, 1974. It contended that the earlier partnership had stood dissolved on the death of Mrs. Ellen Modi on 12th January, 1974 and that, therefore, this was a case of succession contemplated by Section 188 of the Act and not a case of reconstitution of the partnership within the meaning of Section 187. The Income Tax Officer rejected the contention. The appeal to the Commissioner of Income-tax (Appeals) failed. The assessee thereupon appealed to the Tribunal. The Tribunal noted that there was a difference of opinion between the Allahabad High Court *Commissioner of Income-tax v. Kunji Behari Shyam Lal*, 109 I.T.R. 154, the Andhra Pradesh High Court *Addl. Commissioner of Income-tax v. Vinayaka Cinema*, 110 I.T.R. 468, the Gujarat High Court *Addl. Commissioner of Income-tax v. Harjivandas Hathibhai*, 108 I.T.R. 517 and the Calcutta High Court *Mathuradas Govardhandas v. Commissioner of Income-tax*, 125 I.T.R. 470 on the one hand and the Punjab High Court *Nandlal Sohanlal v. Commissioner of Income-tax*, 110 I.T.R. 170 and the Karnataka High Court *Sangam Silks v. Commissioner of Income-tax*, 122 I.T.R. 479 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 Section 187 and directed the I.T.O. to make assessments for the two aforementioned periods of the relevant previous years.
- D
- E
- F
- G

Section 187, so far as is relevant, reads thus :

- H "187.(i) Where at the time of making an assessment under section

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. A

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

(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." C

Section 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 section 187, separate assessments shall be made on the predecessor firm and the successor firm in accordance with the provisions of section 170." D

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

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

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

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

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

(a) .....

(b) ..... H

A (c) by the death of a partner; and

(d) ....."

B 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 Section 42 of the Partnership Act, the partnership stood dissolved on 12th January, 1974, by reason of Mrs. Ellen Modi's death. This the Tribunal rightly found.

C Section 188 states that where a firm carrying on a business is succeeded by another firm and the case is not covered by Section 187, separate assessments have to be made on the predecessor firm and the successor firm. Section 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 were 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 Section 42 of the Partnership Act contemplates it. If there is no such provision and a partner dies, the partnership stands dissolved. F 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 Section 187. When the surviving partners in such a case continue the business in partnership, Section 188 is attracted for there is a succession of one by another partnership.

G 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 v. Commissioner of Income-tax, Lucknow*, 169 I.T.R. 761. The relevant H 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 section 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 section 187(2) could not be said to apply in the light of the facts."

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 *Commissioner of Income-tax v. Basant Behari Gopal Behari and Company*, 172 I.T.R. 662, 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 *Commissioner of Income-tax v. Indralok Picture Palace*, 188 I.T.R. 730, 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 I.T.O. took the view that this was a case of reconstitution of the partnership and, clubbing the periods, made

A 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.

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

R.A.

Appeal dismissed.