

Commissioner Of Income Tax, West ... vs Pigot Champan & Company on 13 April, 1982

Equivalent citations: AIR 1982 SC 1085, [1982] 135 ITR 620 (SC), 1982(1) SCALE 371, (1982) 2 SCC 330, 1982(14) UJ 359 (SC), 135 ITR 620, AIR 1982 SUPREME COURT 1085, 1982 TAX. L. R. 1118, (1982) 9 TAXMAN 7, 1982 UJ (SC) 359, (1982) TAXATION 66, 1982 (12) TAX LAW REV 321, 1982 SCC (TAX) 97, 1982 UPTC 920, (1982) 135 ITR 620, (1982) 30 CURTAXREP 375, (1982) 1 SCWR 308, 1982 TAXATION 66 (3) - 1, 1982 (2) SCC 330

Bench: Amarendra Nath Sen, R.S. Pathak, V.D. Tulzapurkar

JUDGMENT

1. This appeal at the instance of Commissioner of Income-Tax and by a certificate granted by the Calcutta High Court raises the question whether the respondent-assessee is entitled to relief under Section 25(4) of the Indian Income-Tax Act, 1922 for the assessment year 1959-60 which in turn depends upon the proper answer to the question whether on the facts and circumstances of the case and on a proper construction of the Deed dated 30th March, 1959 it is a case of mere re Constitution of the old firm or a new firm succeeding to the business of the old firm entitling the respondent-assessee to claim the relief?

2. The undisputed facts giving rise to the above question are these: M/s. Pigot Champan & Co. is a firm of foreign exchange brokers which had been operating in Calcutta for a very long time. There is no dispute that the firm had been taxed on its business income under the Indian Income-Tax Act, 1918 and that the other conditions laid down in Section 25(4) of the 1922 Act for entitling an assessee to the relief under the provision are satisfied. The Constitution of the firm Had undergone several changes in the past; the firm was re-constituted for short periods and whenever any partner retired he gave up his claim to the partnership assets which vested in the continuing partners. A deed of partnership was executed by and between Rogers Haywood, Leonard Mark Blomenstok, H.G. Ablitt and S.C. Roy on 18th May, 1953 which, after reciting the various deeds executed in the earlier years, provided inter alia:

(a) That the partnership should be continued for a term of 6-years from 1.4.1953 and shall expire on 31-3-1959;

(b) That Rogers Haywood would retire from the firm on 31-3-1957 but the partnership should be continued by the remaining partners until 31-3-1959;

(c) What would be the shares of the partners as varied from year to year including the shares of the remaining partners after Haywood's retirement;

(d) That goodwill of the firm was to belong to Hay wood until his retirement; thereafter it was to devolve on the three continuing partners in equal shares and on the retirement of Blomenstok it was to devolve on Ablitt and Roy in equal shares.

3. By a deed of variation dated 7-4-1955 one Leonard William Mclean was admitted as a partner of the firm for one year; by another deed of variation dated 30th April, 1956 Mclean was admitted as the partner for the rest of the term and the retirement of Haywood was postponed from 31-3-1957 to 31-3-1958 but it was provided that on such retirement the partnership was to be continued by the remaining 4 partners till 31-3-1959; the deed also provided that Blomenstok would retire from the firm on 31-3-1959 and on such retirement the goodwill and the capital of the firm shall devolve absolutely on Ablitt and Roy and Mclean in certain shares set out therein.

4. Haywood retired on 31-3-1958 and Blomenstok on 31-3-1959. On 30th March, 1959 a Deed was executed by and between Mclean, describing himself as the retiring partner, and Ablitt and Roy jointly describing themselves as continuing partners, whereby it was provided that the partnership business of M/s. Pigot Champan & Co. subsisting between them shall be deemed to have been dissolved by mutual consent as from 1st April, 1959 and that thereafter the said business with its assets and goodwill shall belong to and be carried on by the continuing partners whose shares were defined. The retiring partner released all his claims to his share of goodwill and assets of the firm in favour of the continuing, partners while the continuing partners in their turn absolved and indemnified the retiring partner from any liability of the firm. The business was then carried on by Ablitt and Roy., on terms and conditions recorded in a Deed of Partnership executed by them on 29th June, 1959. This new deed of partnership dated 29th June, 1959 inter alia recited the following facts: (a) that by a deed dated 30th March, 1959 made between Mclean, Ablitt and Roy their partnership was mutually dissolved as from 1.4.1959, (b) that Ablitt and Roy shall remain partners under terms and conditions mentioned therein to the exclusion of any other document, (c) that the business shall be that of exchange brokers and (d) that the same shall be carried on under the name and style of M/s. Pigot Champan & Co.

5. For the Assessment Year 1959-60, for which the accounting year ended on 31-3-1959, the respondent-assessee filed a Return of Income declaring its total income of Rs. 1,80,300; the return was filed on 40 10-8-1959 but by a letter dated 21-8-1959 the assessee claimed relief under Section 25(4) of the 1922 Act in respect of that income; it was claimed that by the deed dated 30th March, 1959 the firm of M/s. Pigot Champan & Co. (which had been assessed and had paid taxes under the 1918 Act and had been regularly assessed to Income-tax thereafter) had been dissolved as from 1st April, 1959 and was succeeded by another firm of two partners Ablitt and Roy and as such relief under Section 25(4) in respect of the Assessment Year 1959-60 was due to the respondent assessee. The Income-Tax Officer, however, took the view that there was no dissolution of the firm and what had actually taken place on 1-4-1959 was merely a change in the Constitution of the firm; according to him the entire assets and liabilities of the old partnership were taken over by the new firm as on 1-4-1959 and there was no cessation of the business within the meaning of Section 25(4) of the 1922 Act. He, therefore, dismissed the assessee's claim for relief under Section 25(4). On appeal, the Appellate Assistant Commissioner agreed with the view taken by the Income-Tax Officer and dismissed the appeal. On further appeal the Tribunal on a consideration of the various deeds of the

partnership, deeds of variation and the Deed dated 30th of March, 1959 held that the assessee firm must be regarded as having been dissolved under Section 40 of the Indian Partnership Act in terms of the Deed dated 30-3-1959, that as the retiring partner had given up all claims to his share in the goodwill and assets of the firm and in turn had been indemnified with regard to the liabilities, there was no necessity for taking an account and striking a balance and since it was the case of the assessee firm succeeding to the business of the old firm which had been dissolved the assessee was entitled to relief under Section 25(4) in respect of its income for the assessment year 1959-60 and in this view of the matter it allowed the appeal.

6. At the instance of the Commissioner of Income-Tax the following question-was referred to the High Court for its opinion:

Whether in the facts and circumstances of the case and on a proper construction of the agreement dated 30th March, 1959 the Tribunal was right in upholding that the assessee firm was dissolved on 1-4-4959 and was entitled to relief under Section 25(4) of the Indian Income-Tax Act, 1922 in respect of its income for the Assessment Year 1959-60?

The High Court called for a supplementary statement of the case from the Tribunal directing the Tribunal to forward to the High Court a true copy of the new deed of partnership that was subsequently executed by Ablitt and Roy on 29th June, 1959 and on a consideration of the said deed together with the earlier documents that were on record the High Court upheld the view of the Tribunal and answered the question in favour of the respondent assessee. The Commissioner of Income-tax has come up in appeal challenging the view taken by the High Court.

7. Section 25(4) of the 1922 Act under which relief has been granted by the Tribunal and by the High Court to the respondent-assessee runs thus:

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-lax Act, 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 periods 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. Where any such claim is made, an assessment shall be made on the basis of the income, profits and gains of the said period, and, if an amount of tax has already been paid in respect of the income, profits and gains of the previous year exceeding the amount payable on the basis of such assessment a refund shall be given of the difference.

8. Counsel for the Appellant pointed out that Section 25(4) itself makes a distinction between a case of succession by another person upon a dissolution of the firm and a case where there is merely a change in the Constitution of a partnership and according to him in order to get relief thereunder it is necessary to show that there has been a succession by another person and not merely a change in the Constitution of the partnership. Counsel further pointed out that in the instant case the firm had been undergoing several changes in the past; that the firm was re-constituted for shorter periods, that whenever any partner retired he gave up his claims to the assets and goodwill which vested in the continuing partners and what happened as of 1st April, 1959 as evidenced by the deed dated 30th March, 1959 was a similar reconstitution of the same firm; according to him if on the earlier occasions there was no succession then the change in the firm as of 1st April, 1959 was also not a succession. He urged that the recitals as also the operative part of the deed dated 30th March, 1959 clearly contemplated that Ablitt and Roy were to carry on the firm's business from 1st April, 1959 as continuing partners, the goodwill and assets having devolved on them by the outgoing partner Mclean releasing his claims therein in their favour. He pointed out that a retiring partner releasing all his claims in the goodwill and assets of the firm in favour of the continuing partners and in turn getting himself indemnified by the continuing partners with regard to the liabilities of the firm were the normal things usually provided for whenever there was a reconstitution of the firm and would have no bearing on the aspect whether there was a dissolution of the firm. Counsel, therefore, supported the view taken by the Income Tax Officer and Appellate Assistant Commissioner on the construction of the deed dated 30th March, 1959 and urged that what had actually taken place on 1-4-1949 was merely a change in the Constitution of the firm and it was not a case of another person succeeding to the business of the old firm upon its dissolution. According to counsel when a partnership is dissolved and only one of the erstwhile partner takes over the business and carries it on as the proprietor thereof or upon dissolution some of the erstwhile partners take some outsiders as partners and carry on the business, those would be the cases where another person (entity) could be said to have succeeded to the business within the meaning of the Section 25(4) but in the instant case after retirement of Mclean, the two erstwhile remaining partners, namely, Ablitt and Roy jointly described as continuing partners by the deed dated 30th March, 1959, took over the business and carried it on as from 1-4-1959 under the style of M/s. Pigot Champan & Co. at the same place and therefore it could not be said that it was a case of a dissolution of the erstwhile firm and succession to the old business by a new firm and as such both the Tribunal and the High Court were in error in granting relief under Section 25(4) to the respondent-assessee.

9. We might mention that in support of the aforesaid contention, counsel for the appellant relied upon a few decided cases including a decision of this Court in Commissioner of Income-Tax v. A.W. Figgies & Company and Ors. 24 ITR 405. but in our view it is unnecessary to discuss the facts of those cases and the conclusions reached therein because the principle is well settled that it is an examination of relevant documents and relevant facts and circumstances that the Court has to be satisfied in each case as to whether there has been a succession or a mere change in the Constitution of the partnership. It cannot be disputed that 'dissolution' and 're-constitution' are two distinct legal concepts, for, a dissolution brings the partnership to an end while a reconstitution means the continuation of the partnership under altered circumstances but in our view in law there would be no difficulty in a dissolution of a firm being followed by the Constitution of a new firm by some of the erstwhile partners who may take over the assets and liabilities of the dissolved firm. In other

words it is not possible to accept the contention of Counsel for the appellant that upon a dissolution of a firm succession to the old business by another person would only arise if a solitary partner takes over assets and liabilities and carries on the business as a sole proprietor thereof or if some of the erstwhile partners alongwith some strangers take over the assets and liabilities of the old firm and carry on the business. The two instances mentioned by Counsel for the appellant are undoubtedly clear cases of succession to the old business by another person or entity but succession to the old business contemplated under Section 25(4) need not be and cannot be confined to the instances mentioned by Counsel for the appellant. Under Section 40 of the Partnership Act, 1932 a firm can be dissolved with the consent of all the partners or in accordance with the contract between the partners; under Section 43 a partnership at will can be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm and upon such notice being given the firm gets dissolved as from the date mentioned in the notice as the date of dissolution and if no date is so mentioned as from the date of the communication of the notice, while Section 44 contemplates dissolution of a firm by and under order of the court in certain contingencies mentioned therein. It is quite conceivable that in cases of dissolution of the firm brought about by a notice under Section 43 or by an order of the court under Section 44 some of the erstwhile partners may take over the assets and liabilities and carry on the same business by constituting a new firm and even such cases would be cases of succession to the old business within the meaning of Section 25(4) of the 1922 Act. In our view the question whether there has been a dissolution of the firm and upon such dissolution a new firm has succeeded to the business of the old firm is a question which depends upon the intention of the parties to be gathered from the document or documents, if any, executed by and between the partners and other facts and surrounding circumstances of the case.

10. In the instant case, therefore, the question is whether there has been a dissolution of the old firm followed by the creation of a new firm which could be said to have succeeded to the business of the old firm? We have already summarised, while narrating the undisputed facts, the effect of the earlier documents commencing from the initial deed of partnership dated 18th May, 1953 right up to the Deed dated 30th of March, 1959 with which we are principally concerned. On an examination of these documents the following facts emerge clearly: (a) that the initial partnership between Haywood, Blomenstok, Ablitt and Roy under the deed dated 18th May, 1953 was for a fixed term of six years from 1-4-1953 and as such the same would automatically stand dissolved under Section 42(a) of the Partnership Act on 31-3-1959; (b) under the deed dated 30th of March, 1959 the partnership between Mclean, Ablitt and Roy Was in terms "dissolved by mutual consent as from 1st April, 1959;" (c) the document expressly states both in the recital portion and in the operative part (vide Clauses 1 and 2) that the firm has been dissolved by mutual consent; (d) the continuing partners were given the sole right to collect all the assets of the dissolved firm and to issue, recover and give full receipts for all debts of that firm; (e) each of the parties to the deed released the other from all proceedings, accounts, costs, claims and demands in respect of the dissolved firm; (f) the Tribunal found as a fact that the relevant account books clearly indicated that the old firm stood dissolved and its assets and liabilities were taken over by the new firm of the two continuing partners and (g) within three months another document was executed on 29th June, 1959 by and between the continuing partners recording the terms and conditions on which the continuing partners, to the exclusion of the retiring partner, were to carry on the business of the old firm with effect from 1-4-1959. Having regard to these facts and circumstances which emerge clearly on record

it seems to us that both the Tribunal as well as the High Court were right in coming to the conclusion that the old firm was dissolved on 1st April, 1959 and it was the case of a new firm succeeding to the old business and therefore, the respondent assessee was entitled to the relief claimed under Section 25(4) of the 1922 Act in respect of its income for the Assessment Year, 1959-60.

11. In the result the appeal fails and is dismissed. There will be no order to costs.