Sohan Pathak And Sons, Banaras vs Commissioner Of Income-Tax, U.P. And ... on 11 May, 1950

Equivalent citations: [1951]19ITR199(ALL), AIR 1950 ALLAHABAD 648

JUDGMENT

MALIK, C.J. - This is a reference under Section 66(1) of the Income-tax Act read with Section 21 of the Excess Profits Tax Act. The assessee was a joint Hindu family owning considerable property in Banaras and carrying on business under the name and style of Messrs. Sohan Pathak & Sons. The Sohan Pathaks family tree is as follows :-

SOHAN PATHAK ½ Girdhar ½ Ganesh ½ Mahesh Ram Shyam Sunder ½ Man Mohan Chandra Mohan Badri Nath Gopi Narayan ½ Radhey Mohan ½ Jitendra Mohan ½ Hira Lal Panna Lal Kishori Lal Kamal Narain ½ Hirday Narain Shri Nath Ram Mohan Shyam Mohan Krishna Mohan The joint family was carrying on extensive business in Banaras brocade goods and in the year 1943-44 it has made a profit of Rs. 26,802. In 1944-45 upto July 16, 1943, it made a profit of Rs. 64,775 which was well in excess of the amount on which excess profits tax was payable, i.e., Rs. 36,000. On July 16, 1943, the adult members of the family are said to have made a partial partition by dividing the Banaras brocade business, the status of the joint family remaining joint and the other property also not being divided. After this division on the July 16, 1943, on the of July 17, 1943, they started two partnership firms under the name and style of (1) Sohan Pathak Girdhar Pathak, and (2) G. M. Pathak & Co. The two firms carried on the same business as the joint family was carrying on. The partners in Sohan Pathak Girdhar Pathak were said to be -

Shyam Sunder, Major 2 annas share Hira Lal,

" 2 "

Panna Lal, " 2 "

Man Mohan, Minor 4 "

Gopi Nath, " 2 "

Radhey Mohan " 2 "

Sri Nath, " 2 "

G. M. Pathak & Co., had as its partners Ganesh Ram, Major 2 annas share Badri Nath, " 2 "

Mahesh Ram, " 2 "

Kishori Lal, " 2 "

Chandra Mohan Minor 4 "

Ram Mohan, " 2 "

Shyam Mohan, " 2 "

It would be seen that all the four branches were equally represented in the two firms, each having a share of annas 4. The reason why this partial partition was made on July 16, 1943, according to the assessee, was to safeguard the interest of the minor members, who, in case of loss, would not be liable for the losses of the business, being minors, though they would be entitled to the profits thereof, while, if the joint family had continued the business, the entire joint family property would have liable for the losses. This explanation was not accepted by the Excess Profits Tax Officer or by the Appellate Tribunal, who held that the main purpose was to avoid payment of excess profits tax. It would be seen from the facts stated above that in Girdhars branch, who was dead, there were only two minors and no major member. In Ganeshs branch Gopi Nath and Radhey Mohan were the only two minors. In Mahesh Rams branch there were no minors. In Shyam Sundars branch all his three sons were minors, and his fourth son, Krishna Mohan was born after July 16, 1943, and his name was, therefore, not included. No explanation is given why Mahesh Rams branch took greater responsibility for the losses, if any, than the other two branches of Ganesh and Shyam Sunder, and why Girdhars branch was so favourably treated as not to be made liable for any losses at all, while each branch was given the same interest of annas 4 in each business.

On the finding that the transaction had been entered into with the main purpose of avoiding payment of excess profits tax, the Excess Profits Tax Officer, under Section 10A, held the assessee liable for the profits of the business. It may be mentioned that during the period from July 17, 1943, to the October 8, 1943, the rest of the assessment year, the Banaras brocade business and a profit of Rs. 25,983.

The Appellate Tribunal came to the conclusion that the Excess Profits Tax Officer was right in taking action under Section 10A.

On an application filed by the assessee the following questions have been referred to us for answer :-

> "I. Whether in view of the fact that the partial partition had been accepted by the Income-tax Officer and the business was treated as having been discontinued for the purpose of assessment under the Income-tax Act, the same business could legally be treated as having continued unbroken in respect of the same chargeable accounting period for the purpose of section 10A of the Excess Profits Tax Act read with Sections

4 and 6 of the same Act ?

II. Whether in the circumstances of the case, the effect of the partial partition of the Hindu undivided family on March 16, 1943, and the formation of two different firms was a transaction within the meaning of Section 10A of the Excess Profits Tax Act ?

III. Whether on the facts found by the Tribunal as stated in para 7 of the statement of case, it was justified to draw the inference that the main purpose behind the partial partition was the avoidance or reduction of liability to excess profits tax ?

We may mention here that we were put to a great deal of trouble by reason of the way the statement of case was drafted, as well as by reason of the fact that the paper book contained nothing more than the statement of case. In paragraph 3 reference was made to paragraph 7 of the statement of case, but paragraph 7 of the statement of case was as follows :-

"The Tribunal finally held that on the facts of the case, the Excess Profits Tax Officer was right in taking action under Section 10A for the chargeable accounting period in dispute."

We were told that paragraph 7 was a mistake for paragraph 4, or paragraph 7 of the statement of case was a mistake for paragraph 7 of the order of the Appellate Tribunal. But neither in paragraph 7 of the order of the Appellate Tribunal nor in paragraph 4 of the statement of case are the findings of the Appellate Tribunal summarised on which we are expected to give our answer. This unsatisfactory way of stating a case has always been a source of great inconvenience and we have more than once pointed out that it is not for this Court either to record findings of fact or to collect the findings from the various documents on the Income-tax file. The facts found by the Tribunal should be clearly set out in the statement of case so that we may have only to answer the question, whether on those facts the conclusion was or was not possible. Now that the Tribunal has stopped including other papers such as the assessment order, the appellate orders including the order of the Appellate Tribunal, we have no material from which we can collect the facts even it we wanted to do so. In this case, counsel for the Department provided us with typed copies, but even they were not of much assistance. We looked into the appellate order carefully and it is only by implication that the Appellate Tribunal can be said to have accepted the findings of the Excess Profits Tax Officer. After having, in paragraph 3, quoted the grounds on which the Excess Profits Tax Officer had overruled the contention of the assessee and having mentioned in paragraph 6 that counsel for the Department had urged that the onus had been fully discharged and the he had referred to the grounds on which the Excess Profits Tax Officer had invoked the provision of Section 10A, the Members of the Tribunal in paragraph 9 say : "On the facts of the case, we hold, therefore, that the excess Profits Tax Officer was right in taking action under Section 10A." From that we can only assume that they accepted the grounds which they had set out in paragraph 3 as the grounds on which the Excess Profits Tax Officer had acted. They do not say so at any place. The portions of their appellate order where they seem to have given any finding, of their own, on question of fact are to be found partly in paragraph 7 and partly in paragraph 8. In paragraphs 7 and 8 they found the

following facts :-

(1) On July 16, 1943, the assets of brocade business were equally divided among four groups of members forming the family.

(2) On the next day these four groups formed two partnership concerns for carrying on the same brocade business.

(3) This business was to be carried on by capital received from the family.

(4) The four branched had equal shares in the profits.

(5) If the main purposes of the partial partition of the business was to safeguard the interests of the minors, the family should have divided the shares in earlier chargeable accounting periods when a slump had set in and the profits had gone down and not in the chargeable accounting periods when the profits had gone up considerably.

The grounds on which the Excess Profits Tax Officer had acted are set out in paragraph 4 of the statement of case. Even if we discard the grounds on which the Excess Profits Tax Officer had come to the conclusion that the main purpose was to avoid payment of excess profits tax, it cannot be said that on the facts found by the Appellate Tribunal it was not justified in drawing the inference that the main purpose behind the partial partition was the avoidance or reduction of liability to excess profits tax. This is our reply to question No. III.

As regards question No. I we have already held in Misc. Case No. 12 of 1945, Ganga Sahai Umrao Singh v. Commissioner of Excess Profits Tax, U.P., decided on April 25, 1950, that the Excess Profits Tax Officer is not bound by the findings arrived at by the Income-tax Officer. The Income-tax Officer had accepted the plea of partial partition by his order dated July 24, 1946, and the claim for relief under Section 25(3) of the Income-tax Act on the ground of creation of distinct and separate partnerships on BHC July 17, 1943, for purposes of assessment of income-tax for the year 1944-45. The two partnerships had been registered by the Income-tax Officer and it was argued on that basis that the Excess Profits Tax Officer having accepted the partial partition and having accepted that the joint family had discontinued business for purposes of assessment under the Income-tax Act, the same business could not legally be treated as having been continued during the same period for purposes of payment of excess profits tax.

For the reason given by us in our decision quoted above our answer to the question is that the Excess Profits Tax Officer was not bound by the decision of the Income-tax Officer and if under Section 10A of the Excess Profits Tax Act he came to the conclusion that the main purpose behind the transaction was avoidance of payment of excess profits tax, he could proceed in accordance with the provisions of that section and make the necessary adjustment.

As regards the second question, Mr. Pathak has urged that the partial partition of the Hindu undivided family and the formation of two different firms was not a transaction within the meaning of Section 10A of the Excess Profits Tax Act. The argument is that the transaction must be something in the nature of a business deal, the main purpose of which is avoidance or reduction of liability, and that there should be a liability. It is urged that it could not have been intended by Section 10A to give the Excess Profits Tax Officer authority to nullify any act, not being in the nature of a business deal, by which the members of the assessee family decided to break up their status. It is further urged that on the breaking up the joint family status and on the two partnerships coming into existence there was a change in the persons carrying on the business within the meaning of Section 8 and a new business must be deemed to have commenced and in such circumstances where the old business must be deemed to have come to an end and a new business to have commenced, Section 10A should not be applied.

Dealing with the excess profits tax in England Lord Hanworth in Birt, Potter and Hughes, Ltd. v. Commissioner of Inland Revenue, said :

> "I desire to observe at the outset that we are dealing with what is known as and what was imposed as the Excess Profits Duty, its name indicating that it was a duty upon excess profits; it was designed, as we all know, to try to secure to the Revenue a portion of the profits being made in the course of the war which were said to be enhanced by the circumstances of the war and, being so enhanced, to be beyond the sum which the subject was entitled to keep free of taxation, inasmuch as he ought not to be entitled to make a larger profit due to the misfortune of the nation at large in being at war."

This being the object behind the statute, it was provided that any profits in excess of the normal profit in trade or business shall be paid back to the Revenue.

In the same case Lord Hanworth made it clear that the difference between the excess profits tax and the income-tax is that while the excess profits tax is designed to catch a portion of the amount which is deemed by the Legislature to be in excess of the normal profits of the trade or business, the income-tax is intended to be a tax upon a persons income or annual profits. His Lordship said :-

> "If, therefore, one contrasts the scheme and form by which income-tax is imposed, there is reason for saying that that tax is upon a person in respect of his profits and gains; whereas the tax which is imposed by the Excess Profits Duty Act is on the amount of the profits exceeding the normal, and unless there are such profits no tax is charged."

To avoid successful evasion of payment of this excess amount earned during the war Section 10A was enacted which provides that, where the main purpose behind any transaction or transactions was the avoidance or reduction of the liability to pay excess profits tax, the Excess Profits Tax Officer may, with the previous approval of the Inspecting Assistant Commissioner, make such adjustments as respects liability to excess profits tax as he considers appropriate so as to counteract the

avoidance or reduction of liability to excess profits tax. It means, in short, that if excess profits tax would be payable but for a certain transaction or transactions and the main purpose behind that transaction or those transactions is the avoidance or reduction of liability then the Excess Profits Tax Officer may ignore such transaction or transactions for the purpose of assessment. There can be no doubt that if there had been no partial partition and the business had been carried on as before there would have been the liability to pay the excess profits tax by the joint family. If the joint family effected a partial partition and started carrying on the business in partnership with the main object of evading excess profits tax liability then we fail to see why Section 10A of the Act should not be made applicable simply because the business became the separate property of the family.

Mr. Pathak has urged that it is open to a member of the joint Hindu family to sever his status either in whole or in part and the Excess Profits Tax Officer cannot force the members of a joint Hindu family to continue as members of the joint Hindu family. That is perfectly true, but, if the members of the joint Hindu family partition the property, with the main purpose of avoiding excess profits tax, the Excess Profits Tax Officer, even though he may not be able to make them reunite, can certainly ignore such a partition and adjust the liability in accordance with the provisions of Section 10A. On the finding that the partial partition was with the main purpose of evading payment of excess profits tax, we fail to see how it can be urged that Section 10A was not applicable. The argument that it is a new business does not also affect the matter. If the change was effected with the main purpose of evading payment of excess profits tax, the Excess Profits Tax Officer is entitled to ignore such a change. Mr. Pathak contended that under Section 8 whenever there is a change in the persons carrying on a business, the business is deemed to have been discontinued and a new business commenced. That since the business in this case was deemed to have been discontinued under the law, it could not be liable to excess profits tax. It must, however, be kept in view that in this case there was no actual discontinuance of the business. The discontinuance relied upon by Mr. Pathak is only a legal fiction and this legal fiction can be avoided by the Excess Profits Tax Officer as he is entitled to ignore the transaction which gave rise to this legal fiction. It is true that no person can be compelled to carry on his business and if he chooses to discontinue it, he cannot thereafter be assessed to excess profits tax but where there is no actual discontinuance and the business continues to run as before with only a change in the persons carrying on the business, Section 10A permits the Excess Profits Tax Officer to disregard the change with the result that so far as proceedings under the Excess Profits Tax Act are concerned, it has to be held that there has been no change in the persons carrying on the business and consequently no discontinuance.

Mr. Pathak has urged that a transaction must mean something done in the course of the business and a discontinuance of the business and the start of a new business is not a transaction. He has quoted from Websters Dictionary that a transaction means "doing or performing; that which is done, affair, act, doing, negotiation or dealing." The word "transaction" is derived form the word "transact" which means to do something. Partial partitioning of joint family is certainly an act and so is the starting of the partnership business. We fail to see how these acts should not be deemed to be "transactions."

The result, therefore, is that our answer to this question is that the partial partition of the Hindu undivided family on the July 16, 1943, and the formation of two different firms were "transactions"

within the meaning of Section 10A of the Excess Profits Tax Act.

The assessee must pay the costs of this reference which we assess at a figure of Rs. 500.

Reference answered accordingly.