

Beni Ram Moolchand vs Commr. Of Income Tax, United Provinces, ... on 11 February, 1953

Equivalent citations: AIR1954ALL661, [1954]25ITR287(ALL), AIR 1954 ALLAHABAD 661

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Bench: V. Bhargava

JUDGMENT

V. Bhargava, J.

1. This is a reference under Section 21 of the Excess Profits Tax Act read with Section 66 (1), Income-tax Act,

2. The assessee Beniram Moolchand carries on the business of manufacturing scents and scented oils and of dealing in foreign scents at Kannauj. During the relevant chargeable accounting period, he also held the selling agency for the sale of Sandalwood oil manufactured by the Mysore Government Factory. The agreement of selling agency granted the agency in the joint names of the assessee and another person, Lala Banarasi Das Khattri, who had also a business similar to that of the assessee at Kannauj. This agreement was executed on 1-3-1942, and granted the sole right to the assessee and Lala Banarsi Das Khattri to sell Sandalwood oil manufactured by the Mysore Government in the territory consisting of the United Provinces (now the State of Uttar Pradesh), the Central Provinces (now the State of Madhya Pradesh), Central India (now the State of Vindhya Pradesh), The Punjab, Delhi, Rajputana (now the State of Rajasthan) and all the Indian States within these limits.

Only a few of the terms of this deed of agreement are relevant for the purpose of this reference and we, therefore, need mention only those terms. According to those terms, the agents guaranteed a minimum sale of 12,000 pounds of oil in their agency territories at rates fixed by the Mysore Government from time to time. If, in any year, the agents failed to take the minimum quantity guaranteed, they were bound to take a larger quantity in the next year so that the minimum for the next year was to be increased to that extent. The packed oil was to be delivered to the agents F. O. R. at any railway station in the agency territory. The agents had to furnish a security of Rs. 20,000/- and they were allowed credit to this extent as well as further credit to the extent of Rs. 15,000/- against drafts at 60 days' sight. The agents were bound to arrange to take delivery of the oil, warehouse it and insure it to its full value against all risks and losses. All expenses incurred in this respect had to be borne by the agents themselves. The agents were permitted to sell the oil on credit

but they were to indemnify the Mysore Government against all losses caused by default in payment on the part of the customers. The agents were also bound to make effective arrangements for advertising the oil in a suitable manner. They were to receive a contribution of Rs. 500/-a year, provided that minimum amount was spent, for advertisement purposes and any excess expenditure on advertisement had to be borne by the agents themselves. In consideration of all this business, the agents were entitled to receive "a commission of four annas on every pound of oil supplied to them for sale and sold by them.

3. The Excess Profits Tax authorities sought to include the income of the assessee from this agency business for Excess Profits Tax purposes in the income from the assessee's own business of manufacturing scents and scented oils and dealing in foreign scents. The assessee contended that this agency business was a partnership business, of which the assessee and Lala Banarsi Das Khattri were partners and consequently this business must be held to be separate and distinct from the old business for purposes of the assessment of Excess Profits Tax. The Income-tax Appellate Tribunal found that each of the commission agents, namely, the assessee and Lala Banarsi Das Khattri, had been carrying on the business of the commission agency along with their separate business activities through their respective firms by means of their own separate staff, separate office and separate set of dealings, keeping separate account of their respective transactions and had also entered into certain separate and independent dealings out of the Sandal oil stock received by them as commission agents and earned profits on them. It was also found that separate account of expenditure had been kept by each of them and no common expenses were incurred nor any net profits were worked out or ascertained through the medium of any partnership account.

It was also admitted before the Tribunal that if, in respect of such separate dealings, any stock was left with either of the two commission agents and the prices depreciated, the loss was to be borne by the Mysore Government and that part of the loss, which was not borne by the Mysore Government, was to be borne by the assessee or by Lala Banarsi Das Khattri, whosoever had the stock left in his hands. The further finding of the Tribunal was that the commission on the total purchases made by both the agents was finally divided equally between the assessee and Lala Banarsi Das Khattri. In entering into the agreement, the executants had entered as representing their respective firms so that the firm Beniram Moolchand was as such one of the commission agents. As a result of the transactions in connection with this selling agency, the assessee and Lala Banarsi Das Khattri jointly earned a sum of Rs. 12,473-3-9 as commission and contribution towards advertisement charges. This amount was received by the assessee and half of it was credited by the assessee in favour of Lala Banarsi Das Khattri, The remaining half retained by the assessee was his own share. On these facts, the Tribunal held that no partnership existed between the assessee and Lala Banarsi Das Khattri and that the work of selling agency in respect of the oil manufactured by the Mysore Government done by the assessee was his own separate business. On the application of the assessee. the following question has been referred by the Tribunal for our decision:

"Q. Whether, on the above facts, the Tribunal was justified in drawing the inference that the commission agency in the joint name of the appellant and Lala Banarsi Das held under the deed of agreement, dated 1-3-1942, was not a partnership?"

4. Learned counsel for the assessee has contended that the question has not been properly framed by the Tribunal and has presented an application under Section 66(4) of the Indian Income-tax Act requesting that the question be re-framed as follows:

"Q. Whether the sum of Rs. 5,986-9-9 earned by the applicant as commission from the Mysore State Government from Sandalwood oil Agency is exempt from Excess Profits Tax?"

The argument of the learned counsel is that the question, as framed by the Tribunal, confines the assesses to one contention only, viz., that the sum of Rs. 5,986-9-9 earned by the assessee from the selling agency business was not liable to Excess Profits Tax, only because it had been earned in a business carried on by the assessee in partnership with Lala Banarsi Das Khattri. The question has been sought to be reframed in an attempt to challenge the liability of the amount earned by the assessee to Excess Profits Tax on two other grounds: One ground that the learned counsel wanted to urge was that, even though the selling agency business might not have been carried on in partnership with Lala Banarsi Das Khattri, yet it was a business of the assessee which was separate and distinct from his old business of manufacturing scent and scented oil and dealing in foreign scents and, for the purpose of Excess Profits Tax, the amount earned in the selling agency business should not be added to the income from his old business; the other ground was that the profits from the selling agency business were earned in the State of Mysore and as such those profits were exempt from being charged to Excess Profits Tax under the third proviso to Section 5 of the Excess Profits Tax Act.

5. The application of the assessee under Section 66 (4) of the Indian Income-tax Act has to be disallowed as we are not satisfied that the points of law, which the learned counsel wants to urge after having the question re-framed, arise out of the appellate order of the Income-tax Appellate Tribunal. The scope of the jurisdiction of the High Court in references under Section 66, Income-tax Act, is restricted to deciding questions of law raised by the case referred to the Court by the Tribunal. Their Lordships of the Judicial Committee in -- 'Commr. of Income-tax, B and O. v. Kameshwar Singh of Darbhanga', AIR 1933 PC 108 at pp. 114-115 (A) remarked:

"The duty of the High Court under Section 66(5) is to 'decide the questions of law raised' by the case referred to them by the Commissioner and it is for the Commissioner to state formally the questions which arise. Here the High Court itself formulated the question to be decided as being.....Their Lordships deprecate this departure from regular procedure, but in the circumstances, have not thought it proper to decline to express their view on the question thus informally presented."

The words "questions of law raised by the case" have since been interpreted in the various High Courts and there are two decisions of this Court also. In 'In re Govind Ram Tansukh Rai', (1944) 12 ITR 450 (All) (B), a Bench of this Court held :

"It is not necessary that all legal arguments in support of a contention should be put forward before the Assistant Commissioner or the Commissioner so long as the

contention itself is substantially put forward and variation is permissible in regard to legal arguments in support of the contention provided they clearly and properly arise on the facts found and on the contention raised by the assessee."

In -- 'Mahabir Prasad v. Commr. of Income-tax, U. P., AIR 1952 All 271 (C), in considering the scope of Sub-section (4), Section 66, Indian Income-tax, we hold :

"Sun-section (4), to our minds, is wide enough to cover such a case and if this Court is satisfied that the statement of the case is insufficient, it can refer the case back to the Income-tax Appellate Tribunal to give a fuller statement. If the Court then considers that it would like to have further statement of facts and other questions referred to it, it can always pass suitable orders under Section 66(4) of the Income-tax Act. The point is covered by the decision of a Bench of the Bombay High Court in --'Khandvala and Co, v. Commr. of Income-tax', AIR 1947 Bom 89 (D)."

The Bombay High Court, in -- 'AIR 1947 Bom 89 (D)', held :

"When a statement of case, with the question of law framed by the Tribunal, is filed in Court for disposal, if a party is aggrieved and wants to contend that certain further facts ought to be stated, or certain questions of law should be raised, he can make an application by way of notice of motion. That should be heard along with the case stated by the Tribunal for the Court's opinion. At that time, the Court will consider whether the statement of case is complete for the question of law raised by the Tribunal. The Court can also consider whether, on the case stated by the Tribunal, the proper question is raised or not. That is the proper time for an aggrieved party to bring ' to the notice of the Court that certain further and other facts are necessary to be stated or certain further or other questions of law arise and should be brought for decision by the Court."

These decisions clearly indicate that the principle governing the application under Section 66(4), Income-tax Act, is that the High Court can ask for further statement of facts on questions of law already framed by the Tribunal and, further, the Court can reframe question referred so as to cover points of law which really arise on the facts already found by the Tribunal in the case. It is not within the scope of the powers of the High Court to frame a new question of law not framed by the Tribunal which does not arise on the facts found in the case, or, which requires further facts to be found and stated by the Tribunal besides the facts already found and stated.

6. Learned counsel for the assessee has very strongly relied on a decision of the Nagpur High Court in -- 'Mohanlal Hiralal v. Commr. of Income-tax', AIR 1953 Nag 173 (E), in which the learned Judges held :

"In interpreting the expression 'the question, of law arising out of such order', Chagla, C. J., summed up the correct legal position very tersely thus : "..... looking at the plain language of the section apart from any authority, I should have stated that a

question of law arose out of the order of the Tribunal if such a question was apparent on the order itself or it could be raised on the facts found by the Tribunal & which were stated in the order. I see no reason to confine the jurisdiction of this Court to such questions of law as have been argued before the Tribunal or are dealt with by the Tribunal. The Section does not say so and there is no reason why we should construe the expression 'arising out of such order' in a manner unwarranted by the ordinary grammatical construction of that expression': -- 'Madanlal Dhamidharka v. Commr. of Income-tax', AIR 1949 Bom 24 at p. 25 (F)."

This view of the Nagpur High Court, or the view of the Bombay High Court which it follows, is, in no way, in conflict with the opinion which we have expressed above and which is supported by the decisions of this Court and the Bombay High Court and does not widen the scope of the jurisdiction of the High Court beyond answering the question of law framed by the Tribunal after asking for further statement of the facts, or, answering questions of law after refraining them so as to cover points of law arising out of facts found in the case. The application of this principle to this case rules out the contention of the learned counsel for the assessee that the question referred by the Tribunal should be refrained as suggested in the application under Section 66(4) of the Act.

7. The facts necessary for deciding the two questions of law, which learned counsel wanted to argue by amendment of the question referred to us, have not all been found by the Income-tax Appellate Tribunal, probably for the reason that those contentions were not raised before it and, consequently, it had no occasion to investigate into those facts. As the facts stated above show, the Tribunal did hold that the agency business of the assessee was not carried on in partnership with Lala Banarsi Das Khattri and, for this purpose, the Tribunal held that each of the two persons alleged to constitute the partnership carried on separate business activities through their respective firms by means of a separate staff, separate office and separate set of dealings, keeping separate account of their respective transactions and had also entered into certain separate and independent dealings out of the Sandal oil stock received by them as commission agents and earned profits on them.

The word 'separate' used in this finding was meant to distinguish between the activities of the assessee and the activities of Lala Banarsi Das Khattri as commission agents of the Mysore Government. This word was not used to connote that the commission agency work of the assessee was separate from his previous continuing business of manufacturing scents and scented oils and dealing in foreign scents. The Tribunal did not enter into the question whether the assessee kept a separate staff, separate office and separate accounts of the commission agency business apart from the staff, office and accounts of the old business of manufacturing scents and scented oils and dealing in foreign scents. The Tribunal would have investigated this question of fact, if it had been contended by the assessee before it that his commission agency business was separate and distinct from his old business even though it might not have been in partnership with Lala Banarsi Das Khattri. The ground, that learned counsel wanted to urge, can, therefore, be considered only after obtaining fresh facts from the Tribunal and cannot, therefore, be said to be a question of law raised by the case referred to us.

8. Similarly, the second argument that learned counsel wanted to urge, would also require a further finding from the Tribunal whether the profits from the commission agency business were earned by the assessee in the State of Mysore or at his place of business in Kannauj. The facts found only show that the oil was supplied by the Mysore Government from an area to which the Indian Income-tax Act did not apply and the commission was also sent to the assessee from the same place. The income, which was earned by the assessee, arose out of the assessee's dealings with the Mysore Government as well as out of the activities which the assessee had to carry on at various places in stocking and selling oil and in advertising it. It cannot, therefore, be said that enough facts have already been found by the Tribunal which would show that the profits from the selling agency business were earned in the State of Mysore and, consequently, it is not permissible for us to re-frame the question so as to permit the assessee to contend that the profits were exempt from being charged to Excess Profits Tax under the third proviso to Section 5, Excess Profits Tax Act, We are, therefore, not inclined to re-frame the question and dismiss the application under Section 66(4) of the Indian Income-tax Act.

9. In these circumstances, the only question, that falls to be determined by us, is the question which has already been framed by the Tribunal and referred to us for decision. The burden of proving that the commission agency business carried on by the assessee was in partnership with Lala Banarsi Das Khattri lay on the assessee. To discharge this burden, the assessee has relied on the agreement of agency entered into between the assessee and Lala Banarsi Das Khattri as one party and the Government of Mysore as the other party. It has been contended that, under this agreement, the assessee and Lala Banarsi Das Khattri had jointly taken, the sole selling agency from the Mysore Government and had given a joint guarantee for the sale of the oil, that they were also joint guarantors in respect of all other obligations to Mysore Government and that the commission earned on the oil purchased was to be equally shared by them, and this shows that the business of sole agency constituted a partnership between the assessee and Lala Banarsi Das Khattri, It is to be noticed that the assessee has not produced any deed or agreement of partnership executed by the assessee and Lala Banarsi Das Khattri, nor has any other evidence been adduced to prove what the agreement 'inter se' between the assessee and Lala Banarsi Das was. The terms of the agreement with the Mysore Government do not, in our opinion, necessarily lead to an inference that the assessee and Lala Banarsi Das Khattri, in working jointly as selling agents, had agreed to enter into a partnership. Even persons, who may not be partners in carrying on commission agency business, may make themselves jointly responsible to the principal granting the agency in respect of matters arising between the commission agents and the principal, but this circumstance would not indicate that such persons must be acting as partners. The rights of such persons 'inter se' would have to be determined by the terms of the agreement between them and not by the terms of the agreement jointly entered into by them with the principal. Occasions arise when persons individually may not be in a position to comply with the terms demanded for granting the commission agency, or, when persons may combine to take the agency jointly in order to avoid competition and thus obtain more favourable terms.

The mere fact of taking the agency jointly would not necessarily constitute partnership. To constitute partnership under Section 4 of the Indian Partnership Act, persons should have agreed to share profits of a business carried on by all or any of them acting for all. The two ingredients, which

are necessary to constitute partnership, are an agreement to share the profits and the carrying on of the business by all or any of them acting for all. The agreement with the Mysore Government does not show that there was any agreement between the assessee and Lala Banarsi Das Khattri to share the "profits" of the selling agency business. On the other hand, even the contention of the assessee is that the agreement between the assessee and Lala Banarsi Das Khattri was to share the "commission" on the oil purchased from the Mysore Government. The commission earned on the oil purchased cannot be said to be the profits of the selling agency business.

The facts found by the Tribunal show that the agency business did not consist of merely purchasing oil from the Mysore Government. Under the agreement with the Government, the assessee and Lala Banarsi Das Khattri had not merely to purchase the oil but they had to carry out a number of other operations. They were required to take delivery of the oil and warehouse it at their own expense. They were also required to insure the oil to its full value against all risks and losses out of their own pockets. They had to incur expenditure on advertisement and were to be reimbursed to the extent of Rs. 500/- a year only by the Mysore Government. If the expenses on advertisement exceeded Rs. 500/-, the excess had to be borne by them; and if there was a surplus, it could be appropriated by them. For carrying on all these activities they- had to maintain a staff and incur other expenses. The commission earned by them could only turn into profits after setting off all these and other incidental expenses.

The agreement between the assessee and Lala Banarsi Das Khattri was only to share the commission while there was no agreement to share the various expenses. It is, therefore, clear that the facts established by the assessee do not, in the absence of proof of the terms of the agreement between the assessee and Lala Banarsi Das Khattri, prove that a partnership between them had come into existence. There are the further facts that the assessee and Lala Banarsi Das Khattri had separate business activities through their respective firms by means of a separate staff, separate office and separate set of dealings. They were keeping separate accounts of their respective transactions and had also entered into certain separate and independent dealings out of the Sandal oil stock received by them as commission agents and earned profits on them. Separate accounts of expenditure had to be kept by each of them and no common expenses were incurred nor any net profits worked out or ascertained. An extract from the 'Rokar Bahi' of the assessee has been placed before us by the Tribunal as a part of the statement of the case. It shows that even the sum of Rs. 500/- received from the Mysore Government for expenses over advertisement was equally divided by the assessee and Lala Banarsi Das Khattri irrespective of the actual expenditure incurred by each on advertising the Sandal oil. All these circumstances lead to the inference that, though the assessee and Lala Banarsi Das Khattri had entered into a joint agreement with the Mysore Government, they kept their own business separate from each other and did not enter into any agreement 'inter se' to share the profits arising from the commission agency as a whole.

10. The word 'profit' was explained by Fletcher-Moulton L. J. -- 'In re Spanish Prospecting Co. Ltd.', (1911) 1 Ch 92 at p. 98 (G), as follows :

" 'Profit' implies a comparison between the state of a business at two specific dates usually separated by an interval of a year. The fundamental meaning is the amount of

gain made by the business during the year. This can only be ascertained by a comparison of the assets of the business at the two dates."

Later, in his judgment, Fletcher-Moulton L. J. proceeded to hold :

"We start, therefore, with this fundamental definition of profits, namely, if the total assets of the business at the two dates be compared, the increase which they show at the later date-as compared with the earlier date (due allowance of course being made for any capital introduced into or taken out of the business in; the meanwhile? represents in strictness the-profits of the business during the period in question."

This definition of the word 'profits' clearly indicates that profits depend on the total assets at the beginning of a period and at the end of that period and the ascertainment of these profits without actual stock valuation would always depend on the calculation of the gross receipts during the period and the gross expenditure incurred during that period. The receipts alone without having any regard for the expenditure cannot be deemed to be the profits of the business. The assessee and Lala Banarsi Das Khattri had agreed to share the gross receipts of the business, namely, the commission and the contribution towards expenses for advertisement paid to thereby the Mysore Government. There was no agreement to share the expenses which have also to be taken into account in working out the profits. We, therefore, hold that the Tribunal was justified in drawing the inference that the commission agency in the joint name of the assesses and Lala Banarasi Das Khattri held under the deed of agreement, dated the 1st of March, 1942, was not a partnership.

11. We answer the question accordingly. The assessee shall pay costs to the Department which we assess at Rs. 400/-