

Bishan Chand vs Commissioner Of Income-Tax, U.P., ... on 2 September, 1952

Equivalent citations: AIR1953ALL165, [1952]22ITR520(ALL), AIR 1953 ALLAHABAD 165

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Bench: V. Bhargava

JUDGMENT

Malik, C.J.

1. This is a reference under Section 21 of the Excess Profits Tax Act read with Section 66(1) of the Income-tax Act. The questions referred to us for answer are as follows : "1. Whether there is any change in the person carrying on a business within the meaning of Section 8(1) of the E. P. T. Act 1940 when the business which was previously carried on and owned by a Hindu undivided family is on disruption of the family, carried on and owned by a partnership composed of the members of the quantum family? 2. Whether the succeeding partnership is entitled to claim the set off of the deficiencies of profits of the chargeable accounting periods when the business was owned by the family?

2. From the facts set out in the statement of the case, it appears that Kalicharan and Chotey Lal were two brothers. Kalicharan had two sons Bishan Chandra and Triloki Nath, while Chotey Lal had one son Shiva Prasad. Bishan Chandra, Triloki Nath and Shiva Prasad were all members of a joint Hindu family. Upto 29th September 1941, they carried on business and were assessed to Excess Profits Tax as a Hindu undivided family. On 29th September 1941, there was a disruption in the family and Seth Bishan Chandra and Seth Shiva Prasad, representing the two branches of Kalicharan and Chotey Lal, entered into a partnership. From the statement of the case it appears that the joint family broke up into two parts, Seth Shiva Prasad and his sons remaining joint as one unit and Kali Charan's two sons and their descendants forming the other unit. The partnership thus became a partnership between Seth Bishan Chandra as karta representing his branch and Seth Shiva Prasad as karta representing his branch. Who the karta of the joint family was while the family was still joint does not appear from the statement of the case. The profits made by this joint Hindu family during the year immediately previous to the partition were below the standard profits and the question arose whether this deficiency could be carried forward and could be set off against the profits made by the partnership consisting of Seth Bishan Chandra and Seth Shiva Prasad representing their respective families.

3. The Tribunal held that there had been a change in the personnel, that the case was covered by Section 8(1) of the Excess Profits Tax Act and that the deficiency in the previous year could not be set off against the profits of the assessment year.

4. Section 7 of the Excess Profits Tax Act deals with question of granting relief on occurrence of deficiency of profits and Section 8 lays down in what circumstances such deficiency cannot be set off against the profits made in subsequent years.

5. We are only concerned with Sub-section (1) of Section 8 which is as follows :

"As from the date of any change in the persons carrying on a business, the business shall, subject to the provisions of this section, be deemed for all the purposes of this Act except for the purposes of determining the amount of the statutory percentage to have been discontinued, and a new business to have been commenced."

6. Learned counsel has urged that the persons who were carrying on the business while the family was joint are still the same even after the partition and there has been no change as no outsider was admitted into the partnership. Learned counsel has pointed out that in Sub-section (1) of Section 8 of the Excess Profits Tax Act the word "persons" has been used in plural while in some of the other sub-sections of the same section the word 'person' has been used in singular. The argument is that the word "person" in this sub-section must be deemed to include natural persons and not juristic persons. It is urged that though the word 'person' is defined in Section 2, Sub-section (17) of the Act as including 'a Hindu undivided family', this can be the meaning assigned only so long as there is nothing repugnant in the subject or context and in this case the language of Section 8 rules out such an interpretation. In short it is urged that if the same set of persons who were carrying on the business continue to carry it on, then the mere fact that there was a change in their status or in the shares held by them would not necessarily result in the business being called a new business. Reliance has been placed on a case decided by us on 29th August 1952 -- 'Ramkumar Ramnivas v. Commissioner of Income-tax, U.P., Misc. Case No. 371 of 1948 (All)', where we held that a joint Hindu family as such cannot be a partner except through its karta or such of the adult male members who enter into the partnership and the partnership must be deemed to be with them, though they may be representing the joint family.

7. Learned counsel has urged that a Hindu undivided family is not a person distinct and separate from its members like a company incorporated under the Indian Companies Act or a corporate body which has its existence distinct and separate from that of the members constituting it and, therefore, though the Hindu undivided family might have been taxed as such it was really the individual members of the Hindu undivided family who had been taxed and if there was no change in the membership, the mere fact that the joint status had been broken and instead of coparceners they had become co-owners, it could not be said that the persons carrying on the business were different so as to make it a new business. By way of illustration, learned counsel has mentioned a case where three adult members of a joint Hindu family were carrying on a business as a joint Hindu family and after breaking up of the joint status they continue to carry on the same business, as co-owners and not as coparceners, it is urged that the Excess Profits Tax Officer cannot claim that there has been a

change in persons carrying on the business and the business is, therefore a new business so that the deficiency in the previous year cannot be set off against the profits made in the year in question.

8. In -- 'Ramkumar Ramnivas' case (Misc. Case No. 371 of 1948 All.) the question arose whether a Hindu undivided family as such could be a partner in a partnership firm. It was suggested that a Hindu undivided family was a person as defined under the Indian Income-tax Act and it can therefore enter into a partnership. We were however, of the opinion that the question, whether a Hindu undivided family could be a partner in a partnership firm, must depend on the provisions of the Indian Partnership Act, and held that partnership was a result of a contract and only the karta or the adult members of the joint Hindu family, who had entered into the agreement, could be deemed to be partners while the other members of the family might be entitled to the benefits of the partnership and be liable for the losses thereof, but, except through those who had entered into partnership on their behalf, they could not exercise the rights of a partner, nor could they be made liable for the personal obligations of the partnership. We had further pointed out that where the karta or the adult male members had acted within their rights in entering into the partnership the joint family property might be made liable for the debts of the partnership, just as the joint family would be entitled to the benefits thereof. That decision cannot be of any assistance in this case where the question has to be decided not in accordance with the Indian Partnership Act but in accordance with the Indian Income-tax Act or the Excess Profits Tax Act. In these Acts a joint Hindu family is treated as a unit for purposes of taxation.

For the decision of the question, therefore, whether the assessee carrying on the business was the same, the question must depend on the interpretation of Sections 7 and 8 of the Excess Profits Tax Act, without any reference to the Indian Partnership Act or to the question whether a Hindu undivided family as such can or cannot enter into a partnership. Under the Excess Profits Tax Act if a Hindu undivided family is carrying on business and has made profits, exceeding the standard profits, the Excess Profits Tax Officer is entitled to realise the tax made from the assets of the business and, therefore, the liability of the members of the Hindu undivided family, whether minors or majors and whether they were as kartas or as adult members of the joint family carrying on the business or were merely sleeping members, if we may use the term, of the Hindu undivided family is the same. Under the general law, however, the karta or such other adult members who were carrying on the business are not only liable to the extent of the joint family property but are also personally liable for the losses of the business. The Hindu undivided family being recognised as a unit, for purposes of the Excess Profits Tax Act the "person" who was carrying on the business under Section 8(1) was the Hindu undivided family before the partition on 29th September 1941. As a result of the partition that Hindu undivided family ceased to exist and it was broken up into two Hindu undivided families and the business was now being carried on not by the Hindu undivided family that had existed before 29th September 1941, but by a partnership firm consisting of the two representatives of the two Hindu undivided families which had come into existence as a result of the partition under a partnership deed dated 29th September 1941. The business is, therefore, no longer being carried on by the Hindu undivided family that was in existence before September 1941 but by entirely different persons, i.e., Seth Bishan Chandra as representing the Hindu undivided family of which he is the karta and Seth Shiva Prasad representing the Hindu undivided family of which he is the karta. In other words, it is now being carried on by a firm consisting of two persons, Seth Bishan

Chandra and Seth Shiva Prasad, as representing their families.

9. There is another way of looking at the case. It is admitted that, before the partition, the business was being carried on by the Hindu undivided family. Whether this is understood to mean that the business was being carried on by the Hindu undivided family as a unit or, as urged by learned counsel for the assessee, by all the members of the joint family, is immaterial because after the partition the business was being carried on by Seth Bishan Chandra and Seth Shiva Prasad only. They were the two persons who entered into the partnership. The other members of the family belonging to the two branches represented by them might be bound by their actions and might be entitled to the benefits of the business carried on by them, but it cannot be said that they are carrying on the business as members of the new partnership firm. It is, of course, obvious that it cannot be held that the new partnership firm is being carried on by the old Hindu undivided family as a unit. It must, therefore, be held that on any interpretation the business now carried on by the partnership firm must be deemed to be a new business within the meaning of Section 8 of the Excess Profits. Tax Act.

10. The result, therefore, is that our answer to the first question is in the affirmative and the second question is in the negative.

11. The assessee must pay the cost of the other side which we assess at Rs. 300 /-.