

PETITIONER:
COMMISSIONER OF INCOME TAX, KANPUR

Vs.

RESPONDENT:
NITYA NAND DEVKINANDAN

DATE OF JUDGMENT: 08/07/1997

BENCH:
S.C. AGARWAL, D.P.WADHWA.

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T
THE 8TH DAY OF JULY, 1997

Present:

Hon'ble Mr. Justice S.C. Agrawal
Hon'ble Mr. Justice D.P. Wadhwa

Ranbir Chandra, Lakshmi Iyangari, B.K. Prasad, Advs. for the appellant

Ms. Purnima Bhat and E.C. Agrawala, Advs. for the Respondent

The following Judgment of the Court was delivered:

S.C. AGRAWAL, J.:

These appeals by certificate granted under Section 261 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') are directed against the judgment of the Allahabad High Court dated November 5, 1980 in Income Tax Reference No. 301 of 1977 relating to the assessment years 1972-73 and 1973-74. In the said Reference case the following two questions were referred for opinion of the High Court by the Income Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal'):

1. Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that since, strictly speaking, there are no orders passed under Section 184(7) as such, the benefit of continuance of registration being granted year after year automatically on the fulfilment of certain year automatically on the fulfilment of certain conditions laid down in the said section, the Commissioner of Income Tax had no jurisdiction under section 263, Income Tax Act to cancel the same.
2. Whether on the facts and in the circumstances of the case, the Tribunal was correct in holding that the renewal of registration could not be cancelled by the Commissioner of Income tax invoking

the provisions of section 263, Income Tax Act on the ground that there is a difference in the profit sharing ratio shown in Form No. 11-4 and those mentioned in the partnership deed, the shares in fact having been divided on the basis of the deed in the account books in the assessment year 1967-68 when registration was duly granted and the same was renewed year after year.

Question No. 1 was answered by the High Court against the Revenue and in favour of the assessee. In view of the answer given to question No.1 the High Court did not consider it necessary to answer the second question on ground that it has become academic and the said question was returned unanswered.

The respondent (hereinafter referred to as 'the assessee-firm') is a partnership firm which was allowed registration under Section 185 of the Act for the assessment year 1967-68. Thereafter the assessee-firm was continued to be treated as a registered firm right upto the assessment year 1973-74. On a perusal of the assessment records the Commissioner of Income Tax (hereinafter referred to as 'the Commissioner') found that on November 3, 1966, when the assessee-firm submitted the application for registration for the assessment year 1967-68 in Form 11-A, there was discrepancy regarding shares of difference partners as mentioned in the partnership deed and the shares of the partner shown in the application for registration made in Form 11-A and that in each of the years relevant to the assessment years 1967-68 to 1973-74 the account books of the assessee-firm showed that the profits in the firm had not been distributed amongst its partners in accordance with the shares mentioned in Form No. 11-A. Being of the view that various orders passed by the Income Tax Officer whereunder the assessee-firm was granted registration for the assessment year 1967-68 and was treated to be continuing as a registered firm for the subsequent years, were erroneous and prejudicial to the interest of the Revenue, the Commissioner issued as show cause notice under Section 263 of the Act requiring the assessee-firm to show cause as to why the registration granted to it under Section 184(7) of the Act in respect of the assessment years 1972-73 and 1973-74 should not be cancelled. In respect of earlier years no action was proposed by the Commissioner for the reason that the action taken by the Income Tax Officer in respect of those years fell beyond the period of limitation of two years laid down in Section 263 of the Act. The assessee-firm appeared before the Commissioner and showed cause and maintained that throughout the profits has been divided amongst the partners in accordance with the shares as shown in the partnership deed and that there was a mistake in Form 11-A filed by the assessee-firm for seeking registration of the firm for the assessment year 1967-68. The Commissioner, however, concluded that the registration for the year 1967-68 as also the renewals in subsequent years were granted on wrong assumption and that treating the firm as continuing to be registered was prejudicial to the interest of the Revenue. The Commissioner, therefore, in exercise of his powers under Section 263 of the Act, cancelled the renewal of registration granted to the assessee-firm for the assessment years 1972-73 and 1973-74 and directed the Income Tax Officer to reframe the assessments for each of the two

years in accordance with law. The appeal filed by the assessee-firm against the said order of the Commissioner was allowed by the Tribunal on the view that according to Section 184(7) registration of the firm was to remain effective for the years subsequent to the year 1967-68 automatically, provided the conditions laid down in the said Section were fulfilled and that the said Section does not contemplate passing of an order either for renewal or continuance of registration of the firm and there was no order in regard to initial registration continuing to be effective in the subsequent years which could be revised by the Commissioner under Section 263 of the Act. On merits also the Tribunal rule that profits of the firm in various years has been divided amongst its partners in accordance with the shares mentioned in the partnership deed on the basis of which the firm was granted registration for the assessment year 1967-68 and neither registration of the assessee-firm for that year nor its being continued to be treated as registered for subsequent years could be said to be erroneous merely for the reason that there was discrepancy in the shares of the partners as mentioned in the application made in Form 11-A for registration of the firm for the assessment year 1967-68. The High Court, while answering question No. 1 in favour of the assessee-firm and against the Revenue, has affirmed the view of the Tribunal that in the matter of continuation of the registration of the assessee-firm no order had been passed by the Income Tax Officer which could be the subject matter of revision under Section 263 of the Act. Hence this appeal.

At the relevant time provision with regard to registration of firms were contained in Section 184 to 186 of the Act. Section 184 dealt with application for registration, Section 185 prescribed the procedure on receipt of the application and Section 186 dealt with cancellation of registration. As regard continuation of the registration of the firm which had earlier been granted registration the relevant provisions were contained in sub-Section (7) of Section 184 and in sub-Section (3) and (4) Section 185 which read as under :-

"Section 184(7):

Where registration is granted to any firm for any assessment year, it shall have effect for every subsequent assessment year;

Provided that -

(i) there is no change in the constitution of the firm or the shares of the partners as evidenced by the instrument of partnership on the basis of which the registration was granted; and

(ii) the firm furnishes, before the expiry of the time allowed under sub-section (1) or sub-section (2) of Section 139 (whether fixed originally or on extension) for furnishing the return of income for such subsequent assessment year, a declaration to that effect, in the prescribed form and verified in the prescribed manner, so, however, that where the Income Tax Officer is satisfied that the firm was prevented by sufficient cause from furnishing the declaration with the

time so allowed, he may allow the firm to furnish the declaration at any time before the assessment is made.

Section 185. Procedure on receipt of application.-

(1) & (2) Omitted

(3) Where the Income Tax Officer considers that the declaration furnished by a firm in pursuance of sub-section (7) of section 184 is not in order, he shall intimate the defect to the firm and give it an opportunity to rectify the defect in the declaration within a period of one month from the date of such intimation; and if the defect is not rectified within that period, the Income Tax Officer shall, by order in writing, declare that the registration granted to the firm shall not have effect for the relevant assessment year.

(4) Where a firm is registered for any assessment year, the Income Tax Officer shall record a certificate on the instrument of partnership or on the certificate on the instrument of partnership or on the certified copy submitted in lieu of the original instrument, as the case may be, to the effect that the firm has been registered under this Act, for that assessment year; and where a declaration under sub-section (7) of section 184 is furnished by the firm, for the relevant subsequent assessment year.

Omitted."

The scheme of the aforesaid provisions regarding continuation of the registration differs from the provisions contained in Section 26A of Income Tax Act, 1922 relating to the registration of firms. Under Section 26A of the Income Tax Act, 1922 the registration of a firm was valid only for one year and for the purpose of renewal of registration an application was required to be made every year. The process of renewal of registration was no different from the original registration. By Section 184 and 185 of the Act the requirement of making an application for renewal of registration every year was dispensed with. Sub-Section (7) of Section 184 provided that where the registration has been granted to any firm for any assessment year it shall have effect for every subsequent assessment year provided the following conditions were satisfied :

[i] there is no change in the constitution of the firm or the share of the partners as evidenced by the instrument of partnership on the basis of which the registration was granted; and

[ii] a declaration in the prescribed form and verified in the prescribed manner is furnished, before the expiry of the time allowed under sub-section (1) or sub-Section (2) of Section 139 for furnishing the return of income for such subsequent assessment year.

Sub-Section (3) and (4) of Section 185 prescribed the

procedure to be followed by the Income Tax Officer in case where a declaration was furnished in pursuance of Section 184(7). Sub-Section (3) of Section 185 laid down that if the Income Tax Officer was of the view that the declaration was not in order, he was required to intimate the defect in the declaration within a period of one month from the date of such intimation; and if the defect was not rectified within that period, the Income Tax Officer would, by order in writing, declare that the registration granted to the firm shall not have effect for the relevant assessment year. Sub-Section (4) of Section 185 prescribed that in cases where a declaration was found to be in accordance with the requirements of sub-Section (7) of Section 184 the Income Tax Officer would record a certificate on the instrument of partnership or on the certified copy submitted in lieu of the original instrument, as the case may be, to the effect that the firm is registered under the Act for the relevant subsequent assessment year.

The order passed by the Income Tax Officer under sub-section (3) of Section 185k declaring that the registration granted to the firm shall not have effect for the relevant assessment year, was appealable under Section 246 (j) of the Act. No appeal lay against the action taken by the Income Tax Officer under sub-section (4) of Section 185. The question is whether the correctness of such action could be examined by the Commissioner in exercise of his revisional power under Section 263 of the Act. In the impugned judgment the Allahabad High Court has taken the view that the matter of continuance of registration under Section 185(4) of the Act no order is passed by the Income Tax Officer and he only appends a certificate on the instrument of partnership that the firm stands registered and that such an action of Income Tax Officer cannot be regarded as passing of an order against which revision would lie under Section 263 of the Act. The High Court has placed reliance on the earlier judgment of the said Court in Ashwani Kumar Maksudan Lal vs. Addl. Commissioner of Income Tax. 83 ITR 854. That was a case of an order passed by the Income Tax Officer under Section 185(3) whereby it was directed that the registration of the firm could not be continued for the reason that the declaration was not in order. Under the provisions of Section 246 in force at that time no appeal lay against an order passed under Section 185(3). The High Court held that the said order was revisable. In that case the Court was not dealing with the question whether action under Section 185(4) was revisable under Section 263 of the Act.

On behalf of the Revenue reliance was placed on the following observation of the Andhra Pradesh High Court in Addl. Commissioner of Income Tax, A.P. vs. Chekka Ayyanna & Ors., [1977] 106 ITR 313 :

"A close reading of Section 184(7), proviso (ii), in conjunction with Section 185(4) would show that notwithstanding the condonation of delay by the Income Tax Officer when he is satisfied that the firm was prevented by sufficient cause from filing the declaration within the time allowed, nevertheless, he would have to pass an order under Section 185(4) to the effect that the firm has been registered under the Act for that assessment year;...." [p.319]

The High Court has, however, expressed its inability to

agree with the said view that scribing for the certificate under Section 185(4) of the Act that the firm stands registered for the subsequent years, results in an order.

This matter has also been considered by the High Court of Punjab & Haryana in Commissioner of Income Tax vs. Jagadhri Electric Supply & Industrial Co., [1983] 140 ITR 490. In that case, the Income Tax Officer had treated the registration of the firm as continuing under Section 185(4) of the Act and the question for consideration was whether there was an order by the Income Tax Officer within the meaning of Section 263 of the Act. The High Court has held:

"The ITO has to apply his mind to the question whether the declaration furnished by the assessee is in accordance with the provisions of the Act and the Rules framed thereunder or not, and, after satisfying himself, the necessary order, in the nature of a grant of the certificate, is to be recorded. Even if it may be taken to be a formal order but all the same, it is necessary to record some order, as has been actually done by the ITO in the present case and which has been reproduced in the proceeding under the Act, and would be covered under Section 263(1) of the Act, provided the other conditions are also fulfilled. There is another approach as well. If the order thus passed or the certificate so granted by the ITO is of such a nature that, if erroneous, is likely to prejudice the interests of the Revenue, then the provisions of Section 263(1) of the Act will be attracted. In other words, it is the nature of the order which will determine the applicability of Section 263 of the Act." [p.499]

We are in agreement with the aforesaid view taken by the High Court of Punjab & Haryana and are unable to endorse the view taken by the Allahabad High Court in the impugned judgment. For the purpose of treating the registration of a firm as continuing for a subsequent assessment year the Income Tax Officer is required to apply his mind to the declaration that is by the firm under Section 184(7) and to examine whether the declaration is in accordance with the provisions of the Act and the rules framed thereunder and after satisfying himself that it is so, he has to record the certificate on the instrument of partnership or on the certified copy submitted in lieu of the original instrument to that effect that the registration shall have effect for the relevant assessment year. In cases where the Income Tax Officer finds that the declaration is not in accordance with the provisions of the Act and the rules framed thereunder has to pass an order declaring that the registration granted to the firm in any assessment year shall have at that stage the Income Tax Officer has to apply his mind and take a decision whether to record a certificate of continuance of the registration or declare that the registration has ceased to continue. The action of the Income Tax Officer in declaring that the registration has ceased to continue

operates to the prejudice of the assessee-firm falling under Section 185(3) and it could be assailed in an appeal under Section 246(j) of the Act. The action of the Income Tax Officer in recording a certificate for continuance of the registration of the firm in the relevant assessment year falling under Section 185(4) has a bearing on the tax liability of the assessee-firm and if such a certificate is wrong recorded that action is likely to be prejudicial to the Revenue. Since such action is based on the decision taken by the Income Tax Officer after finding that the declaration furnished by the firm is in accordance with the provisions of the Act and the rules framed thereunder the action taken by the Income Tax Officer in recording the certificate regarding continuance of the registration in the relevant assessment year has to be regarded as an order which is subject to the revisional jurisdiction of the Commissioner under Section 263 of the Act. We are, therefore, unable to agree with the answer given by the High Court to question No.1. In our opinion the said question must be answered in the negative, i.e., in favour of the Revenue and against the assessee. In view of question No.1 being thus answered question No. 2 requires to be considered. Since the High Court has not considered the said question the matter has to be remitted to the High Court for considering question No. 2 referred to it by the Tribunal.

In the result, the appeal are allowed, the impugned judgment of the High Court is set aside and question No. 1 that was referred to the High Court by the Tribunal is answered in the negative, i.e., in favour of the Revenue and against the assessee. The matter is remitted to the High Court for considering question No. 2. No orders as to costs.