

K.T. Mathew Vs. Assistant Commissioner of Income Tax and anr.

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Court : Kerala

Decided On : Oct-31-2000

Reported in : (2001)165CTR(Ker)594

Appeal No. : O.P. No. 13308 of 1994 31st October, 2000

Appellant : K.T. Mathew

Respondent : Assistant Commissioner of Income Tax and anr.

Advocate for Pet/Ap. : M. Ramesh Chander & P. Raghunath, *for the Petitioner*
P.K.R. Menon, N.R.K. Nair & George K. George, *for the Respondents*

Judgement :

M.R. Harmaran Nair, J.

The challenge in the original petition is with regard to Ext. P3 order passed by the Income-tax Settlement Commission, Madras, refusing registration for the firm represented by the petitioner under section 184 of the Income Tax Act, 1961.

2. Claiming that an oral partnership was entered into before the petitioner bid in an 'Abkari' auction, the petitioner moved for registration of the firm under the aforesaid section. It was contended that there were 11 partners. The deed of registration which was subsequently registered was also produced. The Settlement Commission found that though there are 11 partners in the partnership

deed, only 7 of them had contributed to the bid amount and that in the circumstances there was no justification for registration of the firm.

3. The learned counsel for the petitioner submitted that the aforesaid aspect is not of which the sum of Rs. 11,30,000 which was deposited as 30 per cent of the total any significance insofar as the petitioner had explained the manner in which the bid amount was collected. It was mentioned that the amounts actually due from the four partners, namely, Marykutty, Kunhanandan Nambiar, Mathew Mathew and Alex Mathew had also been paid up by the other partners, namely, Chacko Mathew, K.P. Joseph and Mathew M. Koladiyil. The contention, therefore, is that all the partners have contributed to the share of the bid amount and hence the aforesaid finding of the Commission is incorrect. It was also argued that the Commission, having found that the firm has come into existence, was wrong in refusing registration.

4. I have heard the learned special standing counsel for the revenue, He pointed out that the bid in this case was in favour of the petitioner alone and that in view of the prohibition in rule 6(22) of the Kerala Abkari Shops (Disposal in Auction) Rules, 1974, the transfer of the right to bid in the auction in favour of the firm is illegal and as such the firm cannot be registered at all. In this regard reliance was also placed in *Narayanan & Co. v. CIT* : [1997]223ITR209(Ker) .

5. Sec. 184 of the Income Tax Act, as it stood during the relevant assessment year provided as follows :

'184. Application for registration. -(1) An application for registration of a firm for the purposes of this Act may be made to the assessing officer on behalf of any firm, if

(i) the partnership is evidenced by an instrument, and

(ii) the individual shares of the partners are specified in that instrument.

(2) Such application may, subject to the provisions of this section, be made either during the existence of the firm or after its dissolution.

(3) The application shall be made to the assessing officer having jurisdiction to assess the firm, and shall be signed :

(a) by all partners (not being minors) personally, or

(b) in the case of a dissolved firm, by all persons (not being minors) who were partners in the firm immediately before its dissolution and by the legal representative of any partner who is deceased.

Explanation : In the case of any partner who is absent from India or is a lunatic or an idiot, the application may be signed by any person duly authorised by him in this behalf, or, as the case may be, a person entitled under law to represent him.

(4) The application shall be made before the end of the previous year for the assessment year in respect of which registration is sought :

Provided that the assessing officer may entertain an application made after the end of the previous year, if he is satisfied that the firm was prevented by sufficient cause from making the application before the end of the previous year.

(5) The application shall be accompanied by the original instrument evidencing the partnership, together with a copy thereof:

Provided that if the assessing officer is satisfied that for sufficient reason the original instrument cannot conveniently be produced, he may accept a copy of it certified in writing by all the partners (not being minors), or, where the application is made after the dissolution of the firm, by all the persons referred to in clause (b) of sub-section (3), to be a correct copy or a certified copy of the instrument.' and in such cases the application shall be accompanied by a duplicate copy of the original instrument.

(6) The application shall be made in the prescribed form and shall contain the prescribed particulars.

(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) of S 139 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 assessing officer is satisfied that the firm was prevented by sufficient cause from furnishing the declaration within the time so allowed, he may allow the firm to furnish the declaration at any time before the assessment is made.

(8) Where any such change has taken place in the previous year, the firm shall apply for fresh registration for the assessment year concerned in accordance with the provisions of this section.'

It can be seen from the above that the registration for assessment as a firm is subject to various conditions, production of the partnership deed being only one among them. What is important in the matter is the aspect of sharing. The term 'share' it is conceded at the Bar, refers to sharing of the capital. In the instant case as per the accounts produced before the authority there was no mention of contribution by four of the partners, though an explanation is given that their shares were remitted by other partners. That apart, on the date on which the petitioner bid the auction, the partnership itself had not been registered. Though the petitioner bid the auction representing the firm, there is no contemporaneous document produced to show that the bid was not in the name of the petitioner alone, but on behalf of the firm. The facts involved in *Narayanan & Co. v. CIT* (supra) were more or less similar to the case in hand. The provision in rule 6(22) of the Kerala Abkari Shops (Disposal in Auction) Rules was also considered therein. It was found that where the statutory provisions or conditions of licence do not prohibit the formation of partnership for exploiting the licence to deal in liquor, such a partnership cannot be held to be illegal, but where there is a specific prohibition, any partnership entered into in contravention of those provisions would be

unlawful and void. Such an agreement cannot be recognised by the Income Tax Act as a genuine partnership. The provisions in section 15 of the Kerala Abkari Act prohibit sale of liquor without licence and the provision in section 24 to the effect that licence granted under the Act shall be subject to restrictions and conditions as the Government may direct was also taken note of while considering the importance of rule 6(22) aforementioned that the licensee shall not sell or otherwise transfer his contract or licence without the written consent of the Asstt. Excise Commr. concerned.

6. By granting a licence under the Abkari Act what the successful bidder gets is a personal privilege and he cannot be allowed to share that privilege with others. When a bidder conveys his right in favour of the firm, the right that he got becomes restricted to the share of profits which may fall to his share from time to time. That indicates that by such conveyance of right, he actually transfers a portion of his exclusive privilege to deal in liquor covered by the licence that he got. Such a transfer is hit by rule 6(22) and conveyance in favour of the firm would be void under section 23 of the Contract Act. Such a void contract cannot be recognised as a genuine partnership under the Income Tax Act, 1961.

7. I am aware that the petitioner has a case that there was an oral partnership already brought into existence as on the day of bidding the auction. According to me, this does not make any difference as long as there is no record to show that the bid he made was for and on behalf of the firm. According to me, the Commission was right in refusing registration of the firm though not for the reasons mentioned in Ext. P3. I do not think therefore, that this court would be justified in invoking its writ jurisdiction.

In the circumstances, the original petition is without merit and it is dismissed.