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Court : Kolkata

Decided On : Jan-12-1938

Reported in : [1938]6ITR234(Cal)

Appeal No. : Civil Reference No. 6 of 1937

Appellant : Moolji Sicka in Re [No. 2].

Judgement :

DERBYSHIRE, C.J. - The facts are fully stated in the case but shortly are as follows :-

Babu Moolji Sicka was a member of a trading partnership. During the accounting year which was October 1930 to October 1931 the assessee's share of the profits of the firm was 11/39. After the accounting year, namely on December 17th, 1931, the partners agreed in a deed that the assessee's share of the profits of the firm should hence forward be 11/30. The partners remained the same, but their respective shares in the profits were altered. The assessment year was April 1932 of March 1933, and the deed referred to was in operation during the year of assessment. The assessment was made on December 2nd, 1932.

The question is whether in the facts and circumstances stated and on the true construction of Section 26(1) of the Indian Income-tax Act the assessee should be chargeable to tax on the basis of his share of the profits which he had during the accounting year. If Section 26(1) applies then the assessee would be chargeable

to tax on the basis of his share of the profits at the time of making the assessment. That share was of course greater than during the accounting year. Section 26(1) reads :

'Where, at the time of making an assessment under Section 23, it is found that a change has occurred in the constitution of a firm or that a firm has been newly constituted, the assessments on the firm and on the members thereof shall, subject to the provisions of this Act be made as if the firm had been constituted at the time of making the assessment and as if each member had received a share of the profits of that year proportionate to his interest in the firm at the time of making the assessment.

There is no question here of a firm having been newly constituted. The only question is whether a change has occurred in the constitution of a firm. There is no previous decision to guide us as to the meaning of change in the constitution of a firm. The relevant explanation of the word 'constitution' given in the The New English Dictionary by Sir James Murray Vol II, page 876 is 'The way in which anything is constituted or made up; the arrangement or combination of its parts or elements as determining its nature and character; make frame composition.' From a consideration of that definition a 'change in the constitution of a firm' would suggest a change in its partners but not a change in the proportion in which the partners divide the profit. Some help is obtained from the provisions of the Partnership Act, 1932. Section 17(a) of that Act says;-

'Subject to contract between the partners where a change occurs in the constitution of a firm, the mutual rights and duties of the partners in the re-constituted firm remain the same as they were immediately before the change, as far as may be.'

Section 38 provides :

'A continuing guarantee given to a firm or to a third party in respect of the transactions of a firm is, in the absence of agreement to the contrary revoked as to future transactions from the date of any change in the constitution of the firm.'

Section 63(1) enacts :-

'When a change occurs in the constitution of a registered firm any income continuing partner and when a registered firm is dissolved any person who was a partner immediately before the dissolution or the agent of any such partner or persons specially authorised in this behalf may give notice to the Registrar of such change or dissolution specifying the date thereof; and the Registrar shall make a record of the notice in the entry relating to the firm in the Register of Firms and shall file the notice along with statement relating to the firm filed under Section 59.'

Section 17 does not appear to help in arriving at a meaning of the phrase 'change in the constitution of a firm, but Section 38 and 63 where they mention the phrase 'change in the constitution of a firm are, it seems to me refereeing to a change in the personnel of the firm that, is a change in the persons who are partners in the firm.

In my opinion there was no change in the constitution of the firm on December 17th, 1931 within the meaning of Section 26(1) of the Indian Income-tax Act. Consequently Section 26(1) has no application to this particular case. The result is that the assessment must be on the basis of the share which the assessee had during the accounting year. With regard to the years subsequent to the year of assessment of 1932-33, the matter has not been pressed and the question does not arise.

The assessee will get half the ordinary costs of the Reference.

KHUNDKAR, J. - I agree.

MUKHERJEA, J. - I agree.

Reference answered accordingly.