appellants were pursuing their departmental representatives right upto April; 1966 (the last representation having been rejected on April 5, 1966), and the further fact that on the date on which the writ petition was filed a suit for claiming the appropriate relief would have been within time, we would hold that the delay in the appellants approaching this Court (delay in the sense that there was nothing to prevent them from coming to this Court earlier) is not fatal to their writ petition.

(16) No seriousness was attached to the objection of non-impleading of some possible persons by the learned Single Judge even while dismissing the writ petition. There is no reason which might impel us to adopt a different course. This aspect of the matter has however; to be kept in view while formulating the relief which has to be granted to the appellants.

(17) For the foregoing reasons we allow this appeal, set aside the judgment and order of the learned Single Judge and grant the writ petition of the appellants, and hold that rules 6(f) and 7(1)(e)(i) of the Punjab Financial Commissioner's Office (State Service Class III) Rules, 1957; are void and ineffective, and that the same should not be treated as standing in the way of the appellants regarding their conditions of service. In view of the fact that everyone who is likely to be affected by this order has not been impleaded by the appellants in their writ petition, we further hold that effect would be given to this direction only to such an extent by which any person; who has not been impleaded as a respondent in the writ petition would not be affected. In the circumstances of the case we leave the parties to bear their own costs of this appeal.

MEHAR SINGH; C. J.—I agree.

K.S.K.

INCOME TAX REFERENCE

Before Mehar Singh, C.J., and Shamsher Bahadur, J.

R. N. OSWAL HOSIERY AND MAHABIR WOOLLEN MILLS,—*Appellant..*

versus

THE COMMISSIONER OF INCOME TAX, PUNJAB,—*Respondent.*

Income Tax Reference No. 3 of 1964

March 28, 1968

Income Tax Act (XI of 1922)—Ss. 2(2), 3 and 23(5)—Two partnership firms having common partners and identical shares—Such firms—Whether one as a matter of law.

Held, that though a 'firm' has generally to be given the meaning assigned to it in the Indian Partnership Act, all the same it would be an 'assessee' under sub-section (2) of section 2 of the Indian Income-tax Act, 1922 with all the incidents of this term, in fact the tax is payable by it as such and in respect of which proceedings can be taken for assessment under the Act. Both the firm and its individual partners are assessable separately under section 3 of the Act. However, if there are two separate businesses by two firms composed of the same partners having identical shares, they are two different assessable units, and such two partnership firms are not one as a matter of law.

[Paras 5 and 7]

Case referred under section 66(1) *of the Income-tax Act,* 1922 *by the Income-tax Appellate Tribunal, Delhi Bench, for decision of the following questions of law arising from I.T.A. Nos.* 1120, 1121, 1122 *and* 1123 *of* 1962/63, *regarding Assessment years* 1958-59 *and* 1959-60 :—

1. Whether two partnership firms having common partners and identical shares are as a matter of law one ?

2. If, yes, whether the income earned by such two firms is to be assessed collectively ?

BHAGIRATH DASS AND B. K. JHINGON, ADVOCATES, for the Appellants.

D. N. AWASTHY AND RAMESH CHAND, FOR B. S. GUPTA, ADVOCATES, for the Respondent.

Shamsher Bahadur, J.—The questions which fall for determination in the reference made to this Court under sub-section (1) of section 66 of the Indian Income-tax Act, 1922 (hereinafter called the Act) are these: —

"(1) Whether two partnership firms having common partners and indentical shares are as a matter of law one ?

(2) If yes, whether the income earned by such two firms is to be assessed collectively ?"

The first question as framed is manifestly one of law and not dependent on the facts but it would be necessary to have a background of

the circumstances in which the reference at the instance of the applicant has been made by the Income-tax Appellate Tribunal, Delhi.

(2) The assessments in respect of which appeals were pending before the Income-tax Appellate Tribunal relate to 1958-59 and 1959-60, the previous years ending with 31st March, 1958 and 31st of March, 1959, respectively. The applicant is R.N. Oswal Hosiery and Mahabir Woollen Mills; Ludhiana; which formed itself into a partnership under a document of 6th of April, 1953, consisting of five partners, each entitled to one-fifth share. Another partnership consisting of the same five partners with the same shares was formed under an earlier partnership-deed of 7th of January, 1953, with the name and style of Messrs. Mahabir Woollen Mills, also at Ludhiana. Since 6th of April, 1953, the five persons have continued to remain as partners in both the firms. The nature of business of the two firms is somewhat different. Whereas the firm of R.N. Oswal Hosiery carries on the business of manufacture and sale of hosiery goods, Mahabir Woollen Mills carried on the business of manufacture and sale of R.D. Woollen yarn. The two firms were registered separately upto the assessment year 1957-58. Both these firms were assessed separately uptil the assessment year 1958-59, when the Income-tax Officer for the first time came to the conclusion that there being common partners of both the firms, the two units constituted one assessable entity for purposes of income-tax.

(3) The assessment was made on the same basis in respect of the assessment year 1959-60. It followed as a matter of consequence that the renewal applications of the two firms for registration were declined as the assessing authorities considered these firms to be constituting one unit only. These matters gave rise to four appeals, two with regard to the assessment orders for the years 1958-59 and 1959-60 with which we are concerned, and the remaining two with the refusal of the authorities to renew registrations. The appeals were disposed of by a common order in favour of the applicant-assessee by the Appellate Assistant Commissioner on 16th of February; 1962. The Income-tax Appellate Tribunal in the appeals preferred by the Revenue passed an order on 6th of February,1963, by which the orders of the Income-tax Officer were restored and those of the Appellate Assistant Commissioner set aside. The order of the Appellate Tribunal raises, *inter alia*, the abstract proposition of

law which is formulated as the first question to be answered in this reference in the statement of the case of 6th of September, 1963.

(4) It has been contended by Mr. Bhagirath Dass, the learned counsel for the assessee, that the firms constituted by different partnership deeds are separate assessable units. Though we are not concerned with the factual details it may be recapitulated, as stated in the order of the Appellate Tribunal, that the firms had separate factories situated three miles apart; there were no common over-head expenses; there was no common staff; there were separate bank accounts and the nature of business of the two firms was different. On behalf of the Revenue, a pure question of law was raised that two partnerships having common partners and identical shares constituted in the eye of law one unit and the income earned by them has to be assessed collectively. Considering this proposition of law to be sound, the Tribunal on basis of a judgment of the Bombay High Court, upheld the claim of the Department. It was only as an alternative argument that it was urged by the Revenue before the Appellate Tribunal that "there is ample evidence on record to prove to the hilt that at least both the firms in the present case are one as a matter of fact." It has to be reiterated that the alternative argument presented before the Appellate Tribunal has not been referred to us as a question on which the opinion of this Court is invited.

(5) For answering the first question in the reference, which is the abstract legal proposition with which alone we are concerned in this reference, some provisions of the Act may be noted. "Assessee", under sub-section (2) of section 2 has been defined to mean "a person by whom income-tax or any other sum of money is payable under this Act, and includes every person in respect of whom any proceeding under this Act has been taken for the assessment of his income or of the loss sustained by him or of the amount of refund due to him". Sub-section (6B) of the same section defines 'firm', 'partner' and 'partnership' to have the same meaning respectively as in the Indian Partnership Act, 1932. A 'person' under sub-section (9) of section 2 is defined to include a Hindu undivided family and local authority. Section 3 of the Act is the charging section which says:—

> "Where any Central Act enacts that income-tax shall be charged for any year at any rate or rates tax at that rate or those rates shall be charged for that year in accordance

with, and subject to the provisions of, this Act in respect of the total income of the previous year of every individual Hindu undivided family, company and local authority, and of every firm and other association of persons or the partners of the firm or members of the association individuality."

Pausing for a moment to see the impact of these definitions on the problem to be resolved by us, it would be noted that (though a 'firm' has generally to be given the meaning assigned to it in the Indian Partnership Act, all the same it would be an 'assessee' under sub-section (2) of section 2 with all the incidents of this term, if in fact the tax is payable by it as such and in respect of which proceedings can be taken for assessment under the Act. The last clause in the charging section, which is independent of the other provisions, refers to every firm or the partners of it as assessable units. It is in this background that the mechanics of assessment of a firm under sub-section (5) of section 23 is to be viewed. Clauses (a) and (b) of sub-section (5) give details of the mode of assessment of registered and unregistered firms and as observed in the Law and Practice of Income Tax by Kanga and Palkhivala, (1958 edition) Volume I, at page 566, the effect of the amendment after 1956 is this :—

"Income-tax at specially low rates is now assessable on a registered firm, though no super-tax is at all assessable on it. The partners of a registered firm are liable, as before 1956, to be charged in their individual assessments to both income-tax and super-tax in respect of their shares of the firm's profits. So there is double taxation, in the case of a registered firm, so far as income-tax (but not super-tax) is concerned, and partial relief against such double taxation is afforded by section 14(2) (aa).

When an unregistered firm is assessed as a unit, the rates of tax applicable may be higher than those which would be applicable to the total income of a partner, inclusive of his share of the firm's profits, but a partner would not be entitled to any refund of the tax paid by the firm at the higher rates. The reason is that an unregistered firm is a distinct asessable entity for the purposes of the Act and pays the tax in discharge of its own liability and not on behalf of its partners."

Thus, both the firm and its individual partners are assessable separately under section 3 of the Act. In both the Finance Acts of 1958 and 1959 paragraph D deals with the rates of income-tax which are payable in the case of every registered firm. On the first forty thousands of total income there is no income-tax and on the next 35,000 it is at the rate of 5 per cent and on the next 75,000 of total income the rate of income-tax is at the rate of 6 per cent and so on. The point to be emphasised is that the firm as distinct from its partners, under the Act is made a unit of assessment.

(6) The case of the Department is based fundamentally on the observations made by Sir John Beaumont, Chief Justice (Chagla J., concurring) in *Vissonji Sons and Co.*, v. *Commissioner of Income-tax, Central* (1). The proposition to which the learned Chief Justice subscribed was thus stated:—

> "In law a firm has no existence independently of its partners, and if there are two firms consisting of exactly the same partners, the real position in law is that there is only one firm. It may carry on separate businesses, and may carry on those businesses in different names, but in fact there is only one firm in law..."

It appears that the earlier observations of a Special Bench of Chief Justice Rankin, Ghose and Buckland JJ., in *re. Martin and Co.* (2), were not brought to the notice of this Bench. In remitting the case to the Commissioner of Income-tax, it was observed by Chief Justice Rankin in the short judgment delivered by the Bench thus:—

> "In remitting the case to the Commissioner I would point out not by way of deciding this case, but entirely for the guidance of the Commissioner that this case may ultimately have to be decided upon findings which do not at present appear in the case stated. The proposition that the same persons in the same shares cannot for income-tax purposes be partners of two entirely separate firms is

(1) (1946) 14 I.T.R. 272.
(2) A.I.R. 1929 Cal. 753.

correct, but I am not prepared as at present advised to proceed upon so very general a principle without a careful enquiry into the concrete case and into the matters above mentioned."

In the last analysis, according to Chief Justice Rankin, the matter whether the two businesses of the same set of partners are two separate units or one, is one essentially of fact, and not of abstract legal theory.

(7) That in Partnership Law a firm has no legal existence apart from its partners and is merely a compendious name to describe its partners, is a well-known proposition and was reiterated by the Supreme Court in *Commissioner of Income-tax, West Bengal* v. *A.W. Figgies and Company* (3), at page 408. Mahajan J. (later Chief Justice Mahajan) observed in the judgment after stating this position:—

"But under the Income-tax Act the position is somewhat different. A firm can be charged as a distinct assessable entity as distinct from its partners who can also be assessed individually."

For this conclusion, the learned Judge, relied on section 3, which was the charging section, where also the last clause is "...... and of every firm and other association of persons or the partners of the firm or the members of the association individually". On an interpretation of this section, Mr. Justice Mahajan observed at page 409:—

"The partners of the firm are distinct assessable entities, while the firm as such is a separate and distinct unit for puposes of assessment."

A Bench of Chief Justice Chagla and *Tendolkar J.* in *Jesingbhai Ujamshi* v. *Commissioner of Income-tax, Bombay Mofussil* (4). took a different view from the one adopted in *Vissonji Sons and Co.,* v. *Commissioner of Income-tax, Central* (1). In this judgment, Chief Justice Chagla questioned the validity of the general proposition

(3) (1953) 24 I.T.R. 405.
(4) (1950) 18 I.T.R. 23.

laid down by Sir John Beaumont in *Vissonji Sons and Co.,* v. *Commissioner of Income-tax Central* (1), in these words:—

> "With great respect to the learned Chief Justice, the actual question that he had to consider in that reference was whether a certain item which the assessee claimed as a bad debt was a bad debt or not, and the learned Chief Justice disposed of that reference by coming to the conclusion that this question was really a question of fact and the only question of law that arose was whether there was sufficient evidence to justify the finding of fact by the Tribunal."

The particular observation, to which reference has been made, according to Chief Justice Chagla, was a mere *obiter.* After discussing the Calcutta case in *Martin and Co.* (2), and also a decision of the Lahore High Court in *Krishna Ginning and Pressing Factory* v. *Commissioner of Income-tax, Punjab* (5). Chief Justice Chagla reached the following conclusion:—

> "Therefore, we disagree with the Tribunal in the view it has taken of the law and we are of the opinion, that there is nothing in law to preclude common partners constituting two separate firms for the purpose of the Income-tax Act. Whether there are two firms or only one firm is a question of fact which can only be determined by the Tribunal itself."

The emphasis, according to Chief Justice Chagla, was to be on the nature of the two business of which the same set of partners constituted different firms, and this is apparent from the question which the Bench reformulated for the decision of the Tribunal, this being:—

> "Whether in law common partners can constitute two separate firms in respect of different business carried on by these partners for the purpose of the Indian Income-tax Act?"

(5) (1931) 5 I.T.C. 334.

The same Bench of Chief Justice Chagla and Tendokar, J. re-affirmed the same legal position in *Jeshinghbai Ujamshi* v. *Commissioner of Income-tax, Bombay* (6). Here again the reference was necessitated, according to Chief Justice Chagla, by a misapprehension on the part of the Tribunal as to the law which was laid down in *Jesinghbai Ujamshi* v. *Commissioner of Income-tax, Bombay, Mofussil,* (4). The Tribunal had been repeating the view of Chief Justice Beaumont in *Vissonji Sons and Co.* v. *Commissioner of Income-tax, Central* (1), that if the partners are common, there can only be one firm and in coming to that conclusion they had applied the principle of ordinary civil law. Chief Justice Chagla was at pains to point out that a firm was a taxable unit under the Income-tax Act, while it was not so under the ordinary civil law. Whether the business was one or separate was a question of fact which could only be determined by the Tribunal after taking into consideration all the relevant materials. If there were two separate business by the two firms composed of the same partners having identical shares, they were two different assessable units. The Appellate Tribunal, in the instant case, has also taken the view that no question of there being two businesses can arise if the owner of the two businesses is the same. This was the very proposition of law on which an eminent judge like Sir George Rankin had expressed doubt and two successive benches of the Bombay High Court had agreed with him. The view taken by Sir John Beaumont in *Vissonji Sons and Co.* v. *Commissioner of Income-tax, Central,* (1), must be regarded as solitary because Chagla J., who concurred with him in that case has so emphatically taken a totally different line in *Jesinghbai Ujamshi* v. *Commissioner of Income-tax, Bombay Mofussil* (4), and *Jesinghbai Ujamshi* v. *Commissioner of Income-tax, Bombay* (6). Whether there is interlacing or interlocking between the two firms would be a matter for decision when the question of fact comes for adjudication before the Tribunal. At the moment, we are concerned with the purely legal proposition whether the same set of partners of two different firms can ever form two different units ?

(8) On a consideration of the authorities, we are of the opinion that the view taken in *In re Martin and Co.*, (2), *Jesinghbai Ujamshi* v. *Commissioner of Income-tax, Bombay Mofussil;* (4) and

(6) (1955) 28 S.T.R. 454.

Jesinghbai Ujamshi v. *Commissioner of Income-tax, Bombay* (6), is more in consonance with the provisions of the Act than the one adopted by the Division Bench of the Bombay High Court in *Vissonji Sons and Co.* v. *Commissioner of Income-tax, Central* (1). In the result, we would answer this question in the negative in favour of the assessee. The second question in consequence does not arise. The assessee would be entitled to get costs of this reference.

Mehar Singh, C.J.—I agree.

R.N.M.

INCOME-TAX REFERENCE

Before Mehar Singh, C.J., and Shamsher Bahadur, J.

M/s. SATPARKASH-RAM NARAIN,—*Appellants.*

versus

THE COMMISSIONER OF INCOME-TAX, PUNJAB, JAMMU AND KASHMIR AND HIMACHAL PRADESH AT PATIALA,—*Respondent.*

Income-tax Reference No. 51 of 1967

April 3, 1968

Income-tax Act (XI of 1922)—S. 5 and 28—Initiation and conclusion of penalty proceedings under section 28(1)(c) by one Income-tax Officer against an assessee—Long time, thereafter a successor officer imposing penalty—Such successor officer not giving opportunity of being heard to the assessee—S. 5 (7C)—Whether applies—Imposition of the penalty—Whether with authority.

Held, where one Income-tax Officer initiates penalty proceedings under section 28(c) of Indian Income-tax Act, 1922 and the hearing of the proceedings are concluded. Long time thereafter a successor officer passes an order imposing penalty without giving an opportunity to the assessee to be heard, the provision of section 5(7C) of the Act apply and though the assessee fails to exercise right under the first part of the proviso to section 5(7C) to have the proceedings reopened, it does not lose its right of being heard under section 28(3) before the