

CIVIL MISCELLANEOUS

Before A. N. Grover and H. R. Khanna, JJ.

PREM SUKH DASS,—*Petitioner.*

versus

THE STATE OF PUNJAB AND OTHERS,—*Respondents.*

Civil Writ No. 2089 of 1963.

1964

August, 10th

Punjab Professions, Trades, Callings and Employments Taxation Act (VII of 1956)—Ss.2, 3 and 5—Partner of a firm—Whether liable to pay tax under the Act—Partnership Act (IX of 1932)—S.4—Firm—Nature of—Relationship of partners inter se—Trade—Meaning of—Exhibition of cinematograph films—Whether amounts to carrying on trade—Gross income—How to be determined.

Held, that a partner of a firm is a person who carries on trade in agreement with other partners and is covered by section 3 of the Punjab Professions, Trades, Callings and Employments Taxation

(1) 1964 S.T.C. 624.

Act, 1956. According to section 4 of the Indian Partnership Act, 1932, "partnership" is relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. Persons who have entered into partnership with one another are called individually "partners" and collectively "a firm", and the name under which their business is carried on is called the "firm name". It is not possible to see how a partner cannot be regarded as carrying on trade or following a profession or calling, if he does so, by entering into an agreement with other persons to share the profits of a business. Indeed, as is provided by section 4 of the Partnership Act, it is not necessary that the business should be carried on by all of them. Even one of the partners can carry on the business acting for all. It is well-known that a firm is not recognised as distinct from the members composing it. The firm as such has no legal recognition. The law looks to the partners composing it; what is called the property of the firm is their property, and what are called the debts and liabilities of the firm are their debts and their liabilities. Moreover, a member of an ordinary partnership fills a double character; he is both a principal and an agent. As a principal, he is bound by what he does himself and by what his co-partners do on behalf of the firm, provided they keep within the limits of their authority; as an agent, he binds them by what he does for the firm, provided, he keeps within the limits of his authority. The name under which the firm carries on any business in point of law is only a conventional name applicable to the persons who, on each particular occasion when the name is used, are members of the firm.

Held, that the word "trade" is not limited to an activity in which purchase and sale or exchange of goods and commodities predominates. The word "trade" is associated with the activity which an individual pursues to earn his livelihood or living. In that sense the words "trading concern" in Explanation (b) to section 5 of the said Act, which have been used in contradistinction to the words "manufacturing concern" in Explanation (a) would include the business or activity of exhibiting cinematograph films in a cinema house which essentially is meant for earning profits or making a livelihood or living. The gross profits of such a business are to be worked in accordance with Explanation (b) and not Explanation (c) to section 5 of the Act.

Held, that after the amendment introduced by Punjab Act No. 3 of 1960, the gross income for the purposes of taxation under the Act has to be calculated in the manner provided by section 5 after allowing only such expenses as are permitted by the Explanations to that section.

Petition under Article 226 of the Constitution of India praying that a writ of certiorari, or any other appropriate writ, order or direction be issued quashing the order of respondents 2 to 4.

G. C. MITTAL, ADVOCATE, for the Petitioner.

D. D. JAIN, ADVOCATE, for the Respondents.

ORDER

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GROVER, J.—This is a petition under Article 226 of the Constitution in which the legality and validity of the assessment of the gross income of the petitioner from various partnership firms and his liability to pay tax under the Punjab Professions, Trades, Callings and Employments Taxation Act, 1956 (hereinafter called the Act) which was fixed at Rs. 250 have been challenged.

The petitioner claims to be the *karta* of a Hindu undivided family and also a partner in four firms. These firms are—

- (a) Messrs Prem Sukh Dass—Ram Kishore, Sirsa, which carries on money—lending business;
- (b) Messrs Prabhat Talkies, Sirsa, which exhibits cinema shows;
- (c) Messrs Bensal Theatres, Sirsa, which also exhibits cinema shows ; and
- (d) Bensal Rice and Dal Mills, Sirsa.

The income Tax Department determined the income of the petitioner from his share in the aforesaid firms to be Rs. 23,916. However, in response to a notice issued by the Assessing Authority under the Act, the petitioner filed a return declaring his income at Rs. 14,623. The Assessing Authority worked out the share of profits of the petitioner from the various firms at a total figure of Rs. 31,129 and called upon him to pay a tax of Rs. 250 under the Act as his total income exceeded Rs. 25,000. This order was maintained by the Deputy Commissioner in appeal. On revision, the Revising Authority took the view that the gross income from the cinema business was to be calculated in accordance with section 5(c) of the Act and not section 5(a) or 5(b). It directed the Assessing Authority to make re-calculations after allowing deduction of expenditure as indicated in the order.

In order to decide the points that have been urged on behalf of the petitioner, it is necessary to set out certain provisions of the Act. Section 2(b) defines “total gross income” to mean aggregate of gross income derived from

various professions, trades, callings and employments whether such profession or calling is followed, trade is carried on or employment is, within or outside the State of Punjab. Section 2(d) is—

“‘person’ includes Hindu undivided family or an incorporated company; ...”

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Section 3 is in the following terms:—

“Every person who carries on trade either by himself or by an agent or representative, or who follows a profession or calling, or who is in employment, either wholly or in part, within the State of Punjab, shall be liable to pay for each financial year or a part thereof a tax in respect of such profession, trade, calling or employment.

* * * * *

Section 5, which relates to the determination of tax is to the effect—

“The tax payable by any person under this Act shall be determined with reference to his total gross income during the previous year, provided that the tax payable by any person shall not exceed two hundred and fifty rupees for any financial year.

Explanation.—In computing the total gross income of any person under this section—

(a) the following expenses incurred by him in respect of a manufacturing concern shall be excluded—

* * * * *
* * * * *

(b) the following expenses incurred by him in respect of a trading concern shall be excluded:—

* * * * * ; and

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(c) an amount equal to five per centum of the aggregate gross income derived by a person from the profession or calling, if he maintains an office or establishment in connection therewith in the ordinary course of such profession or calling, shall be excluded."

The first contention that has been advanced is that a partner of a firm does not carry on trade either by himself or by an agent or representative nor does he follow a profession or calling so as to attract the levy of tax under section 3. It is the firm which carries on the trade etc., and since the firm cannot fall within the definition of "person" as given in section 2(d), the petitioner, who is only a partner in the aforesaid firms, was not liable to pay any tax under the Act. The Appellate Authority dealing with this submission has expressed the view that it cannot be said that partner of a firm does not carry on trade and it is the firm alone which carries on trade or business. The partner is liable to be assessed on the share of profit from the various firms of which he is a partner and no direct assessment can be made on the firm. The Revising Authority considered the provisions of section 4 of the Indian Partnership Act, 1932, and it has been rightly stated that although the firm is not a person, it is the collective name for all the partners who individually are persons and are liable to be assessed as such under the Act.

Now, section 4 says that "partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. Persons who have entered into partnership with one another are called individually "partners" and collectively "a firm", and the name under which their business is carried on is called the "firm name." It is not possible to see how a partner cannot be regarded as carrying on trade or following a profession or calling, if he does so by entering into an agreement with other persons to share the profits of a business. Indeed, as is provided by section 4 of the Partnership Act, it is not necessary that the business should be carried on by all of them. Even one of the partners can carry on the business acting for all. It is well known that a firm is not recognised as distinct from the members composing it. The firm as such has no legal recognition.

The law looks to the partners composing it; what is called the property of the firm is their property, and what are called the debts and liabilities of the firm are their debts and their liabilities. Moreover, a member of an ordinary partnership fills a double character; he is both a principal and an agent. As a principal he is bound by what he does himself and by what his co-partners do on behalf of the firm, provided they keep within the limits of their authority; as an agent he binds them by what he does for the firm, provided he keeps within the limits of his authority. The name under which the firm carries on any business in point of law is only a conventional name applicable to the persons who on each particular occasion when the name is used are members of the firm (see Chapter 3, Lindley On Partnership, Twelfth Edition). The case of the petitioner, therefore, must be held to be covered by section 3 of the Act.

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It has next been contended that the total gross income of the petitioner within the meaning of section 5 cannot be calculated in the manner in which it has been done by the assessing authorities. It is pointed out that whatever amount actually comes into the hands of the petitioner as his share of the income from each firm would constitute his gross income from that firm. What the assessing and appellate authorities did was to assess the gross income in the following manner:—

- | | | |
|---|-----|--------|
| (1) Share from Messrs Prem Sukh Dass,
Ram Kishore, Sirsa | Rs. | 10,416 |
| (2) Share from Messrs Prabhat Talkies,
Sirsa | Rs. | 5,357 |
| (3) Share from Messrs Bensal Theatre,
Sirsa | Rs. | 15,242 |
| (4) Share from Bensal Rice and Dall
Mills, Sirsa | Rs. | 114 |

As regards the share from the first firm—Messrs Prem Sukh Dass-Ram Kishore, the gross income of the firm during the relevant year was Rs. 41,663 and the Assessing Authority divided it by 1/4 according to the share of the petitioner in that firm. No deduction was given under

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any of the heads of Explanation appearing in section 5 of the Act. With regard to the income from the two cinema businesses, the gross receipts were first determined out of which deductions were allowed under Explanation (b) in section 5. Then the share of the petitioner was determined to be Rs. 5,357 in the case of Messrs Pra-bhat Talkies and Rs. 15,242 with regard to Messrs Bensal Theatres. As regards Bensal Rice and Dal Mills, the amount of gross profit determined was Rs. 114.

So far as the share from Messrs Prem Sukh Dass-Ram Kishore, which carries on the business of money-lending is concerned, it is submitted that that firm is neither a manufacturing concern nor can it be called a trading concern. Even if that be so, it will be covered by Explanation (c) in section 5, which relates to income derived from profession or calling. Since apparently it was not shown that any amount was being paid by that firm towards the maintenance of office or establishment the gross income was properly calculated by the assessing authorities.

As regards the two cinema concerns, a good deal of argument has taken place as to whether they can be regarded as trading concerns within the meaning of Explanation (b) in section 5. It is contended that when cinema films are exhibited, it can hardly be said that any trade is being carried on. On behalf of the petitioner it is sought to confine the meaning of the word "trade" to its commercial or narrow or restrictive sense in which it is limited to an activity in which purchase and sale or exchange of goods and commodities predominates. In 87 Corpus Juris Secundum at page 203, it is stated that in this sense the term denotes the barter or purchase and sale of goods, wares, and merchandise, either by wholesale or retail, having reference to the business of selling or exchanging some tangible substance or commodity for money. This is possibly the most common signification which is given to the term but, as is stated in that very book, that is not the only signification nor is it the most comprehensive meaning with which the word is properly used. At page 205 it is mentioned that in a broader sense the word "trade" is defined as means of livelihood; anything practised as a means of getting a living, * * * * business embarked in for gain or profit : * * * * business of any kind which a person engages in for profit; * * *

a line of work or a form of occupation pursued as a business or calling, as for a livelihood or for profit; * * *. It is further stated that "the word 'trade' usually signifies some business or money-making occupation, and is frequently defined in terms of an activity carried on for gain or profit, or as a means of livelihood or subsistence, * * *". I had an occasion to consider in *Banu Mal v. District Board of Karnal* (1) the meaning of the word "trade" in connection with the words "trade, profession, calling or employment" appearing in a notification issued under the Punjab District Boards Act, 1883, levying professional tax. The following passage at page 311 may be usefully reproduced:—

"Thus the word 'trade' is associated with the activity which an individual pursues to earn his livelihood or living. In *Mazagaon Dock Ltd. v. I.T. & E.P.T. Commissioner* (2) while considering the meaning of the word 'business' in a case arising under the Income-tax Act their Lordships after referring to the discussion of the connotation of the word 'trade' by Scott L.J. in *Smith Barry v. Cordy* (3) referred to the previous observations made in earlier cases decided by their Lordships with regard to the meaning of the word 'business' which was stated to be 'some real, substantial and systematic or organised course of activity or conduct with a set purpose'. The Calcutta Court had occasion to consider the meaning of the word 'business' as used in certain provisions of the Income-tax Act in *Rogers Pratt Shellac Company V. Secretary of State* (4). The following observations at page 45 are significant:—

"The word 'business' is one of large and indefinite import and connotes something which occupies attention and labour of a person for the purpose of profit. The word means almost anything which is an occupation or

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(1) 1959 P.L.R. 309.

(2) A.I.R. 1958 S.C. 861 at p. 866.

(3) (1946) 28 Tax Cases 250 at p. 259.

(4) A.I.R. 1925 Cal. 34.

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a duty requiring attention as distinguished from sport or pleasure and is used in the sense of an occupation continuously carried on for the purpose of profits."

Keeping the above discussion in mind about the meaning of the word "trade" it would be obvious that the words "trading concern" in Explanation (b), which have been used in contradistinction to the words "manufacturing concern" in Explanation (a), would include the business or activity of exhibiting cinematograph films in a cinema house which essentially is meant for earning profits or making a livelihood or living. The assessing and the appellate authorities were, therefore, right in taking Explanation (b) into consideration with regard to the two firms which carry on cinema business and the Revising Authority fell into an apparent error in working out the gross profits under Explanation (c). In doing so, the Revising Authority referred to *Kantilal Chatrabhuj Shah v. The Palitana Municipality* (5) but that was quite a different case and the observations which were made therein were in a different context. The present question never came up for consideration before the Saurashtra Court and I have no manner of doubt that the cinema concerns would be covered by Explanation (b) in section 5 and not Explanation (c).

As regards general submission on behalf of the petitioner that gross profits should be taken to be the profits which come into the hands of the petitioner from the firms after all the expenses, losses, etc., have been deducted therefrom, I find no substance in it. Section 5, as it stood before the Explanation was introduced by Punjab Act No. 3 of 1960, came up for consideration before a Bench of this Court in *the Public Foundry and Workshop Private Ltd. V. The Deputy Commissioner* (6) on which the learned counsel for the petitioner has relied. It has been held that the expression "total gross income" as defined in section 2 means the aggregate of income derived from various professions, trades, callings and employments. To put it in the form of an equation, total gross income is equal to the sum total of the income derived by an individual from each of the sources, namely, income from professions, income from trades, income from

(5) A.I.R. 1955 Saurashtra 90.

(6) 1959 P.L.R. 835.

callings and income from employments. It has been further held that the word "income" means the balance of gain over loss. It is synonymous with the expressions gain, profit, revenue, etc. Therefore, the income of a person is equivalent to the gross income accruing to him minus the legitimate charges incurred by him in earning it. When this decision was given, the definition of "total gross income" in section 2(b) was somewhat different as the word "gross" appearing before "income" and after "of" did not exist at that time and it was introduced by Punjab Act No. 3 of 1960. At any rate, it appears that it was owing to the view expressed in that case that the Explanation was added in 1960 by the amending Act as mentioned above. The Explanation makes provisions in detail for the expenses which have to be excluded while computing the total gross income of any person under section 5 of the Act. As the Legislature has expressed its intention about the expenses which can be deducted, no question now arises of taking any other deductions into account and, therefore, the gross income would be that which is computed in accordance with the Explanations appearing in section 5, as has been done in the present case.

As no other point worth mentioning has been pressed by the learned counsel for the petitioner, the petition is allowed only to the extent that the order of the Revising Authority that the gross income from the two cinema concerns should be computed in accordance with Explanation (c) in section 5, is quashed. It will be open to the Assessing Authority to make re-calculations, if necessary, in the light of our decision. In the circumstances, there will be no order as to costs.

H. R. KHANNA, J.—I agree.

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