

v.

## INCOME-TAX OFFICER, A-3, WARD, HYDERABAD

August 23, 1968

[J. C. SHAH, V. RAMASWAMI AND A. N. GROVER, JJ.]

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*Income-tax Act (11 of 1922), ss. 23(5) and 44—Firm registered—Dissolved—Liability of one partner to pay arrears of tax.*

The appellant was a partner in a firm which carried on business in 1949-50 and was then dissolved. For the assessment year 1951-52 the firm was assessed as a registered firm and its income was apportioned between the partners and taxed in their hands. Subsequently the Commissioner of Income-tax acting under s 33B of the Indian Income-tax Act, 1922 directed that the assessment of the firm be enhanced. The Income-tax Officer after making the enhancement as directed made consequential changes in the assessments of the partners. Two of the partners, other than the appellant did not pay the additional tax and the Income-tax Officer issued a notice to the appellant to pay the tax payable by them on the footing that under the provisions of s. 44 of the Income-tax Act, 1922 there was joint and several liability of each and every partner of the dissolved firm in respect of the arrears of tax. The appellant filed a writ petition in the High Court to quash the notice but it was dismissed. In appeal, this Court.

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HELD : There is nothing in s. 44 of the Act which supports the contention that for payment of tax assessed against a partner of registered partnership under s. 23(5)(a) another partner becomes liable jointly and severally with the first partner to pay tax. The dissolution of the firm makes no difference to the application of this principle. [843 C-D]

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It should be noticed that the tax assessed against a partner of a registered partnership is assessed on his total income inclusive of the share in the income of the partnership and the rate applicable is determined by the quantum of the total income of the partner. Section 44 on the contrary contemplates cases of joint and several assessment of income of the business of a partnership which is discontinued. When such assessment is made, each member of the partnership may be liable to pay jointly and severally tax payable by the partnership. But when under the scheme of the Act tax is assessed individually against each partner, and no tax is made payable by the partnership, the principle of joint and several liability under s. 44 cannot be invoked. Although under the Partnership Law the contractual obligations of a partnership are enforceable jointly and severally against the partners, the liability to pay income-tax is statutory, and does not arise out of any contract and its incidence will be determined by the provisions of the statute. If the statute which imposes liability has not made it enforceable jointly and severally against the partners, no such implication can be drawn merely because the contractual liabilities of a partnership may be jointly and severally enforced against the partners. [843 H-844 C]

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*Income Tax Officer, Agra v. Radha Krishan*, 66 I.T.R. 590, followed.

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 998 of 1966.

A Appeal by special leave from the judgment and order dated December 21, 1964 of the Andhra Pradesh High Court in Writ Petition No. 1294 of 1961.

*P. Ram Reddy* and *R. Thiagarajan*, for the appellant.

B *C. K. Daphtary*, Attorney-General, *T. A. Ramachandran*, *R. N. Sachthey* and *B. D. Sharma*, for the respondent.

The Judgment of the Court was delivered by

**Ramaswami, J.** This appeal is brought, by special leave, from the judgment of the High Court of Andhra Pradesh dated December 21, 1964 in Writ Petition No. 1294 of 1961.

C The appellant had entered into a partnership with three others named D. Sayappa, H. Siddappa and M. Veeraiah to carry out a "Gulmoha" contract for the year 1949-50. The firm was known as Messrs. Kalva Suryanarayana. After completion of the contract the partnership came to an end. For the assessment year 1951-52, the partners of the dissolved firm made an application for registration of the partnership to the respondent who granted the registration on February 28, 1953, and on that basis proceeded to assess the total income of the partnership which he determined as Rs. 1,64,546/- (O.S.), and the total income was apportioned among the four partners in proportion of their respective shares. Subsequently, the Commissioner of Income Tax in exercise of his revisional power under s. 33B of the Income Tax Act passed an order on February 26, 1955 holding that the partnership had suppressed income to the extent of Rs. 1,72,149 (I.G.) by inflating the expenses under railway freight and by not accounting for the sale of old gunnies. The Commissioner of Income Tax accordingly directed that the assessment already made should be enhanced by a sum of Rs. 1,72,149. In pursuance of this order the respondent revised the assessment on March 11, 1955 and determined the total income of the partnership at Rs. 3,13,189 (I.G.) and apportioned it among the several partners in proportion to their shares and demand notices were issued accordingly against individual partners of the dissolved firm. It appears that the appellant and D. Sayappa paid their shares of the tax, but M. Veeraiah and H. Siddappa failed to pay their shares which were Rs. 10,654.62 and Rs. 5,640.62 respectively. After about six years the respondent issued a notice to the appellant under s. 45 of the Income Tax Act, 1922, hereinafter called the 'Act', calling upon him to pay up the arrears on the footing that under the provisions of s. 44 of the Act there was joint and several liability of each and every partner of the dissolved firm in respect of the arrears of tax. The appellant thereafter moved the High Court for grant of a writ to quash the notice. The writ petition was dismissed by the High Court by its judgment dated December 21, 1964.

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The provisions of s. 23(5) and s. 44 of the Act as they stood at the material time are reproduced below : A

"23. (5) Notwithstanding anything contained in the foregoing sub-sections when the assessee is a firm and total income of the firm has been assessed under sub-section (1), sub-section (3) or sub-section (4) as the case may be; B

(a) in the case of a registered firm, the sum payable by the firm itself shall not be determined but the total income of each partner of the firm, including therein his share of its income, profits and gains of the previous year shall be assessed and the sum payable by him on the basis of such assessment shall be determined . . . . . C

"44. LIABILITY IN CASE OF A DISCONTINUED FIRM OR ASSOCIATION : Where any business profession or vocation carried on by a firm or association of persons has been discontinued, or where an association of persons is dissolved every person who was at the time of such discontinuance or dissolution a partner of such firm or a member of such association shall in respect of the income, profits and gains of the firm or association, be jointly and severally liable to assessment under Chapter IV and for the amount of tax payable and all the provisions of Chapter IV shall, so far as may be applied to any such assessment." D E

In support of this appeal, the argument was addressed that the appellant who was an individual assessee under s. 23(5) could not be held liable for payment of the tax due from the ex-partner of the partnership and there was no joint and several liability imposed under the provisions of the Act in such a case. In our opinion, the argument put forward on behalf of the appellant is well-founded and must be accepted as correct. Under the scheme of the Act a partnership is a unit of assessment and the income of the partnership is computed as that of the unit irrespective of whether the partnership is registered or unregistered. After the income of the partnership is computed in a case where the partnership is registered under s. 26A the share of each partner in the income of the partnership is determined and is added to his other income and the total income so computed is brought to tax. If the partnership is unregistered, the tax payable by the partnership is, except when the Income-tax Officer otherwise directs in the interests of revenue determined as in the case of any other entity, and the demand for tax is made on the partnership itself. The result is that, if the partnership is registered, tax is collected from the partners individually and there is no levy of tax against the F G H

- A partnership. If the partnership is unregistered, the tax may, unless otherwise directed, be levied against the partnership. In either case, the machinery set up by s. 23(5) is for assessment of tax payable on the income of the partnership. The income of the partnership is computed, but tax is assessed on that income on the partners or the partnership, according as the income is of a partnership registered or unregistered. In *Income Tax Officer, Agra v. Radha Krishan*<sup>(1)</sup> it was argued that in the case of assessment made under s. 23(5)(a) of the Act the tax liability was joint and several and the Income Tax Officer could recover from other partners the share of the tax attributable to one partner which cannot be recovered from him. The argument was rejected by this Court and it was pointed out that under the scheme of the Act tax is assessed individually against each partner and no tax is made payable by the partnership and therefore the principle of joint and several liability has no application. It was also held in that case that there is nothing in s. 44 of the Act which supports the contention that for payment of tax assessed against a partner of a registered partnership under s. 23(5)(a) another partner becomes liable jointly and severally with the first partner to pay tax. In our opinion, the principle of this decision governs the present case also. It is true that in the present case we are dealing with the assessment of a partnership after its dissolution and s. 44 of the Act is directly applicable but this circumstance makes no difference to the application of the principle laid down in *Income Tax Officer, Agra v. Radha Krishan*<sup>(1)</sup>. The object of enacting s. 44 is to prevent evasion of tax by discontinuance of the business of a firm or dissolution of an association of persons. On discontinuance of the business of a firm or dissolution of the association of persons, it is declared that every person who was, at the time of such discontinuance or dissolution, a partner of such firm or a member of such association shall, in respect of the income, profits and gains of the partnership or association be jointly and severally liable to assessment and for the amount of tax payable. There is, however, nothing in the section which supports the argument of the respondent that for payment of tax assessed against the partners of a registered partnership individually under s. 23(5)(a) of the Act another partner becomes liable jointly and severally with that first partner to pay tax. The entire scheme of taxing the income of a registered partnership in the hands of individual partners is inconsistent with any argument that for payment of tax assessed against a partner, other partners are liable. It should be noticed that the tax assessed against a partner of a registered partnership is assessed on his total income inclusive of the share in the income of the partnership and the rate applicable is determined by the quantum of the total income of the partner. Section 44 on the contrary

(1) 66 I.T.R. 590.

contemplates cases of joint and several assessment of income of the business of a partnership which is discontinued. When such assessment is made, each member of the partnership may be liable to pay jointly and severally tax payable by the partnership. But when under the scheme of the Act tax is assessed individually against each partner, and no tax is made payable by the partnership, the principle of joint and several liability under s. 44 cannot be invoked. It is true that under the Partnership law the contractual obligations of a partnership are enforceable jointly and severally against the partners. But the liability to pay income-tax is statutory and does not arise out of any contract and its incidence will be determined by the provisions of the statute. If the statute which imposes liability has not made it enforceable jointly and severally against the partners, no such implication can be drawn merely because the contractual liabilities of a partnership may be jointly and severally enforced against the partners.

For these reasons we hold that the respondent had no jurisdiction to issue the impugned notice dated June 22, 1961 under s. 45 of the Act and the proceedings taken against the appellant in pursuance of that notice should be quashed by grant of a writ in the nature of *certiorari* under Art. 226 of the Constitution. We accordingly set aside the judgment of the High Court of Andhra Pradesh dated December 21, 1964 and allow this appeal with costs here and in the High Court.

Y.P.

*Appeal allowed.*