

I. L. R. Punjab and Haryana

(1968)1

INCOME TAX REFERENCE

*Before A. N. Grover and Prem Chand Pandit, JJ.*M/S LAL CHAND MOHAN LAL,—*Petitioner.**versus*THE COMMISSIONER OF INCOME-TAX, PUNJAB, HIMACHAL
PRADESH, JAMMU AND KASHMIR,—*Respondent.*

Income Tax Reference No. 13 of 1963.

March 22, 1967.

Income Tax Act (XI of 1922) S. 26-A—Firm consisting of seven partners formed to carry on business of sale of opium and poppy-heads when the licence was in the name of two partners only—Whether entitled to be registered.

Held, that the whole object of the partnership, as gathered from the partnership deed, was such that violation of the provisions of the Opium Act and the rules framed thereunder was involved or would result necessarily therefrom. Rules 51 to 57 of the Opium Rules contemplate a partnership carrying on the business of sale of opium only if a licence is taken in its name and if it is proposed that certain or all the partners should actively carry on business, the said rules must be complied with. The reference to the instrument of the partnership in the present case fully establishes that all the partners intended to carry on the business and not that some of them were merely financing or sleeping partners. It has been found as a fact that all the partners were actually carrying on the business. The partnership which was formed, therefore, was essentially one which was meant to conduct the business in contravention of the law. Such a partnership could not be accorded registration under section 26-A of the Indian Income Tax Act, 1922.

Case referred by the Income-tax Appellate Tribunal, Delhi Bench, under section 66(1) of the Indian Income-tax Act (Act XI of 1922) for decision of the important question of law involved in the case given as under:—

“Whether on the facts and in the circumstances of the case, the firm was validly constituted and was entitled to registration under Section 36-A of the Income-tax Act ?”

C. D. DEWAN, ADVOCATE, for the Petitioner.

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

M/s. Lal Chand-Mohan Lal *v.* The Commissioner of Income-tax, Punjab,
Himachal Pradesh, Jammu and Kashmir (Grover, J.)

JUDGMENT

GROVER, J.—The facts as given in the statement of the case are that a partnership was formed on 1st April, 1955 between seven persons, two of whom were Lal Chand and Mohan Lal to carry on opium business. The other five partners were Amir Chand, Rajinder Kumar, Kishori Lal, Kalu Ram and Sohan Singh. An application was made for registration of the firm under section 26-A of the Indian Income-tax Act, 1922 on 23rd September, 1955. The Income-tax Officer declined to register the firm because although admittedly the opium contracts were in the name of Messrs Lal Chand-Mohan-Lal at Malout and Fazilka, the business was actually carried on by all the seven partners. On appeal the Appellate Assistant Commissioner set aside the order of the Income-tax Officer and directed that the firm be registered. He was of the opinion that whatever the position *inter se* among the partners might be so far as the excise authorities were concerned, M/s. Lal Chand-Mohan Lal would be held responsible for all the dues and liabilities under the rules by the excise authorities. The Department appealed to the Appellate Tribunal. The Tribunal examined Kishori Lal, one of the partners, and was satisfied that the persons who were not licensees were actually carrying on the business. Following a judgment of this Court which is now reported as *Commissioner of Income-tax v. Benarsi Das and Company* (1), the appeal was allowed and the order of the Income-tax Officer was restored. In the statement of the case a contention which was raised before the Appellate Tribunal has also been mentioned. It was sought to be established that the opium contract had been taken in the name of M/s. Kishori Lal-Lal Chand for the Fazilka shop and in the name of M/s Kishori Lal-Mohan Lal, for the Malout shop. The Tribunal, however, noticed that before the Income-tax Officer and the Appellate Assistant Commissioner the case had proceeded on the footing that M/s. Lal Chand-Mohan Lal were the licensees. Before the Tribunal it was admitted by Kishori Lal that he was merely authorised to act as an agent. The Tribunal, therefore, reaffirmed the finding that persons other than licensees had acted on behalf of the licensees in contravention of the provisions of the Punjab Excise Act, 1914.

On the above facts, the following question has been referred by the Tribunal :—

“Whether on the facts and in the circumstances of the case, the firm was validly constituted and was entitled to registration under section 26-A of the Income-tax Act ?”

(1) (1962) 44 I.T.R. 835.

Before the decisions which have been relied on by counsel for both sides are discussed, it is necessary to set out certain salient points from the instrument of partnership (Annexure "A") which was made a part of the case. It is expressly stated therein that all the seven partners agreed to carry on the business of sale of opium and poppy heads in the name and style of Messrs Lal Chand-Mohan Lal at Fazilka and Malout in partnership. Article 2 of the agreement was :

"The partnership shall carry on business of sale of opium and poppy heads."

There was nothing in the deed of partnership to show that any of the partners was merely a financing or a sleeping partner and was not to actively participate in the business of sale of opium and poppy heads. In *Benarsi Das and Company's case*, a Division Bench of this Court, of which the judgment was delivered by me, held that where a person obtained a licence for the sale of opium in his own name and later on formed a partnership with others for carrying on the business and applied for registration of the firm under section 26-A of the Income-tax Act, registration should be declined. The provisions of the Opium Act of 1878 and the rules framed thereunder were considered in detail and the following observations were made, which may be reproduced, at page 841 :—

"The rules to which reference has been made in the present case do contemplate that it is the licensee who must attend to the sale of opium in the premises with regard to which he holds the licence. This is clear from condition (t) which must be contained in every licence along with the other conditions mentioned in rule 40. Of course, the licensee can obtain the permission of the appropriate authority for another person conducting sales on his behalf but unless that is done, it is only the licensee who can possess and sell opium and no other. Section 4 of the Act is equally clear on the point."

After distinguishing the decision of the Punjab Chief Court in *Bashesar Das v. Gobind Ram* (2), it was said:—

"Even if the partnership was not *per se* unlawful, it cannot be said that it did not become unlawful when it intended to conduct the business jointly on a licence granted to only one of its partners as was observed in *Mohideen Sahib & Co. v. Commissioner of Income-tax* (3)".

(2) 159 P.L.R. 1906.

(3) (1950) 18 I.T.R. 200.

M/s. Lal Chand-Mohan Lal v. The Commissioner of Income-tax, Punjab, Himachal Pradesh, Jammu and Kashmir (Grover, J.)

The question which was very similar to the one referred in the present case was answered in the negative.

Mr. Chetan Das Dewan, who appears for the assessee, has canvassed the correctness of the previous decision of this Court and, according to him, the following matters were either overlooked or not considered in their proper perspective :—

- (a) There is no prohibition in the Opium Act or the rules made thereunder called "the Punjab Opium Orders" promulgated by Gazette notification, dated 14th July, 1956 against formation of a partnership for carrying on the business of sale of opium and poppy heads, and, therefore, the partnership which was formed in the present case was on the face of it legal.
- (b) Condition (t) in rule 40 permits the licensee to conduct sales on his behalf by previously obtaining the approval of the Deputy Excise and Taxation Commissioner or Excise and Taxation Officer and, therefore, there is no absolute prohibition in the matter of the partners other than the licensees to carry on the business of sale of opium and poppy heads.
- (c) Even if section 9 makes the possession or sale of opium an offence but that will not affect the legality and validity of the partnership which came into existence as a result of the instrument, dated 1st April, 1955 (Annexure "A").
- (d) Under rule 59(1)(c) any licence can be revoked, cancelled or suspended in the event of a breach by the holder thereof or by his servants or any one acting with his express or implied permission of any of the terms of the conditions of his licence. This does not, however, mean that the agreement of partnership itself is rendered illegal or void.

Mr. Dewan has relied a great deal on a Bench decision of the Madhya Pradesh High Court in *M/s. Dayabhai and Co. v. Commissioner of Income-tax* (4). It was held therein that there was nothing in the Motor Vehicles Act laying down that transport business in

(4) A.I.R. 1966 M.P. 13.

partnership could only be done on permits issued and obtained by the firm itself and with vehicles of which the firm was the owner. It could not, therefore, be said when transport business was carried on with vehicles belonging to a partner or to a firm on the authorisation of permits held by a partner, that sections 31, 42 and 59 of the Motor Vehicles Act had been transgressed. There being thus no violation of any provision of the aforesaid Act, the partnership firm could not be regarded as illegal, nor could such a partnership agreement be held to be void as against public policy. The decision of the Madras, Andhra Pradesh and Kerala High Courts that a partnership entered into for the purposes of conducting a business on a licence granted or to be granted to one of the partners was void *ab initio* of the statute under which the licence was granted prohibited a transfer of the licence, were regarded as no longer correct in view of the decision of the Supreme Court in *Umacharan Shaw & Bros. v. Commissioner of Income-tax* (5). The Madhya Pradesh Bench, however, pointed out that there was nothing in the Motor Vehicles Act which required a partner as such to take out a licence for carrying on the business and, therefore, there was no question of the unlicensed partner by himself or through his agent, the other partner, carrying on the partnership business without a licence. In the partnership deed there was nothing about the transfer of permits held by the permit-holder or of the vehicles owned by him to the partnership firm. In the opinion of the Madhya Pradesh Court, the question of illegality of a partnership must be distinguished from illegality of any acts done in the course of its business by the firm or some or all of its members. In the Supreme Court decision on which the Madhya Pradesh Bench relied (*Umacharan Shaw & Bros. v. Commissioner of Income-tax*) the Appellate Tribunal had affirmed the order of the Income-tax Officer holding that there was no genuine partnership, especially as the existence of the partnership was not disclosed to the bankers or to the excise authorities who issued the licence for the shops and that the formation of the partnership was in violation of the Bengal Excise Act, 1911. As regards the question whether the formation of the partnership was in violation of the Bengal Excise Act, this is what was said after referring to section 42(1)(a) at page 276 :—

“There was no evidence that the excise licences were transferred or sublet. The three shops, it appears, were managed separately and their accounts were kept distinct.”

M/s. Lal Chand-Mohan Lal v. The Commissioner of Income-tax, Punjab, Himachal Pradesh, Jammu and Kashmir (Grover, J.)

It may be mentioned that section 42(1)(a) provided that a licence could be cancelled or suspended if it was transferred or sublet by the holder, thereof without the permission of the appropriate authority. The question which was being decided by their Lordships was not the same as the one which has been referred to us. Indeed, in that case though the Tribunal had stated that it had not proceeded on the ground that the partnership was illegal being against the Bengal Excise Act, the argument was referred to as supporting the conclusion that the firm was not genuine. It is not possible to see, with respect, how the Madhya Pradesh Court considered that the Madras, Andhra Pradesh and Kerala decisions would no longer be good in view of what has been observed in *Umacharan Shaw's case*.

It is, however, difficult to see how the decision of the Madhya Pradesh Court can be of much avail to the assessee in the present case. There is no question here of any transfer or subletting of a licence. The ratio of the decision given by this Court in *the case of Benarsi Das and Company* is that the whole object of the partnership was such that violation of the provisions of the Opium Act and the rules was involved or would necessarily result therefrom. As stated before, there was a clear stipulation in the instrument of partnership that it would carry on the business of sale of opium and poppy heads. If the partnership was to carry on the business of sale of opium and poppy heads, it would be doing so in violation of the express provisions contained in section 4 and the rules framed under section 5 of the Opium Act and would involve the commission of an offence punishable under section 9 of the Act inasmuch as no licence had been issued in the name of the partnership. It is contemplated by the rules that if a partnership intends to do such a business, it can take out a licence in its name. Rule 51 provides that a licence may only be granted to—

“(a) an individual;

(b) * * *

(c) “ * * *

(d) a partnership or firm.”

Rule 54 says that when a licence is granted to a partnership or firm not incorporated under the Act, all the individuals comprising the partnership or firm should be specified on the licence. Rule 55

provides that on the application in writing of all the original partners a partner may at any time be added by authority competent to grant the licence provided he is otherwise eligible. Rules 56 and 57 are to the effect that on the application in writing of all the original partners a partner may at any time be removed by the authority competent to grant the licence and that a licence granted to a partnership is determined by the dissolution of the partnership, etc. All these provisions indicate that the relevant statutory provisions contemplate a partnership carrying on the business of sale of opium only if a licence is taken in its name and if it is proposed that certain or all the partners should actively carry on business, the rules which have been mentioned must be complied with. The reference to the instrument of the partnership in the present case, as has been noticed at an earlier stage, fully establishes that all the partners intended to carry on the business and not that some of them were merely financing or sleeping partners. It has been found as a fact that all the partners were actually carrying on the business. The partnership which was formed, therefore, was essentially one which was meant to conduct the business in contravention of the law. It is not possible to understand how such a partnership could ever be accorded registration under section 26-A of the Act.

In conclusion it may be mentioned that the decision of this Court in *Benarsi Das and Company's case* has been followed in a recent decision of the Orissa Court in *Mohapatra Bhandar v. Commissioner of Income-tax* (6). There the question was substantially the same as is to be found in the present case. Mr. Dewan has not been able to persuade us that the previous decision of this Court requires reconsideration by a larger Bench. The answer to the question, therefore, is returned in the negative. In view of the entire circumstances the parties are left to bear their own costs.

PREM CHAND PANDIT, J.—I agree.

B. R. T.
