

Before : N. K. Sodhi, J.

M/S K. K. KAKKAR AND ASSOCIATE,—Petitioner.

versus

THE COMMISSIONER OF INCOME TAX AND  
ANOTHER,—Respondents.

Civil Writ Petition No. 13802 of 1989.

5th September, 1991.

*Income Tax Act, 1961—Ss. 142(1), 144, 184, 185, 185(5), 186—Best Judgment Assessment—Firm, registered in 1977 under section 184 and 185—Assessee firm thereafter treated as registered firm since returns in Form 12 were submitted regularly—Failure to file returns for particular assessment year—Notice under section 142(1) issued—Failure to respond—Assessee proceeded ex parte under section 144 and assessment made on best judgment—ITO purportedly acting under section 185(5) failing to award assess status of registered firm—Denial of such status is illegal—ITO cannot cancel registration of assessee without resort to procedure prescribed under section 186(2).*

(Paras 4 & 5)

*Held*, that since Form 12 had been submitted in time, the provision of Sub-Section (7) of Section 184 of the act made it obligatory that the registration granted in the earlier years would continue to have effect for that year as well.

*Held*, that in the instant case, the firm had been registered for the first time in the year 1977-78 and its registration continued thereafter and for the relevant assessment year the requisite declaration form 12 having been submitted by the firm in time, the Income Tax Officer while making the best judgment assessment under section 144 of the Act for that assessment year could not, therefore cancel the registration without resorting to section 186(2) of the Act. The impugned order of the Income Tax are not sustainable in law and deserve to be quashed.

*Petition under Articles 226 of the Constitution of India praying that :—*

- (i) *the records of the case be summoned and a writ or direction in the nature of certiorari quashing the order dated 19th March, 1987 passed by Respondent No. 2 refusing registration and the order dated 8th June, 1989 of the Commissioner of Income Tax, Rohtak upholding the same and dismissing the Revision Petition;*
- (ii) *any other writ or direction which this Hon'ble Court may deem fit in the facts and circumstances of the case be passed;*

(iii) the filing of the certified copies of orders Annexures 'P-1' to 'P-3' be dispensed with; and

(iv) the writ petition be allowed with costs.

B. K. Jhingan, Advocate, for the Petitioner.

A. K. Mittal, Advocate, for the Respondent.

#### JUDGMENT

N. K. Sodhi, J.

(1) Messers K. K. Kakkar and Associates is a firm of contractors carrying on its activities at Faridabad in the status of a partnership firm (hereinafter called 'the firm'). It is an old and regular assessee under the Income-tax Act, 1961 (for short, 'the Act') and was granted registration as a firm for the first time for the assessment year 1977-78 under sections 184 and 185 of the Act and was thereafter being treated as a registered firm under sub-section (7) of Section 184 of the Act as Form-12 envisaged by Rule 24 of the Income-tax Rules was being submitted on its behalf. For the assessment year 1984-85 which is the year now in question, the firm filed usual declaration in Form-12 in time and therefore, the registration already granted to the firm had to continue to have its effect for this assessment year as well. No fresh order of registration was necessary to be passed by the Income-tax Officer in view of the provisions of sub-section (7) of section 184 of the Act as there was no change in the constitution of the firm or in the shares of the partners. During the assessment proceedings for the relevant assessment year, a notice under section 139(2) of the Act was issued calling for return of income for the said assessment year in response to which the firm did not file any return. Again, notices under section 142(1) of the Act were issued which were duly served on the firm but these two were not complied with. The Income-tax officer was left with no alternative but to complete the assessment *ex parte* under section 144 of the Act on the basis of past record. While proceeding to make the best judgment assessment under section 144 of the Act, the Income-tax Officer refused to grant registration to the firm for the assessment year 1984-85 purportingly exercising powers under section 185(5) of the Act and the Income-tax Officer proceeded on the basis that the status of the firm was that of an unregistered firm. A copy of the order dated 19th March, 1987 passed by the Income-tax Officer in this regard is Annexure P1 with the writ petition. Feeling aggrieved against this order, the petitioner invoked the powers of the Commissioner of Income-tax under section 264 of the Act, who,—*vide* its order dated June 8, 1989 (Annexure P4 with the writ petition) dismissed the

revision petition holding that since the firm had failed to comply with the notices issued under sections 139(2) and 142(1) of the Act, the Income-tax Officer was justified in refusing to continue with the registration of the firm. For this view, the Commissioner relied upon a decision of *Calcutta High Court reported in C.I.T. v. Sooraj-mul Nagarmull* (1). The petitioner has challenged the order of the Income-tax Officer as also the order of the Commissioner in the present writ petition.

(2) The only contention advanced on behalf of the firm is that since Form-12 had been submitted in time to the Income-tax Officer for the relevant assessment year, he could not while making the best judgment assessment refuse to treat the firm as a registered firm and that in case he was inclined to cancel the registration, he should have followed the procedure prescribed by section 186 of the Act. The respondents have controverted the stand of the writ petitioner and the impugned orders are sought to be justified on the basis of the provisions of sub-section 5 of section 185 of the Act. It is the case of the respondents that since the Income Tax Officer had to complete the assessment *ex parte* under section 144 of the Act, refusal of registration to the firm was consequential to the making of such an assessment order.

(3) In order to appreciate the controversy between the parties, it is necessary to refer to the relevant provisions of sections 184, 185 and 186 of the Act which are reproduced hereunder for facility of reference :

“Section 184. *Application for registration.*

(1)	xx	xx	xx	xx	xxx
(2)	xx	xx	xx	xx	xxx
(3)	xx	xx	xx	xx	xxx
(4)	xx	xx	xx	xx	xxx
(5)	xx	xx	xx	xx	xxx
(6)	xx	xx	xx	xx	xxx
(7)	xx	xx	xx	xx	xxx

(7) Where registration is granted to any firm for any assessment year, it shall have effect for every subsequent assessment year :

Provided that :

- (i) there is no change in the constitution of the firm or the shares of the partners as evidenced by the instrument of

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(1) 139 I.T.R. 239.

partnership on the basis of which the registration was granted; and

- (ii) the firm furnishes, before the expiry of the time allowed under sub-section (1) or sub-section (2) of section 139 (whether fixed originally or on extension) for furnishing the return of income for such subsequent assessment year a declaration to that effect in the prescribed form and verified in the prescribed manner, so, however, that where the Income Tax Officer is satisfied that the firm was prevented by sufficient cause from furnishing the declaration within the time so allowed, he may allow the firm to furnish the declaration at any time before the assessment is made.

(8)	xx	xx	xx	xxx
(1)	xx	xx	xx	xx
(2)	xx	xx	xx	xx
(3)	xx	xx	xx	xx
(4)	xx	xx	xx	xx

Section 185. *Procedure on receipt of application.*

- (5) Notwithstanding anything contained in this section, where in respect of any assessment year, there is, on the part of a firm, any such failure as is mentioned in section 144, the Income-tax Officer may refuse to register the firm for the assessment year.

Section 186. *Cancellation of registration.*

- (1) xx            xx            xx            xx
- (2) If, where a firm has been registered or its registration has effect under sub-section (7) of section 184 for any assessment year, there is on the part of the firm, any such failure in respect of the assessment year as is mentioned in section 144, the Income-tax Officer may cancel the **registration of the firm** for the assessment year, after giving the firm not less than fourteen days' notice intimating his intention to cancel its registration and after giving it a reasonable opportunity of being heard.

(3)	xx	xx	xx	xx
(4)	xx	xx	xx	xx"

- (4) It is the admitted case of the parties that the firm was granted registration for the first time for the assessment year 1977-78

and that thereafter, for the subsequent assessment years, the firm automatically continued to be a registered firm under sub-section (7) of section 184 of the Act inasmuch as Form-12 was being submitted in time. Even for the relevant assessment year, the said Form was submitted in time and it is not the case of the respondents that there was any change in the constitution of the firm or in the shares of the partners. It is true that during the relevant assessment year, the firm failed to comply with the notices issued to it by the Income-tax Officer under sections 139(2) and 142(1) of the Act with the result the Income-tax Officer was left with no choice but to proceed to make the best assessment judgment under section 144 of the Act. In my opinion, while making such an assessment, it was not open to the Income-tax Officer to cancel the registration of the firm without following the procedure prescribed in sub-section (2) of section 186 of the Act. Since Form-12 had been submitted in time, the provisions of sub-section (7) of section 184 of the Act made it obligatory that the registration granted in the earlier years would continue to have effect for that year as well. The Income-tax Officer was not required to pass any specific order and the continuance of registration was automatic. The provisions of sub-section (5) of section 185 of the Act do not apply to a case like the present one where the firm already stood registered and was claiming automatic continuation of its registration under section 184(7) of the Act. Section 185(5) of the Act would apply only when the firm is to be registered for the first time and the Income-tax Officer is required to pass a specific order granting registration after satisfying himself that the requirements of section 184 of the Act are complied with. For all subsequent years after its registration, the firm can claim automatic continuation of its registration provided it furnishes Form-12 in time. No other formality is required to be gone through and the Income-tax Officer is bound to continue recognising the firm without having to pass any specific order to that effect. In other words, if Form-12 as submitted, is in order, the continuation of registration is automatic and if the Income-tax Officer for any reason wishes to cancel the automatic registration, he must follow the procedure prescribed in sub-section (2) of section 186 of the Act. While making the assessment of a firm for an assessment year in which it is seeking registration for the first time, if the Income-tax Officer is satisfied that the firm has committed any default for which it should not be granted registration, he may refuse to register the firm and proceed to assess it as an unregistered firm. This power he would exercise under sub-section (5) of section 185 of the Act. The words "may refuse to register the firm for the assessment year" in sub-section (5) of section 185 of the Act make it abundantly clear that this provision

would apply when the firm is seeking registration for the first time. If it were open to the Income-tax Officer to exercise powers under this provision even when the firm already stood registered then the words "or its registration has effect under sub-section (7) of section 184 for any assessment year" used in sub-section (2) of section 186 of the Act would become redundant. Thus, once the registration has been granted and assessment is being made for any subsequent year for which Form-12 has been submitted, it is not open to the Income-tax Officer to exercise powers under section 185(6) of the Act and in case continuation of the registration is to be cancelled, the procedure laid down in sub-section (2) of section 186 of the Act will have to be followed. The view that I am taking finds support from a Division Bench judgment of the Allahabad High Court reported as *Additional Commissioner of Income-tax v. Radha Kishan Banwari Lal* (2).

(5) In the instant case, the firm had been registered for the first time in the year 1977-78 and its registration continued thereafter and for the relevant assessment year the requisite declaration Form-12 having been submitted by the firm in time, the Income-tax Officer while making the best judgment assessment under section 144 of the Act for that assessment year could not, therefore, cancel the registration without resorting to section 186(2) of the Act. The impugned order of the Income-tax Officer, as also of the Commissioner of Income-tax are not sustainable in law and deserve to be quashed.

(6) Counsel appearing for the department placed strong reliance on a Division Bench judgment of the Calcutta High Court in *Soorajmul Nagarmull's case* (supra) to contend that it was open to the Income-tax Officer to cancel the registration under section 185(5) of the Act even when the firm already stood registered for the assessment year 1977-78. According to the counsel, the view expressed by the Allahabad High Court in *Radha Kishan Banwari Lal's case* (supra) is not correct and the judgment of the Calcutta High Court should be followed. I find no merit in this contention. In *Soorajmul Nagarmull's case*, learned Judges of the Calcutta High Court were considering the provisions of sections 23(4) and 26A of the Income Tax Act, 1922 whereunder there was no provision similar to the one contained in sub-section 7 of section 184 of the Act. Under the 1922 Act, a firm was required to get itself registered every year by filing an application whereas this is not so now under

the Act where registration once granted continues automatically, provided the assessee furnishes the requisite declaration in Form-12 within time. For this reason, the judgment of the Calcutta High Court would not be applicable to the facts of the present case.

(6) For the reasons recorded above, the writ petition is allowed and the order of the Income-tax officer to the extent it treats the petitioner firm as an unregistered firm for the relevant assessment year quashed, so also the order of the Commissioner. It shall, however, be open to the Income-tax Officer to proceed in the matter in accordance with law. Parties to bear their own costs.

*J.S.T.*

*Before : A. L. Bahri, J.*

DR. RAVINDER KUMAR SHARMA,—*Petitioner.*

*versus*

SHRI OM PARKASH,—*Respondent.*

*Regular Second Appeal No. 505 of 1991*

14th October, 1992.

*Code of Civil Procedure, 1908—Section 100—Whether document creates licence or tenancy—Depends upon interpretation of documents—Would be a question of law which can be raised in Regular Second Appeal.*

(Para 6 and 16)

*Held, that where the decision of the Courts below is based on appreciation of evidence, oral as well as documentary, and such a conclusion is on facts, the same cannot be questioned in the second appeal. However, as to whether a document creates a licence or a tenancy, would be a question of law, which could be question in the Regular Second Appeal.*

*Transfer of Property Act, 1882—Section 105—Whether lease or licence—Control over shop remained with plaintiff—Defendant handed keys of shop to plaintiff's mother and collected the same in the morning—Some goods belonging to plaintiff and his mother also lying in shop—Defendant also produced several receipts describing amount as licence fee—Case of licence and not of lease as there is no creation of any interest in property or tenancy in favour of defendant.*

*Held, that these two facts, one regarding taking over the key in the morning and returning in the evening, secondly existence of the goods of the plaintiff and his mother in portion of the shop in dispute,*