IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 28 OF 2002

M/s. Badshah Enterprises
Maugal Archana Apartments
15th Road, Bandra (W),
Mumbai – 400 050 .. Appellant

v/s.

1. The Assessing Officer
   Ward 21(5), having office at
   Parimal Chambers, Mumbai – 400 013

2. Commissioner of Income Tax
   Mumbai City IX, Piramal Chambers
   Mumbai – 400 013 ..Respondents

Mr. S.P. Kanuga I/b Ms. Sapna N. Nath for the appellant
Mr. Sham Walve for the respondent

CORAM : M.S. SANKLECHA &
SANDEEP K. SHINDE, J.J.

DATE : 2nd JULY, 2018

P.C. :-

1. This appeal under Section 260A of the Income Tax Act,1961 (the Act) from the order of the Income Tax Appellate Tribunal (the Tribunal) was admitted on 13th August, 2004 on the following substantial question of law :-

> *"Whether on the facts and in the circumstances of the case and provisions of law contained in Sections 184, 184(2), 139(9) and 143(3) of the Act, the Tribunal was justified that the assessee was not*

entitled to grant of registration and that be assessed as a registered firm ?

2. This Appeal relates to Assessment Year 1993-94.

3. The appellant is a partnership firm. The appellant assessee was assessed as registered firm for Assessment Year 1992-93 on the basis of the instrument of Partnership Deed filed with the Income Tax Department. On 1st April, 1993, Sections 184 and 185 of the Act were amended. For the subject Assessment Year i.e. 1993-94, the Assessing Officer refused registration of the assessee firm for failure to file the certified copy of the partnership deed along with the return of income as required under Section 184 of the Act. Thus, the appellant assessee firm was assessed as an AOP (Association of Persons) by an order dated 24th January, 1996.

4. Being aggrieved, the appellant assessee filed an appeal to the Commissioner of Income Tax (Appeals) [CIT(A)]. By an order dated 30th December, 1996, the CIT(A) allowed the appeal by holding that the requirement of filing certified copy of the partnership deed along with the return of income was applicable only to those assessees who are seeking registration for the first time on or after Assessment Year 1983-84. According to the CIT(A), this was evident from the reading of Section 184(2)(3) and (4) of the Act. Consequently, by an order dated 30th December,

2016, the order of the Assessing Officer seeking to assess the appellant as an AOP was quashed and set aside while directing the Assessing Officer to assess the appellant as a partnership firm after due verification.

5. Being aggrieved with the order dated 30th December, 2016 of the CIT(A), the Revenue preferred an appeal to the Tribunal. The impugned order dated 29th June, 2001 of the Tribunal allowed the Revenue's appeal by holding that for the subject assessment year there was a change in the share of the partners in as much as the provision for salary and interest was made for the partners as required in terms of Section 40(b) of the Act. Thus, there was a change in the share as evidenced by the instrument providing for salary and interest to the partners to secure the benefit of Section 40(b) of the Act. Thus, it set aside the order of the CIT(A) and restored the order of the Assessing Officer assessing the appellant as an AOP.

6. Before we deal with the respective contentions, it would be useful to reproduce Section 184 of the Act as existing at the relevant time. It reads as under :-

> *"184. (1) A firm shall be assessed as a firm for the purposes of this Act, if –*
> *(i) the partnership is evidenced by an instrument : and*
> *(ii) the individual shares of the partners are specified in that instrument.*

(2) A certified copy of the instrument of partnership referred to in sub-Section (1) shall accompany the return of income of the firm of the previous year relevant to the assessment year commencing on or after the 1st day of April, 1993 in respect of which assessment as a firm is first sought.

Explanation – For the purpose of this sub-section, the copy of the instrument of partnership shall be certified in writing by all the partners (not being minors) or, where the return is made after the dissolution of the firm, by all persons (not being minors) who were partners in the firm immediately before its dissolution and by the legal representative of any such partner who is deceased.

(3) Where a firm is assessed as such for any assessment year, it shall be assessed in the same capacity for every subsequent year if there is no change in the constitution of the firm or the shares of the partners as evidenced by the instrument of partnership on the basis of which the assessment as a firm was first sought.

(4) Where any such change had taken place in the previous year, the firm shall furnish a certified copy of the revised instrument of partnership along with the return of income for the assessment year relevant to such previous year and all the provisions of this section shall apply accordingly.

(5) Notwithstanding anything contained in the foregoing provisions of 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 firm shall not be assessed as such for the said assessment year and, there upon, the firm shall be assessed in the same manner as an association of persons, and all the provisions of this Act shall apply accordingly."

7. Mr. Kanuga, learned Counsel in support of the appeal submits as under:-

(a) The appellant assessee was already assessed as a registered partnership firm for Assessment Year 1992-93. Therefore, in the absence of any change in the constitution of the firm or share of the partners, the earlier registration as a firm would continue.

(b) A change in the constitution of the firm or the shares of the partners of the firm would only mean that change in the persons constituting the partnership firm or a change in the profit sharing ratio amongst the partners *inter se.* It is only in any one of the above two eventualities, that requirement of filing of the certified coppy of the partnership deed along with return of income for the subject assessment year is mandatory; and

(c) Even though an instrument was executed in the previous year relevant to the subject assessment year providing for salary and interest to the partners, the same was done only to satisfy the provisions of Section 40(b) of the Act It does not make any change in the constitution of the firm or in the shares of the parters in the partnership firm. Thus, no occasion to apply section 182(4) of the Act would arise.

8. As against the above, Mr. Walve, learned Counsel appearing for the respondent Revenue in support of the impugned order submits as under :-

(a) In view of the fact that a fresh instrument was executed in the previous year relevant to the subject assessment year providing for salary and interest to its partners so as to avail of benefit of Section 40(b) of the Act, would by itself indicate that there is a change in the profit sharing ratio of the appellant. Thus, the requirement in terms of Section 184(4) of the Act that the appellant assessee should file a certified copy of the partnership deed along with its return of income for the subject assessment year. This not having been done, would disqualify it from being assessed as a registered firm. Notwithstanding it has been assessed in the earlier assessment year as a registered firm.

(b) In any case, the amended Section 184 which came into effect from 1st April, 1993 would require the appellant assessee to file its certified copy of the partnership deed along with its return of income. The assessment in an earlier assessment year as a registered firm will not enure to the benefit of the assessee for the subject assessment year. This in view of the amended Section 184 of the Act. In support, reliance is placed upon the decision of the Kerala High Court in ***Bhaskar & Co. Vs. CIT, 331 ITR 90***; and

9. We note that the impugned order of the Tribunal has set aside the order of the CIT(A) on the ground that there has been a change in the share of partners as evidenced by the instrument executed providing for salaries and interest to partner. Thus, the assessment as a firm in the earlier assessment year will not assist the appellant assessee to be assessed as a firm. The impugned order of the Tribunal holds that Section 184 of the Act has not been satisfied not on the ground that there has been a change in the

constitution of the firm but only on account of change in share. This is so as the partners continued to remain the same.

10. We are of the view that payment of salary and / or interest paid to a partner on account of the work he does or further amount contributed for running of the firm. It does not change the share of profits as indicated in the partnership deed. The execution of an instrument laying down the salary to be paid to the partner and / or interest to be paid to the partners for the amount contributed by them had become necessary only for the purposes of claiming benefit of Section 40(b) of the Act. It has no relevance to decide whether or not there has been a change in the constitution of the firm or share in the partners for the purposes of being assessed as a partnership firm.

11. In the above view, as the appellant firm was already assessed as a partnership firm for the earlier assessment i.e. for Assessment Year 1992-93, by virtue of sub-section 3 of Section 184 of the Act, the appellant firm would continue to be assessed as a partnership firm. This is so as there is no change either in the constitution or in the share of the partners.

12. Mr. Walve next contended in any event that from the Assessment Year

1993-94, even if the assessee was being assessed as a firm prior to Assessment Year 1993-94, the amended section would require the assessee to file a certified copy of the partnership deed along with the return of income. According to him, amendment to Section 184 w.e.f. 1st April, 1993 is a fresh start. Reliance in support is placed upon the decision of Hon'ble Kerala High Court in Bhaskar and Co. (supra). The aforesaid decision proceeds on the basis that after the amendment to Section 184 of the Act, the earlier assessment as a partnership firm under the earlier regime cannot be relied upon to avail the benefit of assessment as a partnership firm from Assessment Years 1993-94 onwards.

13. With respect, we are unable to agree with the view of the Hon'ble Kerala High Court in Bhaskar and Co.(supra) on the above issue. This for the reason that it proceeds on the basis that prior to Assessment Year 1993-94, there was a different regime viz. registration of a firm on compliance of the formalities to be assessed as a partnership firm. Now there is no requirement of registration, all that is required is that the certified copy of the partnership deed to accompany the return of income to be assessed as to tax as partnership firm. Therefore, the Hon'ble Kerala High Court held that the new regime which commences from Assessment Year 1993-94 would require filing of the partnership deed along with the return of income in the

Assessment Year 1993-94 and once that is done, then no further requirement of filing the partnership deed in the subsequent assessment years would be necessary in view of Section 184(3) of the Act. With respect to Hon'ble Kerala High Court, we read Section 184(3) of the Act differently. It allows the status / benefit of being assessed as a partnership firm, if in an earlier assessment, it was so assessed, on the condition of there being no change in the constitution of the firm or share of the partners. The benefit of Section 184(3) of the Act is not based on the procedure to be followed, so as to be assessed as a partnership firm. Therefore, if the appellant was assessed as a partnershp firm earlier, the benefit would continue in the absence of change in constitution or share of the partners.

14. Moreover, requirement of a certified copy of the instrument of the partnership deed being filed along with the return of income for assessment years commencing from 1st April, 1993, only applies to firms which seek to be assessed as a partnership firm under the Act for the first time after 1st April, 1993. There is no warrant to restrict the meaning and the scope of sub-section 3 of Section 184 of the Act. Accepting the submission on behalf of the Revenue would necessarily require reading words into sub-section 3 of Section 184 of the Act to the effect that it would apply in respect of the assessment as a firm was first sought “after 1st day of April, 1993”. It is a

settled position in law that fiscal statute is to be strictly construed. It is not open to add words and / or delete words in the absence of any ambiguity. Therefore, full play must be given to sub-section 3 of Section 184 of the Act and the benefit of assessment as a partnership firm in the earlier years would continue for the subject assessment year as there is no change in the constitution of the firm or shares of the partners on the basis of which the assessment as a firm was first sought / made. Moreover, whenever while considering an Act, an ambiguity is noticed, then it must be resolved in favour of the assessee. On both the issues viz. strict construction of a taxing statute and ambiguity therein to be resolved in favour of the assessee reliance is placed upon the Apex Court decision in ***Commissioner of Income Tax Vs. Vatika Township (P) Ltd. 367 ITR 466 @ 494***.

15. In the above view of the matter, we hold that as the appellant firm was assessed as a partnership firm prior to Assessment Year 1993-94 and as there has been no change in share of the partners, the appellant assessee would continue to be assessed as a partnership firm in the subject assessment year.

16. In the above view, the substantial question of law raised for our consideration is answered in the negative i.e. in favour of the appellant assessee and against the respondent revenue.

17. The appeal is allowed in the above terms.

(SANDEEP K. SHINDE J.) **(M.S. SANKLECHA, J.)**