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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CENTRAL EXCISE ACT REFERENCE NO.1/2011**

Reserved on: 14th August, 2013

Date of decision: 20th November, 2013

M/S FREEZAIR INDIA (P) LIMITED Appellant

Through Ms. Meenakshi Arora and
Ms. Pragaya Ohri, Advocates.

versus

**COMMISSIONER OF CENTRAL EXCISE,
COMMISSIONERATE, DELHI-1** Respondent
Through Mr. Kamal Nijhawan, Sr. Standing Counsel.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJIV KHANNA, J.:

By order dated 14th November, 2011, the following substantial question of law was framed in the present appeal:-

“Whether the appellant company is liable and could be assessed for the period prior to its incorporation i.e. 1st April, 1998?”

2. As a limited issue arises for consideration, we need not refer to the entire factual matrix except the relevant facts, which are undisputed and admitted. Show cause notice dated 3rd May, 2000 was issued to M/s Freezair India (P) Limited CB-382/10, Indra Market, Ring Road, Naraina, New Delhi, Shri Kuldeep Singh Punj Proprietor of M/s. Freezair India (P) Limited CB-382/10, Indra Market, Ring Road, Naraina, New Delhi and Shri Narinder Singh Punj, Director of M/s. Freezair India (P) Limited CB-382/10, Indra Market, Ring Road,

Naraina, New Delhi under Sections 11A, 11AB and 11AC of the Central Excise Act, 1944 (Act, for short) read with Rules 9(2), 173Q, 209A and 226 of the Central Excise Rules, 1944.

3. In paragraph 37 of the said notice, it was stated as under:-

“Whereas it appears that M/s Freezair India/M/s Freezair India (P) Ltd. has not paid Central Excise duty amounting to Rs.45,62,325/- on the cooling/indoor units of split air conditioner & other parts of air conditioner manufactured and cleared by them, without disclosing the production/clearances with the intent to evade payment of duty (as per Annexure-A), during the years 1996-97, 1997-98 & 1998-99 without getting themselves registered with the Central Excise department, by wilfully suppressing the clearances from the department, without accounting for the production and clearances in the statutory records, without submitting RT-12 returns, without filing classification declaration, without following the prescribed procedure, without maintaining prescribed Central Excise records in contravention of above referred rule. Therefore, it appears that they have rendered themselves liable to penal action under the provision of Section 11AC of Central Excise Act, 1944, Rules 9(2), 173Q and 226 of Central Excise Rules, 1944.”

4. Freezair India Private Limited was incorporated as a company on 29th January, 1998 and started operations as a manufacturer and seller of air conditioning and cooling units with effect from 1st April, 1998. They applied and were granted registration under the Act. Kuldeep Singh Punn and Narinder Singh Punn were the two directors from the date of incorporation till issue of show cause notice. The manufacturing activities were undertaken from the factory located at CB 382/10, Indra Market, Ring Road, Naraina, New Delhi. Prior to 1st April, 1998, from the same premises, M/s Freezair India, sole proprietorship of Kuldeep Singh Punn was operating and carrying on manufacturing and sale activities of air conditioners and cooling units. Pursuant to the incorporation of the company, all assets and liabilities

of the sole proprietorship Freezair India were taken over by the appellant.

5. On 22nd April, 1999, search and seizure operations were undertaken by excise officers and incriminating documents and material were seized. This included diary and date-wise details of clearances, receipts and payments in the handwriting of Kuldeep Singh Punn for the period prior and post incorporation of the appellant company on 29th January, 1998 and start of manufacturing and sale operations with effect from 1st April, 1998.

6. Reply to the show cause notice was filed on 9th June, 2000 stating that the appellant was registered with the Department of Central Excise on 1st April, 1998. However, considering the matter on merits, the reply dealt with the demand mentioned in the show cause notice of Rs.45,62,325/-, which related to alleged clandestine manufacture and sales during the Assessment Years 1996-97, 1997-98 and 1998-99.

7. Order in original dated 28th September, 2000 was passed. In paragraph 1 of the said order it stands recorded:-

“1. These proceedings arise from the Show Cause Notice No. IV(HQRS.) Prev./15/34/99/1270 dated 03-05-2000 issued to M/s. Freezair India (P) Ltd., (hereinafter referred as the said party) having their factory at CB-382/10, Indra Market, Ring Road, Naraina, New Delhi and engaged in the manufacture of Air Conditioners and cooling units of split air conditioners falling under Chapter Heading No. 8415 and to its two directors namely Sh. Kuldeep Singh Punn and Sh. Narender Singh Punn. Prior to 29-01-98, the said company was known as Freezair India situated at the same address and Sh. Kuldeep Singh Punn was Proprietor (at present, Director of the said company).”

(Emphasis Supplied)

8. After considering the reply, the alibi and defence was rejected

and in paragraph 44 of the said order the adjudicating authority, i.e., Commissioner, Central Excise, Delhi-1 directed and confirmed demand of Central Excise duty of Rs.45,62,325/- under Rule 9(2) read with proviso to Section 11A of the Act. Penalty of equivalent amount was imposed on the appellant under Section 11 AC of the Act read with Rule 173Q. Interest under Section 11AB of the Act was directed to be imposed. Recovery was directed against the appellant even for the period prior to the incorporation. Penalty of Rs.3 lacs and Rs.2 lacs was imposed on Kuldeep Singh Punn and Narender Singh Punn under Rule 209A of the Rules.

9. The appellant herein preferred an appeal before Customs, Excise and Gold (Control) Appellate Tribunal under Section 35B of the Act. In the grounds of appeal, one of the primary contentions raised was that the appellant company was incorporated on 29th January, 1998 and had started manufacturing operations from 1st April, 1998 and that they cannot be saddled with the liability of duty or penalty to the extent of Rs.35,57,431/- pertaining to the period between 1st July, 1996 to 31st March, 1998 and proportionate interest. The appeal was disposed of by the impugned order of the tribunal dated 18th December, 2002. The appeal was partly allowed with the appellant being held liable to pay the duty but with a direction that the amount would be re-quantified. Penalty imposed was set aside for fresh decision. Imposition of interest under Section 11AB was upheld and the same had to be re-computed on the appropriate amount.

10. Substantial part of the impugned order the tribunal relates to merits of the additions and other issues. On the contention of the appellant relating to their liability prior to 1st April, 1998 there is only one paragraph and the reasoning rejecting the appellant's contention

reads:-

“11. A contentious issue raised in this case is whether M/s. Freezair were liable to pay duty for the period prior to 1-4-98. Admittedly, the company is successor-in-interest to the proprietary concern of Shri Kuldeep Singh Punn. The company inherited all the rights and liabilities of the proprietary concern, a fact conceded by the appellants. The liabilities inherited by the company from the proprietary concern included the liability to be assessed and to pay the duty of excise. In so far as the goods manufactured and cleared by Kuleep Singh Punn prior to 1-4-98 are concerned, M/s. Freezair stood in the shoes of the manufacturer and were, therefore, liable to be assessed to duty. It follows that the company had the liability to pay duty on such goods. None of the decisions cited by the learned counsel appears to support a contrary view.”

(Emphasis Supplied)

11. The appellant preferred an appeal before the Supreme Court on which notice was issued, limited to the question whether the appellant could be assessed for duty for the period prior to 1st April, 1998. Demand in respect of the said period was stayed. The appeal was admitted to hearing by order dated 24th November, 2003. Subsequently, learned counsel for the Revenue was asked to seek instructions whether having regard to the facts of the case, if the appellant-assessee paid the excise duty as demanded for the period prior to 1st April, 1998, the revenue would be willing to wave off and not press for recovery of penalty. Revenue did not agree to the said proposal. By order dated 14th September, 2011, the appeal was allowed to be withdrawn with liberty to the appellant to prefer an appeal or reference before the High Court. Pursuant to the said liberty, the present reference was filed and stands admitted for hearing and disposal in terms of order dated 14th November, 2011. The question raised is whether the appellant-company can be held to be vicariously liable for the dues and the liability of Kuldeep Singh Punn,

an individual and promoter director. The important issue is whether the appellant could have been assessed and charged with the liability to pay excise duty, penalty and interest for the period prior to 1st April, 1998, i.e., whether the original adjudication/assessment order itself is flawed and bad for levying, imposing and creating duty liability on the appellant for the period prior to 1st April, 1998? Another question raised is whether the said liability can be enforced based on the premise that the appellant is liable to pay the said amount because the company upon incorporation has taken over the assets and liabilities of the sole proprietorship of Kuldeep Singh Punn.

12. On the face of it, there has been an extraordinary and serious error in the impugned order passed, which is of a basic or fundamental nature. The appellant herein was incorporated only on 29th January, 1998 and came into existence on the said date as a separate juristic entity and a legal person. It was registered under the Act and started manufacturing activities from 1st April, 1998. The appellant could not have indulged in clandestine and wrong sales prior to 29th January, 1998 as it was not in existence and was not carrying on manufacturing activities till 31st March, 1998. Before the said date, Kuldeep Singh Punn in his individual capacity as a sole proprietor of Freezair India was carrying on the business of manufacture and sales of air conditioners and cooling units from the same premises from where the appellant started operating. However, this does not mean that the appellant company is the same person as Kuldeep Singh Punn, sole proprietor of Freezair India. A company once incorporated in accordance with the law is a juristic person, a body corporate capable of being sued and with the right to sue a third person. A company in law is a different person, altogether from the subscribers of the

memorandum and the promoter directors. Company's debts are the obligations of the company and similarly the promoter's debts are obligation of the promoters and cannot be normally recovered from the other. Principle of independent corporate existence of a registered company is of great significance and cannot be ignored except in the case of statutory mandate or when the corporate veil is required to be pierced for exceptional and good reasons. These are extraordinary situations when the law goes behind the corporate personality and ignores the legal entity for justifiable, sound and adept reasons.

13. Strictly speaking, principle of lifting of corporate veil has no application to the facts of the present case. The said principle is normally applied against the promoter directors, directors or others in charge and responsible for day to day work of the company, to enforce obligations of the corporate identity and seek performance or penalise the natural person behind the corporate cloak. Sometimes but rarely it can be applied as a principle at the behest of the company i.e. the corporate entity. In the present case, what is sought to be enforced in the impugned order is entirely different. It holds that the appellant company liable for the dues and liabilities of Kuldeep Singh Punn, its promoter director. The liabilities are for the period prior to the incorporation of the company or beginning of the operations.

14. In view of the aforesaid discussion, we reject the argument of the respondent that in the present case that the corporate veil should be lifted and, thereby make the appellant company liable to pay duty for the failure and fraudulent transactions made by Kuldeep Singh Punn, sole proprietor. The said activities and liabilities indulged were in his capacity as a sole proprietor and not because he was or would be the promoter director of the appellant. In the absence of any such

statutory provision relied upon and pointed out to us, the said plea of the respondent has to be rejected. Principle of vicarious liability has to be created and enacted under statute by the Legislature. Sometimes the doctrine is applicable by the courts to punish and impose penalties or fines by lifting the corporate veil as offences or violations of law committed by natural persons behind the company. But in such cases, the offences or violations are committed by the artificial juristic person and do not relate to period prior to the incorporation. These are cases of lifting of corporate veil. The said doctrine cannot be applied to the present factual matrix.

15. Learned counsel appearing for the appellant had drawn our attention to sub-rule (2) of Rule 230 of the Rules, which reads as under:-

“230. Goods, plant and machinery chargeable with duty and not paid.-

(2) Where any such person transfers or otherwise disposes of his business in whole or in part, or effects any change in the ownership thereof, in consequence of which he is succeeded in the business or trade or part thereof by any other person or persons, all excisable goods, materials, preparations, plant, machinery, vessels, utensils, implements and articles in the custody or possession of the person or persons succeeding may also be detained for the purpose of exacting duty due from the producer, manufacturer or dealer up to the time of such transfer, disposal or change, whether such duty has been assessed before such transfer, disposal or change, but has remained unpaid, or is assessed thereafter.”

16. Though the aforesaid Rule was not referred to and relied upon by the respondent, we feel that the said Rule does not help and assist them. The said Rule materialises and operates when a person transfers or otherwise disposes of his business in whole or in part as a result of which there is a successor who continues with the said

business or trade or part thereof. The Rule stipulates that all excisable goods/material preparations, plant and machinery etc. in custody or possession of the person or person succeeding can also be detained for the purpose of extracting duty due from the producer, manufacturer or dealer by the time of transfer, disposal or change. It is immaterial whether duty was assessed before transfer, disposal or change but has remained unpaid, or is assessed thereafter.

17. For sub-rule (2) to Rule 230 to apply, there should be determination of duty on the predecessor and a finding to invoke and make recovery from the successor. (The second part need not be in the order of assessment). It is immaterial whether the said assessment was before or after the transfer of business to the successor in whole or in part. In the present case, there has been no assessment of duty on the predecessor either before or after transfer; i.e., with effect from 1st April, 1998 or with the incorporation of the appellant-company on 29th January, 1998. In other words the predecessor, i.e., Kuldeep Singh Punj has not been assessed or charged with the liability. For the period even prior to 1st April, 1998, the appellant company has been assessed, which is wrong and incorrect. This is not permissible and is not postulated under Rule 230(2) of the Rules. No provision has been highlighted or pointed out under which this adjudication can be sustained and upheld. Respondent may have succeeded and would have applied Rule 230(2), if the original assessment had been rightly made and assessed in the hands of Kuldeep Singh Punj the sole proprietor for the period prior to 1st April, 1998. However, Rule 230(2) cannot be invoked to make, levy and impose duty, penalty etc in original assessment against the appellant company and make it primarily liable for the alleged evasion of duty, prior to the date of its

incorporation or starting production.

18. Rule 230(2) is restrictive and part of the recovery mechanism i.e. it enables recovery of tax dues from the successors but only by way detaining of excisable goods, material, preparations, plants, machinery etc. which were acquired by the successor from the predecessor, who was/is liable to pay the tax dues. It does not postulate that the assessment or levy can be imposed on the successor for the tax dues or liability of the predecessor. It does not create a charge to impose tax on the successor or pass an order in the name of the successor.

19. Though counsel for the parties have not referred to proviso to Section 11, but the same is relevant in cases of succession. For the sake of completeness, we are reproducing Section 11 of the Act which reads:

“11. Recovery of sums due to Government. — In respect of duty and any other sums of any kind payable to the Central Government under any of the provisions of this Act or of the rules made thereunder including the amount required to be paid to the credit of the Central Government under Section 11D, the officer empowered by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) to levy such duty or require the payment of such sums may deduct the amount so payable from any money owing to the person from whom such sums may be recoverable or due which may be in his hands or under his disposal or control, or may recover the amount by attachment and sale of excisable goods belonging to such person; and if the amount payable is not so recovered, he may prepare a certificate signed by him specifying the amount due from the person liable to pay the same and send it to the Collector of the district in which such person resides or conducts his business and the said Collector, on receipt of such certificate, shall proceed to recover from the said person the amount specified therein as if it were an arrear of land revenue.

Provided that where the person (hereinafter referred to as predecessor) from whom the duty or any other sums of any kind, as specified in this section, is recoverable or due, transfers or otherwise disposes of his business or trade in whole or in part, or effects any change in the ownership thereof, in consequence of which he is succeeded in such business or trade by any other person, all excisable goods, materials, preparations, plants, machineries, vessels, utensils, implements and articles in the custody or possession of the person so succeeding may also be attached and sold by such officer empowered by the Central Board of Excise and Customs, after obtaining written approval from the Commissioner of Central Excise, for the purposes of recovering such duty or other sums recoverable or due from such predecessor at the time of such transfer or otherwise disposal or change.”

20. The proviso was inserted with effect from 10th September, 2004. This is probably the reason why the proviso was not referred to by the learned counsel for the parties. The proviso has to be harmoniously read with Rule 230(2). The Rule permits detention of assets of the predecessor, while the proviso postulates and permits sale etc. The said proviso further supports the interpretation given above drawing distinction between levy or charge, computation and recovery as three separate steps. Proviso to Section 11 stipulates where a person (described as predecessor) from whom any duty or other sums are recoverable or due, transfers or disposes of his business or trade in whole or in part or effects change of ownership, then subject to requisite compliances, of excisable goods, material, preparations etc. in custody or possession of the person succeeding can be attached or sold. The proviso, therefore, postulates a demand being recoverable and due from the predecessor i.e. assessment of the predecessor and in such situation, recovery can be effected from the assets specified and taken over by the successor.

21. In *Macson Marbles (P) Ltd. vs. Union of India* (2008) 15 SCC

481, reference was made to Rule 230(2) and it was held that the rule indicates the mode of recovery of excise duty and the liabilities of the predecessor can be recovered from the successor. However, in the said case, recovery against the successor was struck down because no opportunity to participate was given to the successor. Any order of recovery against the successor, should entail participation and notice to the successor. We express no firm opinion on whether the successor should also be given notice before adjudication or penalty order is passed for compliance and to meet the principles of natural justice but before sale etc., the person adversely effected should be heard. The said view finds support from the decision in the case of *Macson Marbles (P) Ltd.(supra)*.

22. Proviso to Section 11 and Rule 230(2) relate to recovery and is a method of recovery of the dues assessed and payable by the predecessor. Tax statutes can be divided into three parts. The first part relates/creates a charge, tax becomes payable. The second part relates to adjudication or computation and is procedural in nature. Adjudicatory machinery qualifies the amount of duty payable as per the charging section but the assessment does not create the charge. The charge is created by the statute, i.e., charging section. The third part relates to recovery of the tax or duty.

23. Under the charging section for the period prior to 1st April, 1998, Kuldeep Singh Punn was liable and in the adjudication proceedings, the dues payable by him had to be adjudicated. Sub-rule (2) to Rule 230 does not deal with or relate to the first two parts. It applies only when an adjudicating order is passed in terms of the law, (i.e., Act) against Kuldeep Singh Punn. It relates to recovery of the dues which may be payable by predecessor pursuant to an

adjudication order against the predecessor, i.e., Kuldeep Singh Punn.

24. It can be contended that the view taken above is technical and is not equitable. Tax laws are technical and principles of good and fair governance require compliance with the law and statute. Revenue cannot ignore the basic principles and if we accept the contention of the Revenue in the present case, it may lead to unacceptable consequences and injustice in other cases. If we were to hold that the appellant company is responsible, liable and could have been assessed for period prior to 1st April, 1998, there would be inappropriate and unsatisfactory consequences, which are undesirable. In law, equity and as a legal principle, it would imply that the penalty could have been and should have been imposed on the appellant even for the prior period. Further personal penalty could and should have been imposed even on unconnected persons/directors for the prior period (In the present case it is an accepted position that Narender Singh Punn was not a director and not involved in day-to-day work prior to 1st April, 1998). This may result in legal consequences which are unpalatable and unacceptable. The appellant company can possibly set off and claim as expenditure operational costs but penalty and fines payable/paid for infraction of law and offences is not allowed as deduction (see Section 37 of the Income Tax Act, 1961). There can be also cases wherein the successor is unknown or an unconnected person, who have given good consideration to the predecessor for purchasing and acquiring the business. Rule 230 sub-rule (2) has its own consequences and may be applied in such cases but the effect thereof and treatment of amount paid by the successor for tax purposes may be different.

25. Transfer of business from predecessor to successor and the

method of computation of incomes especially when the transfer takes place in mid-term of the financial year has led to complexities and difficulty in taxation assessments. To overcome and surmount such problems, provisions are specifically enacted to provide for assessments including tax and penalty liabilities from the successor etc. Income Tax Act, 1961 in Section 159 deals with the liability of legal representatives. We may note that the liability is restricted to the assets and wealth inherited by the legal representative. Under the Income Tax Act, 1922, penalty could not be imposed and recovered from the legal heirs but sub-section (1) to Section 159 is broader and includes any sum. Section 163 of the Income Tax Act, 1961 deals with representative assessee. Section 170 deals with succession of business or profession and sub-section (3) thereto provides for recovery of the dues from the successor when the dues cannot be recovered from the predecessor. Thus, the mandatory and primary condition of sub-section (3) to Section 170 is that the Revenue should not be in a position to recover the dues from the predecessor and then “only” the successor is liable. Similar provisions exist in Sections 17 and 19 of the Wealth Tax Act, 1957. Section 188 of the Income Tax Act, 1961 deals with the assessment of income when there is succession of one firm by another firm and Section 178 deals with cases of discontinuation of business or dissolution of the firm. No provision has been pointed out to us wherein under the provisions of the Act, i.e., Excise Act, 1944 or the Rules framed thereunder, proceedings could have been initiated and continued and the appellant could have been assessed and tax levied for the period prior to 1st April, 1998 in respect of transactions etc of the predecessor Kuldeep Singh Punj, who was/is very much alive.

26. The appellant company has taken over assets and liabilities of Kuldeep Singh Punn. The liabilities taken over, were mentioned in the books of accounts and not those which were not mentioned or were clandestine activities undertaken by Kuldeep Singh Punn in his personal or individual capacity as a sole proprietor, before the company was incorporated on 29th January, 1998 and started business with effect from 1st April, 1998. Even otherwise the appellant at best has taken over the “liability” but this does not mean that the assessment or adjudication order should be passed or could have been passed against the appellant.

27. Recovery of liability is distinct and separate from the “charge” or adjudication of the liability. The general principle or rule is that a successor is not liable for the debt of the predecessor but this rule is subject to judge-made doctrines which have been carved out as exceptions. Primarily these doctrines are species of liability based upon fraud or inherent inequity. Sometime, the doctrine is invoked as the liability arises out of the interest or charge on the property sold. The liability is akin to the liability in rem.

28. There could be five basic situations in which successor’s liability may be recognized, namely (1) expressed or implied assumption of liability; (2) transfer of asset by the purchaser for fraudulent purpose of escaping liability for the seller’s debt; (3) mere continuation of the enterprise amounting to consolidation or de-facto merger; (4) the purchasing corporation is merely continuation of the seller for continuity of the enterprise and (5) charge on the property. Principle 4 implies continued production of the transferred product line with the assets purchased. Intentional assumption of liabilities by the successor is in the realm of contract law. Taxation statutes, normally

treated and regarded as self-contained codes, expressly or by clear implication should stipulate when a successor will be liable for vicarious liabilities or dues of the predecessors or the seller. Therefore, the statutory provisions of each tax or other enactment have to be examined and aforesaid principles 1, 3, 4 and 5 may have limited applications in absence of statutory provisions. Principle 2 in a given case, it appears, may be applied even without statutory mandate. But in the present case, the succession is not stated or claimed to be fraudulent. The statutory provisions or the legislative mandate is the primary and guiding principle, to make the successor vicariously liable to pay the liabilities of the predecessor. It would be appropriate here to refer to the judgment of the Supreme Court in *State of Punjab versus Jullunder Vegetables Syndicate*, AIR 1966 SC 1295. In the said case, the Supreme Court was concerned with the provisions of East Punjab General Sales Tax Act, 1948. The respondent-assessee firm therein was dissolved with effect from 11th July, 1953 and the issue related to tax payable on the turnover for the period between 4th October, 1952 to 31st March, 1953. Original assessment order passed was set aside on the ground of lack of jurisdiction by the authority. On the question, whether the adjudication proceedings could continue after dissolution of the firm, in spite of the provisions of the Partnership Act, 1932, the Supreme Court held as under:-

“8. The scheme of the Act is a simple one. A firm is a dealer: the said dealer is assessable to tax on its turnover, if its turnover exceeds the prescribed limit. It cannot do business while being liable to pay tax under the Act without getting itself registered and possessing a registration certificate. It is assessed to tax under Section 11 of the Act in the manner prescribed thereunder. If it discontinues its business, it shall within the specified time inform the prescribed authority accordingly. A dealer and its partners are jointly and severally responsible to pay the tax assessed on the

dealer. But there is no provision expressly empowering the assessing authority to assess a dissolved firm in respect of its turnover before its dissolution. The question is whether such a power can be gathered by necessary implication from the other provisions of the Act.

9. The first question is whether a firm is a separate assessable entity for the purposes of the Act or whether it is only a compendious term used to denote a group of partners. The definition of “dealer” takes in three categories of assessable units, namely, person, firm or a Hindu joint family. The substantive and the procedural provisions of the Act prescribe the mode of assessment and realization of the tax assessed on such a dealer. If we read the expression “firm” in substitution of the word “dealer”, it will be apparent that a firm is an independent assessable unit for the purposes of the Act. Indeed, a firm has been given the same status under the Act as is given to it under the Income Tax Act. Under Section 3 of the Income Tax Act also “firm” is treated as a unit of assessment and as a distinct assessable entity. Though under the partnership law a firm is not a legal entity but only consists of individual partners for the time being, for tax law, income tax as well as sales tax, it is a legal entity. If that be so, on dissolution, the firm ceases to be a legal entity. Thereafter, on principle, unless there is a statutory provision permitting the assessment of a dissolved firm, there is no longer any scope for assessing the firm which ceased to have a legal existence. As in the present case, admittedly, the firm was dissolved before the order of assessment was made, the said order was bad.

10. In this context as we have stated earlier, there cannot be a distinction on principle between an assessment made on a firm under a proceeding initiated before the dissolution and that made in a proceeding started after the dissolution. In either case, unless there is an express provision, no assessment can be made on a firm which has lost its character as an assessable entity.”

29. It was accordingly held that to initiate and continue proceedings against a firm, which was dissolved, it was necessary that there should be a statutory provision. As there was no provision expressly empowering the Assessing Officer to tax a dissolved firm even in

respect of turnover before the dissolution, the proceedings were struck down. Thus, the provision should expressly stipulate or the power in that regard should be conferred by necessary implication. The Supreme Court in the said decision referred to the judgments of the High Courts, which had proceeded on equity principle that the partners of a dissolved firm could be liable and should pay the assessed tax but rejected the said ratio/reasoning observing:-

“15. The Allahabad High Court in *Jagat Behari Tandon v. Sales Tax Officer, Etawah* [(1955) 6 TC 125] maintained the assessment of a dissolved firm on the ground that it was not a separate entity. The Madhya Pradesh High Court in *Lalji v. Assistant Commissioner Sales Tax, Raipur* [(1958) 9 STC 571] relied upon Section 17 of the CP and Berar Sales Tax Act, 1947, similar to Section 16 of the present Act, to sustain the continuity of a firm as a legal entity till a notice contemplated by that section was given. The Madras High Court in *R.D. Fernandes, in re* [(1957) STC 368] relied upon the provisions of the Partnership Act to reach the desired end. The Punjab High Court in *Khushi Ram Behari Lal & Co. v. Assessing Authority, Sangrur* [(1964) 15 STC 165] distinguished the Full Bench decision, which is the subject-matter of the present appeal before us on the ground that the dissolution of the firm in the case before it was long after the assessment proceedings were initiated. It also relied upon Section 16 of the Act to support its conclusion that the liability of the firm continued till the registration was cancelled. It may also be noticed that the question in that case arose after the amended definition wherein the expression “firm” was omitted. The Madras High Court in *R. Ponnuswami Gramani v. Collector of Chingleput District* [(1960) 11 STC 80] followed the earlier decision of that court; and it does not contain any reasoning on the question. The Bombay High Court in *Bankatlal Badruka v. State of Bombay* [(1961) 12 STC 405] based its conclusion only on the circumstance that the notice of dissolution under Rule 35 of the Hyderabad General Sales Tax Rules, 1950, was not given before the assessment. The Orissa High Court in *Commissioner of Sales Tax, Orissa v. Aurobindo Auto Service* [(1963) 14 STC 46] also sustained the assessment after dissolution *inter alia*, on the ground that no notice of dissolution was given under Section 18(b) of the Orissa Sales Tax Act,

1947, read with Rule 14 of the Orissa Sales Tax Rules, 1947. But the main reason for that decision was based upon Section 19(3) of the Orissa Sales Tax Act which is *pari materia* with Section 44 of the Income Tax Act, which has been construed by this Court to confer a power on the assessing authority to make such an assessment. All these decisions, if we may say so with respect, were overburdened with the consequences of a contrary construction on the incidence of taxation and also by their mixing up the question of the statutory power of assessing a dissolved firm with the liability of the partners thereof to pay the tax so assessed on the firm before dissolution. For the reasons we have already given earlier, we cannot accept the validity of the reasons given in the said judgments for maintaining an assessment on a dissolved firm, whether the proceedings were initiated before or after the firm was dissolved.”

30. Thereafter, reference was made to the two income tax decisions in the case of *Abraham (C.A.) versus Income Tax Officer* (1961) 41 ITR 425 (SC) and *Commissioner of Income Tax, Madras versus Angidi Chettiar(S.V.)*, (1962) 44 ITR 739 (SC) but it was observed that two decisions were of no help and were in fact against the Revenue as there were express provisions relating to assessment of dissolved firm.

31. In the present case, Kuldeep Singh Punn was certainly available and could have been assessed in respect of his clandestine and wrongful activities. In his absence, even the legal heirs may have been liable but not the successor. A successor would have been liable only for recovery of the liability once the assessment order was passed and adjudicated under Rule 230(2).

32. In view of the aforesaid discussion, we answer the question of law in favour of the appellant-assessee and against the respondent-Revenue. However, we would like to clarify that the Revenue would be entitled to and can pass an order against Kuldeep Singh Punn if it is

permissible and allowed by law in respect of the alleged transactions prior to 1st April, 1998. We have not expressed any opinion on the said aspect or on the question whether the show cause notice issued earlier was against Kuldeep Singh Punj in his personal capacity as sole proprietor of Freezair India. We express no opinion on the said aspect as Kuldeep Singh Punj as an individual is not a party before us. In the facts of the present case, there will be no order as to costs.

(SANJIV KHANNA)
JUDGE

(SANJEEV SACHDEVA)
JUDGE

NOVEMBER 20th, 2013
VKR/kkb