

Menaben V. Parikh Vs. Controller of Estate Duty, Bombay

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Court : Mumbai

Decided On : Dec-08-1977

Reported in : [1979]116ITR840(Bom)

Judge : Desai and ;M.N. Chandurkar, JJ.

Acts : [Estate Duty Act, 1953](#) - Sections 2(15), 2(16) and 6

Appeal No. : Estate Duty Reference No. 1 of 1968

Appellant : Menaben V. Parikh

Respondent : Controller of Estate Duty, Bombay

Advocate for Def. : R.J. Joshi, Adv.

Advocate for Pet/Ap. : R.J. Kolah, Adv.

Judgement :

Desai, J.

1. In this reference we are concerned with the estate of the deceased, V. M. Parikh. The reference is at the instance of the accountable person under s. 64(1) of the E.D. Act, 1953.

2. The said V. M. Parikh (hereinafter referred to as 'the deceased') died on 9th January, 1961, and the accountable person is the legal heir of the deceased. The

deceased was a salaried employee of M/s. Batliboi & Co. (as the name appears in the statement of case but which we are told is a limited company) for over 20 years prior to his death. He was to be paid monthly Rs. 150 or three annas nine pies in a rupee in the net profits of the business, whichever was higher. The deceased expired on 9th January, 1961. The accounting period of M/s. Batliboi & Co. (hereinafter referred to as 'the company') ended on 30th June of every year. Accordingly, the salary payable to him from July 1, 1960, to January 9, 1961, when calculated on the basis of the share of profit came to Rs. 6,75,244. Obviously, the computation or ascertainment of this amount could have taken place only after June, 1961.

3. Before the Deputy Controller, the accountable person admitted that this amount constituted part of the estate, but claimed that income-tax on this amount should be allowed as a liability in computing the net estate that would be liable for duty. However, in appeal before the Appellate Controller of Estate Duty, it was contended that the Deputy Controller had erred in including the said amount in the principal value of the estate, inasmuch as the said amount representing share of profits was determinable at the end of the accounting year of the said company, i.e., on or after 30th June, 1961, i.e., much after the death of the deceased and as such it was not due to the deceased on the date of his death. It was accordingly contended that it accrued to the estate of the deceased and was a capital receipt of the estate from the said company. An alternative plea to the effect that even if the said amount is includible, income-tax due thereon should be allowed had been raised before the Deputy Controller. It was held by the Appellate Controller that the employee earned his salary by his day to day service, though the amount of the salary may be determinable at a later date. In this view of the matter, the Appellate Controller was of the opinion that the inclusion of the amount of Rs. 6,75,244 for estate duty was justified in the circumstances of the case.

4. So far as deduction on account of tax liability was concerned, the contention of the accountable person was fully accepted and necessary direction given in his order by the Appellate Controller.

5. The accountable person carried the matter further to the Tribunal. It was argued before the Tribunal that on the date of death of the deceased, the apportionment of profit could never have taken place since the profits of the company could be determined only at the end of its accounting year. Hence, the argument continued, there was no question of treating the sum of Rs. 6,75,244 as salary received or receivable by the deceased on the date of his death. The argument that this constituted capital receipt of the estate was repeated before the Tribunal.

6. The Tribunal, after consideration of the submissions made before it and the authorities cited at the Bar, held that although the computation could be made and the amount ascertained only at the end of the accounting year of the company, in view of the fact that the salary was payable to the deceased at the end of the month of service, the amount accrued to him at the end of the month of service. It was further opined that the amount related to payment of salary and would constitute a debt. In this view of the matter, the Tribunal held that the said sum of Rs. 6,75,244 was an amount includible in the estate of the deceased and was liable to estate duty. The direction given by the Appellate Controller regarding deduction to be made from this amount for the tax liability thereon was reaffirmed by the Tribunal. As stated above, the reference has been made to us at the instance of the accountable person and the following question is referred to us by the Tribunal :

'Whether, on the facts and in the circumstances of the case, the sum of Rs. 6,75,244 or any part thereof is includible in the estate of the deceased for estate duty purposes ?'

7. In support of his argument that this sum did not represent property of the deceased and, therefore, could not have passed or deemed to have passed on the death of the deceased, Mr. Kolah principally relied on the decision of the Supreme Court in *E.D. Sassoon & Company Ltd. v. CIT* : [1954]26ITR27(SC) . It may be stated that reliance was also placed on an unreported judgment in *CEPT v. P. N. Mehta & Sons* (Income-tax Reference No. 19 of 1950, decided on 10th October, 1950), but since the Bombay decision is referred to in the Supreme Court decision, we will refer to that decision a little later on.

8. The matter before the Supreme Court in E.D. Sassoon's case : [1954]26ITR27(SC) arose by reason of assignment of a managing agency of S company to A, which took place on 1st December, 1943. Under the managing agency agreement, the S company was entitled to receive as their remuneration, subject to a minimum, a commission of certain per cent. per annum on the annual net profits of the U company which was due to them on the 31st March every year. The accounts of this commission payable to the managing agents for the calendar year 1943 were made up in 1944 and paid to A in 1944. The question was whether in the assessment year 1944-45, A was liable to pay tax on the accrual basis on the whole of the commission or whether the tax was payable by A and the S company on proper apportionment being made between them of the amount received by A. It is important to bear in mind that the Supreme Court was really considering a claim of apportionment of the commission by A, in which claim, it may be mentioned, A was supported by the revenue.

9. The Supreme Court held that the contention of apportionment of commission was improper and could not be accepted, but the principal question to which the Supreme Court applied its mind was whether the S company had become entitled to any part of the managing agency commission by reason of their having acted as managing agent for a part of the year in question. It is in this context that the position in law has been considered from pages 37 onwards of the report. According to the majority of the Supreme Court, the stated period under the managing agency agreement was a year and unless and until the agents completed the period of the year, they would not be legally entitled to any commission or remuneration for the year. According to the Supreme Court, the managing agency agreement was an entire and indivisible contract stipulating a payment of remuneration or commission per year and enjoined upon the managing agents the duty and obligation of rendering services to the company for the whole year by way of condition precedent to their earning any remuneration or commission for the particular accounting year. Once this conclusion was reached by the Supreme Court, it was clear that the contention as to apportionment of such commission must fail. It is true that subsequently in the judgment the Supreme Court has made observations distinguishing the expression 'accrues', 'arises' and 'received' and has opined that both the words 'accrues' and 'arises' are used in

contradistinction to the word 'received' and indicate a right to receive.

10. The Supreme Court then goes on to say at page 51 of the report :

'It is clear therefore that income may accrue to an assessee without the actual receipt of the same. If the assessee acquires a right to receive the income, the income can be said to have accrued to him though it may be received later on its being ascertained. The basic conception is that he must have acquired a right to receive the income. There must be a debt owed to him by somebody.'

11. The short question which will arise for the purpose of applying this decision is whether the deceased had the right to receive a share of the profits only if he served the company for the full year and whether it could be said that he lost such right if he could not serve the company for the full year but only a part thereof by reason of his death before the completion of the year. If he served the company for the full period for which he could render service to anyone on this earth, then it would not be right to say that he did not have in law the right to receive the share of profit although the actual computation of profit or the apportionment of the amount payable would be certainly at a point of time subsequent to his death. The unreported Bombay case referred to in E. D. Sassoon's case : [1954]26ITR27(SC) in the Supreme Court decision has no bearing either way on the matter before us as the question considered was limited only to the accountable year in which the income was to be taken. On the facts of that case, the decision of the Tribunal as to the accountable year was upheld by the High Court. Mr. Kolah sought to argue on the basis of this decision and observations in similar decisions that these cases would suggest that on the date in question, i.e., closure of the accountable year in which the income was held not to accrue, there was no legal right to receive the income. As we shall point out later on if the relevant provisions of the E.D. Act are considered, this argument loses force and really would appear to us to have no relevance for the purpose of considering the property which has passed on the date of apportionment, though all these authorities would certainly have great relevance on the levy of income-tax in a particular accountable year.

12. In its decision in E. D. Sassoon's case : [1954]26ITR27(SC) , the Supreme Court also referred to another Bombay decision in Salt and Industries Agencies

Ltd. v. CIT : [1950]18ITR58(Bom) . In this case, counsel on behalf of the assessee had contended before the Division Bench of the Bombay High Court that at the relevant point of time accrual of the profit had taken place completely at Kandla (then outside India) and it was this contention that was rejected by the Supreme Court. It was held that till the accounts were submitted to the head office in Bombay and the profit determined, the commission could not be ascertained. The observations made in rebutting the argument of the counsel for the assessee are not decisive or conclusive and it is not held that nothing had accrued at Kandla or that, in law, there was no right in the managing agent which could be said to have arisen at Kandla. E. D. Sassoon's case : [1954]26ITR27(SC) was followed and applied by the Bombay High Court in Bhogilal Laherchand v. CIT : [1955]28ITR919(Bom) . This was a peculiar case where a minor had been admitted to the benefits of the partnership. He attained majority during the course of the year and elected to continue to remain a partner of the firm. The income-tax department attempted to calculate the proportionate profits coming to the share of this partner on the date when he attained majority and the contention of the department was that the sum calculated constituted the income of the minor which was liable to be included in the assessment of his father who must pay tax on this amount. It was held on the facts of the case and following the decision of the Supreme Court in E. D. Sassoon's case : [1954]26ITR27(SC) , that on 22nd August, 1950, the minor had not acquired any legal right to receive the sums from the partnership at the point of time when he ceased to be a minor and became a major. In our view, the decision turned on the same peculiar facts of that case and would have little relevance for our purpose.

13. In order to consider whether the amount mentioned in the question referred to us is includible in the estate of the deceased, it will have to be seen whether the amount can be considered to be in anywise the property of the deceased. For these purposes counsel on behalf of the revenue contended that decisions given under the Income-tax Act were of little assistance for determining the true position under the E.D. Act and the position would be required to be determined in accordance with the specific statutory provisions under the E.D. Act. In this connection, he drew our attention to the definitions of 'property' and 'property passing on death' occurring in ss. 2(15) and 2(16) of the E.D. Act, 1953, and the

further provisions to be found in ss. 3, 5 and 6. These provisions have been considered by the Delhi High Court in two decisions to which reference may now be made.

14. The first of these is CED v. A. T. Sahani : [1970]78ITR508(Delhi) . In the report aforesaid the statutory provisions are fully set out and it is observed (p. 516) :

'In order, therefore, to enable the revenue to bring to charge any property for the purpose of estate duty by taking recourse to section 6, the attempt must also satisfy the test that it was the property of the deceased in the sense in which it is defined in section 2(15).'

15. The item which was being considered by the Delhi High Court was an amount of compensation at the specified rates payable to the nominee of the deceased or as nominee of the Indian Airlines Corporation in the event of his injury or his death. The specified rates were concerned with the amount payable on the death of the employee.

16. The court observed thus (p. 517) :

'It was a remuneration to which the deceased was entitled under the terms of his employment; only its payment was conditional upon his death being caused by an accident during or as a result of air journey performed as a member of the flying crew in the service of the Corporation or while travelling on duty in surface transport provided by the Corporation or its nominated agents and was, by its very nature, receivable by his legal heirs.'

17. The court further considered that the deceased must be deemed to have the power of disposition in the sense that he could nominate the person or persons by whom the amount is recoverable after his death. Applying the ratio of the decision of the Court of Appeal in England in Attorney-General v. Quixley [1929] 98 LJKB 652, it was held that the deceased must be regarded as having an interest in the amount and also the right to appoint the person to whom it should be paid on his death. According to the Delhi High Court, the amount of compensation was includible in the estate of the deceased. In a later Full Bench decision, the very

High Court in *Dewan Labh Chand v. CED* : [1972]83ITR538(Delhi) also reaffirmed that an immediate quantification is not an essential attribute of 'property' under the E. D. Act. (See observations at pages 546, 547 and 557 of the report).

18. Mr. Kolah submitted for our consideration that on the date of death of the deceased he could not be said to have the legal right of receiving the share of profits. He further submitted that it could not be then predicated whether there would be any profit during that year or not; obviously this cannot be done until the accounts were made up of the company which could only be done after June, 1961; only then it could be said that there were profits out of which a share could be payable. According to Mr. Kolah, therefore, there was no property of the deceased on the date of his death and what was paid to his estate after June, 1961, could not be regarded as part of the property of the deceased or as part of the property of the deceased passing on his death.

19. As indicated by us earlier, we are not able to subscribe to his submission that on the date of death the deceased could not be said to have a legal right to claim to share in profits. The approach of the Supreme Court in *E. D. Sassoon's case* : [1954]26ITR27(SC) about the entitlement of the managing agency commission could have no application to the facts before us. There is no real distinction between the monthly payment of Rs. 150 and the payment in the share of profits. They must be taken to accrue to the deceased from month to month; however, the amount of profits accrued to him becomes due and payable to him only after June when the accountable year of the company would come to an end and when the profits, if any, can be ascertained. To accept Mr. Kolah's submission would amount to a mixing up of computation or ascertainment of the amount due to the deceased with accrual of the same.

20. As put by Mr. Joshi the proper approach would be to consider whether the deceased had a legal right to receive the share of the profits in law by reason of his death before the completion of the year or before June and to consider also whether the deceased was competent to dispose of this right and could have disposed of it legally. If the answers to these questions are in the affirmative as suggested by the revenue and, in our opinion, these are the correct answers, the

fact that the ascertainment or computation would take place subsequently and the actual amount would be determined much after the death of the deceased, would not seem to matter. Property passing on the death would include property passing either immediately on the death or after an interval, either certainly or contingently and in view of this very wide ambit of the statutory provisions, we are afraid that we must reject the contention advanced by Mr. Kolah which appears to be attractive at first blush but which must be rejected on closer scrutiny.

21. In the result, the question referred to us must be answered in the affirmative and against the assessee. The accountable person will pay to the Commissioner the costs of the reference.

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