

E. Alfred Vs. Additional Income-tax Officer and anr.

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Court : Chennai

Decided On : Feb-15-1956

Reported in : (1956)2MLJ149

Appellant : E. Alfred

Respondent : Additional Income-tax Officer and anr.

Judgement :

ORDER

Rajagopalan, J.

1. Ebenezer, a Christian, died intestate on 22nd November, 1945. The petitioner and his eight sisters were the children of Ebenezer and his heirs and legal representatives. The income that had accrued to Ebenezer during the account year ending 31st March, 1945, was assessed in the assessment year 1946-47 under the provisions of Section 24-B(2) of the Income-tax Act, after the issue of a notice under Section 22(2) of the Act to the petitioner as the legal representative of the deceased Ebenezer. The assessment was completed on 26th March, 1951, and a notice of demand was issued to the petitioner under Section 29 of the Act. The petitioner appealed against the order of assessment to the Assistant Commissioner, who substantially confirmed the order of the Income-tax Officer.

2. During the pendency of the appeal a penalty of Rs. 250 was first levied on the petitioner under Section 46(1) of the Act. Subsequently to the termination of the

appeal, when the time finally granted for the payment expired on 15th December, 1951, the Income-tax Officer imposed a further penalty of Rs. 10,000 on 8th March, 1952. It was the validity of these orders imposing the penalties under Section 46(1) of the Act that the petitioner challenged by an application under Article 226 of the Constitution for the issue of a writ of certiorari.

3. Proceedings were also taken under Section 46(2) of the Act for the recovery of the arrears of tax. Though that was also challenged in the application filed by the petitioner, the arguments before us were confined to the validity of the levy -of penalty. The validity of the assessment itself under Section 24-B(2) of the Act was never in issue, and we were not called upon to consider that.

4. The only question for our determination is: where the income of a deceased person was assessed to tax under Section 24-B(2) of the Act, can the legal representative of that deceased person be penalised under Section 46(1) of the Act for failure to pay that tax within the time allowed?

5. Section 45 of the Act lays down that, if the amount specified as payable in the notice of demand issued under Section 29 remains unpaid, 'the assessee failing so to pay shall be deemed to be in default'. Section 46(1) provides for the imposition of a penalty when the assessee is in default in making payment of the tax. The question is, whether the petitioner was 'an assessee in default' within the meaning of Section 46(1). Unless that question is answered in the affirmative, the Income-tax Officer would have had no jurisdiction to levy a penalty on the petitioner.

6. Section 2() of the Act, as it now stands, defines the expression 'assessee':

Assessee means a person by whom income-tax whether with or without interest is payable and includes a person by whom a penalty or a sum of money for compounding the offence under Section 53 or any other sum is payable under this Act.

Before its amendment in 1951 the definition ran:

Assessee means a person by whom income-tax is payable.

It should, however, be noted that this definition itself is subject to the limitation of the opening words of Section 2, that that is the meaning to be given 'unless there is anything repugnant in the subject or context.'

7. To establish 'default' in the payment of the assessed tax, within the meaning of Section 45, two conditions at least have to be satisfied : (1) Failure to pay the amount specified in the notice of demand issued under Section 29, and (2) that failure must be that of an assessee. Section 29 runs:

When any tax (penalty or interest) is due in consequence of any order passed under or in pursuance of this Act, the Income-tax Officer shall serve upon the assessee or other person liable to pay such tax (penalty or interest) a notice of demand in the prescribed form specifying the sum so payable.

In the context of Section 29, which itself marks a distinction between an assessee and any other person liable to pay the tax due, the definition of assessee in Section 2(2) cannot be invoked to include within the scope of the expression 'assessee' every person liable to pay the assessed tax. The limitation imposed by Section 29 will necessarily govern the interpretation of the expression 'assessee', as used in Section 45 of the Act, because failure to comply with the notice of demand issued under Section 29 of the Act is one of the primary conditions to be satisfied before Section 45 can apply. Obviously, when Section 46(1) refers to 'an assessee in default', it is the assessee who is in default within the meaning of Section 45 that is meant. A penalty can be imposed under Section 46(1) only on such an assessee in default.

8. The contention of the learned Counsel for the petitioner was, that the petitioner was not himself the assessee within the scope of Section 29, but that he fell into the other category specified by Section 29, and that he was only 'the other person liable to pay such tax.' As the petitioner was not himself the assessee, the argument ran, he could not be treated as an assessee in default within the meaning of Section 45 or Section 46(1).

9. It should be remembered that the petitioner was not taxed on his income. It was his father's computed income that was taxed. The father was dead before the tax

could be assessed. The assessment was under the provisions of Section 24-B(2) of the Act. It was by the fiction enacted by Section 24-B(2) that the petitioner was the assessee for the assessment on the income of his deceased father. The scope and content of that fiction enacted by Section 24-B(2) have therefore to be ascertained.

10. Section 24-B(2) provides for three different contingencies. For the limited purpose of discussing the scope of Section 24-B, we shall refer to the person, whose income can be assessed under any of the provisions of Section 24-B, as the deceased.

11. Section 24-B(1) provides only for the collection of the tax assessed on the income of the deceased. It contemplates a case where the assessment itself has been completed during the lifetime of the deceased assessee. It refers to the tax assessed as 'tax which would have been payable by the deceased under this Act if he had not died.' There was therefore no need to enact a provision for any purpose other than the collection of the tax assessed. Section 24-B(1) lays the liability to pay that assessed tax on the executor, administrator or other legal representative of the deceased. It further limits that liability to the extent to which the estate of the deceased is capable of meeting the charge, that is, the assessed tax.

12. Section 24-B(3) provides for a different contingency. It comes into play where for the assessment year in question the prescribed notice under Section 22 has been published. The deceased himself would then have had an opportunity to submit a return of his income. If no return was submitted or an incomplete return was submitted, the machinery, for which Section 24-B(3) provides is attracted. It should be remembered that in this class of cases, the machinery for assessment of the income of the deceased to income-tax has already been set in motion by publishing the notice under Section 22 of the Act. The assessment has to be completed after the death of the deceased. In such a case Section 24-B(3) lays down that the Income-tax Officer may make an assessment of the total income of such (deceased) person and determine the tax payable by him on the basis of such assessment. For making such an assessment Section 24-B(3) further

enables the Income-tax Officer by the issue of an appropriate notice, which would have had to be served upon the deceased person had he survived, to require from the executor, administrator or other legal representative of the deceased person any accounts, documents or other evidence which the officer might, under the provisions of Sections 22 and 23, have required from the deceased person. In Section 24-B(3), the executor, administrator or other legal representative is not treated as an assessee even for completing the assessment of the income of the deceased.

13. Section 24-B(2) has to be invoked where a person liable to be assessed to income-tax dies before the publication of the notice under Section 22, where the death takes place before any step is taken for setting the machinery of assessment in motion. The relevant portion of Section 24-B(2) runs:

Where a person dies, before the publication of the notice referred to in Sub-section (1) of Section 22...the executor, administrator or other legal representative shall, on the serving of notice under Sub-section (a) of Section 22...comply therewith and the Income-tax Officer may proceed to assess the total income of the deceased person as if such executor, administrator or other legal representative were the assessee.

14. Thus Section 24-B(1) comes into play after the assessment has been completed, and where only the assessed tax or any portion thereof remains to be collected. Section 24-B(3) has to be invoked to complete the assessment. Section 24-B(2) has to be resorted to even for the initiation of proceedings to assess the tax. Sub-sections (2) and (3) of Section 24-B do not specifically refer to any machinery for collection. Obviously where the assessment is completed under Section 24-B(3), the notice of demand under Section 29 can issue only to the executor, administrator or other legal representative of the deceased. The executor, administrator or other legal representative of the deceased would not himself be the assessee within the meaning of Section 29. He would obviously fall within the scope of the other category, 'other person liable to pay such tax'. Similarly Section 24-B(2) also does not provide for the machinery of collection. As we pointed out, the assessment itself has to be begun by the issue of a notice

under Section 22(2) of the Act to the executor, administrator or other legal representative of the deceased. In that case too notice of demand can issue under Section 29 only to such executor, administrator or other legal representative of the deceased.

15. The question is, when Section 24-B(2) directs that the assessment may be on the basis, that such executor, administrator or other legal representative is the assessee, the position of the executor, administrator or other legal representative is different from that of a person of that class under Section 24-B(1) or under Section 24-B(3) for the purpose of payment. We have pointed out that Section 24-B(1) limits the liability of the executor, administrator or other legal representative to the assets of the deceased person in his hands. There is no such express limitation; either in Section 24-B(3) or in Section 24-B(2). We are unable to hold that either expressly or by necessary intendment the Legislature intended to impose under Section 24-B(2) or Section 24-B(3) a heavier burden on the executor, administrator or other legal representative of a deceased person than what Section 24-B(1) expressly imposes on a person of that class. The principle of *hereditas damnosa* of the old Roman Law cannot, in our opinion, govern the recovery of the income-tax which his deceased predecessor-in-interest would have had to pay, had he continued to live. It was clearly necessary to provide only for the machinery of collection under Section 24-B(1) of the Act, because the assessment was completed before the death of the person, liable to pay the assessed tax. Under Sub-sections (2) and (3), the assessment itself of the income of the deceased person had to be provided for. That was provided for without any express provision in either of these two sub-sections for collection of the assessed tax. If through all the three sub-sections the same principle runs, that the extent of the liability of the executor, administrator or other legal representative of the deceased person is limited by the possession of the assets of the deceased person, there should be little difficulty in placing the executor, administrator or other legal representative of the deceased person, who comes within the scope of either Section 24-B(2) or Section 24-B(3) of the Act, in the category of persons referred to in Section 29 of the Act as 'other person liable to pay such tax', as distinct from the 'assessee'. For the purpose of Section 29, therefore, it is the deceased that would be the assessee, and the executor, administrator or other

legal representative, in whose presence the income of the deceased is assessed either under Section 24-B(2) or under Section 24-B(3), would be not the assessee but merely a. person liable to pay the assessed tax.

16. We have already pointed out that Section 24-B(1) does not refer to the executor, administrator or other legal representative of a deceased as an assessee even for purposes of collection. Section 24-B(3), which does not concern itself with the collection at all, does not refer to such executor, administrator or other legal representative of the deceased as the assessee. The fiction of treating the executor, administrator or other legal representative of the deceased as the assessee was necessary only for proceedings governed by Section 24-B(2) of the Act, because the assessment proceedings could be initiated in that class of cases only after the death of the deceased. For the limited purpose of assessment, the fiction was enacted, by which the executor, administrator or other legal representative of the deceased is deemed to be the assessee. Like Section 24-B(3), Section 24-B(2) did not concern itself with the collection of the assessed tax. The liability of a legal representative under Section 24-B(2) cannot obviously be any heavier than that of a legal representative under Section 24-B(3), though Section 24-B(2) alone refers to such legal representative as the 'assessee'. It was only for purposes of assessment that the fiction was enacted in Section 24-B(2).

17. Legal fictions are nothing unusual. The scope and the limits of an enacted, legal fiction have to be gathered primarily from the express language or the necessary intendment of the provision of law that enacted that legal fiction. Beyond that point, the enacted legal fiction cannot be extended.

18. In our opinion, the legal fiction enacted by Section 24-B(2) is only for the purposes of assessment. For the purpose of initiating and completing the assessment on the income of the deceased, his legal representative is deemed by that legal fiction to be the assessee. With the completion of the assessment, the necessity for that legal fiction ends. The liability to pay the assessed tax has to be enforced under Section 29 of the Act. For the purpose of Section 29 of the Act, the legal representative would not himself be an assessee, but he would, nonetheless,

be a person liable to pay the tax. When there is such a specific statutory provisions to enforce the liability of the legal representative in Section 29 of the Act, there is no need to continue the fiction enacted by Section 24-B(2) further, to provide also-for the collection of the assessed tax.

19. Section 24-B is not the only provision in the Income-tax Act for the imposition of vicarious liability whether it be for the purpose of assessment, or for purpose of collection, or for purpose of assessment and collection of the income-tax.

20. Under Section 4(2) and under Section 16(1c), the legal fiction enacted is that for the purposes of taxation, the income of a given person is deemed to be the income of another person, on whom the incidence of taxation falls. Since by the fiction the income itself becomes the income of the person taxed for the purposes of the Income-tax Act, the person taxed would be the assessee for all purposes under the Act, without any need to say so expressly.

21. Section 18(7) applies where the person liable to deduct the tax due from his employee at source does not deduct it, or after deducting it fails to pay the tax. In such cases the employer is deemed to be an assessee in default in respect of that tax. Section 18(7) has only to provide for collection; and though the primary liability itself lay upon the employer, his failure to discharge the liability made him. 'assessee in default' only because of the fiction expressly enacted for that limited purpose by Section 18(7) of the Act.

22. Under Section 23-A(1) it is the shareholder, who has not been paid the undisbursed dividends, that is liable to pay the tax, treating such undisbursed dividends as part of his income. Still, when making a statutory provision for the recovery of the tax imposed on such undisbursed dividends the Act provided under Section 23-A(3)(ii) that the tax shall be recoverable from the company, if it cannot be recovered from such a member. Section 23-A(3)(iii) provides that, where the tax is recoverable from the company, such a company shall be deemed to be the assessee in respect of such sum for purposes of collection. The extent of the fiction, of treating the company as the assessee is clearly defined by the Act: it is only for the purpose of collection.

23. The fiction enacted by Section 40(1) of the Act is that the guardian, trustee or agent is deemed to have been in direct receipts of the income, profits or gains of the beneficiary. The limit of the fiction as enacted by Section 40(1) is 'all the provisions of this Act shall apply accordingly.' That would certainly mean all the provisions for assessment, as well as all the provisions for collection of the assessed tax. A similar provision is also made in Section 40(2). Under Section 42(1) the agent of a non-resident assessee is deemed to be the assessee, and the extent of his. ability is indicated by the expression 'for all the purposes of this Act.'

24. Thus the scheme of the Income-tax Act, which created legal fictions for the imposition of vicarious liability, is quite consistent with the principle we mentioned above, that the extent of the liability arising under the legal fiction is demarcated either by express words or by necessary intendment.

25. Applying that test, can it be said that, when Section 24-B(2) enacted that the legal representative of a deceased person shall be deemed to be an assessee, the legal representative must be deemed to be the assessee, for not only the purposes of assessment for which Section 24-B(2) provided, but also for the purpose of collection? There are certainly no express words in Section 24-B(2) to extend the limits of the fiction beyond the stage of assessment to the stage of collection also. We cannot see anything in the language of Section 24-B(2), either taken independently or in its setting in Section 24-B, to justify an inference, that by necessary intendment the fiction, enacted by Section 24-B(2) was totally different in its, scope from what Section 24-B(1) or Section 24-B(3) provided for and that when Section 24-B(2) directed that the legal representative should be treated as the assessee, it also enacted by necessary intendment that the leelal representative should be treated as the assessee for purposes of collection also, principally for Section 45 and Section 46(1) with which we are now concerned.

26. The learned Counsel for the department contended that the Legislature could not have intended to provide only for a limited application of the fiction enacted in Section 24-B(2), since Section 24-B(2) itself did not provide for the machinery for collection of the assessed tax. We are unable to accept that contention. That would appear to overlook the specific provision, Section 29 of the Act. The legal

representative would be a person liable to pay the tax even though he is not the assessee. Further, Section 46(2) refers only to 'arrears' and 'an assessee', and not to 'an assessee in default'. It is not necessary for us to discuss at this stage the precise scope of Section 46(2) and we express no final opinion on that.

27. What the department seeks in this case is not only to impose a vicarious liability to have the tax assessed, which Section 24-B(2) lays upon the legal representative of a deceased person, but also to impose a vicarious liability of penalty for non-payment of the assessed tax within the time allowed. The position of an assessee is obviously quite different from that of an executor, administrator or other legal representative of that assessee. The liability of the assessee himself is not limited by the possession of any assets of his own. The liability of the executor, administrator or other legal representative of a deceased person is obviously limited by the extent of the assets of the deceased person in the hands of such legal representative. The default by a legal representative to pay the tax, which but for the death of his predecessor-in-interest that person would have had to pay, could not be treated on a par with the default of the assessee himself, and, in our opinion, it was not so treated either by Section 45 or Section 46(1).

28. In our opinion, the legal representative assessed under the provisions of Section 24-B(2) on the income of his deceased predecessor-in-interest is not an 'assessee' within the meaning of Section 29, nor an 'assessee in default' within the meaning of Section 45 or Section 46(1). It is only an assessee in default that can be penalised under Section 46(1). The petitioner, not having been an assessee himself within the meaning of Section 29, should not have been penalised under Section 46(1), even though the tax demanded in the notice issued under Section 29 was not paid within the time allowed. The imposition of the penalties on the petitioner was wholly without jurisdiction.

29. The petition is allowed. The rule is made absolute to the extent indicated above. The orders of the Income-tax Officer imposing the penalties of Rs. 250 and Rs. 10,000 will stand cancelled.

30. In the view we have taken of the invalidity of the orders of the Income-tax Officer, we refrain from considering whether the Commissioner of Income-tax

exercised his revisional powers, which the petitioner invoked, consistently with the directions given by an order of this Court dated 21st January, 1954. We are not commenting on the propriety of the orders ultimately passed by the Commissioner.

31. The petitioner is entitled to his costs. Counsel's fee Rs. 250.

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