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Faizunnissa Begam Vs. Assistant Controller of Estate Duty

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Court : Chennai

Decided On : Sep-30-1994

Reported in : [1995]214ITR749(Mad)

Judge : M. Srinivasan, JJ.

Acts : Estate Duty Act - 1953; Income Tax Act, 1961 - Sections 31, 66(1), 143, 143(3), 250 and 251(1)

Appeal No. : Writ Petition No. 13158 of 1985

Appellant : Faizunnissa Begam

Respondent : Assistant Controller of Estate Duty

Advocate for Def. : N.V. Balasubramanian, Adv.

Advocate for Pet/Ap. : Mrs. Chitra Venkataraman, Adv.

Judgement :

Shrinivasan, J.

1. The prayer in this writ petition is for issue of a writ of certiorarified mandamus calling for the records of the case from the file of the Assistant Controller of Estate Duty, Thanjavur, in No. S. 704/TNJ/dated February 6, 1985, issued under section 59 of the Estate Duty Act, 1953, and quash the same and direct the respondent to

forbear from taking any action under the provisions of the Estate Duty Act.

2. The petitioner's father, the late Haji M. A. Sathar, was an assessee under the Income-tax and the Wealth-tax Acts. He died on August 16, 1970, leaving behind his wife; the petitioner, his sister and brother as legal heirs. The value of the estate was nearly Rs. 9,00,000. The mother of the petitioner being one of the legal heirs filed the estate duty return under the Estate Duty Act in her capacity as an accountable person. The respondent made certain additions, disallowed the claim for certain deductions to the return figure of the estate and fixed the principal value at Rs. 9,13,692 in his order of assessment dated January 31, 1974. The accountable person filed an appeal before the Appellate Controller against the disallowance of the claim for deduction. The appellate authority, by order dated August 18, 1975, cancelled the assessment in view of certain materials filed by the accountable person and directed the respondent to redo the assessment in accordance with law. Consequently, by an assessment order dated December 18, 1975, the respondent fixed the principal value of the estate at Rs. 4,42,635. However, the respondent included in the estate of the deceased the value of the site measuring 40 cents in Thanjavur together with a mosque under construction, which was dedicated by the deceased on July 3, 1970. According to the respondent, there was no evidence of any dedication in the mosque during the life time of the deceased and, therefore, he included the value of the said property and the building materials holding that the deceased continued to be the owner of the property.

3. The accountable person preferred an appeal to the Appellate Controller. By order dated August 27, 1976, the Appellate Controller held that the inclusion of the said property in the estate was not sustainable. Aggrieved by the same, the respondent preferred an appeal before the Income-tax Appellate Tribunal, Madras Bench 'D', in E.D.A. No. 52/(Mds) of 1976-77 : By order dated December 30, 1977, the Tribunal remanded the dispute as regards the inclusion of 40 cents in the estate of the deceased back to the respondent for fresh consideration. The relevant part of the Tribunal's order reads thus :

'Having considered the matter, we re of the opinion that the matter should go back to the Assistant Controller of Estate Duty for a fresh consideration of the matter. It is no doubt true that the materials were not placed before him at the earlier stage, but we find that the nature of the evidence is such that they did not come into existence after the filing of the return. The evidence relates to a public function held on July 3, 1970, which would go a long way in deciding the issue not in dispute. We have, therefore, submitted this material and accordingly remit the case back to the Assistant Controller of Estate Duty for a fresh disposal. The accountable person will furnish the same material before the Assistant Controller of Estate Duty. We set aside the order of assessment of the Assistant Controller and the appellate order of the Appellate Controller and direct that the matter should be considered afresh. We, however, add that the direction covers only the consideration of the issue which has arisen in the appeal before us and does not cover matters which have been concluded.'

4. Thereafter, the respondent issued a notice on February 6, 1985, to the petitioner and the other accountable persons proposing to redo the assessment in toto under section 59 of the Estate Duty Act, 1953 (hereinafter called 'the Act'), and directed them to appear before him. On March 29, 1985, the accountable person sent a reply through her chartered accountant objecting to the proposed reassessment on the ground of limitation under section 73A(b) of the Act, in view of the fact that the original assessment w s made as early as on January 31, 1974, and that he ought to have revised the order of assessment within three years therefrom. It was also requested that the accountable person being informed of the circumstances under which the proposal was made so that appropriate steps could be taken for furnishing necessary details called for in the notice. Thereupon on May 30. 1985, the respondent sent another letter to the petitioner's mother wherein it was stated that the original assessment was completed as early as on January 31, 1974, and fresh assessment was made on December 18, 1975, consequent to the remand by the Appellate Controller. The respondent, however, claimed that the contention of the accountable person that the proposed reassessment was barred by limitation was erroneous and that the assessment is one falling under section 58 of the Act and, therefore, there was no period of limitation therefor. The authorised representative of the accountable person

prayed for certain time before the respondent for moving the Controller of the Estate Duty to interfere and give appropriate direction. The authorised representative also appeared before the Commissioner of Income-tax on October 4, 1975, for discussion in this matter consequent on which he filed the copy of the order of the Appellate Controller of Estate Duty dated August 27, 1976, and the order of the Tribunal dated December 30, 1977, and drew the attention of the authority with regard to the scope of the remand order. However, the petitioner received a letter from the office of the Commissioner of Income-tax dated October 30, 1985, refusing to interfere in the matter and directing the accountable person to prefer an appeal before the Appellate Controller if she is aggrieved by the assessment. At that stage, the present writ petition is filed by the petitioner on December 13, 1985.

5. It is the contention of the petitioner that the order of the Tribunal is very clear in restricting the scope of the remand to a particular property and the respondent is entitled to make reassessment only on that basis. It is the contention of learned counsel that the proposed assessment with regard to all the matters which had already become final will be clearly barred by limitation and it is not open to the respondent to do so. On the other hand, the contention of learned counsel for the respondent is that the Tribunal had no right to restrict the scope of remand and the assessment that is to be made now will be one under section 58 of the Act and, therefore, there is no period of limitation. The respondent's counsel also places reliance on certain decisions of this court.

6. Before considering the authorities referred to by learned counsel for the respondent, it is necessary to decide the question whether the order of the Tribunal is restricted in its scope. I have already extracted the relevant passage in the order of the Tribunal. There can be no doubt whatever that the Tribunal set aside the order of assessment and remanded the matter for fresh consideration only with reference to the issue considered by them in the appeal. The last sentence in the passage extracted earlier places the matter beyond all doubt. Therefore, the respondent can make a fresh assessment only with reference to that particular issue.

7. The contention of learned counsel for the petitioner that the assessment had already concluded with regard to the other issues is well-founded. It is seen from the order dated January 31, 1974, the deceased was taken to be an Indian domicile and a foreign liability of Rs. 1,16,360 was allowed. That was confirmed by the appellate authority in its order dated August 18, 1975. That issue had become final as there was no appeal with regard to the same before the Tribunal. If the respondent was aggrieved thereby, he should have challenged the same by an appeal before the Tribunal. Having not done so, it is not open to the respondent to reopen the assessment with regard to the said matter.

8. Learned counsel for the respondent invites my attention to the judgment of this court in CIT v. Seth Manicklal Fomra : [1975]99ITR470(Mad) . The Division Bench held that once the order of assessment is set aside and the matter comes up for fresh assessment before the officer, his powers will have to be decided with reference to the provisions of section 143(3) of the Income-tax Act and not with reference to any observations made by the Appellate Assistant Commissioner in his order or with reference to the scope of the appeal before the Appellate Assistant Commissioner. It is seen from the facts of the case that the order of the Appellate Assistant Commissioner did not contain any restriction as such. After having found that there was no restriction in the order of remand, the Bench proceeded to consider whether there could be such a restriction by the Appellate Assistant Commissioner in his order of remand. The Bench expressed the opinion that there could not be any such restriction when an order of remand is made. The relevant passage on which reliance is placed by learned counsel for the respondent reads thus (at page 473) :

'It is the contention of the learned counsel for the assessee that the order of the Appellate Assistant Commissioner dated June 19, 1964, is in the nature of a remand for the purpose of considering a particular issue relating to the estimation of the income from business in sugar and shall not be treated as one setting aside the entire order and remanding the entire proceedings for a reconsideration by the Income-tax Officer. We are unable to read the order of the Appellate Assistant Commissioner as in any way limiting the scope of the Income-tax Officer when he makes a fresh assessment order. Once the order of assessment is set aside, it is

open to the Income-tax Officer to consider the entire matter afresh and neither the order of the Appellate Assistant Commissioner in terms restricts the Income-tax Officer to consider the issue relating to the estimation of the income alone nor there is any warrant for reading such a restriction of the power either under section 251(1)(a) or under section 143(3) under which the Income-tax Officer makes a fresh assessment. In fact, we doubt very much as to whether the Appellate Assistant Commissioner could restrict the power of the Income-tax Officer while setting aside the assessment order itself and directing him to make a fresh assessment order. It might be open to the Appellate Assistant Commissioner without setting aside the order and directing the Income-tax Officer to make a fresh assessment to invoke his powers under section 250, call for a finding on a specific issue and dispose of the appeal himself. But if the order of assessment is set aside and the Income-tax Officer is directed to make a fresh assessment, we do not find anything in the provisions of the Act which would restrict the powers of the Income-tax Officer in passing an order under section 143(3). Once the order of assessment is set aside and the matter comes up for fresh assessment before the Income-tax Officer, we are of the opinion that the powers will have to be decided with reference to the provisions under section 143(3) and not with reference to any observations made by the Appellate Assistant Commissioner in his order or with reference to the scope of the appeal before the Appellate Assistant Commissioner. A similar view was taken by this court in Sri Gajalakshmi Ginning Factory Ltd. v. CIT : [1952]22ITR502(Mad) . In that case, the assessee-company purchased a ginning factory with certain lands appurtenant thereto and also a plot containing some fruit stalls. In one of the subsequent accounting years, the assessee sold some portion of the land and also the fruit stalls and realised a profit of Rs. 9,397 from the sale of the land, and Rs. 3,800 from the sale of the fruit stalls. The Income-tax Officer treated the sum of Rs. 9,397 as capital receipt and assessed the sum of Rs. 3,800 under the head of business. The assessee appealed against that portion of the assessment order treating the sum of Rs. 3,800 as income from business, but the Appellate Assistant Commissioner upheld the order of the Income-tax Officer, but reduced the amount to Rs. 2,800. The assessee filed a further appeal to the Income-tax Appellate Tribunal. The Tribunal considered that there was not enough material to distinguish a sum of Rs. 3,800 received from the

sale of fruit stalls from the amount of Rs. 9,397 which was treated as capital asset by the Income-tax Officer and in that view remitted the matter to the Appellate Assistant Commissioner for a fresh consideration as to whether the sum of Rs. 3,800 is assessable as income from business. While considering this question, the Appellate Assistant Commissioner not only held that the sum of Rs. 3,800 was assessable to tax as income from business but also enhanced the assessment holding that the sum of Rs. 9,397 which was realised from the sale of vacant plots, was also assessable as income from business. This order was challenged by the assessee before the Tribunal and later, at the instance of the assessee, a question relating to the jurisdiction of the Appellate Assistant Commissioner in the inclusion and the assessment of the sum of Rs. 9,397 was referred to this court under section 66(1). This court held that the Appellate Assistant Commissioner had the power under section 31 to assess the sum of Rs. 9,397 after the remand from the Tribunal. This court was of the view that after the remand the powers of the Appellate Assistant Commissioner would have to be decided only with reference to section 31 and not with reference to the order of remand itself and observed :

'It seems to us difficult to draw a distinction between cases where the Appellate Assistant Commissioner was dealing with an appeal which was heard by him in the first instance. The only power which he could exercise in disposing of an appeal whether received by him after remand or directly against the order of the Income-tax Officer is the one conferred upon him by section 31 of the Act, and it is not subject to any restrictions arising out of the subject-matter of the appeal.'

Though this decision related to a remand order made by the Appellate Tribunal to the Appellate Assistant Commissioner and the powers of the Appellate Assistant Commissioner in such a remanded matter, we are of the view that the ratio of this decision is applicable even for the purpose of determining the jurisdiction of the Income-tax Officer after the order has been set aside by the Appellate Assistant Commissioner, with a direction to make a fresh assessment.

More directly a point was considered by the Allahabad High Court in J.K. Cotton Spg. and Wvg. Mills Co. Ltd. v. CIT : [1963]47ITR906(All) . That case related to the jurisdiction of the Income-tax Officer to include the 'deemed dividend' under

section 23A after the Appellate Assistant Commissioner set aside the original assessment order, and remanded the proceedings for a fresh assessment under section 31 of the Indian Income-tax Act, 1922. It was held that though the Income-tax Officer, while making a fresh assessment in compliance with the Appellate Assistant Commissioner's directions, was bound by the directions given, subject to carrying out those directions, he has the same powers as he had originally when making the assessment order under section 23. It is not in dispute in our case that the direction of the Appellate Assistant Commissioner in regard to the consideration of the circumstances pointed out by him in the assessment of the income from business in sugar was carried out by the Income-tax Officer. Therefore, the income-tax Officer had all the powers he had originally when making the assessment order under section 143(3). This decision in J. K. Cotton Spg. and Wvg. Mills Co. Ltd. v. CIT : [1963]47ITR906(All) was followed in a later decision of the same High Court in Abhai Ram Gopi Nath v. CIT : [1971]79ITR339(All) . Though these decisions were rendered under the provisions of the Indian Income-tax Act, 1922, the provisions of the Income-tax Act, 1961, are in pari materia with the provisions of the Indian Income-tax Act, 1922, in so far as these powers of the Appellate Assistant Commissioner and that of the Income-tax Officer while making a fresh assessment are concerned. The ratio of these judgments, therefore, is fully applicable and governs the instant case.'

9. Reliance is also placed on the judgments in Triplicane Urban Cooperative Society Ltd. v. CIT : [1980]126ITR125(Mad) and Rayon Traders Pvt. Ltd. v. ITO +. In the former case, the Bench held that the Income-tax Officer cannot pass any order under section 250 of the Income-tax Act, 1961, while as a result of the Appellate Assistant Commissioner's order on appeal, the assessment is reduced and the Income-tax Officer passes an order giving effect to the decision of the Appellate Assistant Commissioner, the Income-tax Officer's order has to be treated as one passed under section 143 and, therefore, a regular assessment for the purpose of section 214 of the Income-tax Act. In the latter case, a similar view was expressed and it was held that the order passed by the Income-tax Officer for giving effect to the Appellate Assistant Commissioner's order is an order under section 143 and, therefore, a 'regular assessment'.

10. None of the rulings referred to above, will have any bearing in the present case. As pointed out already, the order of the Tribunal is very explicit in its terms and the remand is expressly restricted to one particular issue. If the respondent wants to make a reassessment pursuant to the order of the Tribunal, he can do so only with respect to that issue. But the respondent is now seeking to reopen the matters, which are already concluded by earlier orders and make a fresh assessment. With regard to those matters, it will fall only under section 59 of the Act and not under section 58. If it falls under section 59, it will be automatically governed by section 73A. Under that section, two periods of limitation are prescribed, one for the first assessment and another for the reassessment. If it is the case of the first assessment, it cannot be done after the expiration of five years from the date of the death of the deceased. If it is a case of reassessment, it cannot be done after the expiration of three years from the date of assessment. In this case, learned counsel claims that the proposed assessment is one under section 58.

11. I am unable to agree. For the purpose of implementing the order of the Tribunal, it is a fresh assessment as directed by the Tribunal. There may not be any period of limitation for that purpose as contended by him. But that will be confined only to the issue which was directed to be considered by the Tribunal.

12. But with reference to the other matters, which are reopened by the respondent on his own without a direction from the Tribunal, they will be governed only by section 59 and consequently by section 73A.

13. In order to get over the period of limitation, learned counsel for the respondent contends that a notice was issued within the prescribed period of limitation, before 1978. He places reliance on a communication in No. S. 704/TNJ, dated May 30, 1985, by the respondent to the accountable person. In the first paragraph, it is stated that a notice under section 59 was issued and served on her within three years from the date of assessment made on December 18, 1975. It is contended by learned counsel that in her reply to the said communication sent on behalf of the accountable person, there is no denial of the factual statement referred to above. In the reply dated June 26, 1985, what is stated is as follows :

'However, possibly overlooking the observations of the court in the above two cases, which were referred to in my letter dated March 29, 1985, it is surprising that a point is raised in your letter that - 'if there is no assessment, no notice under section 59 can be issued for reassessment purposes.' Your argument is self-defeating since if there is no assessment the period of limitation is only five years from the date of death which has already expired. Hence, your argument that the period of limitation is to be counted from the date of fresh assessment is not legal and is not supported by any case-law in favour of that construction.'

14. It is argued by learned counsel for the respondent that there is no factual denial and, therefore, the court must draw an inference that there was notice issued under section 59 within three years from December 18, 1975. It is also submitted that there is no denial of the issue of notice in the affidavit filed in support of this writ petition.

15. I am unable to accept the said contentions. When this matter was heard on August 26, 1994, after hearing the parties, partly, I directed the respondent to produce a copy of the notice said to have been issued under section 59 of the Act within three years from December 18, 1975, and also any proof available for the service of the said notice on the writ petitioner and I granted time for production of such notice till September 16, 1994. The matter was again called on September 17, 1994, and adjourned by one week. Till now, no such notice has been produced. It is represented by learned counsel for the respondent that old files are not available and it is not possible for the respondent to produce a copy of the said notice. In-those circumstances, it is not possible for this court to draw an adverse inference against the petitioner and hold that a notice was issued by the respondent within three years from December 18, 1975.

16. Consequently, there is no difficulty in holding that the impugned notice dated February 6, 1985, is barred by limitation in so far as it relates to matters other than the one governed by the order of the Tribunal dated December 30, 1977. It is open to the respondent to confine the assessment proceedings to the issue considered by the Tribunal and remanded to him for fresh consideration.

17. With the above direction, the writ petition is allowed. There will, however, be no order as to costs.

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