(2001) 02 RAJ CK 0017

In the Rajasthan High Court

Case No : .I.T. Reference No. 52 of 1995

Commissioner of Income Tax APPELLANT

Vs

Pushpa Devi RESPONDENT

Date of Decision : 20-02-2001

Acts Referred:
Income Tax Act, 1961 — Section 142(1), 143, 143(2), 143(3), 144

Citation : (2001) 250 ITR 495

Hon'ble Judges : S.K. Garg, J;Rajesh Balia, J

Bench : Division Bench

Advocate : Sundeep Bhandawat, for the Appellant; None, for the Respondent

Judgement

Rajesh Balia, J.—Heard learned counsel for the Revenue. None appeared for the respondent in spite of service.

2. The Income Tax Appellate Tribunal, Jaipur Bench, Jaipur, by its order dated July 13, 1994, has referred the following two questions of law arising out of two separate appeals filed by the assessee and the Department for the assessment year 1985-86 :

"1. Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was legally justified in holding that the action of the Assessing Officer in non-issuing of notices of one LH was not bona fide and diligent ?

2. Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was legally justified in annulling the assessment order passed by the Assessing Officer ?"

3. The relevant facts for the present purposes are that the assessee who was liable to be assessed for the assessment year 1985-86 was Kantilal Saraf an individual who was deriving income as partner from a registered firm, Usha Bleaching Centre, Pali, and also from tuitions, He died on July 9, 1986, leaving behind him the following legal heirs and representatives, namely : 1. Smt.

Pushpadevi (widow), Shri Dileep Kumar (son), Smt. Usha (daughter), Kumari Raj Kumari (daughter), Shri Praveen Kumar (son), Shri Rakesh Kumar (son) and Kumari Pooja (daughter). It appears that because of the death of Kantilal no return was filed initially by the deceased for the assessment year 1985-86. However, in pursuance of a letter dated September 26, 1986, and the notices under Sections 142(1) and 143(2) both dated December 15, 1986, his widow, Smt. Pushpa Devi, filed a return on July 30, 1987, declaring the income of the deceased assessee for the assessment year 1985-86 at Rs. 19,020. The Income Tax Officer completed the assessment u/s 143(3) on March 30, 1988, assessing the deceased on a total income of Rs. 1,46,590. Smt. Pushpa appealed against that order before the Commissioner of Income Tax (Appeals) challenging the validity and legality of the assessment order dated March 30, 1988, of the deceased assesses through Pushpa Devi one of his legal representatives. Smt. Pushpa raised the ground that all the legal representatives of the deceased had not been made party to the proceedings hence the assessment order made without notice to all the legal representatives was invalid. The learned Commissioner of Income Tax (Appeals) finding that the factual position is true that the notices were not issued to the legal representatives held that it was a case of procedural irregularity rectifiable by issue of notices to all the legal representatives of the deceased assessee. For reaching this conclusion he relied upon the decision of the Calcutta High Court in Sajjan Kumar Saraf Vs. Commissioner of Income Tax, He, therefore, set aside the assessment and remanded the case back to the Income Tax Officer for making fresh assessment in accordance with law. The order of the Commissioner of Income Tax (Appeals) was passed on August 3, 1989, which was made the subject-matter of the appeal by the assessee which was Appeal No. 1409 of 1989.

4. Meanwhile, in compliance with the order passed by the Commissioner of Income Tax (Appeals), dated August 3, 1989, the Income Tax Officer, issued notice to the five legal representatives out of seven legal representatives of the deceased assessee. By his letter dated November 12, 1990, Shri Arvind Bhatt, advocate, appeared before the Income Tax Officer and requested to keep the proceedings in abeyance as an appeal against the order dated August 3, 1989, was pending for the decision of the Tribunal. The Income Tax Officer did not accept the request letter because the same was not accompanied by the power of attorney in favour of Shri Bhatt and she completed the assessment u/s 144 on December 18, 1990. She again assessed the income of the assessee at the same figure as Rs. 1,46,590. The five legal representatives approached the Commissioner of Income Tax (Appeals) in appeal once again.

5. The validity of the order passed by the Assessing Officer was challenged on the ground that the composite notice in the name of five legal representatives in one envelop sent to and delivered at the wrong address did not amount to sufficient compliance with the Commissioner of Income Tax (Appeals) earlier order. It was contended that two of the legal representatives were issued no notices at all. In sum it was submitted that no proper opportunity of being heard

was given to the legal representatives representing the estate of the deceased.

6. The learned Commissioner of Income Tax (Appeals) found substance in these submissions. He pointed out that no notice had been issued to Smt. Usha and Kumari Puja and that the remaining legal representatives had complied with the notices issued to them but the Income Tax Officer had not even marked their attendance in the order sheet. He, therefore, held that the order made by the Income Tax Officer u/s 144 was bad and the assessment so made was not proper. He, however, once again set aside the assessment and sent it back to the Income Tax Officer directing him to again issue the notices to all the legal representatives in accordance with law and then complete the assessment afresh in accordance with law after considering the material on record and giving proper opportunity of being heard to all the legal representatives.

7. Against the order passed by the Commissioner of Income Tax (Appeals) on March 13, 1991, both the assessee as well as the Revenue preferred their respective appeals before the Tribunal. The five legal representatives of the deceased contended that the order passed by the Income Tax Officer, was without notice to the legal representatives a second time and was void ab initio. The contention of the Department in its appeal was that the Commissioner of Income Tax (Appeals) should have confirmed the assessment order instead of setting aside the same and sending it back to the Income Tax Officer for assessment.

8. The Tribunal found that despite clear direction by the Commissioner of Income Tax (Appeals), the Income Tax Officer had not brought all the legal representatives of the deceased on record by issuing requisite notice to them particularly when the Income Tax Officer was having full knowledge of the legal representatives of the deceased assessee. Not issuing requisite notice to all the legal representatives, separately and individually the Income Tax Officer had not acted bonafide and diligently and the Income Tax Officer had proceeded to complete the assessment in the manner she has in spite of objections having been made and raised before her, the heirs cannot be deemed to have waived their rights. In this connection, it was concluded by both the authorities, namely, the Commissioner of Income Tax (Appeals) as well as the Tribunal, that two minors were not at all brought on the record and not even their natural guardians were informed of the pending proceedings. With these findings, the Tribunal held the second assessment to be void ab initio and annulled the same.

9. In the aforesaid facts and circumstances, the two questions referred to above have been raised for the opinion of this court. The real controversy is contained in question No. 2, whether, on the facts and circumstances of the case, the Tribunal was justified in annulling the assessment order passed by the Income Tax Officer. The fact of the acceptance of the finding that the Income Tax Officer has not acted bonafide and diligently in not issuing notice to all the legal representatives cannot be effaced. They are accepting that no notice at all was served to them.

10. The controversy as to the effect of not serving one or more of the legal representatives of the assessee on the assessment made on the returns filed by one or several legal representatives has been stated by the Supreme. Court in Commissioner of Income Tax, Shilong Vs. Jai Prakash Singh, Reversing the decision of the Gauhati High Court in Jai Prakash Singh (Legal Representative of Estate of Late B. N. Singh) Vs. Commissioner of Income Tax, Assam, the court said that (headnote) :

"An omission to serve or any defect in the service of notices provided by procedural provisions does not efface or erase the liability to pay tax where such liability is created by distinct substantive provisions (charging'' sections). Any such omission or defect may render the order irregular-depending upon the nature of the provision not complied with--but certainly not void or illegal."

11. It was a case which has arisen in somewhat like circumstances in which the present case has arisen. For the assessment years 1965-66, 1966-67 and 1967-68, S, the assessee, had not filed returns of his income. He died on April 16, 1967, leaving behind ten legal representatives. Nine out of ten legal representatives were not served with notice of assessment. However, the eldest son, J. filed the returns for the three assessment years on March 17, 1970, November 12, 1970 and October 27, 1971, respectively. The assess ment orders were made mentioning the names of all the ten legal representatives against the column "name of the assessee". They were described as "legal representatives of the late S". Assessment was made in the status of an "individual". The Appellate Assistant Commissioner agreed that there were some irregularities in the assessment as notice to all the legal representatives was not issued and did not accept the contention of the assessee saying that in the absence of any notice to all the legal representatives, the assessments were illegal and void and must be set aside, and he, accordingly, set aside and remitted the matter to the Income Tax Officer for making fresh assessment after notice to all the legal representatives. This order was confirmed by the Tribunal. On a reference, the High Court held that in the absence of service of notice on all the legal representatives, the assessment made upon them was a nullity. The Supreme Court reversed the judgment of the Gauhati High Court as aforesaid and upheld the order of the Tribunal and remitted the case back to the assessing authority for deciding the matter afresh after notice to all the legal representatives.

12. In coming to this conclusion, the apex court relied on its earlier decision in Estate of Late Rangalal Jajodia Vs. The Commissioner of Income Tax, Madras, It was a case in which the assessment under the estate duty has been framed without notice to the heirs accountable persons. The court said (page 511) :

"An assessment proceeding does not cease to be a proceeding under the Act merely by reason of want of notice. It will be a proceeding liable to be challenged and corrected. Similarly, if there is a mistake as to the name or there is a misdescription of the name, the proceeding will be liable to be challenged and corrected by giving notice to the assessee subject to such just exceptions as an assessee can take under law."

13. In view of the aforesaid, we are of the opinion that question No. 2 referred by the Tribunal must be answered in the negative, i.e., to say, in favour of the Revenue and against the assessee, by holding that the assess ment order made without notice to all the legal representatives of the deceased on submission of the returns by one or more of the legal representatives only on being challenged for want of notice to all the legal representatives suffers from procedural irregularities and is liable to be corrected by setting aside the order and directing that the notice to all the legal representatives in accordance with law be issued but is not void and not liable to be annulled.

14. So Far as question No. 1 is concerned, we are of the opinion that the action of the Assessing Officer in not issuing notice to one of the legal representatives was not bona fide and diligent. It is apparent that in spite of having full knowledge about the name and address of the legal representatives and clear directions of the Commissioner of Income Tax at the first instance, the Assessing Officer has not issued notice to two of the legal representatives at all. Further, she even did not care to issue notice to the legal representatives to whom they were issued separately at their respective addresses and without even making effort to know about their current addresses and to serve all of them properly and individually. This litigation is the direct result of such reckless act of the Assessing Officer in disregard of the basic requirement of fair procedure of issuing proper notice to all the affected parties known to her.

15. The reference is accordingly answered.

16. Since the assessee has not appeared no order as to costs.