
(1984) 01 AHC CK 0052

In the Allahabad High Court

Case No : Wealth-tax Application No. 72 of 1983

Commissioner of Wealth-tax

APPELLANT

Vs

J.K. Srivastava

RESPONDENT

Date of Decision : 12-01-1984

Acts Referred:

Wealth Tax Act, 1957 — Section 27(3), 4(1)
Wealth Tax Rules, 1957 — Rule 2

Citation : (1984) 43 CTR 189 : (1984) 150 ITR 446 : (1984) 19 TAXMAN 131

Hon'ble Judges : M.P. Mehrotra, J;Gopi Nath, J

Bench : Division Bench

Advocate : Bharatji Agarwal and M. Katju, for the Appellant; R.S. Dhawan, for the Respondent

Final Decision : Allowed

Judgement

1. These are eight connected applications relating to different assessment years u/s 27(3) of the W.T. Act, 1957. The Appellate Tribunal refused to state the case on the ground that no question of law arose and, therefore, the Department has now come up in the instant applications and in support of the same, we have heard the learned counsel for the Department. In opposition, we have heard the learned counsel for the respondent, Sri R.S. Dhawan. The learned counsel for the Department contended that, in the instant case, a question of law did arise and the Appellate Tribunal was in error in thinking that no question of law arose and also it erred in thinking that even if a question of law arose, the answer was self-evident and, therefore, it was not necessary to make a reference.

2. To appreciate the rival contentions of the learned counsel, certain facts, in brief, may be stated. The respondent-assessee was assessed as an individual during the assessment years 1969-70 to 1976-77. His father, Sri J. P. Srivastava, who died on December 15, 1954, made a gift during his lifetime to the former and to his grandson, Sri V.K. Srivastava. These amounts were invested and the income therefrom was held by the AAC in the appeals for the assessment years

1954-55 and 1956-57 to belong to an association of persons, where the shares of the members were indeterminate and, therefore, liable to tax at the maximum-rate and for the subsequent assessment years, both according to the Income Tax return and the Income Tax assessment, the income from these assets was assessed in the status of an association of persons, where the shares of the members of the association of persons were not determinate.

3. In the wealth-tax assessment of the respondent-assessee, Sri J. K. Srivastava, the WTO included half share of the said assessee in the association of persons consisting of the said assessee and his said son to whom, as stated above, gifts had been made by the late Sri J. P. Srivastava during his lifetime. The other half share in the said association of persons was presumably included in the assessment of Sri V.K. Srivastava, the son of Sri J.K. Srivastava, who was taken to be the other member of the said association of persons.

4. Against the order of the WTO, an appeal was preferred by the assessee but the same did not succeed.

5. On further appeal before the Tribunal, it was held that it was not possible to determine the value of the assessee's interest in the said association of persons in view of Rule 2 of the W.T. Rules. The assessee was, therefore, held not liable to be assessed to wealth-tax in respect of the value of his interest in the said association of persons. Apart from placing reliance upon Section 4(1)(b) and Rule 2, the Tribunal also placed reliance upon a number of circulars of the Board and also upon the Finance Minister's Budget speech and the Memo explaining the provisions of Finance Bill, 1981. The Tribunal held that the circular of the Board was binding upon the Department and its officers and, therefore, the assessee was not liable to be charged with wealth-tax in respect of the share in the association of persons which was indeterminate. Lastly, the Tribunal emphasised that it was not the function of the court or the Tribunal to fill up any lacuna in the statutory provisions and that task appertained to the legislature and not to the court.

6. The Tribunal rejected the reference application u/s 27(1) on the ground that the controversy which the Department was seeking to raise could not be raised in view of the very clear and explicit condition which could be spelt out from Section 4(1)(b) read with Rule 2 and the circular in question. In its view, the legal position was so clear and self-evident that there was no need to make a reference to this court. The Tribunal placed reliance on *Commissioner of Income Tax, Punjab Vs. Chander Bhan Harbhajan Lal*, *Mathura Prasad Vs. Commissioner of Income Tax, Uttar Pradesh*, *Commissioner of Income Tax, West Bengal Vs. Indian Mica Supply Co. P. Ltd.*, and *Commissioner of Gift Tax, Bombay Vs. Smt. Kusumben D. Mahadevia*. These authorities are in support of the proposition that where a reference will be futile or where the answer to the proposed question of law is self-evident, the Tribunal will be justified in not making any reference to this court. The Tribunal again emphasised, while rejecting the reference application, that if there was a lacuna in the statutory provisions, then

the same can be made good by the legislature and not through the instrumentality of judicial interpretation by the court or the Tribunal.

7. The learned counsel for the Department contended that the two questions whose reference has been sought in the instant application u/s 27(3) are questions of law. He further contended that it will not be correct to say that the controversy had become irrelevant or the answer to the same was self-evident. He placed reliance on a Division Bench decision in *Smt. Prem Lata Agarwal Vs. Commissioner of Wealth-tax*, and contended that in somewhat similar facts where also a gift had been made to two donees, the Department was held justified in including 50 per cent. share in the gifted amount on the footing that this was the value of the share of the assessee in the association of persons which was formed by her along with her son, to whom the gift had been made. Lastly, the learned counsel for the Department contended that the interpretation, if any, was placed by the Board in its circular in question, the same was not binding when the matter was in controversy in a court of law. He placed reliance on the following observations made by the Supreme Court in *Gestetner Duplicators Pvt. Ltd. Vs. Commissioner of Income Tax, West Bengal*, :

"Turning to the circular dated January 16, 1941, issued by the Central Board of Revenue on which counsel for the Revenue has relied, it cannot, in our view, affect the question of deductibility, for, if the commission paid by the assessee to its salesmen is covered by the expression "salary" on its true construction, which, according to us, it does, the Board's view or instructions cannot detract from the legal position arising on such proper construction....."

8. The learned counsel for the Department lastly contended that the circular in question did not, in any manner, come in conflict with the interpretation which the Department was placing upon Section 4(1)(b) read with Rule 2 of the W.T. Rules.

9. Sri R.S. Dhawan, the learned counsel for the assessee, supported the order of the Appellate Tribunal rejecting the reference application on the grounds which have been set out in the said order. He further submitted that the insertion of Section 21AA in the W.T. Act by the Finance Act, 1981, with effect from April 1, 1981, made the legal position absolutely explicit. In other words, the interpretation which was placed by the Tribunal on Section 4(1)(b) read with Rule 2, in the light of the circular in question, finds support from the background in which Section 21AA was placed on the statute book. The said section is as follows :

"21AA.(1) Where assets chargeable to tax under this Act are held by an association of persons, other than a company or a co-operative society, and the individual shares of the members of the said association in the income or assets or both of the said association on the date of its formation or at any time thereafter are indeterminate or unknown, the wealth-tax shall be levied upon and recovered from such association in the like manner and to the same extent

as it would be leviable upon and recoverable from an individual who is a citizen of India and resident in India for the purposes of this Act, and-

(a) at the rates specified in Part I of Schedule I ; or

(b) at the rate of three per cent.;

whichever course would be more beneficial to the Revenue.

(2) Where any business or profession carried on by an association of persons referred to in Sub-section (1) has been discontinued or where such association of persons is dissolved, the Wealth-tax Officer shall make an assessment of the net wealth of the association of persons as if no such discontinuance or dissolution had taken place and all the provisions of this Act, including the provisions relating to the levy of penalty or any other sum chargeable under any provision of this Act, so far as may be, shall apply to such assessment.

(3) Without prejudice to the generality of the provisions of Sub-section (2), if the Wealth-tax Officer or the Appellate Assistant Commissioner or the Commissioner (Appeals) in the course of any proceedings under this Act in respect of any such association of persons as is referred to in Sub-section (1) is satisfied that the association of persons was guilty of any of the acts specified in Section 18 or Section 18A, he may impose or direct the imposition of a penalty in accordance with the provisions of the said sections.

(4) Every person who was at the time of such discontinuance or dissolution a member of the association of persons, and the legal representative of any such person who is deceased, shall be jointly and severally liable for the amount of tax, penalty or other sum payable, and all the provisions of this Act, so far as may be, shall apply to any such assessment or imposition of penalty or other sum.

(5) Where such discontinuance or dissolution takes place after any proceedings in respect of an assessment year have commenced, the proceedings may be continued against the persons referred to in Sub-section (4) from the stage at which the proceedings stood at the time of such discontinuance or dissolution, and all the provisions of this Act shall, so far as may be, apply accordingly.

Explanation.--Notwithstanding anything contained in Section 5, in computing the net wealth for the purposes of this section in any case, any assets referred to in Clauses (xv), (xvi), (xxii), (xxiii), (xxiv), (xxv), (xxvi), (xxvii), (xxviii) and (xxix) of Sub-section (1) of that section shall not be excluded."

10. The background in which this provision was inserted by the Finance Act, 1981, is fully detailed in Circular No. 308 dated June 29, 1981, which has been reproduced in [1981] 131 ITR 119 of the Statutes Section. The relevant portion of the said circular is as follows :

"21.1. Under the Wealth-tax Act, 1957, individuals and Hindu undivided families are taxable entities but an association of persons is not charged to wealth-tax on

its net wealth. Where an individual or a Hindu undivided family is a member of an association of persons, the value of the interest of such member in the association of persons is determined in accordance with the provisions of the rules and is includible in the net wealth of the member.

21.2 Instances had come to the notice of the Government where certain assesseees had resorted to the creation of a large number of associations of persons without specifically defining the shares of the members therein with a view to avoiding proper tax liability. Under the existing provisions, only the value of the interest of the member in the association which is ascertainable is includible in his net wealth. Accordingly, to the extent the value of the interest of the member in the association cannot be ascertained or is unknown, no wealth-tax is payable by such member in respect thereof.

21.3. In order to counter such attempts at tax avoidance through the medium of multiple associations of persons without defining the shares of the members, the Finance Act has inserted a new Section 21AA in the Wealth-tax Act to provide for assessment in the case of associations of persons which do not define the shares of the members in the assets thereof. Sub-section (1) of new Section 21AA provides that where assets chargeable to wealth-tax are held by an association of persons (other than a company or a co-operative society) and the individual shares of the members of the said association in the income or the assets of the association on the date of its formation or at any time thereafter, are indeterminate or unknown, wealth-tax will be levied upon and recovered from such association in the like manner and to the same extent as it is leviable upon and recoverable from an individual who is a citizen of India and is resident in India at the rates specified in Part I of Schedule I or at the rate of 3 per cent., whichever course is more beneficial to the Revenue."

11. Mr. Dhawan's contention, in effect, is this :

It was realised that the share of a member in an association of persons where it is unspecified and indeterminate could not be brought into the wealth-tax assessment of an individual assessee, in view of the cumulative effect of Section 4(1)(b) read with Rule 2 of the rules framed under the Act. The association of persons, as such, was not an assessable entity and, therefore, such share escaped wealth-tax assessment prior to April 1, 1981. Section 21AA sought to plug this loophole by enabling the Department to assess the association of persons as such to wealth-tax where the share of the member was indeterminate. The learned counsel's contention is that the fact that the legislature felt the necessity to make such an enactment itself justified the view that prior to April 3, 1981, the share of an individual assessee in an association of persons, where it was indeterminate, could not be included in his wealth-tax assessment. Sri Dhawan also raised a point that the questions whose reference were sought were not questions of law. His contention is that the controversy regarding the extent of share is basically a controversy of fact and, in this connection, he placed reliance on Commissioner of Income Tax Vs. Novelty

Trading Corporation and Others, . Lastly, the learned counsel heavily underlined the argument which had found favour before the Tribunal, that the Circulars of the Board, even if they are at variance with the statutory enactment, are still binding upon the Department's officers. He placed reliance on K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another, , where reliance has been placed on Ellerman Lines Ltd. Vs. Commissioner of Income Tax, West Bengal, Calcutta, .

12. In our view, a question of law does not arise in the instant case. We are not impressed with the contention of the learned counsel for the assessee that the question which is sought to be referred is a question of fact. The facts in the instant case are not at all in dispute. The gift was made by Sri J. P. Srivastava, in favour of his son and a grandson. The Department's contention was that it was entitled to include the value of the share of each member of the assessee on the basis that where there was no specification of the extent of the share, the presumption was that each donee had equal share in the monies which were gifted. We do not say whether such an assumption was in law available to the Department. But we cannot doubt that the controversy is not a factual one in its nature. It is a pure question of law. In our view, the decision in Commissioner of Income Tax Vs. Novelty Trading Corporation and Others, , is not applicable to the instant case. The controversy in the said case was regarding 75 per cent, of the salary expenses whose deduction was claimed u/s 35B of the I.T. Act, 1961. In our view, in Section 35B, the controversy as to what percentage of expenditure should be allowed can have no relevance when the controversy is whether in a case of a gift made to two persons forming an association of persons, it is permissible to the Department to proceed on the presumption that each member has an equal share in such gift.

13. It is not necessary for us to say at this stage as to which interpretation which is being placed upon Section 4(i)(b) read with rule 2 and the aforesaid circular of the Board is correct--whether the interpretation placed by the Department or by the assessee. In an application u/s 27(3), the limited task is to decide whether the question of law does or does not arise and whether it needs to be referred to this court for its answer. Sri. Dhawan sought to distinguish the decision in Smt. Prem Lata Agarwal Vs. Commissioner of Wealth-tax, , on certain grounds. He also submitted that the circular in question has not been noticed in the said decision and similarly, the enactment of Section 21AA was not noticed in the said decision. We would not like to make any observation which might constitute in any manner as expressive of our agreement or disagreement with the said decision. That would not be correct to do so. However, it does seem to us that in the said decision, the controversy which is at hand here was treated to be a question of law and was dealt with as such. In these circumstances, we have felt that a question of law does arise in the instant case and accordingly, we allow these applications and direct the Appellate Tribunal to state the case and refer the following question of law. We shall frame the question in such a manner that both the sides may be able to make their submissions.

14. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was in error in hoping that the assessee was not liable to wealth-tax on the value of his interest in the association of persons ?

15. In our view, the two questions whose reference the Department is seeking will be covered by the question that we have framed. The Department will be entitled to its costs.