
(1990) 07 BOM CK 0009
In the Bombay High Court
Case No : WT Reference No. 56 of 1976

Commissioner of Wealth Tax	Vs	APPELLANT
Mrs. Aimy N.E. Pandole		RESPONDENT

Date of Decision : 07-07-1990

Acts Referred:

Wealth Tax Act, 1957 — Section 2(c)(1), 2(e), 2(e)(1)(iv), 24(6), 7

Citation : (1990) 53 TAXMAN 419

Hon'ble Judges : T.D. Sugla, J; Sujata Manohar, J

Bench : Division Bench

Advocate : G.S. Jetly, Mrs. Manjula Singh and K.C. Sidhwa, for the Appellant;
F.B. Andharujina and J.A. Tambe, for the Respondent

Judgement

Sugla, J.—In this wealth-tax reference at the instance of the department the Tribunal has referred to this Court the following two questions of law:

"1. Whether, on a proper construction of clause 12 of the will executed by lady Serenebai J. Jeejeebhoy, the Tribunal was justified in holding that the assessee's life interest under the trust had no value within the meaning of section 7 of the Wealth-tax Act, 1957?

2. Whether, the life interest to which the assessee was entitled was an "annuity" exempt u/s 2 (e)(1)(iv) of the Wealth-tax Act?"

It is pertinent to mention that the Tribunal in this case followed its earlier orders dated 21-4-1964 and dated 27-7-1964 in the assessee's own case for the assessment years 1959-60 and 1960-61. It is stated in paragraph 11 of the statement of the case that similar questions were referred to this Court by the Tribunal for the assessment years 1959-60 and 1960-61 in Reference Application Nos. 728 and 729 of 1964-65. Since, however, neither Shri Jetly, the learned counsel for the department, nor Shri Andharujina, the learned counsel for the assessee, was able to tell the Court about the fate of those applications, we have considered the questions on merits.

2. The assessee is one of the two daughters of late Dowager Dady Serenebai J. Jeejeebhoy. The proceedings relate to her wealth-tax assessment for the assessment years 1961-62 and 1963-64 for which the valuation dates are 31-3-1961 and 31-3-1963.

Late Dowager Dady Serenebai J. Jeejeebhoy had created a trust under her will dated 14-10-1933. The provision in the will as per clause 12 thereof was as follows:

"My trustees shall held and stand possessed of my said property and the investment for the time being representing the same (hereinafter called "The Residuary Trust Estate") upon trusts following (that is to say):

(a) Upon Trust to divide the Residuary Trust Estate into two separate equal parts, and

(b) Upon to hold and stand possessed of one of such part In Trust to pay the income thereof to my daughter Ruttonbai during her life so that during coverture the same shall be for her separate use without power of anticipation....

(ii) To hold and stand possessed of the other of such equal part of the Residuary Trust Estate upon the like trusts and subject to the like powers and provisions in favour of my daughter Aimy and her issue...."

The assessee is, thus, entitled to and receives the income from one of the two parts of the trust fund so created for life subject to the condition that during coverture the said income shall be for her separate use without power of anticipation. The question that arose before the wealth-tax authorities was whether her right to receive income from one part of the trust fund was an "asset" within the meaning of section 2 (e) of the Wealth-tax Act, 1957 ("the Act"). If so, whether despite the fact that such a right could not be sold as such, it could be valued u/s 7(1) of that Act. Alternatively the question was whether the right to receive the income for life was "annuity", and if so, whether it was not commutable. It is common ground that if such a right constituted "annuity" and it was found to be non-commutable, it will fall within the exceptions and will not be an "asset" u/s 2(e).

3. The WTO held that the right to receive income for life was an "asset" and that the same could be valued u/s 7(1). He also held that it was not an annuity. The AAC, on the other hand, held that the assessee's right to receive income of the trust fund for life was annuity which was not commutable. He held that the said right was, therefore, exempt from wealth-tax. For his aforesaid conclusion, the AAC followed the order of the Tribunal dated 21-4-1964 in the assessee's own case for the assessment year 1959-60 in WT Appeal No. 680 of 1961-62.

The Tribunal dismissed the departmental appeals for the same reasons. The question having been raised, even though it was not necessary to get the valuation of the life interest estimated, the Tribunal got that done u/s 24(6) of the Act. The valuation of an asset done u/s 24(6) is binding not only on the

parties but also on the Tribunal. Valuation of the aforesaid right interest for the assessment year 1961-62 is Rs. 3,65,460 and it is Rs. 4,07,564 for the assessment year 1963-64. The Tribunal's earlier orders dated 21-4-1964 and 27-7-1964 are also annexed to the statement of the case.

4. Shri Jetly took us through all the three Tribunal's orders. He stated that the Tribunal had treated the assessee's right to income, i.e., life interest to the income from the trust fund, as "asset". However, the Tribunal had further held that such an interest was incapable of valuation u/s 7(1) as it could not be sold there being a ban on its alienation. The Tribunal, he pointed out, also held that the interest was annuity which was not commutable and as such the life interest was not an "asset" within the meaning of section 2 (e).

Placing reliance on this Court's decision in the case of CWT v. Purshouam N. Amersey [1969] 71 ITR 180 (Bom.) , which was confirmed by the Supreme Court in Purshottam N. Amarsay and Another Vs. The Commissioner of Wealth Tax, Bombay, , Shri Jetly submitted that the expression if sold in the open market" used in section 7(1) did not contemplate actual sale or the actual state of the market. It was merely to be assumed that there was an open market and the property could be sold in such a market. The value of the property was to be found out on that basis. As regards the conclusion of the Tribunal that the life interest herein was annuity, Shri Jetly relied on the Supreme Court decisions in the cases of Commissioner of Wealth-tax Vs. P.K. Banerjee (decd., by legal representatives), and Nawab Sir Mir Osman Ali Khan v. CIT [1986] 162 ITR 888/ 28 Taxman 641 (SC) for the proposition that in order to constitute annuity the payment to be made periodically had to be a fixed or predetermined amount. It must not be liable to variation depending upon or on any ground relating to the general income of the fund or estate which was charged for such payment. In the present case, it was pointed out, the assessee was not entitled to a fixed sum every year but 50 per cent share of the income of the trust fund. The right to receive income from the trust fund, i.e., life interest herein, being not "annuity", he contended, it was not necessary to further consider whether it was or was not commutable.

5. Shri Andharujina, the learned counsel for the assessee, on the other hand, strongly relied on the orders of the Tribunal. He pointed out that the trust fund itself was divided into two parts. The assessee was entitled to under the settlement the whole income from one part of the trust fund and not 50 per cent of the income of the entire trust fund. This fact, according to him, should justify the conclusion that the life interest was annuity. The intention of the settlor was stated to be obvious inasmuch as the entire income from one part of the trust fund was to be received by the assessee without any deduction whatsoever. The life interest being admittedly not commutable, he stated that right to receive income from the trust fund for life was excluded from the purview of "asset". In any event being not saleable, it could not be valued u/s 7(1). Its value was, therefore, nil or insignificant as held by the Tribunal.

6. The assessee is admittedly entitled to receive for life the entire income from one part of the trust fund in terms of the will dated 14-10-1933. This is, of course, subject to the condition that during coverture this income shall be for her separate use without power of anticipation. The first question is whether such an interest is "asset" under the Act.

Section 2(e) defines "asset" as under :

" Definitions. - (a) to (d) ****

(e) "assets" includes property of every description, movable or immovable, but does not include,-"

The section itself evidently provides that certain types of assets shall not constitute "asset" for the purpose. One such exemption is found in item (iv) which reads, thus:

"(iv) a right to any annuity in any case where the terms and conditions relating thereto preclude the commutation of any portion thereof into a lump sum grant;"

We will first examine whether the assessee's life interest herein is an "asset" independent of item (iv) of section 2(c)(1). We will then consider whether such an interest falls within the exception item (iv) so as to take it out of the definition of "asset".

7. The word "property" is not defined under the Act. But it has been held by the Supreme Court in the case of Ahmed G.H. Ariff and Others Vs. Commissioner of Wealth Tax, Calcutta, that "property" is a term of widest import and, subject to any limitation which the context may require, it signifies every possible interest which a person can hold and enjoy. Accordingly, we have no difficulty in holding that the assessee's life interest is an "asset".

8. This takes us to the second pertinent question, namely, whether this interest also falls within the exception section 2(e)(1)(iv) so that it will not be treated as an asset u/s 2 (e). The question, thus, is whether the said interest is a right to annuity which cannot be computed into a lump sum grant. For this purpose, it would be necessary to first consider whether the said interest is a right to annuity. But this question does not present any problem in view of the Supreme Court decision in more than one case. In P.K. Banerjee's case (supra), the expression "annuity" directly came up for consideration before the Supreme Court. The assessee in that case was entitled to receive the entire income of a fund. The Tribunal had held that such an interest was not "annuity". The Allahabad High Court, on the other hand, held that it was "annuity". Reversing the decision of the Allahabad High Court, the Supreme Court held that what was payable to the assessee was not a periodical payment of a definite and predetermined sum of money but only the net income of the trust funds as in this case. Although it was possible to predicate at any given point of time such income with some certainty having regard to the fact that the trust fund in that case consisted of the Government loan bonds or securities, yet the Supreme

Court held-

"On a consideration of the decisions cited before us, we feel that in order to constitute an annuity, the payment to be made periodically should be a fixed or pre-determined one, and it should not be liable to any variation depending upon or on any ground relating to the general income of the fund or estate which is charged for such payment. In the instant case, as observed in the case of Her Highness Maharani Gayatri Devi of Jaipur [1971] 82 ITR 699 (SC), what we have to see is the intention of the settlor, whether he wanted that the assessee should get a pre-determined sum every year or whether the assessee should get the whole net income of the trust fund. Since the intention of the settlor was indisputably the latter one, the right of the assessee cannot be treated as an annuity. An additional factor which requires us to take the same view is that under the trust deed the trustees had been given the power to reinvest the proceeds of the Government securities which leads to the possibility of variation of the income and consequently of the amount to be received by the assessee. The fact that no such reinvestment had taken place during the relevant years is immaterial." (p. 654)

This question again came up before the Supreme Court recently in the case of Nawab Sir Mir Osman Ali Khan (supra). The subject-matter of consideration in that case was a sum of Rs. 25 lakhs paid to the assessee annually by the Government in lieu of the income from the Sarf-e-Khas. Referring to its earlier decisions in the cases of CWT v. Her Highness Maharani Gayatri Devi of Jaipur [1971] 82 ITR 699 (SC) and P.K. Banerjee's case (supra), it was held that having regard to the terms of payment and the circumstances under which the payment was made, there cannot be any doubt that Rs. 25 lakhs paid annually was annuity. It was a fixed sum to be paid out of the property of the Government in lieu of the previous income of the assessee from Sarf-e-Khas and was, therefore, an annuity. The aforesaid two decisions were distinguished as in both these cases what was paid was not a fixed sum but income. It was 50 per cent of the income in Her Highness Maharani Gayatri Devi of Jaipur's case (supra) whereas it was 100 per cent in the case of P.K. Banerjee (supra).

9. In our judgment, the ratio of the aforesaid two decisions is squarely applicable in this case. The intention of the settlor is clear from the terms of the will. What is granted is the income and not a fixed sum. Following the abovesaid two Supreme Court decisions, we hold that the assessee's right to receive income was not and could not be treated as annuity within the meaning of section 2(e)(1) (iv). Once it is held that it was not an annuity, the further question whether it is commutable becomes irrelevant and, therefore, does not warrant consideration.

10. We have, therefore, to proceed that the assessee's life interest to income of the fund is "asset" u/s 2 (e). The next and the last pertinent question is whether in view of the fact that such an interest is not saleable, it can at all be valued u/s 7(1) of the Act. Here again the question, it appears to us, is squarely covered by this Court's judgment in Purshottam N. Amersey's case (supra). This Court

observed in that case:

"(ii) Section 7 merely deals with the mode in which the value of assets has to be determined and, though the charging section, because of its opening words "subject to the other provisions contained in this Act", must be held to be subject to section 7(1), section 7(1) could not be utilised to nullify the provisions of section 3 itself. The words "if sold in the open market", in section 7(1) do not contemplate any actual sale or the actual state of the market, but only enjoin that it should be assumed that there is an open market and the property can be sold in such a market and on that basis the value should be found out. It is a hypothetical case which is contemplated by those words of the sub-section. The Tax Officer must assume that there is an open market in which the asset can be sold and proceed to value it on that basis. The use of the words "if sold" creates a fictional position which the Tax Officer has to assume.

(iii) The mere fact that the property was not capable of being transferred is not a consideration which ought to prevail. The Tribunal committed an error in that respect as it considered the actual position in the actual market, whereas upon the statute what they should have considered is, assuming a hypothetical market, what would be the price if the interest was sold." (p. 181)

This Court's above decision was, it may be stated, affirmed by the Supreme Court in *Purshottam N. Amersey's case* (supra). Accordingly we hold that the life interest requires to be and could be valued u/s 7(1). The Tribunal, it has already been stated earlier, has referred to the valuation of such an interest by the arbitrators u/s 24(6).

In the circumstances, we answer both the questions in the negative and in favour of the revenue. No order as to costs.