

(1979) 12 AHC CK 0013

In the Allahabad High Court

Case No : Wealth-tax Reference No. 700 of 1978

Commissioner of Wealth-tax

APPELLANT

Vs

Sheela Devi Goel

RESPONDENT

Date of Decision : 04-12-1979

Acts Referred:

Finance Act, 1971 — Section 32
Wealth Tax Act, 1957 — Section 35, 5(1)

Citation : (1980) 16 CTR 127 : (1981) 132 ITR 517

Hon'ble Judges : R.R. Rastogi, J;G.P. Singh, J

Bench : Division Bench

Advocate : R.K. Gulati and A. Gupta, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

Rastogi, J.—This reference u/s 27(3) of the W.T. Act, 1957, hereafter referred to as " the Act" relates to the assessment years 1964-65 to 1969-70. The respondent-assessee, an individual, was, inter alia, assessed to wealth-tax on the value of the jewellery amounting to Rs. 60,000, Rs. 62,000, Rs. 64,000, Rs. 66,000 and Rs. 70,000 for the aforesaid years, respectively, by the WTO, after repelling her; contention that the jewellery was not liable to tax since the jewellery being for her personal use was exempt u/s 5(1)(viii) of the Act. The AAC, on appeals against those orders, following the decision of the Supreme Court in Commissioner of Wealth-tax, Gujarat Vs. Arundhati Balkrishna, , accepted the assessee's contention and directed the exclusion of the aforesaid value of jewellery.

2. By Section 32 of the Finance (No. 2) Act, 1971, Section 5(1)(viii) of the Act was amended with retrospective effect from April 1, 1963, and the words "but not including jewellery" were inserted as a result of which jewellery was taken out of the exempted category of wealth, The aforesaid amendment further inserted at the end of Section 5(1)(viii) two provisos and two Explanations giving an enlarged meaning to the word "jewellery". These insertions were to have

effect from April 1, 1972. The WTO, in view of this amendment, made an application u/s 35 of the Act before the AAC for a rectification of the appellate order made in the appeals for the aforesaid years. It was stated in that application that the exemption allowed in respect of jewellery in view of the aforesaid amendment was a mistake apparent from the record and hence should be rectified. The AAC rejected that application and, being aggrieved, the revenue preferred appeals before the Appellate Tribunal. The Tribunal by a consolidated order dated 28th June, 1976, dismissed those appeals and hence at the instance of the Commissioner of Wealth-tax and in compliance with the direction issued by this court, the following question of law has been referred for our opinion:

"Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was correct in law in holding that the allowance of exemption on the value of the jewellery in the light of the retrospective amendment to the Wealth-tax Act, 1957, was not a mistake apparent from the record capable of being rectified u/s 35 of the Wealth-tax Act, 1957?"

3. It was submitted before us on behalf of the department by Sri Ashok Gupta, advocate, that the Appellate Tribunal erred in holding that the mistake occasioned as a result of the amendments made by the Legislature in the relevant provisions of the Act did not amount to a mistake apparent from the record and that the amending provision involved a debatable question. In our opinion, there is considerable substance in this submission. It would be seen that the amendment made in Section 5(1)(viii) by inserting the words " but not including jewellery " and thereby taking out the jewellery from the exempted category of wealth is to have retrospective effect from April 1, 1963. The provisos and Explanations added to this clause by the aforesaid amendment give an enlarged meaning to the word "jewellery" but these insertions were given prospective effect, i. e., they were to come into effect from April 1, 1972. Relying on the decision of the Bombay High Court in the case of J.M. Shah Vs. J.M. Bhatia, Appellate Assistant Commissioner of Wealth Tax and Others, , the Appellate Tribunal took the view that the applicability of the amending provision to a completed assessment is a debatable point and, as such, it could not be said that there was a mistake apparent from the record which could be rectified u/s 35 of the Act. The view taken by the Bombay High Court in the case of J.M. Shah Vs. J.M. Bhatia, Appellate Assistant Commissioner of Wealth Tax and Others, appears to us to run counter to the view taken by the Supreme Court on this question. In J.M. Shah Vs. J.M. Bhatia, Appellate Assistant Commissioner of Wealth Tax and Others, in the wealth-tax assessment of the petitioner-assessee for the assessment year 1969-70, the AAC by his order dated June 26, 1970, excluded from the assessment of the wealth of the assessee a sum of Rs. 4,15,942 being the value of jewellery and ornaments, on the ground that they were intended for the personal use of the assessee within the meaning of the then existing provision of Section 5(1)(viii) of the Act. After the amendments made in the aforesaid provision by the Finance (No. 2) Act, 1971, the AAC passed an order of rectification u/s 35 of the Act on February 22, 1972,

withdrawing the exemption granted to the assessee in respect of jewellery and ornaments and including the value thereof in the net wealth of the assessee. The assessee filed a writ petition challenging the rectification order and on behalf of the assessee two submissions were made before the Bombay High Court : firstly, that since the original assessment when made, was in accordance with law, there was no error apparent on the face of the record which the AAC could rectify and, secondly, that the question as to whether the Amending Act applies to assessments which were already completed was, in any event, a debatable question. In regard to the first question it was almost conceded that the matter was concluded by the decision of the Supreme Court in the case of M.K. Venkatachalam, I.T.O. and Another Vs. Bombay Dyeing and Mfg. Co., Ltd., and no further argument was advanced. The second contention was pressed on behalf of the assessee and an attempt was made to distinguish the case of Bombay Dyeing Company and the High Court accepted the contention and held that the question as to whether a completed assessment was intended to be affected by the amendment in question was a debatable one and hence the power of rectification u/s 35 could not be invoked. We, however, find that on a reading of the decision in M.K. Venkatachalam, I.T.O. and Another Vs. Bombay Dyeing and Mfg. Co., Ltd., the controversy considered in J.M. Shah Vs. J.M. Bhatia, Appellate Assistant Commissioner of Wealth Tax and Others, does stand resolved.

4. In Bombay Dyeing Company's case, the assessee was assessed for the assessment year 1952-53 and was given credit for a sum of Rs. 50,603-15-0 as representing interest on tax paid in advance u/s 18A(5) of the Indian I.T. Act, 1922. This order was made on October 9, 1952. On May 24, 1953, the Indian I.T. (Amendment) Act, 1953, came into force adding a proviso to Section 18A(5) to the effect that the assessee was entitled to interest not on the whole of the advance tax paid by him but only on the difference between the payment made and the amount assessed. This proviso was deemed to have come into force on April 1, 1952. Hence, the ITO, acting u/s 35 of the Act, rectified the assessment order holding that the assessee was entitled to a credit of only Rs. 21,157-6-0 by way of interest on the tax paid in advance, and issued a notice of demand against the assessee for the balance of Rs. 29,446-9-0. That order was challenged by the assessee by means of a petition under Article 226 of the Constitution. The High Court of Bombay accepted the assessee's contention and held that Section 35 was not applicable as the mistake mentioned in Section 35 had to be apparent on the face of the order and the question could be judged only in the light of the law as it stood on the day when the order was passed. That decision was overruled by the Supreme Court on appeal by special leave and it was held that as a result of the legal fiction brought about as a result of the retrospective operation given to the Amending Act, the subsequently inserted proviso must be read as forming part of Section 18A(5) of the principal Act as from 1st April, 1952, and, consequently, the order of the ITO dated October 9, 1952, was inconsistent with the provisions of the proviso and suffered from a

mistake apparent from the record. The scope of Section 35 of the Act of 1922 was explained and it was observed (p. 150):

"If a mistake of fact apparent from the record of the assessment order can be rectified u/s 35, we see no reason why a mistake of law which is glaring and obvious cannot be similarly rectified. Prima facie, it may appear somewhat strange that an order which was good and valid when it was made should be treated as patently invalid and wrong by virtue of the retrospective operation of the Amendment Act. But such a result is necessarily involved in the legal fiction, about the retrospective operation of the Amendment. Act. If, as a result of the said fiction, we must read the subsequently inserted proviso as forming part of Section 18A(5) of the principal Act as from April 1, 1952, the conclusion is inescapable that the order in question is inconsistent with the provisions of the said proviso and must be deemed to suffer from a mistake apparent from the record."

5. There is another decision of the Supreme Court in which a similar question came up for consideration. In *The Inspecting Assistant Commissioner of Agricultural Income Tax and Sales Tax and Another etc. Vs. V.M. Ravi Namboodiripad, etc.*, assessments were made on March 14, 1962, for the years 1958-59 to 1961-62, in respect of the agricultural income of a Nambudiri illom on the basis of Sub-sections (3) and (4) of Section 3 of the Kerala Agrl. I.T. Act, 1950, as it then stood. Thereafter, the Kerala Legislature passed Act XII of 1964 amending Sub-section (3) and omitting Sub-section (4) of Section 3 with retrospective effect from April 1, 1958. Section 36 of that Act gave power to the Agrl. ITO to rectify the mistakes in an assessment order which were apparent on the face of the record. Having recourse to that power the Agrl. ITO corrected the aforesaid assessments in accordance with the amended provisions. The assessee challenged that order by means of a writ petition under Article 226 of the Constitution in the High Court of Kerala. The High Court took the view that the Agrl. ITO could only have exercised the power of reassessment u/s 35 and not the power of rectification u/s 36. On appeal by special leave, the Supreme Court reversed that decision and, following the decision in *M.K. Venkatachalam, I.T.O. and Another Vs. Bombay Dyeing and Mfg. Co., Ltd.*, held that the Agrl. ITO was empowered to make the rectification u/s 36 of the Act. It would thus be seen that the question of the applicability of an amending provision to a completed assessment is not a debatable point. As noted above, Section 32 of the Finance (No. 2) Act, 1971, inserted the words "but not including jewellery" in Section 5(1) (viii) of the Act and this amendment is to take effect from April 1, 1963. The amended provision thus reads:

"5. (1) Subject to the provisions of Sub-section (1A) wealth-tax shall not be payable by an assessee in respect of the following assets, and such assets shall not be included in the net wealth of the assessee--...

(viii) furniture, household utensils, wearing apparel, provisions and other articles intended for the personal or household use of the assessee, but not including

jewellery."

6. Thus, jewellery intended for personal use which fell among the exempted articles was taken out of that category. As a result of the legal fiction brought about as a result of the retrospective operation given to the aforesaid amendment, it shall be taken that the words " but not including jewellery " formed part of Clause (viii) as from April 1, 1963, and, consequently, the appellate orders passed by the AAC in the appeals against the assessment orders for the years under consideration, dated September 21, 1970, were inconsistent with the aforesaid provisions and suffered from a mistake apparent from the record. If as a result of the said fiction one must read the subsequently inserted words as forming part of Clause (viii) to Section 5(1) of the principal Act as from April 1, 1963, the conclusion is inescapable that the appellate orders of the AAC dated September 21, 1970, were inconsistent with these provisions and must be deemed to suffer from a mistake apparent from the record.

7. The question whether Expln. 1 which was added to Section 5(1)(viii) by Section 32 of the Finance (No, 2) Act of 1971 could or could not be pressed into service while interpreting the word "jewellery" for the period prior to April 1, 1972, came up for consideration before this court in Commissioner of Wealth-tax Vs. His Highness Maharaja Vibhuti Narain Singh, , The view taken was that the word "jewellery" as commonly understood included ornaments made of precious stones, and the Explanation only made explicit what was implicit in the provision from its inception. The decision of the Gujarat High Court in Commissioner of Wealth Tax, Gujarat I Vs. Jayantilal Amratlal, was followed. The view taken in that case was (p. 118):

"Mr. Shah may be right that in a given context the word "include" might import that the enumeration is exhaustive. In the ultimate analysis, however, it is always the question of legislative intent and we are of the opinion that having regard to the obvious fact that gold, silver or platinum ornaments studded with jewels could not have been articles otherwise than of jewellery, Parliament could have only by way of abundant caution thought fit to include the same articles in jewellery by Explanation 1, which has been made effective prospectively."

8. It would, therefore, not be correct that simply because Expln. 1 which gives a wider meaning to the term "jewellery" is made prospective in its application, it would not be available for the assessment year prior to 1972. The upshot of the above discussion is that the appellate order made by the AAC in the appeals against the assessment orders on September 21, 1970, suffered from a mistake apparent on the record as a result of the legal fiction brought about by the retrospective operation given to the amendments made in Section 5(1)(viii) of the principal Act and the WTO was justified in moving the AAC to rectify that mistake and the AAC and the Appellate Tribunal, both, erred in not doing so.

9. We, therefore, answer the question referred in the negative, against the assessee and in favour of the department. Since nobody appeared on behalf of

the assessee there shall be no order as to costs.