

**(1984) 12 PAT CK 0016**

**In the Patna High Court**

**Case No :** Taxation Case No's. 24 to 28 of 1976

Commissioner of Wealth Tax

APPELLANT

Vs

Sheo Kumar Dalmia

RESPONDENT

**Date of Decision :** 20-12-1984

**Acts Referred:**

Wealth Tax Act, 1957 — Section 25(2)

**Citation :** (1985) 33 BLJR 437 : (1985) 48 CTR 290 : (1986) 159 ITR 845

**Hon'ble Judges :** Uday Sinha, J;S. Shamsul Hasan, J

**Bench :** Division Bench

**Advocate :** B.P. Rajgarhia and S.K. Sharan, for the Appellant; L.K. Bajla, for the Respondent

## **Judgement**

Uday Sinha, J.—These are five references u/s 27(1) of the Wealth-tax Act at the instance of the Commissioner of Wealth-tax, Bihar. The five consolidated references are being disposed of by this judgment. The question referred for the opinion of this court is as follows :

"Whether, on the facts and in the circumstances of the case, the Tribunal were correct in law in holding that the Commissioner of Wealth-tax had no power to revise the orders of the Wealth-tax Officer u/s 25(2) because the orders of the Wealth-tax Officer had merged with the order of the Appellate Assistant Commissioner ?"

2. The references before us relate to imposition of penalty for non-filing of returns at the appropriate time. In this reference, we are concerned with the assessment years 1964-65 to 1968-69. The assessee is a Hindu undivided family. The returns of wealth had to be filed by 30th June of each assessment year. They were, in fact, filed for the said five assessment years on October 6, 1969. The returns not having been filed when they were due, the Wealth-tax Officer (hereinafter referred to as "WTO") initiated proceedings u/s 18(1)(a) of the Wealth-tax Act, 1957 (hereinafter called "the Act"), and imposed penalty for each assessment year on the basis of the tax payable by the assessee in the

respective years. The orders imposing penalty are annexure A series to the statement of the case. The assessee preferred appeals to the Appellate Assistant Commissioner against the order of the Wealth-tax Officer imposing penalty. On the date of hearing, however, the assessee withdrew the appeals. The order of August 12, 1971, reads as follows:

"All these five appeals have been withdrawn by the appellant's counsel, vide his signature on the ground of appeal. These appeals are, therefore, dismissed."

3. The assessee thereafter filed an application u/s 18(2A) of the Act to the Commissioner of Wealth-tax (hereinafter called "the Commissioner"), for waiving the penalties imposed by the Wealth-tax Officer. The application was rejected by the Commissioner. The Commissioner observed in his order dated November 17, 1972, that the provisions of Section 18(2A) were not applicable as penalties u/s 18(1)(a) had already been imposed by the Wealth-tax Officer and confirmed by the Appellate Assistant Commissioner. The chapter relating to levy of penalty was thus closed. Later, the Commissioner in exercise of his suo motu powers u/s 25(2) of the Act made it a live issue. Notice was issued accordingly in terms of Section 25(2) of the Act to the assessee. The Commissioner was of the view that the Wealth-tax Officer had not levied penalty in terms of the amended provision of Section 18(1A) of the Act as it stood on the date of passing the orders. In his view, the amount of penalty should have been worked out on the basis of the taxable wealth and not on the basis of the tax payable by the assessee in the respective years. The orders thus being prejudicial to the Revenue, the matter was reopened by the issuance of notice. After hearing the assessee, the Commissioner enhanced the penalties, as mentioned in his order which is annexure-B to the statement of the case.

4. The assessee appealed against the order of the Commissioner to the Appellate Tribunal. One of the submissions urged on behalf of the assessee which found favour with the Tribunal was that the Commissioner of Wealth-tax was not justified in assuming jurisdiction u/s 25(2) of the Act to revise the order of the Wealth-tax Officer as it had merged in the order of the Appellate Assistant Commissioner. The stand of the Revenue, on the other hand, was that the appeals having been withdrawn, there was no order of the Appellate Assistant Commissioner. There was thus no question of merger of the order of the Wealth-tax Officer in the order of the Appellate Assistant Commissioner. The Commissioner, according to the Revenue, had the jurisdiction to revise the order of the Wealth-tax Officer.

5. The short question to be resolved thus is whether the order of the Appellate Assistant Commissioner quoted in paragraph 2 above was a decision on the appeals filed by the assessee and whether the order of the Wealth-tax Officer merged in the order of the Appellate Assistant Commissioner. It is plain that the Commissioner could act in terms of Section 25(2) of the Act only if the order of the Wealth-tax Officer was considered by him to be erroneous. He has no jurisdiction to pass an order in terms of Section 25(2) if orders have been passed

by the Appellate Assistant Commissioner of Wealth-tax. If the order of the Appellate Assistant Commissioner in the instant case is read as an order in the appeal on merits, the Commissioner's order would be without jurisdiction.

6. The question at issue has to be settled in the light of the principle whether the order of the Wealth-tax Officer got merged in the order of the Appellate Assistant Commissioner dated August 12, 1971, quoted above or it stood out as an independent order. Having heard counsel for the parties at length, I am definitely of the view that no question of merger is involved in the instant case. In order to attract the principle of merger, it is essential that an order on merits must have been passed by the appellate or superior authority. In the instant case, no order on merits has been passed. In fact, on the date of hearing of the appeals, there were no appeals on which an order could be passed on merits. The appellant (assessee) sought permission to withdraw the appeals. The learned Appellate Assistant Commissioner granted the prayer. That was the end of the appeals. There was thus no occasion for the Appellate Assistant Commissioner to consider whether the levy of penalty was right or wrong. Until a decision had been given on merits, there could be no question of the doctrine of merger being attracted.

7. It is not necessary to multiply decisions, as the point admits of no difficulty. Reference may be made to a Full Bench decision of the Madhya Pradesh High Court in COMMISSIONER OF Income Tax, M.P. -II Vs. R. S. BANWARILAL, . The point raised in that case was similar to the one before us. Although that was a case of exercise of power u/s 263 of the Income Tax Act, yet the ratio of that case will determine the case u/s 25(2) of the Wealth-tax Act as well. In that case, the facts were that the Income Tax Officer passed an assessment order. The assessee challenged the assessment in appeal challenging the addition in trading account and disallowance of deductions claimed as expenditure. The Appellate Assistant Commissioner upheld the disallowance, but set aside the addition of Rs. 5,000 in the trading account. After the appellate order made by the Appellate Assistant Commissioner, the Commissioner issued notice to the assessee u/s 263(1) of the Income Tax Act, 1961, which is in pari materia to Section 25(2) of the Wealth-tax Act. The Commissioner directed the Income Tax Officer to make a fresh assessment according to law. The assessee preferred an appeal to the Tribunal against the order of the Commissioner but without any success. In the reference before the High Court, it was contended that the order of the Income Tax Officer having merged in the appellate order of the Appellate Assistant Commissioner, the Commissioner had no jurisdiction to invoke the powers u/s 263(1) of the Income Tax Act. The Full Bench laid down that the Commissioner's revisional jurisdiction u/s 263 was available over matters not considered and decided by the Appellate Assistant Commissioner. In regard to other matters, he had no jurisdiction. From this decision, it will be seen that even when there is an appellate order, but it does not cover the entire matter falling for consideration before the Income Tax Officer, the matters which did not fall for consideration before the appellate authority could very well fall within the revisional jurisdiction of the Commissioner. The doctrine of merger was not

attracted although there was an appellate order. The instant case before us must be placed on a much higher footing. In the case before us, the appellate authority was not invited to give its verdict on any of the matters decided by the Wealth-tax Officer. There can, therefore, be no question of merger. The view taken by the Madhya Pradesh High Court, which I am inclined to accept with respect, is based upon the decision of the Supreme Court in *State of Madras Vs. Madurai Mills Co., Ltd.*, and *Commissioner of Income Tax, Bombay Vs. Amritlal Bhogilal and Co.*, and that of the Gujarat High Court in *Karsandas Bhagwandas Patel Vs. G.V. Shah, Income Tax Officer, Rajkot and Others*, .

8. The Income Tax Appellate Tribunal took a contrary view relying upon two decisions of the Supreme Court. In my view, none of those decisions has any application. In *Mela Ram and Sons Vs. The Commissioner of Income Tax Punjab*, , the Supreme Court was concerned with a case where the appellate authority had dismissed the appeal on the ground of limitation. In those circumstances, the Supreme Court laid down that the decision of an appeal on a preliminary issue such as limitation and the like are also orders of affirmance. The proposition cannot be disputed, but the instant case, is not one of dismissal of appeal on the ground of limitation or on the ground of any preliminary objection regarding the maintainability of the appeal. The instant case is one where the appeals were withdrawn and the Appellate Assistant Commissioner was forestalled from giving his verdict on merits. This case of the Supreme Court can be of no avail to the assessee.

9. I am a little surprised at the Tribunal placing reliance upon *Commissioner of Income Tax, Bombay Vs. Amritlal Bhogilal and Co.*, . The passage quoted by the Tribunal is entirely irrelevant. There can be no doubt that where the appellate authority modifies, reverses or confirms, there is a decision of the appellate authority, but where there is no decision of the appellate authority, the question of modification, reversion or confirmation does not arise. The Tribunal failed to take note of the following observation in the case of *State of Madras Vs. Madurai Mills Co., Ltd.*, which runs as follows (p. 149 of STC and p. 683 of AIR):

"But the doctrine of merger is not a doctrine of rigid and universal application and it cannot be said that wherever there are two orders, one by the inferior tribunal and the other by a superior tribunal passed in an appeal or revision, there is a fusion or merger of two orders irrespective of the subject-matter of the appellate or revisional order and the scope of the appeal or revision contemplated by the particular statute."

10. If the above observations had been taken note of, the Tribunal would not have been derailed. The reliance placed upon *Commissioner of Income Tax, Calcutta Vs. Rai Bahadur Hardutroy Motilal Chamaria*, was equally misplaced. In my view, *Commissioner of Income Tax, Bombay Vs. Amritlal Bhogilal and Co.*, laid down the law exactly contrary to what the Tribunal understood.

11. Having given my best consideration to every aspect of the matter, I have not

the least doubt that the Tribunal was absolutely wrong in holding that the Commissioner of Wealth-tax had no power to revise the order of the Wealth-tax Officer on the basis that it had merged with the order of the Appellate Assistant Commissioner. The appeals having been withdrawn, there was no question of merger of the two orders.

12. For the reasons indicated above, the reference is answered in the negative, in favour of the Revenue and against the assessee. In the circumstances of the case, there shall be no order as to costs.

13. Paragraph 14 of the order of the Tribunal shows that the submission regarding merger having been accepted by the Tribunal, the other submissions urged on behalf of the assessee were not considered. The assessee is entitled to consideration by the Tribunal on those facts as well. It will, therefore, now be for the Tribunal to consider the other submissions urged on behalf of the assessee and dispose of the appeals in accordance with law.

S. Shamsul Hasan, J.

14. I agree.