

(2005) 09 AHC CK 0327

In the Allahabad High Court

Case No : Wealth Tax Reference No. 31 of 1997

Commissioner of Wealth Tax

APPELLANT

Vs

Someshwar Saran Kothiwal

RESPONDENT

Date of Decision : 30-09-2005

Acts Referred:

Constitution of India, 1950 — Article 14
Income Tax Act, 1961 — Section 147, 148, 271(1)
Wealth Tax Act, 1957 — Section 16A, 16A(1), 18(1), 23(5), 27(1)
Wealth Tax Rules, 1957 — Rule 1BB, 3B

Citation : (2006) 205 CTR 448 : (2006) 285 ITR 185 : (2007) 160 TAXMAN 132

Hon'ble Judges : Rajes Kumar, J; R.K. Agrawal, J

Bench : Division Bench

Advocate : S.C, for the Appellant;

Judgement

Rajes Kumar, J.—At the instance of the Revenue Tribunal has referred the following three questions u/s 27(1) of the Wealth-tax Act, 1957 (hereinafter referred to as "the Act") for opinion of this Court relating to the assessment years 1980-81 to 1983-84:

"1. Whether on the facts and in the circumstances of the case, the I.T.A.T. is right in law in holding that the CWT (Appeals) was bound to get the matter of valuation of property referred to the Valuation Officer before enhancing the value of the same, while disposing of the appeal u/s 23(5) of the W.T. Act, particularly when the matter of valuation of property was not referred to the Valuation Officer by the Assessing Officer ?

2. Whether on the facts and in the circumstances of the case and having upheld the orders of the CWT (Appeals) in quantum appeal, the I.T.A.T. is legally correct in holding that the assessee is not debarred from raising the plea of illegality of assessment for the limited purpose of penalty proceedings ?

3. Whether on the fact and in the circumstances of the case, the Tribunal was legally correct in allowing the appeals of the assessee against the imposition of

penalties of Rs. 11,364/-, Rs. 17,206/-, Rs. 19,688/- and Rs. 16,462/- under Section 18(1)(c) of the W.T. Act for the assessment years 1980-81, 1981-82, 1982-83 and 1983-84 respectively ?"

2. Brief facts of the case are as follows:

Assessee respondent (hereinafter referred to as "Assessee") is an individual. His assets for the purposes of wealth-tax included various house properties, including 1/4th share in property known as "Town Hall" property, Moradabad. The other three co-owners of this property are assessee's brothers. The assessee had disclosed value of his share in the said property at Rs. 65,541/-, Rs. 71,491/-, Rs. 71,491/- and Rs. 71,905/- for the respective assessment years. This was accepted by the Assessing Officer when he framed the assessment. The assessee, however, went in appeal before the learned Commissioner of Wealth-tax (Appeals) agitating the addition made by the Assessing Officer on some other ground. The learned Commissioner of Wealth-tax (Appeals) noted that the value disclosed in respect of Town Hall property was not commensurate with the income from property, inasmuch as, the value disclosed was even less than or near about three times the rental income. The learned Commissioner of Wealth-tax (A) issued a show cause notice to the assessee calling upon him as to why the value should not be enhanced by taking recourse under the Wealth-tax Act and also as to why penalty should not be levied u/s 18(1)(c). The explanation given by the assessee was found unacceptable by the learned Commissioner of Wealth-tax (A) who by applying the Rent Capitalisation Method, enhanced assessee's share in the value of the property to Rs. 2,12,691/- for assessment year 1980-81, Rs. 2,06,741/- for assessment year 1981-82 and 1982-83 and Rs. 2,06,326/- for assessment year 1983-84. Against the order of Commissioner of Wealth Tax (Appeal) assessee filed appeal before the Tribunal. Tribunal has confirmed the order of Commissioner of Wealth Tax (Appeal). It appears that the order of Tribunal has become final inasmuch as the matter has not been further contested by the assessee.

3. In pursuance of the enhancement of the value of the property Commissioner of Wealth Tax (Appeal) also issued show cause notice for the levy of penalty. Explanation furnished by the assessee was rejected by the Commissioner of Wealth Tax (Appeal), who noted that the assessee had not given any basis for returning value of the property, whereas as per Rule IBB the value determined was far more. He levied penalty u/s 18(1)(e).

4. Against the order of Commissioner of Wealth Tax (Appeal) against the levy of penalty u/s 18(1)(c) of the Act, dealer filed appeal before the Tribunal. Tribunal has allowed the appeal and deleted the penalty. Tribunal held as follows:

"We have heard the learned representatives of the parties at length and have also gone through the relevant record. We find ourselves in agreement with the submission made by the learned AR for the assessee that the learned CWT Appeals) having decided to draw the mantle or the Assessing Officer when he

proposed enhancement of the value of the property was legally required to make a reference to the Valuation Officer u/s 16A of the Wealth-tax Act, when admittedly the provisions of Rule IBB of the WT Rules are not applicable, the property being commercial. Even for the limited purpose of finding out the multiplier the learned CWT Appeals) could not have at his own taken recourse to the provisions of Rule IBB when admittedly Rule IBB is not attracted. Having not made a reference u/s 16A the learned CWT Appeals) committed an error of law which touches the every validity of his order. It is settled proposition of law that the provisions of Section 16A(1) clause (b) when read with Rule 3B of the Wealth-tax Rules, 1957 mandatorily require the WTO to make a reference to the Valuation Officer even when the difference in the value of assets returned by the assessee and the fair market value of the asset as estimated by the WTO is more than the limit prescribed under Rule 3B, as held by Hon''ble Punjab & Haryana High Court in the case of Rajpal Oswal (supra). We cannot ignore the fact that the assessee had specifically requested the learned CWT (Appeals) to make such a reference. Similar view is taken in Delhi High Court judgment in the case of Sharbati Devi Jhalani (supra). No doubt the enhanced value of the property stands confirmed by the Tribunal, yet the assessee is not debarred from raising the plea of invalidity of assessment during the course of penalty proceedings, when no penalty can be levied unless the assessment framed is valid. We are not impressed with the arguments of the learned DR that once the enhanced value stands confirmed by the Tribunal, its findings are conclusive for the purpose of levy of penalty. In the case of Commissioner of Income Tax Vs. Gurudayalram Mukhlal, , it has been held that the findings given in assessment proceedings, though relevant and admissible material in penalty proceedings, cannot operate as res judicata."

5. Heard learned counsel for the parties.

6. Learned Standing Counsel submitted that against the order of Commissioner of Wealth Tax (Appeals) enhancing the valuation of the property Assessee filed appeal before the Tribunal. Tribunal upheld the order of Commissioner of Wealth Tax (Appeals). The order of Tribunal has been accepted by the assessee and no reference against the said order has been filed. Therefore, the said order has become final. Learned Standing Counsel submitted that by accepting the order of the Tribunal it amounts to that the assessee has accepted the valuation determined by the Commissioner of Wealth Tax (Appeals) and it was not open to the assessee to challenge the said valuation before the Tribunal in penalty proceedings on the ground that since there was a difference in the valuation shown by the assessee and valuation proposed by the Commissioner of Wealth Tax (Appeals), on the request being made by the assessee for referring the matter to the Valuation Cell u/s 16A of the Act, Commissioner of Wealth Tax (Appeals) ought to have refer the matter to the valuation cell as was mandatory and since it has not been referred estimate of the valuation was unjustified and could not be made basis for the levy of penalty. He submitted that the Tribunal has illegally emenau the aforesaid plea of the assessee and deleted the

penalty on the ground that Section 16A of the Act read with Rule 3-B of the Wealth Tax Rules was mandatory and reference ought to have been made to the Valuation Cell when the assessee had specifically" requested the Commissioner of Wealth Tax (Appeals) to make such reference. He further submitted that the reference u/s 16A of the Act depends upon the various circumstances which requires adjudication. He further submitted that Section 16A of the Act is not-mandatory. In support of his contention he relied upon the decision of Delhi High Court in the case of Sharbati Devi Jhalani Vs. Commissioner of Wealth Tax, Delhi-VII, and others, . He further submitted that only in a situation where the order is abinitio void a plea can be taken in a penalty proceeding but in a case where some procedural requirement has not been complied with and which is curable. Such plea can not be raised in the penalty proceeding in as much as for the want of non-compliance of such procedural requirement valuation can not be challenged and penalty can not be deleted on this ground. In support of his contention he relied upon the decision of the Apex Court in the case of GUDUTHUR BROS. Vs. Income Tax OFFICER, SPECIAL CIRCLE, BANGALORE.,

7. Learned Counsel for the assessee submitted that penalty proceeding is independent proceeding to the assessment proceeding and it was open to the assessee to raise the plea that the valuation taken by the Commissioner of Wealth Tax (Appeals) was not justified in as much as the matter has not been referred to the Valuation Cell u/s 16A of the Act inspite of the request made by the assessee to make such reference. He further submitted that the reference to the Valuation Cell in a case, where there was a difference in the valuation of the property shown by the assessee and proposed by the revenue and the assessee did not accept such proposed valuation, ought to have been made u/s 16A of the Act. He submitted that reference to the Valuation Cell u/s 16A of the Act in the circumstances was mandatory and in the absence of such reference the valuation taken by the Commissioner of Wealth Tax (Appeals) was not justified and could not be made basis for the levy of penalty u/s 18(1)(c) of the Act. He further submitted that there was no concealment on the part of the assessee in showing the valuation of the property and therefore, the levy of penalty u/s 18(1)(c) of the Act was unjustified. In support of his contention he relied upon the following decisions:

1. Commissioner of Income Tax Vs. Gurudayalram Mukhlal,
2. MANEY AND CO. Vs. COMMISSIONER OF Income Tax, KERALA., .
3. Raj Paul Oswal Vs. Commissioner of Wealth-tax, .
4. Sharbati Devi Jhalani Vs. Commissioner of Wealth Tax, Delhi-VII, and others, .
5. The Commissioner of Income Tax Madras Vs. Khoday Eswarsa and Sons, .
6. Vishwakarma Industries Vs. Commissioner of Income Tax, .
7. Commissioner of Income Tax Vs. Chetan Dass Lachhman Dass, .

8. Commissioner of Income Tax Vs. H. Abdul Bakshi and Bros., .

9. Commissioner of Income Tax Vs. Bimal Kumar Damani, .

8. We have given our anxious consideration to the various submissions made by learned counsel for the parties.

9. Appeal is merely a continuation of the original proceedings. First appellate authority has plenary powers in disposing of the appeal. His power is coterminous with that of assessing officer. He can do what assessing authority can do. In this view of the matter, Commissioner of Wealth Tax (Appeals) had proposed to enhance the valuation of the property exercising the powers of the assessing authority. Since the Commissioner of Wealth Tax (Appeals) had proposed to enhance the valuation of the property and was exercising the power of the assessing authority in case of difference in the valuation shown by the assessee and the valuation proposed on the request of the assessee being made for referring the matter to the Valuation Cell, the Commissioner of Wealth Tax (Appeals) ought to have refer the matter to the Valuation Cell. In the case of Sharbati Devi Jhalani Vs. Commissioner of Wealth Tax, Delhi-VII, and others, , Delhi High Court held that Section 16A of the Act is mandatory. Division Bench of the Delhi High Court held as follows:

" We are unable to agree with the submission of the learned counsel for the Revenue. Section 16A read with Rule 3B clearly lays down the circumstances under which reference is to be made by the Wealth-tax Officer to the Valuation Officer. There can be no doubt that valuation of assets is a specialised job. The Wealth-tax Officer cannot be expected to know the correct value of difference types of assets. If the Wealth-tax Officer agrees that the value returned by an assessee is correct, then the question of applying Section 16A does not arise. If the value proposed by the Wealth-tax Officer is different from the value returned, then the Wealth-tax Officer should intimate to the assessee as to what should be the correct value of the asset. This is implicit in Section 16A. If the assessee agrees to the valuation proposed by the Wealth-tax Officer, then again the question of making any reference to the Valuation Officer would not arise. Where, however, the difference in the value returned and the value estimated is more than what is prescribed in rule 3B, and if the assessee wants a reference to be made, then, in our opinion, the Wealth-tax officer would have no option but to make the requisite reference. The Wealth-tax Officer cannot, thereafter, pick and choose cases where he would or would not make such a reference. To read Section 16A in the manner in which the learned counsel for the - respondents wants us to read, would amount to giving arbitrary powers to the Wealth-tax Officer. Giving of such a power may invite attack on it on the ground of its being arbitrary and thereby being violative of Article 14 of the Constitution. The word "may" in Section 16A(1) has to be read not only with Section 16A(s) but also with Section 16A(1)(b)(i) and (ii). The present case falls u/s 16A(1)(b)(i). If the value as computed according to the rule ID is in excess of what is returned by the assessee, then, at the instance of the assessee, a reference has to be made

to the Valuation Officer. It is only in cases u/s 16A(1)(b)(ii) that the Wealth-tax Officer has the discretion to refer or not to refer the question of the value of an asset to the Valuation Officer. It is now well settled that in certain circumstances the word "may" can mean "shall". In the context in which the word "may" is used in section 16A, we have no doubt that where there is question of conflict of opinion with regard to the value of a particular asset, then the word "may" has to mean "shall" and, on the being called to do so, the Wealth-tax officer has to refer the question of valuation of the asset to the Valuation Officer.

The aforesaid circular clearly states that the provisions of section 16A are mandatory and not directory as contended by the learned counsel for the respondents. The Wealth-tax Officer is bound by the circular issued by the Central Board of Direct Taxes and, in our opinion, the interpretation of the said provision by the Central Board of Direct Taxes is correct."

10. In view of the foregoing discussions question No. 1 is answered in affirmative, i.e. in favour of the assessee and against the Revenue.

11. Now coming to the question No. 2. It is true that the penalty proceeding is independent proceeding to the assessment proceeding and it is open to the assessee to adduce fresh evidence to justify its stand that there was no concealment. (Vide judgments *MANEY AND CO. Vs. COMMISSIONER OF Income Tax, KERALA.*, , *Raj Paul Oswal Vs. Commissioner of Wealth-tax*, , *Sharbati Devi Jhalani Vs. Commissioner of Wealth Tax, Delhi-VII*, and others,) but the question for consideration is whether a valuation of property estimated by Commissioner of Wealth Tax (Appeals) as confirmed by the Tribunal and has become final in the assessment proceeding can be challenged in the penalty proceeding on the ground of non-compliance of a procedural requirement which was curable in nature.

12. The reference u/s 16A of the Act to the Valuation Cell depends upon the various circumstances and is a matter of adjudication. It is true that there was a difference in the valuation shown by the assessee and the valuation proposed by the Commissioner of Wealth Tax (Appeals) and the assessee had asked for referring the matter to the Valuation Cell, the matter ought to have been referred to the Valuation Cell. The valuation assessed by the Commissioner of Wealth Tax (Appeals) without referring the matter to Valuation Cell has been confirmed by the Tribunal in appeal and assessee has accepted the order of the Tribunal and has not challenged further. Therefore, order of Commissioner of Wealth Tax (Appeals) and Tribunal had become final. Thus it is implicit that the valuation made by the Commissioner of Wealth Tax (Appeals) has been accepted by the assessee and therefore, it was not open to the assessee to challenge the valuation in a collateral proceeding namely, in penalty proceeding in ITR No. 170 of 1990 in the case of *Bharat Rice Mill v. CIT* decided on 09.05.2005 assessment u/s 147 of the Income Tax Act was reopened. In the proceeding u/s 147 of the Income Tax Act assessee had not challenged the initiation of the proceeding on the ground that reason has not been recorded before issuing the notice u/s 148

of the Income Tax Act. However, in penalty proceedings u/s 271(1)(c) of the Income Tax Act it was raised that the entire proceeding u/s 147 of the Income Tax Act was bad because notice u/s 148 of the Income Tax Act was issued without recording the reasons, which was condition precedent. Division Bench of this Court after considering the various decisions held that since reassessment order have not been challenged in appeal or in any proceeding, it can not be held to be void order in collateral proceeding. In this view of the matter question No. 2 is answered in negative, i.e. In favour of the Revenue and against the assessee.

13. So far as question No. 3 is concerned let us examine whether on the facts and circumstances of the case Tribunal was right in allowing the appeal and deleting the penalty.

14. Section 18(1)(c) of the Act reads as follows:

"18. (1) If the Wealth-tax Officer, Appellate Assistant Commissioner, [Commissioner (Appeals)], Commissioner or Appellate Tribunal in the course of any proceedings under this Act is satisfied that any person-

(c) has concealed the particulars of any assets or furnished inaccurate particulars of any assets or debts;"

15. A similar provision relating to levy of penalty for the concealment of income exist under the Income Tax Act, 1961 as Section 271(1)(c). Section 271(1)(c) of the Act came up for consideration in the case of K.C. Builders and Another Vs. The Assistant Commissioner of Income Tax, . Apex Court observed as follows:

"One of the amendments made to the abovementioned provisions is the omission of the word "deliberately" from the expression "deliberately furnished inaccurate particulars of such income". It is implicit in the word "concealed" that there has been deliberate act on the part of the assessee. The meaning of the word "concealment" as found in the Shorter Oxford English Dictionary, third edition, Volume 1, is as follows:-

"In law, the international suppression of truth or fact known, to the injury or prejudice of another."

The word "concealment" inherently carried with it the element of mens rea. Therefore, the mere fact that some figure or some particulars have been disclosed by itself, even if it takes out the case from the purview of non-disclosed, it cannot by itself take out the case from the purview of furnishing inaccurate particulars. Mere omission from the return of an item of receipt does neither amount to concealment nor deliberate furnishing of inaccurate particulars of income unless and until there is some evidence to show or some circumstances found from which it can be gathered that the omission was attributable to an intention or desire on the part of the assessee to hide or conceal the income so as to avoid the imposition of tax therein. In order that a penalty u/s 271(1)(c) may be imposed, it has to be proved that the assessee has consciously made the concealment or furnished inaccurate particulars of his

income."

16. In the present case, valuation disclosed by the assessee has been accepted by the Wealth Tax Officer. Assessee filed appeal against the assessment order-challenging the other additions. In appeal Commissioner of Wealth Tax (Appeals) while deciding the appeal proposed to enhance the valuation of the properties which according to him was not properly valued in as much as it ought to have been valued under Rule IBB. The valuation was not accepted by the assessee and request was made to refer the matter to the Valuation Cell u/s 16A of the Act. The matter has not been referred to the Valuation Cell u/s 16A of the Act which ought to have been referred u/s 16A of the Act being mandatory and the valuation has been enhanced in the absence of the reference to the Valuation Cell. In the circumstances, it is very doubtful whether the valuation adopted by the Commissioner of Wealth Tax (Appeals) though it was confirmed by the Tribunal was correct or not. Assessee all along challenged the valuation made by the Commissioner of Wealth Tax (Appeals) therefore, the difference in the valuation of the property can not be said to be a concealed wealth. In the facts and circumstances no case of concealment of wealth has been made out. In the circumstances, we hold that the Tribunal was right in deleting the penalty.

17. In the result, question No. 1 is answered in affirmative, i.e. in favour of the assessee and against the Revenue. Question No. 2 is answered in negative, i.e. in favour of the Revenue and against the assessee and question No. 3 is answered in affirmative, i.e. in favour of the assessee and against the Revenue.