

(1983) 02 AHC CK 0025

In the Allahabad High Court

Case No : Estate Duty Reference No. 842 of 1977

Controller of Estate Duty

APPELLANT

Vs

Zafrul Hasan

RESPONDENT

Date of Decision : 28-02-1983

Acts Referred:

Estate Duty Act, 1953 — Section 59

Citation : (1983) 34 CTR 328 : (1984) 146 ITR 220 : (1983) 13 TAXMAN 565

Hon'ble Judges : V.K. Mehrotra, J; R.M. Sahai, J

Bench : Division Bench

Advocate : M. Katju, for the Appellant; R.R. Agrawal, R.K. Gulati and R.S. Agrawal, for the Respondent

Judgement

V.K. Mehrotra, J.—Haji Mohammad Hamza of Kanpur died on June 21, 1956. His son, Sri M.A. Barkat, filed details of the estate of the deceased under the provisions of the E.D. Act (briefly, "the Act") as accountable person. Assessment was made by the Dy. Controller of Estate Duty on February 29, 1960. The movable property of the deceased included the value of 204 shares in M/s. U. P. Tannery Co. (P.) Ltd., computed at Rs. 12,59,514. This figure had been arrived at after making allowance for the Income Tax liabilities of the company but it was observed by the Dy. Controller in his order that in case it was found that no Income Tax was payable by the company, the liability of the deceased would be rectified.

2. Section 21 of the K. D. (Amend.) Act, 1958, inserted a new Section 59 in the Act while deleting some sections, including Section 62 of the unamended Act, with effect from July 1, 1960.

3. On February 15, 1962, a notice u/s 59 of the Act was issued to the accountable person by the Asst. Controller saying that he had reason to believe that property chargeable to estate duty had been under-assessed. An objection was filed by Sri Barkat to the effect that assessment proceedings had become final under the unamended Act and could not be reopened. On March 9, 1966,

the Asst. Controller issued a notice fixing March 11, 1966, for hearing in the reassessment proceedings after rejecting the objection. At this, Sri Barkat filed Writ Petition No. 1585 of 1966 in this court challenging the initiation of reassessment proceedings. This writ petition was, however, dismissed by a learned single judge whose decision was affirmed by a Division Bench on May 6, 1970, in Special Appeal No. 114 of 1967. The view taken by the Special Appeal Bench was that the notice of February 15, 1963, had been issued well within the period of three years prescribed u/s 73A of the amended Act as it had been issued within that period from the date of the initial order for assessment, dated February 29, 1960. It also held that there was some material in the possession of the Dy. Controller which could furnish him a ground for believing that property had escaped assessment to estate duty u/s 59(2) of the amended Act.

4. On November 26, 1971, an order of reassessment was passed by the Asst. CED, Kanpur, which was affirmed by the Appellate CED by his decision dated October 10, 1974. The matter was taken up in second appeal before the Income Tax Appellate Tribunal, Allahabad Bench, by the accountable person. The Appellate Tribunal allowed the appeal by its order of October 20, 1976. It took the view that the original proceedings of assessment having become final prior to the enforcement of Section 59 with effect from July 1, 1960, it was not open to reopen the assessment of the estate of the deceased. The Tribunal quashed the order of assessment passed on November 21, 1961, but, at the instance of the Controller, Kanpur, it has referred the question :

"Whether, on the facts and in the circumstances of the case, the reassessment order pursuant to Section 59 read with Section 62 of the unamended Estate Duty Act, 1953, was valid ? "

for the opinion of this court.

5. Sub-section (1) of Section 62 of the unamended Act, which alone is relevant, in its material part, ran thus:

"62. (1) If, after the determination of the estate duty payable in respect of any estate, it appears to the Controller that, by reason of any mistake apparent from the record or of any mistake in the valuation of any property in any case other than a case in which the valuation has been the subject-matter of an appeal under this Act.....the estate duty paid thereon is either in excess of or less than the actual duty payable, he may, either on his own motion... ..at any time within three years from the date on which the estate duty was first determined.....

(b) determine the additional duty payable on the property....."

6. Section 59 of the Act, as amended, providing for escaped assessment in so far it is relevant, is in these terms:

"59. If the Controller,--

(a) has reason to believe that by reason of the omission or failure on the part of

the person accountable.....

(b) has, in consequence of any information in his possession, reason to believe notwithstanding that there has not been such omission or failure as is referred to in Clause (a) that any property chargeable to estate duty has escaped assessment, whether by reason of under-valuation of the property included in the account or of omission to include therein any property which ought to have been included, or of assessment at too low a rate or otherwise, ,

he may at any time, subject to the provisions of Section 73A, require the person accountable to submit an account....."

7. Section 73A which provides for limitation reads, in its material part, as under :

"73A. No proceedings for the levy of any estate duty under this Act shall be commenced-

(a) in the case of a first assessment.....

(b) in the case of a reassessment, after the expiration of three years from the date of assessment of such property to estate duty under this Act."

8. The submission of the counsel for Controller in this court has been two-fold: firstly, that the question about the competence of the Asst. Controller to commence the reassessment proceedings u/s 59 of the amended Act stood concluded between the parties by the decision of this court in special appeal and could not be re-examined by the Tribunal and, secondly, that the view that proceedings which had become final under the unamended Act before July 1, 1960, could not be reopened u/s 59, which was brought on the statute book with effect from July 1, 1960, was erroneous. Both these submissions have been countered by the counsel for the assessee.

9. First, about the effect of the judgment of this court in the writ petition and the special appeal arising therefrom. It appears that the challenge made by the accountable person in the writ proceedings was confined to two counts alone. It was canvassed that there was no material before the Asst. Controller which could induce him to have a reasonable belief that some part of the estate of the deceased had escaped assessment and that, in any case, the initiation of proceedings was barred by limitation. On both these counts this court held against the accountable person. It was found that upon recomputation of the liability of the company under the Indian I.T. Act, 1922, it came to light that the amount deducted towards Income Tax liability from the value of the shares of the deceased in M/s. U.P. Tanneries Co. (P.) Ltd. could not be so deducted with the result that the value of the shares had been wrongly computed at a lower figure, thus reducing the value of the movable property of the deceased which should have been subjected to tax. Also, that reassessment proceedings initiated, through the notice dated February 15, 1963, were within the prescribed period of three years from the date of initial assessment made on February 29, 1960. The reassessment proceedings could, therefore, not be characterised as time-barred.

This court was neither invited to nor went into the question whether reassessment proceedings could be initiated at all u/s, 59 in respect of an assessment which had become final prior to July 1, 1960, when that provision became effective for the first time. It cannot be said that the question referred by the Tribunal for the opinion of this court was finally decided between the parties by an earlier decision of the court in writ proceedings.

10. Our attention has been invited to some decisions by counsel for the accountable person that in the advisory jurisdiction in which we are dealing with the matter, the scope of enquiry to be made by us is confined to the question actually referred for our opinion and that it was not open to the counsel for the Controller to raise the question about the effect of the earlier judgment of this court in the writ proceedings. The decisions are of the Supreme Court and were rendered in *Rm. Ar. Ar. Rm. Ar. Ramanathan Chettiar Vs. Commissioner of Income Tax, Madras*, *Commissioner of Income Tax, Andhra Pradesh Vs. Krishna and Sons*, *Agha Abdul Jabbar Khan v. CIT* [1971] 82 ITR 872 and *Commissioner of Income Tax, Andhra Pradesh Vs. Dhanrajgiri Raja Narasingirji*. The proposition is well settled and need not detain us.

11. Now about the question regarding which our opinion has been sought.

12. The jurisdiction to assess property which had escaped assessment to duty is substantive in nature, for, but for an enabling provision in that regard, the Asst. Controller could not exercise it. Section 59 was brought on the statute book with effect from July 1, 1960, in the first instance. There is no dispute about it. Properly, therefore, it could be resorted to only after that date, as has been done in the instant case. The question is whether the provision could be invoked in respect of assessments which had become final prior to July 1, 1960. It is here that the parties have joined issue.

13. Counsel for the Controller has put his case thus : The provision could be invoked in respect of assessments which had been completed within three years of the date on which the jurisdiction was exercised after July 1, 1960, for that was the period prescribed u/s 73A. Says the counsel, there would be no necessity to read any retrospective operation of Section 59 if it is so construed. He refers to the decision of the Calcutta High Court in *Calcutta Discount Co. Ltd. Vs. Income Tax Officer, Companies District I and Another*, and of the Supreme Court in *Commissioner of Income Tax, Madhya Pradesh, Nagpur and Bhandara Vs. D'costa Brothers*, and *J.P. Jani, Income Tax Officer, Circle IV, Ward G, Ahmedabad and Another Vs. Induprasad Devshanker Bhatt*, in course of his submission. We may deal with them here.

14. In *Calcutta Discount Co. Ltd. Vs. Income Tax Officer, Companies District I and Another*, assessments of the petitioner for the years 1942-43, 1943-44 and 1944-45 had been made u/s 23(3) of the Indian I.T. Act, 1922, by orders dated January 25, 1944, February 12, 1944 and February 15, 1945, respectively. Three notices dated March 28, 1951, were issued u/s 34 of the Act as amended by the

Act of the year 1948, calling upon the petitioner to submit returns of its total income and total world income of the three previous years and pertaining to the aforesaid years of assessment. The jurisdiction of the ITO to proceed with the reassessments was challenged on the ground that the condition-precedent for the issuance of the notice was lacking and also on the ground that Section 34 as amended in the year 1948 had no application to the assessments for the three years, as the amendment had no retrospective operation. Dealing with the second ground of attack, Bose J. observed that the Amending Act had given retrospectivity to the provision contained in Section 34, as amended, only till March 30, 1948, the ITO was not entitled to reopen the assessment for the period in respect whereof assessments had been completed prior to that date, namely, those which had been completed in the years 1944 and 1945. This decision does not assist the learned counsel even in respect of his submission that a provision enabling reassessment was procedural in nature so that it had to be generally assumed retrospective in operation. The matter was taken in appeal by the I.T. Dept. and a larger Bench of the Calcutta High Court construed Section 34, as amended in the year 1948, as enabling the ITO to reopen proceedings in respect of all assessment years ending within eight years from March 30, 1949, and from subsequent dates to be within its purview. It felt that what was not within the purview of the provision was an assessment pertaining to any year which ended before eight years from March 30, 1948. The Bench decision is *Income Tax Officer, Companies District 1, Calcutta and Another Vs. Calcutta Discount Co. Ltd.*, , The company took the matter in further appeal to the Supreme Court. The only question raised was about the notices being invalid on the ground of absence of the necessary condition precedent. The applicability of the amended provision was not assailed as is clear from the decision in *Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another*, .

15. We may notice that the power to make reassessment was contained in Section 34 even prior to its amendment by the Amending Act of the year 1948. Some changes were made by the Amending Act, including, in regard to the period for which assessments could be reopened for the purpose. The larger Bench of the Calcutta High Court was not dealing with a case where the power of reassessment was conferred upon the ITO for the first time in the year 1948.

16. In *S.C. Prashar, Income Tax Officer, Market Ward, Bombay and Another Vs. Vasantsen Dwarkadas and Others*, , the question was about reassessment of income pertaining to assessment year 1942-43. The final order, in this case, had been made by the High Court on October 8, 1953. By that date the period for commencing reassessment proceedings prescribed by Section 34, as amended in the year 1948, had expired. " Reassessment proceedings were taken on April 30, 1954, but before the expiry of the period prescribed by the 1948 amendment, Section 34 was further amended by the I.T. (Amend.) Act, 1953, with effect from April 1, 1952. This amendment provided that nothing in Section 34 limiting the time within which action might be taken was to apply to an assessment or

reassessment made on any person in consequence of or to give effect to any finding or direction contained in an order u/s 66. The Supreme Court took the view that on account of the Amending Act of the year 1953, which enabled action at any time if there was a finding or direction in the nature indicated above, the proceedings commenced by the notice given in the year 1954 were valid. It is obvious that on account of successive amendments, the jurisdiction to undertake reassessment u/s 34 was never barred by limitation. The question about initiation of proceedings for reassessment in a case where the jurisdiction to do so was conferred for the first time in regard to cases finalised before the conferment of jurisdiction neither arose nor was considered in this case too.

17. The decision of the Supreme Court in *J.P. Jani, Income Tax Officer, Circle IV, Ward G, Ahmedabad and Another Vs. Induprasad Devshanker Bhatt*, , really concludes the matter against the Controller. There, the respondent was assessed for the year 1947-48 by an order dated January 31, 1952. On March 27, 1956, a notice u/s 34(1)(a) of the Act of 1922 was issued which, according to the assessee, was not duly served but overruling his objection to that effect an order of assessment was framed on March 29, 1957. This order was, however, set aside by the AAC on January 5, 1963, on the ground that there was no valid service of notice upon the assessee. Meanwhile, the 1922 Act had been repealed and the I.T. Act, 1961, came into force from April 1, 1962. Under this Act, the time for taking action for assessment or reassessment of escaped income had been extended to 16 years from 8 years. On January 4, 1963, the ITO issued a notice calling upon the assessee to show cause why proceedings should not be taken u/s 147 of the 1961 Act which was objected to by the assessee who said that action under the 1922 Act had become time barred and the 1961 Act had no application in his case. Later, a notice u/s 148 of the 1961 Act was issued to him on November 13, 1963, which was followed by another notice dated January 9, 1964, u/s 142(1) thereof.

18. The assessee approached the Gujarat High Court under Article 226 of the, Constitution for relief which quashed the proceedings on its view that the right of the ITO to reopen the assessment of the assessee was admittedly barred u/s 34 of the 1922 Act at the commencement of the 1961 Act so that it was not open to the ITO to reopen the assessment under the 1961 Act. The Supreme Court upheld the view taken by the Gujarat High Court. It reiterated the view taken by it earlier in *S.S. Gadgil, Income Tax Officer, Bombay Vs. Lal and Company*, , wherein it was held that unless there was a clear provision to that effect or necessary implication was discernible in the provisions made, reassessment proceedings could not be undertaken in respect whereof the right had become barred under the unamended provision when the amended provision took effect.

19. In the instant case, there is no express provision enabling reassessment in cases where the proceedings had become final prior to July 1, 1960, nor is there an intendment unmistakably pointing to that effect in any provision of the Act as amended by the E.D. (Amend.) Act, 1958. The jurisdiction to make reassessment

was conferred, in the first instance, with effect from July 1, 1960, and must, therefore, be confined to assessments made from after that date. The right vesting in an accountable person to the finality of an assessment made prior to July 1, 1960, has not been taken away either expressly or by necessary intendment by the Amendment Act of the year 1958 which is prospective in its operation in so far as Section 59 is concerned which was made effective from July 1, 1960. We find no justification for reading the provisions in the manner suggested by the counsel for the Controller.

20. The view taken by us finds support from the decision of the Bombay High Court in *Arvind N. Mafatlal Vs. T.A. Balakrishnan*, Deputy Controller of Estate Duty, Bombay, , of the Gujarat High Court in *Controller of Estate Duty Vs. N.A. Merchant*, and of the Calcutta High Court in *CED v. Ila Das* [1981] 132 720.

21. We may also observe that the power of rectification contained in Section 62 of the unamended Act was of a limited character, different from the power conferred by Section 59 of reopening assessment proceedings and, in any case, ceased to be available after the deletion of that provision by the Amending Act. The order of reassessment made on November 26, 1971, could not be sustained under the deleted provision.

22. In conclusion, our answer to the question referred to us is in the negative, against the Controller and in favour of the accountable person. With this answer, the matter shall go back to the Tribunal for appropriate orders in terms of Section 64(6) of the Act.

23. The accountable person shall be entitled to his costs which we assess at Rs. 250.