
(1981) 09 BOM CK 0036

In the Bombay High Court

Case No : Estate Duty Reference No. 11 of 1976

Controller of Estate Duty, Karnataka

APPELLANT

Vs

Xec Cadar Xec Usman

RESPONDENT

Date of Decision : 17-09-1981

Acts Referred:

Estate Duty Act, 1953 — Section 21, 44, 47
Finance Act, 1894 — Section 47, 7(2)

Citation : (1982) 26 CTR 84 : (1983) 140 ITR 42 : (1982) 8 TAXMAN 168

Hon'ble Judges : S.K. Desai, J;D.M. Rege, J

Bench : Division Bench

Judgement

Desai, J.—In this reference the Income Tax Appellate Tribunal Poona Bench, Poona, has referred the following question for our consideration:

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in involving section 47 of the Estate Duty Act, 1953, and applying it to the facts of the present case ?"

2. The reference is at the instance of the Controller of Estate Duty, Karnataka, Bangalore.

3. In order to appreciate the points involved in the question refer to us a few facts may be set out. We are concerned with the estate of one Marzook J.Boodai. He was the son of one Jassein, and the son, Marzook, were citizens, of Kuwait, Jassein was carrying on a small business in Kuwait. Marzook came to the erstwhile Portuguese territory of Goa in 1945 when he was hardly 18 or 19 year of age. At that time he had no capital of his own. The regulation of the erstwhile Portuguese territory of required a foreigner to take a Goan as a partner or associate a Goan with his business since a foreigners was prohibited from carrying on an independent business in Goa. In the circumstances, the deceased, Marzook Boodai, was constrained to take the accountable person, Cadar, as his associate, and both of them set up a join business. The decease Marzook stayed in the erstwhile Portuguese territory from 1945 up to 1958. On May 24, 1958, a

limited partnership under the name and style of Marzook and Cadar Ltd., was floated in Margao. The partners of this unit were the deceased and accountable persons, and they were not related to each other. After setting up this partnership the deceased migrated to Kuwait, making it his permanent home, although he had visited Goa twice after he left of Kuwait for good. The business had its headquarters initially at Margao, but the same were shifted to Panjim in 1961. The business continued till the death of Marzook in 1965. The business of the limited partnership mainly consisted in mining operations.

4. On the death of Marzook in 1965, the Assistant Controller of Estate Duty issued notice initiating proceedings under the E.D. Act, 1953. The Assistant controller brought to duty, in addition to the interest of the deceased in the firm by way of capital, etc., a sum of Rs. 71,80,263, being the advances made by the deceased to the firm. The submission of the accountable persons were negative and reliance was placed on r. 8(c) of the E.D. Rules, 1953. Based on these rules, the assessing authority brought to duty a sum of Rs. 49,64,694, being the realisable portion of the said sum of Rs. 71,80,263. It had been contended before the Assistant controller that the amounts advanced to the Goa firm came out of the borrowals to the extent of Rs. 82,20,000 made by the deceased from the National bank of Kuwait and Md. Kharafi, also a merchant from Kuwait. The Assistant Controller was pressed for deduction of these amounts, since these loans have been left outstanding on the death of the deceased. It has been held that the amount due to the National Bank was in the region of Rs. 32,00,000 and the balance of Rs. 50,20,000 was due to Md. Kharafi, a relative of the deceased. The Assistant Controller was also not satisfied with the existence of sufficient foreign assets to absorb the allowance for the debts under ss. 44 and 47 of the E.D. Act.

5. The action of the Assistant Controller was brought into question by the appeal filed by the accountable persons before the Appellate Controller of Estate Duty. It was conceded before the Appellate Controller that the assets of the deceased did not exceed Rs. 2,00,000. The Appellate Controller accepted the theory of the existence of foreign liabilities. He accordingly allowed the appeal and directed the Assistant Controller to modify his order of assessment and refund any duty, if paid.

6. This decision of the Appellate Controller was challenged by the Department by filing an appeal to the Tribunal.

7. Before the Tribunal the Department attacked principally the theory of borrowals of such huge amounts. The Tribunal, however, accepted the findings of fact arrived at by the Appellate Controller. The Tribunal found that the deceased had huge foreign liabilities to the extent of Rs. 82,20,000. The Appellate Controller had valued the assets left by the deceased at Rs. 15,00,000. This was also questioned before the Tribunal, but this challenge was also thrown out by the Tribunal. It accepted the estimate placed by the Appellate controller that the value of foreign assets was about Rs. 15,00,000. It was on that basis that the Tribunal was called

upon to consider the applicability of ss. 44 and 47 of the E.D.Act. The Tribunal considered these sections and observed as follows:

"While section 44, by its main part, allows deduction of debts and encumbrances of the deceased, section 47 virtually operates as a sort of proviso. The second part of section 47 proceeded on the basis that the scope of section 44, so far as it concerns the debts of the deceased, is wide enough to cover foreign debts, and the first part of section 47 provides for the procedure and forges certain limitations in the matter of deductions of the particulars type of foreign-debts. To invoke the applicability of section 47, the debt must be to persons resident out of India. If these requisites are satisfied, the debt may be set off against the property of the deceased situated outside India, provided estate duty is paid in respect of such property. In other words, when the value of the foreign assets is lower than the value of the foreign liabilities, the deficit has to be adjusted against the Indian assets."

8. In conclusion the Tribunal summed up the position that the foreign liability overwhelmed the principal value of the estate of the deceased and as such there would be no estate in the eye of law liable to duty. Accordingly, it dismissed the appeal filed by the Department.

9. It is thereafter that the Department moved the Tribunal to make this reference, and the above question stands referred to us.

10. The two sections with which we are concerned in this reference both occur in Part VI of the E.D. Act, which bears the heading "Deduction". Section 44 makes provision in the matter of allowance to be made for funeral expense not exceeding rupees one thousand and for debts and to the safeguards indicated by the section, all debts or encumbrances for which an allowance is required to be made are to be deducted from the value of the property liable thereto. Section 45 and 46 deal with certain limitation on the debts deductible.

11. This brings us to s. 47. The heading of this section indicated that debts to persons resident in a foreign country are not to be deducted in the first instance except from duty-paid property in that country. Section 47 may now be fully set out:

"47. An allowance shall not be made in the first instance of debts due from the deceased to persons resident out of India (unless contacted to be paid in India or charged on properties situated within India) except out of the value of any property of the deceased situated out of India in respect of which estate duty is paid; and there shall be no repayment of estate duty in respect of any such debts, except to the extent to which it is shown to the satisfaction of the Controller that the property of the deceased situate in the foreign country in which the persons to whom such debts are due resides is insufficient of the payment."

12. The Appellate Controller deals with these two sections in para 7 of his order

and observes therein that there is a semi-colon which splits the section into two, possibly into two independent provisions. We have already earlier extracted the observations of the Tribunal dealing with s. 47. It has to be noted in the first place on the bare language of the section that the first part of the same (previous to the semi-colon) deals with allowance to be made for debts due from the deceased to persons resident out of India, but that is also governed by the words "in the first instance". The second part of the section subsequent to the semi-colon deals with repayment of estate duty in respect of any such debts, the word "such" obviously referable to debts due from the deceased to persons resident out of India. In other words the first part refers to a claim for an allowance for such debts and the later part or the second part provided for repayment of estate duty in respect of such debts if certain conditions are satisfied.

13. Before us Mr. Joshi appearing on behalf of the Department has accepted the factual findings, namely, that then was an aggregate debt of Rs. 82,20,000 due by the deceased to the two foreign parties, namely, the National Bank of Kuwait and Md. Kharafi, the break-up being Rs. 32,00,000 and Rs. 50,20,000, respectively. He has also accepted the findings of the Appellate Controller that there were foreign assets of about Rs. 15,00,000 available to meet the liability, leaving a deficit of Rs. 67,20,000. The computation of the principal value in India liable to estate duty (if the foreign debts are disregarded) at Rs. 50,65,578 is also accepted. The question he posed for our consideration was that no allowance or any credit was required to be given in respect of the deficit of Rs. 67,20,000 inasmuch as the deceased was not domiciled in India.

14. It is the admitted position that s. 47 is based on s. 7(2) of the U.K. Finance Act, which also falls into two parts. Mr. Joshi, drew out attention to the observations in Dymond's Death Duties, 14th Edn., p. 1102. Dymond has observed, dealing with the said section, as under:

"The first part of the sub-section assumes a British domicile as it allows the foreign debts against any foreign property on which estate duty is paid. Repayment under the second part of the subsection, however, follows on proof that the property in the foreign courts or British jurisdiction in which the creditor (not the deceased) resides is insufficient: where there is such a deficiency in one particular country, it seems it should be deducted proportionately against the remaining property, wherever, situate, but the subsection is not easy to construe."

15. Words to the similar effect are to be found in Green's Death Duties, 7th Edn., at p. 679:

"In the 'first instance' (i.e., in the Inlands Revenue affidavit), the foreign debts are allowed out of any non-British property which is liable to Estate duty, whether situated in the courts where the creditor resides or not, but not out of any British property. The allowance can therefore be made only when the

decease died domiciled in Great Britain: if he died domiciled elsewhere, his foreign assets would not be liable to duty. If the foreign debts exceed the foreign assets, the assets are eliminated from the assessment, but there is no allowance for the deficiency.

The repayment of estate duty on account of foreign debts is on a different footing. It is necessary in first place to show that the property in the courts where the creditor resides is exhausted, but that in itself is not considered sufficient to justify the whole of the deficient being thrown against the British assets. If the deceased left property in more than one foreign country, it is thought that a deficiency in any one such country ought to be apportioned ratably between all the other property and not deducted wholly against the property in Great Britain."

16. Mr. Joshi's argument was that in s. 47 of the E.D. Act although there is no specific reference to the requirement of the deceased being of Indian domicile, the requirement was implicit by reason of the words that there was required to be property of the deceased situated out of India in respect of which estate duty is paid, the word "paid" obviously being used in the place of "payable".

17. Mr. Joshi referred us to s. 21 of the E.D. Act where we find a provision for including property outside India in the property passing on the death of the deceased provided certain conditions are satisfied. Movable property situated outside India is to be included if the deceased was domiciled in India at the time of his death. Immovable property has been exempted from the operations of s. 21. Thus according to Mr. Joshi's argument unless there was movable property situated outside India and unless the deceased was domiciled in India, there could be no property of the deceased situated out of India in respect of which estate duty is paid (payable). In the case before us the deceased was admittedly domiciled in Kuwait. Mr. Joshi urged, therefore, that the view taken by the Tribunal as to the applicability of s. 47 was wholly and totally erroneous and was required to be declared as such.

18. Mr. Dastur, on the other hand, drew our attention to Hansons's Death Duties, 10th Edn., where commenting upon s. 7(2) of the Finance Act, 1894 (U.K.) the author has observed as under at p. 395:

"Except where such debts are contracted to be paid in Great Britain or charged on property in Great Britain, they must be deducted in the first place against personally property of the deceased situated abroad on which duty is paid. Even if the deceased's foreign property is not liable to duty, e.g., where he died domiciled abroad, no deduction is allowable against property in Great Britain for such debts except to the extent that the personal property in the country where the creditor resides is insufficient to meet them, whether such property is charged with British duty or not."

19. It was emphasised that on the questions of the requirement of domicile Hanson has not concurred with the views expressed by Green or Dymond.

20. Mr. Dastur also submitted that the passage from the books of Dymond and Green, which were relied on by Mr. Joshi, were confirmed to the first part of s. 7(2) of the Finance Act, 1894 (U.K.) and would therefore, only apply, it at all, to the first part of s. 47 of the E.D. Act. According to him, therefore, even if Mr. Joshi's submission were accepted for the purposes of argument they would have no bearing on the second part of s. 7(2) equivalent to the portion occurring after the semi-colon and dealing with repayment of estate duty in s. 47. He further submitted that the negative provision of s. 47 could not be applied where a foreign debt is contracted for purpose of creating property in Indian or acquiring property which is subsequently sent to India. It may be mentioned that there are observations at least in the order of the Appellate Controller which suggest that he had accepted the contention of the accountable persons that this heavy borrowing was resorted to by the deceased in order to lend amounts either to the limited partnership at Goa or to purchase machineries which were used in the business of the limited partnership in Goa. Mr. Dastur also emphasized the following words used in the first part of s. 47 namely "in the first instance". It was submitted that the use of these words would suggest that ultimately at the time of making the final assessment the allowance was permissible if it was proved that there was a deficit. Finally, it was submitted that even the first part of, s. 47 equivalent to the first part of s. 7(2) of the Finance Act (U.K.) if construed property is introduced for the benefit of the accountable persons and not for totally disallow in such genuine debts. The argument was based upon the supposition that there could be foreign properties of two types, one liable to be added to the estate of the deceased for the purposes of computing estate duty and the other not so liable.

21. In our opinion, it is unnecessary to go in depth into these various arguments dealing with the first part of s. 47 of the E.D. Act. We will only say that position is not as clear as it appeared to the Appellate Controller and the Income Tax Appellate Tribunal, and in an appropriate case the opening para., would require serious considerations. We say so because, in our opinion, no such difficulty really arises for applying the latter part of s. 47 subject to one necessary clarification which we must make. The latter parts of the section which we have already extracted earlier does not use the words "in the first instance", and the non-use of these words in the latter part as contested with user in the first part seems to suggest that the allowance is only initially not to be permitted by the time it is subsequently required to be considered and this consideration will be at the stage of repayment of estate duty. We find whilst perusing the latter part of the section that the restrictive words (as Mr. Dastur called them) "except out of the value of any property of the deceased situate out of India in respect of which estate duty is paid", which according to Mr. Joshi's submission introduced the requirement of the deceased persons possessing in Indian domicile, are totally absent in this part, and irrespective of whether that requirement is accepted for the first part, in our opinion, such requirement is not necessary for the application of the second part of s. 47.

22. Thus at the stage of considering the application of the second or the latter part of s. 47 of the E.D. Act, we are clearly unable to accept Mr. Joshi's submission that the deceased was required to possess an Indian domicile.

23. This brings us to the clarification which is required to be made since the rather odd expression "repayment of estate duty" is used. In our view, this does not visualize or envisage the accountable person paying the estate duty on the estate in the first place and thereafter after some interval of time claiming and obtaining repayment or refund of any portion. Repayment is clearly in the sense of credit or adjustment. It would appear to use that the estate duty will have to be computed on the estate (liable to duty under the Act) in the first place. Estate duty will also be required to be computed in respect of debts due from the deceased person to non-residents (to the extent of the deficit), and the later amount will have to be given credit to the accountable person against the duty on the estate before a demand is made for payment from him. In the instant case it has been held that the start of the deceased liable for payment of estate duty is computed at about Rs. 50,00,000. The repayment of estate duty will obviously be required to be calculated on Rs. 67,20,000 which is the deficit as computed. The later amount will obviously be more than the first amounts, and hence here cannot be any valid demand for duty on the accountable person. In this view of the matter, and since the position as to the second part is fairly clear, we think it unnecessary to express any firm or definite opinion on the proper interpretation and application of the first part except to say in passing that the matter is not as simple as it appeared to the Tribunal. It may be added, however, that the argument advanced before us by Mr. Joshi, does not appear to have been canvassed either before the Appellate Controller or before the Tribunal. Their attention was also not drawn to the passages from Dymond or Green on which reliance was placed.

24. In the result, we answer the question referred to us in the following manner:

By reason of the interpretation we have put on the later part of s. 47 of the E.D. Act, 1953, it was clearly applicable to the facts of the present case, and for that reason the Tribunal was right in applying s. 47.

25. The Department to pay the costs of the reference to the accountable person.