

(2016) 08 AHC CK 0005

In the Allahabad High Court

Case No : Constitution of India, 1950 - Article 226Income Tax Act, 1961 - Section 132, Section 159, Section 226Right To Information Act, 2005 - Section 19Wealth Tax Act, 1957 - Section 18(1)(a), Section 18(1)(b), Section 18(1)(c), Sec

Deepak Kumar Jain

APPELLANT

Vs

Chief Commissioner of Income Tax

RESPONDENT

Date of Decision : 11-08-2016

Acts Referred:

Civil Misc. Writ (Tax) Petition No. 1748 of 2011

Citation : (2017) 5 ADJ 297

Hon'ble Judges : Sudhir Agarwal and Kaushal Jayendra Thaker, JJ.

Bench : Division Bench

Advocate : Manish Kumar Jain, Pramod Kumar Jain, Rishi Raj Kapoor, Ashish Bansal and S.K. Garg, Advocates, for the Petitioner; C.S.C., Income Tax, R.K. Upahdaya, Ashok Kumar and Ashish Agarwal, Advocates, for the Respondent

Final Decision : Allowed

Judgement

1. Heard Sri Rishi Raj Kapoor, learned counsel for petitioner and learned counsel for respondents.
2. The petitioner has filed this writ petition under Article 226 of the Constitution of India assailing order dated 17.08.2011 (Annexure No. 18 to the writ petition) passed by Chief Commissioner of Income Tax, Ghaziabad (hereinafter to be referred as the "CCIT") rejecting petitioner's representation/application dated 20.08.2009 and holding that no amount is refundable to petitioner and demand of tax dues against "M/s. Girilal Mamchan & Company" has rightly been recovered from petitioner.
3. Petitioner has also sought a writ of mandamus commanding respondents to refund Rs. 72,72,524/- along with interest.
4. Brief facts giving rise to the dispute in present petition are as under :

5. Petitioner Deepak Kumar Jain son of Late Giri Lal Jain is an individual and citizen of India residing at 108, Shyam Park, Sahibabad, Ghaziabad. He has three brothers namely Ashok Kumar Jain, Pradeep Kumar Jain, Vipin Kumar Jain and one sister Smt. Asha Rani.

6. On 04.10.2004, a search operation was carried out at the residential premises of petitioner and his brothers under Section 132 of Income Tax Act, 1961 (hereafter to be referred as "Act, 1961"). The officers of Income Tax Department also searched lockers and seized cash etc. of total sum of Rs. 2,15,12,000/- from residence and lockers of petitioner, apart from cash seized from the residence and lockers of petitioner's brothers.

7. Proceedings for block assessment under Chapter XIV-B were initiated. Vide order dated 03.10.2005 Income Tax cases of petitioner were transferred to Central Circle, Meerut from Ghaziabad. Petitioner cooperated with the authorities and participated in block assessment proceedings. All the cases were completed and even refund was issued. However, a substantial amount, refundable to petitioner, was not refunded. When inquiry was made by submitting application under Right to Information Act, 2005 (hereinafter to be referred as "RTI Act, 2005"), Commissioner of Income Tax, Ghaziabad (hereinafter to be referred as the "CIT") vide letter dated 18.04.2006 informed petitioner that out of total cash seized from petitioner, i.e. Rs. 2,15,12,000/- an amount of Rs. 72,72,524/- was appropriated against demand from one Amrish Kumar Jain and Rs. 46,149/- was appropriated against demand from petitioner and Rs. 70 lacs and Rs. 1 lac were appropriated towards advance tax for Assessment Years (hereinafter to be referred as "A.Y.") 2005-06 and 2006-07, respectively.

8. It is pleaded that petitioner had no business or commercial relation with Sri Amrish Kumar Jain. He (Amrish Kumar Jain) happens to be a distant relative. Petitioner never held or holds any money for, and on account of Sri Amrish Kumar Jain, hence, appropriation of Rs. 72,72,524/- from the funds of petitioner against demand from Amrish Kumar Jain was patently illegal. Petitioner thus filed objection/protest against such appropriation vide letters dated 27.05.2006 and 12.06.2006. He also requested authorities concerned to refund Rs. 72,72,524/- along with interest vide representation dated 07.03.2007. Petitioner again filed an application under RTI Act, 2005 on 19.06.2007 inquiring about names and addresses of all successors of (Late) Giri Lal Jain of M/s. Girilal Mamchand and Company and ratio of their inheritance from the assets of (Late) Giri Lal Jain. Petitioner sought specific information to the following effect:

"Kindly note that precise information about the successors of late Shri Giri Lal Jain and their ratio in the assets of late Shri Giri Lal Jain is being sought and accordingly it is requested that pointed information about this query may be furnished. Any "explanation or "clarification" about the background of recovery of tax demands of Shri Amrish Kumar Jain from the applicant will be denial of desired information."

9. CIT, Ghaziabad, vide letter dated 20.03.2007 informed petitioner that a demand of Rs. 2,18,07,748/- was outstanding against Amrish Kumar Jain. To the said dues, following amount of petitioner and his brothers was appropriated:

Deepak Kumar Jain (Petitioner)

Rs. 7269250/-

Pradeep Kumar Jain

Rs. 7269250/-

Ashok Kumar Jain

Rs. 7269248/-

10. The amount was appropriated through P.D. A/c cheques dated 18.01.2005. It is further said that Settlement Commission, New Delhi vide order dated 12.09.2000, in Misc. Application No. 11B/1/64/82-IT filed by M/s.. Giri Lal Mam Chand and Co., Sahibabad, Ghaziabad, on 20.09.1982, has held that Amrish Kumar Jain is Benamidar of (Late) Giri Lal Jain, hence outstanding demand in the name of Amrish Kumar Jain has been appropriated in accordance with law from the seized funds of petitioner and his two brothers. In reference to another query made under RTI Act, 2005, CIT, Ghaziabad vide letter dated 20.08.2007 informed petitioner that outstanding demand against Amrish Kumar Jain was adjusted from the seized funds of petitioner and his brothers treating them legal heirs of (Late) Giri Lal Jain in accordance with Section 226 of Act, 1961. Assistant Commissioner, Income Tax, Circle-1, Ghaziabad (hereinafter to be referred as "ACIT, Ghaziabad") vide letter dated 23.10.2007 further informed petitioner that demand of Sri Amrish Kumar Jain was created under Wealth Tax Act, 1957 (hereinafter to be referred as the "Act, 1957").

11. Petitioner further states that no appropriation from P.D. Funds of his another brother, Vipin Kumar Jain, was made. Appropriation from three brothers namely petitioner and his two brothers namely Pradeep Kumar Jain and Ashok Kumar Jain, is malicious, illegal and without jurisdiction.

12. A copy of Settlement Commission's order dated 09.01.1996 has also been placed on record to show that Sri Amrish Kumar Jain was grandson of Mrs. Moonga Devi who was sister of (Late) Giri Lal Jain. Settlement Commission held Smt. Moonga Devi and Amrish Kumar Jain as benamidar upto A.Y. 1973-74 but after reconstitution of firm, recognised them as genuine partners of firm, from A.Y. 1974-75. Settlement Commission also held, in para 20, that Giri Lal Jain died on 28.11.1973 and Amrish Kumar Jain was his benamidar till death of Giri Lal Jain and after his death, Amrish Kumar Jain and Smt. Moonga Devi became genuine partners of the firm. An application for rectification was filed before Settlement Commission but that was rejected on 19.09.2000.

13. Petitioner also moved an application under RTI Act, 2005 inquiring, whether any order of appropriation of outstanding dues of Amrish Kumar Jain was made

in respect of seized funds of petitioner but was given no reply. Petitioner then filed appeal under Section 19 of RTI Act, 2005 wherein an order was passed on 04.09.2009 directing respondent authorities to supply required information. Thereupon, ACIT, Ghaziabad, vide order dated 10.09.2009, informed petitioner that CIT is the competent authority to direct for recovery. Further, there was no deposit in P.D. A/c. in the name of Amrish Kumar Jain. Since Smt. Moonga Devi and Amrish Kumar Jain were held benamidars of (Late) Giri Lal Jain vide Settlement Commission's order dated 09.01.1996, appropriation was created since petitioner is one of the legal heirs of (Late) Giri Lal Jain. The document appended with the aforesaid letter dated 10.09.2009 showed further that penalty under Sections 18(1)(a), 18(1)(b), 18(1)(c) and interest under Section 31(2) with regard to Wealth Tax demand against Amrish Kumar Jain was created in 1986 and 1989, though, Giri Lal Jain died on 28.01.1973. Further, no liability relating to A.Y. 1974-75 was payable by (Late) Giri Lal Jain since, Amrish Kumar Jain was held genuine partner in his individual capacity after death of Giri Lal Jain on 28.01.1973.

14. It is in these circumstances, petitioner made a further inquiry from respondents. Vide letter dated 04.11.2009 ACIT, Ghaziabad informed that there is no order wherein petitioner and his brothers including Pradeep Kumar Jain were shown as legal heirs of Amrish Kumar Jain. However, in the light of Settlement Commission's order dated 16.10.2000, petitioner and his brothers were found legal heirs of (Late) Giri Lal Jain though by mistake Pradeep Kumar Jain was shown as legal heir of Amrish Kumar Jain.

15. Letter dated 04.11.2009 said as under:

"Actually, none of applicant and his brothers including Pradeep Kumar Jain are directly legal heirs of Shri Amrish Kumar Jain. They are and remain legal heirs of late Shri Girilal Jain, whose benamidar Shri Amrish Kumar Jain is."

16. Wealth Tax Assessments of Amrish Kumar Jain for the A.Y.s 1970-71, 1971-72, 1972-73, 1973-74 and 1974-75 was completed on 24.03.1986 and Wealth Tax Officer (hereinafter to be referred as "W.T.O.") in para 6 said as under:

"I proceed to compute the assessee's wealth as under and in doing so the capital, secret capital and value of other assets as per the assessee's 15% share in the firm M/s. Giri Lal Mam Chand and Co. as also in respect of various business in different names carried on by the firm M/s. Giri Lal Mam Chand and Co. are being added back subject to necessary modification under Section 35 of the Wealth Tax Act, 1957 after the issues are settled by Settlement Commission.

S.

No.

Particulars of Wealth

1970-71

1971-72

1972-73

1973-74

1974-75

1

Capital in: M/s. Giri Lal Mam Chand and Co. as per B/Sheet

145192

146193

69527

97390

97142

2

M/s. Pathak Bros. As per B/Sheet 50%

12997

13550

15271

17115

18980

3

Secret Capital in M/s. Pathak Bros. 15%

391266

391266

391266

391266

391266

4

Capital as per B/Sheet in the Firm Anil Trading Co. 15%

12621

12621

12621

12621

12621

5

Secret Capital in M/s. Anil Trading Co.

320617

320671

320617

320617

320617

6

Appreciation in land and building

-

1500

3000

4500

5000

Gross Wealth

882633

885747

812302

843503

845606

Less: Wealth tax liability

5768

11485

11025

11635

11675

In Round figure Rs.

876900

874262

801277

831768

833931

876900

874262

801277

831768

833931

Assessed as per separate form. Issue necessary forms. Penalty notices u/s 18(1) (a), 18(1)(b), 18(1)(c) have separately been issued."

17. Petitioner then filed a detailed objection before CCIT and CIT vide letter dated 20.08.2009 and 22.06.2010, respectively, pleading that illegal appropriation has been made from P.D. Account of petitioner in respect of outstanding dues of Amrish Kumar Jain which could not have been appropriated from P.D. A/c of petitioner. However, CCIT passed impugned order dated 17.08.2011 stating that appropriation from P.D. A/c of petitioner in respect of outstanding dues of Amrish Kumar Jain has been rightly made.

18. It is contended that petitioner never held or holds any money for and on account of Amrish Kumar Jain. Appropriation of money, belong to petitioner, towards outstanding dues of a stranger, i.e. Amrish Kumar Jain, is without jurisdiction, beyond authority of law and also contrary to Article 265 of the Constitution of India. It is also pointed out that Amrish Kumar Jain is alive and resides at C-15/157A, Rampura Marg, Delhi-110055 and his office address is Brawn Laboratories Ltd., 4/4B Asaf Ali Road, Delhi; hence recovery could have been made from his property but in an illegal manner it has been appropriated from P.D. A/c of petitioner which is without any authority of law. It is also urged that observations made by CCIT are based on misreading of Settlement Commission's order and impugned order dated 17.08.2011 passed by CCIT is patently illegal.

19. Respondents have filed a counter affidavit as well as supplementary counter affidavit. In the counter affidavit it is said that there was a firm M/s. Mamchand Giri Lal, Bijnor constituted of (Late) Giri Lal Jain and S.D. Jain (father in law of Giri Lal Jain). The firm came into existence in 1951. It was reconstituted w.e.f. 01.05.1966 as M/s. Girilal Mamchand and Co., having following partners:

I. Giri Lal Jain (Late)

II. S.D. Jain (father in law of Giri Lal Jain)

III. Smt. Moonga Devi Jain (sister of Giri Lal Jain)

IV. Amrish Kumar Jain (minor grandson of Smt. Moonga Devi Jain)

20. Settlement Commission in the order dated 09.01.1996 held that right from beginning of firm, from 01.05.1966, Smt. Moonga Devi and Amrish Kumar Jain were benamidars of (Late) Giri Lal Jain. Amrish Kumar Jain, as a partner, was introduced to the benefits of partnership w.e.f. 01.05.1966, till he opted for full fledged membership in the firm. In the year 1971-72, he was merely an employee of firm. Pertaining to A.Y.s 1970-71 to 1974- 75, there was wealth tax demand of Rs. 21807748/- inclusive of interest under Section 31(2) of Act, 1957. The amount of seized money kept in P.D. A/c. came from the earnings and investment from (Late) Giri Lal Jain, hence, outstanding dues against Amrish Kumar Jain were adjusted from the money lying in P.D. A/c.

21. Basic facts stated in writ petition except the aforesaid explanation, are not disputed in counter affidavit. In the Supplementary counter affidavit, respondents have placed on record, assessment orders dated 24.03.1986 passed in respect of Amrish Kumar Jain, for A.Y.s 1970-71 to 1974-75. It has also brought on record notice of demand dated 24.03.1986, 11.01.1989, 11.01.1989, 11.01.1989, 24.03.1986, 11.01.1989, 11.01.1989 of various A.Y.s as detailed below:

Assessment Year

Amount demanded

Date of Demand Notice

1970-71

5,768/-

24/03/86

1970-71

54,390/-

11/01/89

1970-71

8,056/-

11/01/89

1970-71

8,05,653/-

11/01/89

1971-72
11,485/-
24/03/86
1971-72
4,91,744/-
11/01/89
1971-72
8,743/-
11/01/89
1971-72
8,74,300/-
11/01/89
1972-73
11,025/-
24/03/86
1972-73
4,03,190/-
11/01/89
1972-73
8,013/-
11/01/89
1972-73
8,01,300/-
11/01/89
1973-74
11,635/-
24/03/86
1973-74
3,76,877/-
11/01/89

1973-74

8,318/-

11/01/89

1973-74

8,31,800/-

11/01/89

1974-75

11,675/-

24/03/86

1974-75

3,33,871/-

11/01/89

1974-75

8,339/-

11/01/89

1974-75

8,33,900/-

11/01/89

22. It has also placed on record, letter dated 05.01.2005 issued by Deputy Commissioner, Income Tax, Circle-1, Ghaziabad (hereinafter to be referred as "DCIT, Ghaziabad") which is addressed to Deputy Commissioner of Income Tax, Range-1, Ghaziabad for appropriation of cash seized, towards arrears demand of M/s. Giri Lal Mamchand. It reads as under :

"Sub:Appropriation of cash seized towards arrear demand in the case of M/s. Giri Lal Mam Chand Group of Cases - Regarding -

Kindly refer to this office letter of even no., dated 03.01.2005 on the above subject.

2. In continuation of my earlier letter dated 03.01.2005 referred to above, I would request you to kindly get the cheques issued from CIT Office from P.D. A/ c, in favour of the undersigned for a total sum of Rs. 2,18,57,171/- as per details given below :

Name

Demand under I.T. Act/W.T. Act

Amount

Deepak Kumar Jain

Income-tax

Rs. 46,140/-

-do-

Wealth-tax

Rs. 72,69,250/-

Pradeep Kumar Jain

Income-tax

Rs. 3,274/-

-do-

Wealth-tax

Rs. 72,69,250/-

Ashok Kumar Jain

Wealth-tax

Rs. 72,69,248/-

Total

Rs. 2,18,57,171/-

3. After adjustment of above demand, from the remaining amount of seized cash deposited in P.D. A/c, may be allowed to adjust towards advance tax payable by the assessee as per their request -

Name

Advance-tax

Amount

Deepak Kumar Jain

A.Y. 2005-06

Rs. 45,00,000/-

Pradeep Kumar Jain

-do-

Rs. 45,00,000/-

Ashok Kumar Jain

-do-

Rs. 45,00,000/-

23. Petitioner has filed rejoinder affidavit replying averments made in counter affidavit and has said that respondents have falsely stated that seized money kept in P.D. A/c. came from earning and investment made by (Late) Giri Lal Jain. Fact is that said amount is petitioner's personal money which he got from sale of property, acquired by him in 1969. Money seized by Revenue was part of sale proceeds of the said property. This fact was known to Income Tax Authorities. It is pointed out that in the letter dated 10.07.2007 (Annexure No. 8 to the writ petition), it was admitted by CIT that it is not aware, who are the successors of (Late) Giri Lal Jain, thus, suggestion that money lying in P.D. A/c. had come from earning and investment of (Late) Giri Lal Jain and petitioner has inherited from him, is apparently false and based on no material on record. The statement made in counter affidavit is patently false with regard to order of Settlement Commission. It held Amrish Kumar Jain, Benamidar of (Late) Giri Lal Jain for a limited number of years and that too, only under Income Tax Act and not Wealth Tax Act. It is further said that going by the Settlement Commission's order, since Smt. Moonga Devi Jain and Amrish Kumar Jain were held benamidars of (late) Sri Giri Lal Jain, till his death i.e. 28.11.1973, wealth-tax of Amrish Kumar Jain for A.Y. 1974-75 ought to have been completed in his personal capacity and not Benamidar of (Late) Giri Lal Jain. Further more, not admitting, it is said that wealth-tax demand on Amrish Kumar Jain for A.Y.s 1970-71 to 1973-74, even if, could have been recovered from the assets of (late) Giri Lal Jain, demand of A.Y. 1974-75 was not recoverable from assets of (late) Giri Lal Jain. It is said that even Giri Lal Jain was not responsible for payment of Wealth Tax liability of Amrish Kumar Jain. The wealth-tax demand of Amrish Kumar Jain was created on 24.03.1986 and 11.01.1989 but at no point of time petitioner was ever asked to pay the same for the reason that respondents knew that petitioner was not liable to satisfy the said demand, outstanding against Sri Amrish Kumar Jain. Settlement Commission has not held that wealth of Sri Amrish Kumar Jain is to be assessed in the hands of (late) Giri Lal Jain.

24. The short question up for consideration in this writ petition is "whether liability of tax of Amrish Kumar Jain has rightly been appropriated from the funds seized from petitioner and kept in P.D. A/c by Revenue."

25. In order to adjudicate the aforesaid question, it would be appropriate to place relevant facts in a chronological and straight manner.

26. Firm M/s. Mamchand Girilal, Bijnor, was constituted in 1951. It had two partners namely (late) Girilal Jain (petitioner's father) and S.D. Jain (father-in-law of Girilal Jain) i.e. petitioner's maternal grand father (nana). This firm continued till assessment year 1966- 67 (financial year 1965-66).

27. Firm was reconstituted with effect from 01.05.1966 as M/s. Girilal Mamchand and Co. and this time besides (late) Girilal Jain and S.D. Jain, two more partners were introduced i.e. Smt. Moonga Devi Jain (sister of Girilal Jain) and Amrish Kumar Jain (minor) (grand son of Smt. Moonga Devi Jain). Firm was dealing in purchase and sale of Molasses.

28. Sri Amrish Kumar Jain attained majority in 1970 and became full-fledged partner through fresh partnership deed dated 03.04.1970.

29. On 04.04.1972, a search team of Income Tax Department conducted search of residence and business premises of partnership firm M/s. Girilal Mamchand and Co. and other connected establishments. It seized cash of Rs. 24,000/- and certain jewellery.

30. (Late) Girilal Jain died on 28.11.1973, Sri S.D. Jain died 12.05.1974 and Smt. Moonga Devi Jain died on 30.10.1978.

31. After death of Giri Lal Jain on 28.11.1973, firm was reconstituted in A.Y. 1974-75 (financial year 01.04.1973 to 31.03.1974). The remaining three persons namely S.D. Jain, Smt. Moonga Devi Jain and Amrish Kumar Jain continued partners in reconstituted firm.

32. We need not go into the details of question of assessment of firm. Suffice it to mention that on behalf of firm, an application was filed before Income Tax Settlement Commission on 20.09.1982. Admittedly, application filed before Settlement Commission neither was filed by firm which seems to have discontinued on the death of Girilal Jain on 28.11.1973 since due to death of one of the partners, it stood dissolved on that date nor petitioner. The reconstituted firm had three partners namely Sri S.D. Jain, Smt. Moonga Devi Jain and Sri Amrish Kumar Jain. Two of them i.e. S.D. Jain and Smt. Moonga Devi Jain also died on 12.05.1974 and 30.10.1978. Therefore, existing firm dissolved and may be reconstituted subsequently with the remaining partners or became a proprietorship firm after death of Smt. Moonga Devi Jain. In 1982, when application was filed, Firm at the best was having only one Partner alive thus become Proprietorship. It is not the case of respondents that petitioner or any of his brothers was a party before Settlement Commission when application dated 20.09.1982 was filed or that any notice was given to him or his brothers or they were heard. (Late) Girilal Jain obviously having died on 20.11.1973, had no occasion to participate in any proceeding thereafter. Neither any liability could have been saddled upon (Late) Girilal Jain, which was not already created and finalized nor without giving any opportunity of hearing to the petitioner, the alleged liability of Girilal Jain, created subsequently in his absence, can be saddled upon the petitioner.

33. Wealth-tax assessments for the assessment years 1970-71 to 1974-75 were finalized by Wealth Tax Officer, Central Circle, Ghaziabad on 24.03.1986. At that time also, admittedly, neither Girilal Jain was alive so as to have any participation in the said proceedings nor any legal heir of Girilal Jain had any opportunity since

none was put on notice.

34. M/s. Girilal Mamchand and Co., which may have been heard by Wealth Tax Officer, when made assessment order dated 24.03.1986, could have been a proprietorship firm at that time, having only Amrish Kumar Jain alive. It also appears from order dated 24.03.1986 that same was passed with reference to the issues settled by Settlement Commission under Section 35 of Act, 1957 but no such order of Settlement Commission, relating to the wealth-tax dispute, has been placed on record and what has been stated therein has neither been brought to the notice of Court nor there is any averment that it was communicated to petitioner. Only order of Settlement Commission is on record and is dated 09.01.1996 which is in respect of income-tax. The demand notice placed on record along with supplementary counter affidavit dated 24.03.1986 and 11.01.1989 also relate to wealth-tax liability which has nothing to do with Settlement Commission's order dated 09.01.1996 which was in respect of income-tax liability. How and in what manner wealth-tax liability was created in 1986-89 and such demand could have been saddled upon petitioner could not be demonstrated by respondents at all.

35. With respect to the assessment years 1967-68 to 1974-75, 1976-77 to 1977-78, 1981-82 and 1982-83, application was filed before Income Tax Settlement Commission and it is quite obvious that such application would have been filed by Amrish Kumar Jain, being sole proprietor at that time but application was filed i.e. 20.09.1982 on behalf of M/s. Girilal Mamchand and Co. How these proceedings could have been held binding upon the petitioner, we actually fail to understand. Thereupon final order was passed on 23.02.1996 determining liability for A.Y. 1969-70 and onwards. In respect of the A.Y.s 1967-68 and 1968-69, Settlement Commission accepted income of Rs. 61660/- and 1,09,182/-. Settlement Commission also granted immunity from all penalties imposed under Act, 1961 for assessment years 1969-70 and onwards to which settlement relates. Copy of said order dated 09.01.1996 passed by Settlement Commission is on record as Annexure No. 11 to writ petition. The entire order nowhere shows that petitioner or any of his brothers, in any manner, were party in proceedings before Settlement Commission or had any opportunity of hearing.

36. In the counter affidavit, the defence taken is that liability of wealth-tax of Amrish Kumar Jain was appropriated from cash seized during search operation conducted at petitioner's premises on 04.10.2004. Settlement Commission's order relates to only income tax. No order of Settlement Commission relating to wealthtax has been placed on record along with counter affidavit or supplementary counter affidavit. All the documents appended as Annexure S.C.A.-1 to supplementary counter affidavit also relate to only income-tax demand raised from Sri Amrish Kumar Jain C/o M/s. Girilal Mamchand and Co.

37. Respondents have also not shown anywhere by placing any material that petitioner succeeded or inherited any estate from (Late) Giri Lal Jain and that be so, what is the quantum of amount or the extent thereof. It is in this backdrop

we have to judge correctness of action of respondents in appropriation of P.D. A/c of petitioner relating to cash seized in search operation, conducted at petitioner's premises on 04.10.2004, and also, whether such appropriation is legal and justified with reference to Section 159 and/or 226 of Act, 1961.

38. The period of assessment of income-tax or wealth-tax, as the case may be, to some extent relates to when (Late) Girilal Jain was alive. But all proceedings have been conducted and finalized long after his death. In none of such proceedings, petitioner or his brothers have been shown to be made party or given any opportunity of hearing. Against a dead person no liability can be created unless his legal heirs are there. If reconstituted firm after death of Girilal Jain is taken to be the legal representative then liability and recovery could have been made from the then partners/proprietor and not from any person who has no relation, by any means with such reconstituted firm.

39. Facts are evident to show that reconstituted firm or assessment had no participation of petitioner or his brothers. The assessment or settlement, whatsoever may be, all was with the participation of only Amrish Kumar Jain, and quite obvious, as a proprietor of reconstituted firm. If that be so, imposing liability upon petitioner, without placing anything on record that petitioner inherited anything from his father, is patently illegal and without jurisdiction. Petitioner's money was seized in a fresh and separate search and seizure operation and that too conducted in 2004. The search and seizure has nothing to do with any assets of funds of (Late) Girilal Jain who had died some 30 years ago. Nothing could be shown to us, which may authorize respondents to appropriate funds belong to petitioner, which is not shown to have been inherited from ancestors. There is no material placed on record to show that petitioner held or holds money for and on account of assessee. Mere fact that (Late) Girilal Jain happened to be father of petitioner, would not entitle respondents to recover any tax dues, not belong to petitioner, from petitioner unless it is shown that petitioner has inherited a Estate from his father and recovery is being made from such inherited estate.

40. Section 159 of Act, 1961, while making legal representative responsible for assessment proceedings or tax liability of a deceased, confines it to the extent to which estate is capable to meet liability. Meaning thereby, legal representative's liability is confined to the extent, Estate has been succeeded by him and not beyond that.

41. Section 159 also makes it clear that proceedings shall be initiated against legal representative in the same manner as it could have been against deceased-assessee, but if that is so, like deceased assessee, legal representative(s) was/were also entitled to be heard before finalization of liability, after death of deceased-assessee.

42. Parimateria provision in Section 24-B existed in earlier statute in the Income Tax Act, 1922 (hereinafter to be referred as "Act, 1922"). It came to be

considered by a three Judges Bench in Commissioner of Income-Tax, Bombay City I v. Amarchand N. Shroff 1963 (48) ITR (SC) 59, wherein dispute relates to A.Y.s 1950-51, 1951-52, 1952-53, 1953-54 and 1954-55. In a firm of Solicitors there were three partners namely Amarchand N. Shroff, Mangaldas and Hiralal. Amarchand died on 07.07.1949. Partnership of solicitor firm then carried on by remaining two partners namely Mangaldas and Hiralal upto 30.11.1949. On December 1, 1949, Ramesh, son of Amarchand having qualified to become a solicitor, joined the firm as third partner. The arrangement made by the partners in the firm was that the outstanding dues realised upto the death of Amarchand would be divided amongst the then three partners, the realisation between 08.07.1949 to 30.11.1949 divided in two partners namely Mangaldas and Hiralal and thereafter w.e.f. 01.12.1949 equal division amongst newly created firm of three partners. Firm kept its account on cash basis. For the A.Y.s 1950-51 and 1951-52 Income Tax Officer assessed the amount in the hands of heirs and legal representatives of Amarchand as a Hindu Undivided Family (hereinafter to be referred as "HUF"). The matter was taken in appeal, where it was held that the amount was not income of HUF but merely represented inheritance or realisations of assets of Amarchand. Revenue did not pursue the matter further but sometime later Income Tax Officer, under Section 34 of Act, 1922, in respect of same income, started proceedings treating income in the hands of Amarchand N. Shroff by his heirs and legal representatives. The status of that entity was taken to be that of an individual and not of HUF. The amount was assessed in the hands of legal representatives under Section 34(1)(b) read with Section 24-B of the Act, 1922. The assessments were made for the A.Y.s 1950-51 to 1954-55. In appeal, Assistant Commissioner held that notice under Section 34 could validly be served only for A.Y. 1950-51 and for remaining it was invalid. Consequently, assessments for A.Y.s 1951-52 to 1954-55 were quashed. Revenue took appeal to Tribunal who held that assessment could not be made on Amarchand and Section 24-B had no application to the income received after death of Amarchand. The order of Assistant Commissioner was upheld. On a reference made at the instance of Revenue to High Court, raising the question with regard to applicability of Section 24-B, it was held that the amount was not taxable and Section 24-B has no application. On behalf of Commissioner of Income Tax, it was argued before Supreme Court that the amount, which was received by heirs and legal representatives of Amarchand after his death, should be deemed, by fiction incorporated in sub-Section (1), to be income received by Amarchand and liable to tax under Section 24-B(1) of Act, 1922. In other words, heirs and legal representatives of deceased, Amarchand, were liable to pay tax out of the estate of deceased and those amount to the extent of estate, as the estate was liable to tax on the amounts received by heirs and legal representatives just as the deceased, Amarchand, would have been, had he not died. Court said that reading a particular clause of Section 24-B independently was not correct. All sub-sections have to be read together. Section 24-B is restricted to the income received by deceased person before his death and to the income received after his death by his heirs and legal representatives, in the previous year and which

had not been assessed but would have been assessed as income received by him, if death had not taken place. Section 24-B does not authorize levy of tax of receipts by legal representatives of a deceased person in the years of assessment succeeding year of account being the previous year in which such person died. Court held that income-tax is exigible in reference to a person's total income of the previous year. Assessee under Act, 1922 had ordinarily to be a living person and cannot be a dead person because his legal personality ceased on his death. By section 24-B, legal personality of a deceased person is extended for the duration of entire previous year in the course of which he died and therefore, income received by him before his death and that received by heirs and legal representatives after his death but in the previous year, becomes assessable to income-tax in the relevant assessment year. The section was enacted by legislature to bring to tax, after his death, income received during his lifetime, and fill up the lacuna which is pointed out by High Court in *Ellis C. Reid v. Commissioner of Income-tax* (1930) 5 I.T.C. 100.

Any income received in the year subsequent to the previous or the account year cannot be called income received by the person deceased. Section 24-B does not extend to tax liability of estate of a deceased person beyond previous or account year in which that person dies. Court further said "By section 24-B the legal representatives have, by fiction of law, become assessee as provided in that section but that fiction cannot be extended beyond the object for which it was enacted."

43. In *First Additional Income Tax Officer v. Susheela Sadanandan and Anr.* 1965 (57) ITR 168 (SC) Court said that if a person dies executing a Will appointing more than one executor or dies intestate leaving behind him more than one heir, under Section 24-B of the Act, Income-tax Officer has to proceed to assess total income of deceased against all the executors or legal representatives, as the case may be. It also held that if there are more than one executor of a deceased person, all of them will be his legal representatives and for the purpose of section 24B(2) of the Act, all of them can jointly represent the estate.

44. In *Income Tax Officer, Gudur and Another v. Maramreddy Sulochanamma* 1971 (79) ITR (1) SC, Court held that assessment for the period subsequent to the death of assessee against legal heirs would be bad. It also held that before saddling liability upon legal heirs, Income-Tax Officer has to examine as to who are the legal representatives and whether they have received any estate of deceased assessee or not and if so, to what extent.

45. Construing a similar provision in Section 7(c) of U.P. Sales Tax Act, 1948, Court in *Homely Industries v. Sales Tax Officer, Sector V, Kanpur* (1976) 37 STC 483 (SC) observed that an assessment made against a dead person is invalid and if liability is to be saddled upon the legal heirs, notice has also to be served upon them and an opportunity of hearing has to be given to heirs and legal representatives of deceased assessee. It also held that if notice was already served upon assessee when he was alive, there may not be any requirement of

any second notice.

46. In the context of Wealth-tax Act, this Court in *Rameshwar Prasad v. Commissioner of Wealth Tax* 1980 (124) ITR 77 considering Section 19 of Act, 1957, said that sub section (1) imposes liability to pay, created already upon a legal representative. Sub-Sections (2) and (3) of Section 19 deals with liability to assessment by issuing appropriate notice upon the heirs and legal representatives of deceased assessee. Court said that sub-section (1) is confined to liability to pay and not liability to assessment. Section 19(1) by itself does not create on legal representatives" liability to pay which was non existent till the date of death of deceased. In other words, if an order creating liability to pay under the Act had not been passed till the date of death of original assessee, sub-section (1) does not authorize creation of liability to pay on the legal representatives. It also held that legal representatives would not be liable for penalty since penalty proceedings under Section 18 cannot be initiated against a legal representative. Court also makes it very clear that such provision for penalty has been incorporated under Section 18 and not under Section 19 of Act, 1957.

47. In *Smt. Shobha Sengar v. Commissioner of Income Tax*, (2000) 244 ITR 10 (All.), this Court had an occasion to consider Section 159 of Act, 1961. There also, in search and seizure operation under Section 132, certain amount was seized and after clearing of the demand under the assessment made pursuant to search and seizure, remaining property was not returned and sought to be appropriated against certain dues of assessee's husband who had died long back, claiming that the same can be appropriated against legal representatives by referring to Section 159 of Act, 1961. This Court, after referring to Section 132(5) and 132(B) held that in terms of section 132(B)(3) Revenue must have returned assets to the assessee as soon as demand under assessments made against the assessee, after search and seizure, is paid off, and section 159 could not have been relied therein. It also held that for recovery of dues of a deceased assessee from the alleged legal representatives, the Revenue is entitled to recover from the properties left by deceased and coming into the hands of legal representatives. Revenue therefore, has to make it clear as to what are assets left by deceased and came into hands of legal representatives and unless it is clarified, the question of appropriation from the assets of alleged legal representatives does not arise.

48. In view of above discussion, we are clearly of the view that recourse to Section 159 is thoroughly misconceived and illegal on the part of Revenue. Neither there existed any liability against deceased nor any liability was finalized after giving notice to the alleged legal heirs nor the amount which was seized in search and seizure operation under Section 132, otherwise could have been appropriated against the alleged dues of deceased Girilal Jain by referring to Section 159 as discussed above.⁹ In the present case, it is not the case of respondents that an assessment was made against (Late) Girilal Jain and from

the assets of deceased which was received by his legal representatives, the demand has been satisfied. At no point of time any notice or opportunity was given to the petitioner or any of his brothers before finalizing the alleged liability of deceased after his death. In fact highhandedness on the part of respondents is writ large from the fact that they did not keep on informing petitioner or his legal brothers but petitioner has to collect correct information by approaching respondents under RTI Act and not otherwise. This clearly shows a hide and seek approach, patently erroneous and malicious in law, on the part of respondents in appropriating assets of petitioner in respect of certain dues which were not shown to be adjustable there against.

49. In our view here is a clear case of patent illegality, unauthorized appropriation, and unfair and unjust treatment made by the respondents to the petitioner in depriving him his huge amount which in law was refundable to him. The action on the part of respondents also comes within the ambit of patent abuse of process of law.

50. In the result, writ petition is allowed. The entire amount of petitioner which was appropriated by respondent is directed to be refunded with interest at the rate of 12% per annum from the date the amount was seized till repayment to petitioner. The order dated 17.08.2011 passed by CCIT upholding appropriation of Rs. 72,72,524/- is hereby set aside.