(1987) 11 CAL CK 0004

In the Calcutta High Court

Case No : Matter No. 1129 of 1982

J.S. Atwal APPELLANT

Vs

Commissioner of Wealth Tax RESPONDENT

Date of Decision : 24-11-1987

Acts Referred:

Income Tax Act, 1922 — Section 33(4)
Income Tax Act, 1961 — Section 84
Wealth Tax Act, 1957 — Section 27(3)

Citation : (1988) 36 TAXMAN 346

Hon'ble Judges : Dipak Kumar Sen, Acting C.J.;Shymal Kumar Sen, J

Bench : Division Bench

Judgement

Dipak Kumar Sen, Actg. CJ.

1. J.S. Atwal (HUF), the assessee was assessed to wealth-tax in the assessment years 1961-62 to 1965-66 in the status of a HUF as declared in its returns. The assessee preferred appeals from the said assessment before the AAC who upheld all the assessments and dismissed the appeals. The assessee went up on further appeals before the Tribunal. In the appeals before the Tribunal, the assessee sought to raise for the first time the following additional grounds:

"1. For that the appellant is governed by the Hindu Succession Act, 1956 and as the entire property is received on the death of G.S. Atwal who died intestate on 20th January, 1961, therefore, the Hindu Succession Act is well applicable in the instant case which being the general law applicable to all Hindus which includes Buddhists, Jains and Sikhs.

2. For that the appellant claimed 15 per cent deduction from immovable property for joint ownership.

3. For that Samadhi valued by Valuation Officer at Rs. 45,026 has substantial sentimental and religious value for the family but may not have any value in the open market. Thus to be excluded from the value of Rs. 4,31,240 as valued on

31-12-1966 by the Valuation Officer."

2. The Tribunal held that the ground Nos. 1 and 2 involved mixed questions of law and fact and there was no material on record in the relevant assessment proceedings that G.S. Atwal whose properties and assets had devolved on the assessee had died intestate. It was also held that there was no material on record to show that the immovable properties for which the assessee claimed deduction were held in joint ownership. So far as the third additional ground was concerned, the Tribunal held that the same involved investigation into facts, viz., whether there was any Samadhi which were not on record.

3. It was contended by the assessee that in subsequent assessment years the AAC had permitted the assessee to raise such additional grounds and had brought certain materials on record. The Tribunal held that the same would not constitute materials on record for the years under consideration. The application of the assessee was rejected and the additional grounds were not permitted to be raised.

4. On an application of the assessee u/s 27(3) of the Wealth-tax Act, 1957, the Tribunal was directed to refer the following question as a question of law arising out of its order for the opinion of this Court:

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in refusing to entertain the three additional grounds raised by the appellant even though the same admittedly involved mixed question of fact and law or the said refusal was unreasonable or perverse?"

At the hearing before us, the learned advocate for the assessee submitted that the Tribunal erred in rejecting the application of the assessee to raise the additional grounds inasmuch as the facts relevant thereto were already on record in the wealth-tax assessments of the assessee in subsequent years and no fresh investigation was necessary. In any event, the said grounds raised mixed question of fact and law and the Tribunal was required to consider and adjudicate on the additional grounds to the extent they raised the question of law which went to the root of the assessments. In support of his contentions, the learned advocate for the assessee cited the following decisions:

(a) IN RE MOOLJI SICKA AND OTHERS., : In this case five partners of a firm who were being assessed to income tax as individuals contended that each of them ought to be assessed as a HUF. It was found that some of the partners did not have any son and it was held that they could not constitute a HUF only with female coparceners. So far as the others were concerned, it was found that their capital was not ancestral and they had always treated the same as separate and had not thrown their property or income into common stock. The partners relied on an affidavit where it was declared that the property was joint. It was contended that the said declaration which was irrevocable, ipso facto created a HUF and the said partners and their sons became coparceners.

This contention was rejected by the High Court which held that the declaration contained in the affidavit was not conclusive. Such declaration might have been made to defeat the claims of revenue and had been disbelieved by the authorities. Such a declaration was no more conclusive than a declaration about the intention to separate, where the question whether the partition had been effected or not still had to be determined.

(b) Gangadas Sarda Vs. Commr. of Income Tax B. and O., : In this case the assessee was sought to be assessed in respect of certain cash credits in his account books which were detected and treated as income from undisclosed sources. At the final hearing before the Tribunal, the assessee sought to urge an additional ground of law contending that as there could be no previous year in respect of any undisclosed source other than the financial, year next preceding, the assessee was not liable to be taxed in the assessment year involved in respect of the said cash credits. The Tribunal refused to allow the said additional ground to be raised. On a reference, it was held by a Division Bench of the Patna High Court that the question of law related to assessability in a particular accounting year and went to the root of the assessment and the Tribunal should have exercised its discretion judicially and entertained the additional ground.

(c) Hukumchand Mills Ltd. Vs. Commissioner of Income Tax, Central Bombay and Others, : In this case the assessee was a company incorporated in a native State outside the British India and was assessed as a non-resident under the Indian income tax Act, 1922 (''the 1922 Act''). After the Constitution of India came into force the native State became a Part B State within India and the 1922 Act was brought into force in the said State with effect from 1-4-1950. For assessment years 1950-51 to 1952-53, a question arose as to what was the proper written down value of the building, machinery and other fixed assets of the assessee for calculating depreciation allowances. The Tribunal permitted the revenue to raise the contention that depreciation had already been allowed under the law prevailing in the native State and the same should be taken into consideration for computing the written down value under the Taxation Laws (Part B States) (Removal of Difficulties) Order, 1950. The Tribunal remanded the matter to the ITO to ascertain the position. The decision of the Tribunal was challenged by the assessee. On these facts, it was held by the Supreme Court that the Tribunal had sufficient power u/s 33(4) of the 1922 Act, to entertain the contention of the revenue and to remand the matter and such power was not affected by the procedural income tax (Appellate Tribunal) Rules, 1963.

(d) Commissioner of Income Tax, Madras Vs. Mahalakshmi Textile Mills Ltd., : This decision was cited for the following observations of the Supreme Court:

"...There is nothing in the income tax Act which restricts the Tribunal to the determination of questions raised before the departmental authorities. All questions whether of law or of fact which relate to the assessment of the assessee may be raised before the Tribunal. If for the reasons recorded by the departmental authorities in rejecting a contention raised by the assessee, grant of relief to him on another ground is justified, it would be open to the departmental authorities and the Tribunal, and indeed they would be under a duty, to grant that relief. The right of the assessee to relief is not restricted to the plea raised by him." (p. 713)

(e) Commissioner of Income Tax, Madras Vs. S. Nelliappan, : This decision of the Supreme Court was cited for the following observations:

"In hearing an appeal the Tribunal may give leave to the assessee to urge grounds not set forth in the memorandum of appeal, and in deciding the appeal the Tribunal is not restricted to the grounds set forth in the memorandum of appeal or taken by leave of the Tribunal...." (p. 724)

(f) Commissioner of Income Tax Vs. Gangappa Cables Ltd., : This decision of the Andhra Pradesh High Court was cited for the proposition that where there was sufficient evidence on record to support a claim, neither the AAC nor the Tribunal was barred from entertaining such claim notwithstanding the fact that such a claim had not been raised at earlier stages.

5. The learned advocate for the revenue contended to the contrary. He submitted that in the instant case, the assessee had at no stage raised any contention as to its status and had all along been assessed as a HUF. The assessee also did not bring any evidence on record to establish that it did not constitute a HUF. The contention was raised before the Tribunal for the first time by way of additional grounds. The Tribunal acted properly in exercising its discretion and declining to allow the assessee to raise the said additional grounds. The decision of the Tribunal was justified in the facts. In support of his contentions the learned advocate for the revenue cited The Additional Commissioner of Income Tax, Gujarat Vs. Gurjargravures Private Ltd., . In this case the assessee in its appeal before the AAC claimed the benefit of section 84 of the income tax Act, 1961. No such claim had been made before the ITO when the assessment was made nor was there any material on record supporting such a claim. In subsequent years, relief under said section 84, however, had been allowed to the assessee. The AAC refused to entertain the claim. On further appeal, the Tribunal held that as the entire assessment was open before the AAC there was no reason why the claim of the assessee could not be entertained and directed the ITO to allow the relief claimed. On a reference, the Gujarat High Court affirmed the decision of the Tribunal. The matter was finally decided in the Supreme Court. It was held that no claim for relief u/s 84 having been made before the ITO nor there being any material on record in support thereof, from the mere fact that such claim had been allowed in subsequent years it could not be held that such a claim should be entertained and accepted.

6. To appreciate the controversy raised it is necessary to consider rule 11 of the income tax (Appellate Tribunal) Rules which reads as follows:

"11. Grounds which may be taken in appeal.? The appellant shall not, except by leave of the Tribunal, urge or be heard in support of any ground not set forth in the memorandum of appeal, but the Tribunal, in deciding the appeal, shall not be confined to the grounds set forth in the memorandum of appeal or taken by leave of the Tribunal under this rule:

Provided that the Tribunal shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of being heard on that ground."

It appears that under the Rules the Tribunal might allow or disallow an additional ground to be raised. This is left to the discretion of the, Tribunal. In the instant case, the assessee declared its status to be that of a HUF and was assessed accordingly. In appeal before the AAC, it did not challenge the determination of its status. Before the Tribunal it sought to false the contention for the first time by way of additional grounds. Admittedly, the question whether the assessee is a HUF or not, is a mixed question of law and fact. To determine the said question, it would be necessary to enquire, inter alia, into the relationship to the members of the assessee, property inherited by them from the predecessor-in-interest and also the way the assessee had dealt with its properties and assets. These are primarily questions of fact which were not on record in the assessment years involved. In the subsequent assessment years, the assessee was permitted to raise this contention and some materials were brought on record. But law is well settled that the principles of res judicata are not applicable in revenue matters and it would have been necessary for the Tribunal in the assessment years involved to determine a fresh whether the assessee constituted a HUF. A fresh investigation of facts would be necessary by the Tribunal.

7. The question referred is a limited one. All we have to determine is whether the Tribunal acted reasonably and justifiably in refusing to entertain the additional grounds of appeal. In our view, it cannot be held that the Tribunal acted perversely or unreasonably. Admittedly the questions raised were mainly questions of fact and there was no material in the records of the assessment years involved on the basis of which the said questions could be adjudicated. The records of the subsequent assessment years, in our view could not have been treated as the records of the earlier assessment years involved and as noted earlier a further investigation would have been necessary to ascertain the facts pertaining to assessment years involved.

8. For the reasons as aforesaid, we are unable to accept the contentions of the assessee and we answer the question referred in the affirmative and in favour of the revenue. There will be no order as to costs. The learned advocate for the assessee prayed for certificate from us that this was fit case for appeal to the Supreme Court. We are unable to accede to this prayer as we feel that the law on the controversies involved appear to be well settled by the decisions of various High Courts as also the Supreme Court.

Shymal Kumar Sen, J. - I agree.