

(1997) 03 P&H CK 0136
In the Punjab And Haryana At Chandigarh
Case No : ED Ref. No. 2 of 1989

SMT. DHAN KAUR

APPELLANT

Vs

CONTROLLER OF ESTATE DUTY.

RESPONDENT

Date of Decision : 16-03-1997

Acts Referred:

Estate Duty Act, 1953 — Section 37, 58, 59, 64
Income Tax Act, 1961 — Section 147

Citation : (1997) 142 CTR 409

Hon'ble Judges : N. K. Agrawal, J

Bench : Division Bench

Judgement

N. K. AGRAWAL, J. :

The following question of law has been referred at the instance of the accountable person under s. 64(1) of the ED Act, 1953 (for short, "the Act") :

"Whether, on the facts and in the circumstances of the case, the Tribunal was correct in rejecting the accountable persons contention that the reopening of the assessment proceedings was bad in law ?"

2. Joginder Singh died on 3rd November, 1981. His widow, Smt. Dhan Kaur, filed return under the Act, furnishing the account of the estate left by her late husband and showing the principal value of half property as assessable under the Act. Assessment of estate duty was made by the Asstt. CED on 19th February, 1983 on one half of the net estate of the deceased, valued at Rs. 2,54,483. Thus, as intended by the accountable person, assessment was made on only half of the estate of the deceased. The late Joginder Singh was the Karta and sole surviving male coparcener of his Hindu undivided family (HUF). He was survived by his widow and a married daughter. He had left behind 19 acres of agricultural land valued at Rs. 3,12,645 and foodgrains, milch cattle, agricultural implements etc., valued at Rs. 10,000. Value of half share of the deceased in the agricultural land, milch cattle, etc., was taken at Rs. 1,61,323 on the ground that the deceased was entitled to only half of the estate and was actually not an absolute

owner of the property belonging to the HUF.

The Asstt. CED, on an audit objection, reopened the case subsequently by issuing a notice to the accountable person under s. 59 of the Act. A view was taken that the deceased, being the sole surviving male coparcener, was competent to dispose of the entire HUF property in whatever manner he liked. The entire property thus belonged to him as an individual as well as Karta of the HUF. The Asstt. CED then proceeded to assess the entire value of the HUF property instead of its half value which had been assessed earlier.

No fresh return was filed, in response to the notice issued under s. 59 of the Act, by the accountable person though a reply was filed stating that the assessment had already been made correctly. The Asstt. CED, however, did not accept, the plea put forward by the accountable person. Assessment was completed on the entire value of the HUF property left by the deceased.

In appeal filed by the accountable person, reopening of the assessment was challenged on two grounds. First, that the assessment could not be reopened on the basis of the audit objection and, secondly, that the husband was entitled to only half share inasmuch as his wife, being a member of the HUF, was alive. The ACED accepted the appeal on the ground that there were no new facts before the Asstt. CED for reopening the assessment and, therefore, the reopening was not justified.

In the Departments appeal, the Tribunal, however, upheld the reopening of the assessment and also took the view that the entire interest in the property, belonging to the deceased, had passed on his death. That part of the order whereby the entire interest of the deceased was held to have passed on his death has, however, not been challenged before us. No opinion is, therefore, being expressed on that part of the order.

3. Shri B. S. Gupta, Senior Counsel representing the accountable person, has argued that the reopening was bad in law inasmuch as it was based on an audit objection which did not constitute information for the purposes of reopening the case under s. 59(b) of the Act. It has been argued by Shri Gupta that the audit report of the Comptroller and Auditor General of India (CAG) was not admissible as information in the hands of the Asstt. CED. It is also pointed out by Shri Gupta that the Asstt. CED, on coming to know about the alleged mistake pointed out in the local audit, looked into the matter and accepted the audit objection initially. However, the Asstt. CED subsequently took the view that the objection was not acceptable. The IAC, however, insisted upon the reopening by the Asstt. CED. Shri Gupta has argued that, in such a situation, the Asstt. CED cannot be said to have any reason to believe, on the basis of the information, that any property chargeable to estate duty has escaped assessment.

4. Since the validity of the audit note was under challenge, this Court directed the Department to produce the original order of assessment framed by the Asstt. CED on 19th February, 1983 and also the audit note recorded by the CAG. An

attested copy of the assessment framed by the Asstt. CED was thereupon placed on the record by the Department. Regarding the second, namely, the audit note recorded by the CAG, it was reported that the original audit note was not available in the records of the office. However, the counsel for the Department placed on record an extract of the audit note recorded by the CAG, which had been supplied to him by the Department from its file. Another opportunity was afforded to the Department to produce the original file from which the note of the CAG had been extracted for the consideration of this Court. Original audit note was, however, not available.

The copy of the extract of the audit note recorded by the CAG of India, filed by the Department before this Court, reads as under :

"While framing assessment under s. 58(3) dt. 10th February, 1983 total value of agricultural land at Rs. 3,22,645 (including foodgrains). The deceased left behind his widow and one married daughter. At the time of assessment, half share of Rs. 1,61,323 was assessed whereas the other half of the value of agricultural land was exempted being share of the widow in the HUF property in the form of agricultural land. The deceased was a sole surviving male coparcener in an HUF governed by Mitakshara School of Hindu Law. As such, the whole of his property, including the coparcener property, passes on his death. Thus, Rs. 1,61,322 was not assessed. This is a mistake apparent from record and to be rectified."

5. Shri B. S. Gupta, learned senior counsel for the accountable person, has argued that the aforesaid audit note did not constitute a valid and legal information which could be acted upon for reopening the case under s. 59(b) of the Act. It was necessary that the Asstt. CED must have reason to believe that any property chargeable to estate duty had escaped assessment and such belief must have been entertained by him in consequence of an information.

6. The expression information was considered by the Andhra Pradesh High Court in V.S.L. Narasimha Rao and Another Vs. Assistant Controller of Esate Duty, Guntur and Another, . In that case, the assessing authority had assessed the estate of the deceased. Thereupon, the accountable person preferred appeals to the ACED and thereafter to the Tribunal and obtained substantial relief. Subsequently, the assessing authority issued a notice to the accountable person with the observation that property chargeable to estate duty had been underassessed. The notice was challenged by filing a writ petition before the High Court. It was held on the facts that the Controller had reopened the assessment under s. 59(b) of the Act, relying on additional information that came on record at the appellate stage and, since that information was relevant for the purpose of forming a reasonable belief that some property chargeable to duty had escaped assessment, it was held that the basic requirements to assume jurisdiction for reassessment under s. 59 were satisfied.

7. A question about the validity of the reopening of assessment under s. 147(b) of the IT Act, 1961, was examined by the Allahabad High Court in Sterling

Machine Tools Vs. Commissioner of Income Tax, . In that case, the assessee had been assessed for the asst. yr. 1965-66. During the course of assessment for the next year, the ITO found that, on enquiry by the Vigilance Bureau and the Board of Experts, the actual cost of a centering machine was Rs. 7,331, whereas the assessee had claimed the same at Rs. 9,432. The partner of the firm was confronted with that report and, thereupon, the partner gave a note in writing to the ITO, stating that the cost was much more and that he was willing to have the income being worked out on that basis. It was held that the admission was the best evidence and did constitute information within the meaning of s. 147(b) of the IT Act, 1961.

8. A question of reopening of assessment under s. 59(b) of the Act was examined by the Madras High Court in V. Pugalagiri Vs. Assistant Controller of Estate Duty, . Estate Duty assessment had been originally made.

On receipt of an audit objection based on the valuation of the nursing home of the deceased in the WT assessment, notice under s. 59(b) of the Act was issued for reopening the estate duty assessment. It was held that the information that the value of the nursing home was higher in the WT assessment than what had been included in the ED assessment could not be treated as information for the purposes of s. 59(b), because it had not come to the knowledge of the Asstt. CED after the date of the original order of assessment but was within his knowledge at the time of assessment and was specifically referred to in the original order of assessment itself.

9. The Bombay High Court has, in CIT vs. H. D. Dennis & Ors. (1982) 185 ITR 1, taken the view that a mere change of opinion, on the material already considered, by reappraisal of the same material is not information. The change must be supported by fresh information obtained from the records. The opinion expressed by the Department or by the CBDT is not law. Law is which is laid down either by the legislature or judicial decisions and it is the change in such law which constitutes the fresh information.

The same High Court had again an occasion to examine the question of reassessment under the Act. In Union of India and another Vs. Arvind N. Mafatlal, Trustee of Seth Hemantbhagubhai Trust and another, , the original ED assessment was made on the basis of the CBDT Circular dt. 26th March, 1968, which provided that the value of assets forming part of dutiable estate of a deceased individual should be taken at the same value as was determined for the purposes of wealth-tax. The Board revised its stand subsequently by its instructions dt. 29th October, 1974 wherein it was directed that the earlier circular dt. 26th March, 1968 did not apply to valuation of shares covered by s. 37 of the ED Act, 1953. It was held that the subsequent instructions did not represent the decision of the Board on any appeal or other like proceedings but merely represented an opinion of the Central Board. There was, thus, no information on the basis of which a notice of reassessment could be given under s. 59(b) of the Act.

10. The Madhya Pradesh High Court in Arvind Kumar and Another Vs. Income Tax Officer, , has also taken a view that the word information meant not only facts or factual material but included information as to the true and correct state of the law. The information as to law must be from a formal source, namely, a competent legislature or a competent judicial or quasi-judicial authority.

11. The Calcutta High Court in Dey's Medical Stores Mfg. (P.) Ltd. Vs. Commissioner of Income Tax, , has upheld the reopening of assessment proceedings under s. 147(b) of the IT Act, 1961, where certain facts had not been brought to the notice of the ITO in the course of the assessment proceedings. The fact came into the knowledge of the ITO only in the course of the assessment for the subsequent year. It was not a case of reconsideration of the same material already on record.

12. The Patna High Court in COMMISSIONER OF INCOME TAX Vs. SOH KISAN COLD STORAGE. , has observed that information need not necessarily spring from a source external or extraneous to the original record. However, having second thoughts or a mere change of opinion by the prescribed authority on the same set of facts and materials on the record would not constitute information. In that case, the ITO had initiated the reassessment proceedings on the same set of facts which he had already taken note of while making the original assessment. It was held to be not permissible.

13. This Court had also an occasion to examine a question of reopening in Kulbushan and Brij Bhushan Vs. Controller of Estate Duty, . That was a case where the Asstt. CED had discovered that certain sections of the Act, which were applicable, had not been applied. It was held that the Asstt. CED was entitled to reopen the assessment.

14. The Supreme Court has examined the validity of reassessment in Commissioner of Income Tax, Gujarat Vs. A. Raman and Company, That was a case where notice under s. 147(b) of the IT Act, 1961, had been issued by the ITO in respect of three assessment years. It was observed that the expression information in the context in which it occurs, must mean instruction or knowledge derived from an external source concerning facts or particulars, or as to law relating to a matter bearing on the assessment. In that case, the ITO was of the view that income, which could have been earned by the assessee, was not earned and a part of that income was earned by the HUF. That, according to the ITO, was brought about by "a subterfuge or contrivance". It was held that, on the materials on the record, the ITO had no reason to believe that income chargeable to tax had escaped assessment for the three years in question.

15. The Supreme Court had again an occasion to examine a question relating to information, in Indian and Eastern Newspaper Society, New Delhi Vs. Commissioner of Income Tax, New Delhi, . The assessee, in that case, owned a building in which a conference hall and rooms were let out on rent to its members as well as to outsiders. Certain other services were also provided to the

members. The income from that source was assessed to tax all along as income from business. In the course of auditing the Income Tax records pertaining to the assessee, the internal audit party expressed the view that the money realised by the assessee on account of the occupation of its conference hall and rooms should not have been assessed as income from business. It said that an assessment should have been made under the head "Income from property". The ITO treated the contents of the report as information in his possession for the purpose of s. 147(b) of the IT Act, 1961, and reassessed the income on that basis. It was held that the opinion of the audit party on a point of law could not be regarded as information enabling the ITO to initiate reassessment proceedings under s. 147(b). The ITO had, when he made the original assessment, considered the provisions of ss. 9 and 10 of the Indian IT Act, 1922. Any different view taken by him afterwards on the application of those provisions would amount to a change of opinion on material already considered by him. It was further observed as under :

"But although an audit party does not possess the power to so pronounce on the law, it nevertheless may draw the attention of the ITO to it. Law is one thing, and its communication another. If the distinction between the source of the law and the communicator of the law is carefully maintained, the confusion which often results in applying s. 147(b) may be avoided. While the law may be enacted or laid down only by a person or body with authority in that behalf, the knowledge or awareness of the law may be communicated by anyone. No authority is required for the purpose."

16. In *A.L.A. Firm Vs. Commissioner of Income Tax, Madras*, , the Supreme Court has upheld the reopening of assessment after noticing that the ITO, at the time of the original assessment, had looked at the facts and accepted the assessee's contention that the surplus was not taxable but, in doing so, he had obviously missed to take note of the law laid down in the case of *G. R. Ramachari and Co. Vs. Commissioner of Income Tax, Madras*, . It was also noticed that there was nothing to show that the case had been brought to the notice of the ITO. When he, subsequently, became aware of the decision, he initiated proceedings under s. 147(b). The material which constituted information and on the basis of which, the assessment was reopened, was the decision in *G. R. Ramachari & Co.* (supra). This material was not considered at the time of the original assessment.

17. Keeping in view the interpretation of the law on the subject of reopening of an assessment, the facts in the present case, appear to be not at all in favour of the Department. The audit note recorded by the CAG did not refer to any judicial opinion or provisions of law. The audit note spoke about the deceased being a sole surviving male coparcener and, on that basis, it was observed that a mistake apparent from record had occurred in the assessment and that was to be rectified. Since half of the coparcenary property had been assessed, it was treated to be a mistake. As has been observed by the Supreme Court in *Indian & Eastern Newspaper Societys case* (supra), the opinion of the internal audit party

on a point of law cannot be regarded as information for the purposes of reopening an assessment. The audit party did not possess the power on the law. It may only draw the attention of the ITO to it. That part alone of the note of an audit party which mentioned the law which escaped the notice of the ITO constituted information. The part which embodies the opinion of the audit party in regard to the application or interpretation of the law cannot be taken into account by the ITO. In every case, the ITO must determine for himself what is the effect and consequence of the law mentioned in the audit note. In the light of this observation of the Supreme Court, the audit note in the present case, does not constitute an information. As has been seen earlier, the Asstt. CED had initially accepted the audit objection but, later on, he took the view that the objection was not acceptable. However, the IAC insisted upon the reopening of the assessment and then the Asstt. CED proceeded to reopen the case. In these circumstances, the reopening of the assessment is found to be not based on noticing a provision of law but on an advice/instruction from the audit party/IAC. The Asstt. CED had, in the original assessment order, discussed the question of share of the deceased in the agricultural land. Thereafter, one half share was treated to belong to the deceased and value of that share was brought under the levy of estate duty. Therefore, the Asstt. CED had taken notice of the right of the deceased in the HUF property and a change of opinion would not enable the Asstt. CED to reopen the assessment. The audit note, as already seen, points out to a mistake apparent from record, which was required to be rectified. Thus, the audit note did not constitute information within the meaning of s. 59(b) of the Act.

8. The question of law, referred to this Court, is, therefore, answered in the negative, i.e., in favour of the assessee and against the Department.