

(1984) 07 MAD CK 0075

In the Madras High Court

Case No : Tax Case No's. 361 of 1978, 171 to 173 and 1219 of 1979

State of Tamil Nadu

APPELLANT

Vs

P. Ganesa Udayar

RESPONDENT

Date of Decision : 31-07-1984

Acts Referred:

Tamil Nadu Agricultural Income Tax Act, 1955 — Section 9(2)

Citation : (1988) 172 ITR 199

Hon'ble Judges : Rathnam, J;Ramanujam, J

Bench : Division Bench

Advocate : K.C. Bakthavatsalam, for the Appellant; K.J. Chandran, for Subbaraya Aiyar, Padmanabhan and Ramamani, for the Respondent

Judgement

Ramanujam, J.—Tax Cases Nos. 361 of 1978 and 1219 of 1979 arise out of a common judgment rendered by the Tribunal in respect of the assessments made under the Agricultural Income Tax Act for the assessment years 1975-76 and 1976-77 on the respondent/assessee. The other three cases arise out of the orders of the Tribunal in respect of the assessments made for the assessment years 1972-73, 1973-44 and 1974-75 in relation to the same respondent. Hence, the question involved in all these cases being the same, they are dealt with together. However, it is unnecessary to refer to the facts with reference to each case and it will suffice to refer to the facts in Tax Case No. 361 of 1978 in which the Tribunal has given the main judgment.

2. The assessee in all these cases is one Ganesa Udayar of Pilliarnatham, Kallaperambur Post, Thanjavur Taluk. For the year 1975-76, there was an assessment under the Agricultural Income Tax Act wherein all the lands in his possession and enjoyment were assessed in his hands as an individual. The assessee objected to the said assessment by filing an appeal before the Commissioner of Income Tax (Agricultural) on the ground that the assessment should have been made on him in the status of a Hindu undivided family and not in the status of an individual. The Assistant Commissioner, however, did not

accept the assessee's contention. The assessee thereafter went before the Tribunal and reiterated the same contention that the assessment should be made on him in the status of a Hindu undivided family and not as an individual. The Tribunal has chosen to accept the assessee's contention and set aside the assessment made on the assessee in his individual capacity and directed the assessment to be made on the assessee in the status of a Hindu undivided family. A similar order was passed for the assessment year 1976-77 and that is the subject-matter of Tax Case No. 1219 of 1979.

3. When the assessments relating to the assessment years 1972-73, 1973-74 and 1974-75 came to be questioned before the Tribunal subsequently, the Tribunal followed its earlier decision in the first batch with reference to the assessment years 1975-76 and 1976-77 and held that the assessment should be made on the assessee only in the status of a Hindu undivided family and not in the status of an individual. The said order of the Tribunal directing the assessment to be made on the assessee as Hindu undivided family has been challenged in these tax revision cases.

4. The facts as found by the Tribunal are as follows: One Muthusamy Odayar of Pilliarnatham village was the grandfather of the assessee in these cases. The assessee's father was one Palanisamy Odayar. Muthusamy Odayar had admittedly some ancestral property. Subsequently, from the income of that ancestral property as also from the personal earnings of the grandfather, father and the assessee, some further properties were acquired. The original ancestral properties as well as the subsequently acquired properties were the subject-matter of partition between Muthusamy Odayar, Palanisamy Odayar and the assessee in an oral partition on August 5, 1954, and each one of them was thereafter enjoying the properties allotted to them separately. To confirm the oral partition, a partition deed came to be executed on August 7, 1959. According to the said partition deed, Muthusamy Odayar got 27.26 acres, Palanisamy Odayar 25.15 acres and the assessee got 37.98 acres. Certain lands were given away to five sisters of the assessee. Out of the lands got by the partition, the assessee settled 13.96 acres in the name of his minor daughter, Parimalam, and 13.34 acres in the name of another minor daughter, Vimala, under a document dated November 25, 1959. The settlement deed stated that the settlements have been made by the assessee for the purpose of providing for the education, marriage, etc., of the minor daughters. The deed also stated that the title and possession have been given to the settlees with immediate effect. Muthusamy Odayar settled the properties obtained by him in the partition in a settlement deed dated May 15, 1960, under which an extent of 13.10 acres had been settled in favour of his brother, Appathurai Odayar, and an extent of 14.21 acres in favour of his wife, Subbammal. Subsequent to these documents, the grandfather, Muthusamy Odayar, grandmother, Subbammal and the father, Palanisamy Odayar, have all died. The assessee's father, Palanisamy Odayar, appears to have acquired 3.50 acres before his death. The assessee also acquired 9.38 acres and 9.29 acres and held them in the benami names of Anthonisamy and Natesa Odayar. Having

regard to the lands in the actual possession and enjoyment of the assessee, the assessment came to be made by the assessing authority treating the assessee as an individual. The lands so assessed are:

1. Lands held in the assessee's name 10.52 acres
2. Lands in the name of the assessee's father 3.59 acres
3. Lands held in benami names 18.67 acres
4. Lands held by minor daughter, Parimalam 13.96 acres
5. Lands held by minor daughter, Vimala 13.34 acres
6. Lands in the name of grandmother 14.22 acres

5. It is in the light of these admitted facts it has to be seen whether the assessee is to be assessed in the status of a Hindu undivided family as claimed by the assessee or as an individual as has been done by the assessing authority. According to the assessing authority as well as the Appellate Assistant Commissioner, as all the lands referred to above are in the possession and actual enjoyment of the assessee, though held in different names, they have to be assessed in the name of the assessee as an individual and the lands settled in the name of the minor daughters by the assessee will have to be clubbed with the other lands in view of the provisions of Section 9(2) of the Agricultural Income Tax Act. According to the assessee, however, the inclusion of the income from the lands belonging to the assessee's minor daughter and paternal grandmother cannot legally be justified and that the assessment made in the status of an individual on the assessee cannot also be legally justified. The Tribunal has taken the view that since the assessee obtained an allotment of lands at a partition between himself, the father and grandfather, under a document dated August 7, 1959, the lands would continue to have the ancestral character in his hands as against the other members of his own family and, therefore, himself, his wife and minor daughters should be taken to have constituted a Hindu undivided family. Therefore, an extent of 37.98 acres obtained by him on partition should be taken to have been held by the assessee in his capacity as karta of the Hindu undivided family of himself, his wife and two daughters. Once the lands allotted to the assessee at the partition are taken as those of the Hindu undivided family, any subsequent acquisition with the income from those lands, either in the assessee's own name or in benami names, will have to be taken as lands held by the Hindu undivided family represented by the assessee as karta. Similarly, the lands left by the assessee's father at the time of his death, viz., an extent of 3.59 acres, should also be taken to go to the Hindu undivided family represented by the assessee as karta. So far as the lands settled on the minor daughters are concerned, the Tribunal has taken the view that since the assessment has to be made on the assessee in his capacity as a Hindu undivided family, Section 9(2) cannot have any application and, therefore, the clubbing of the minors' lands with the lands held by the Hindu undivided

family cannot legally be justified. It, therefore, directed the exclusion of the lands held by the minor daughters from the assessment. As regards the lands inherited from the grandmother, the Tribunal has held that the assessee is entitled to only 1/21 share as an heir at law and that also could be assessed only in the hands of the assessee in the status of an individual and not as a Hindu undivided family. The view taken by the Tribunal has been challenged by the Revenue before us in these cases.

6. After due consideration of the matter, we are satisfied that the Tribunal has come to the right conclusion. Admittedly, the properties were originally ancestral and the assessee got these properties by a partition under a partition deed dated August 7, 1959. The properties acquired on partition sh'ould be treated as having gone to the assessee in his capacity as karta of a Hindu undivided family of himself, his wife and two minor children. The assessee himself cannot be taken to have got the properties at the partition in his individual capacity. The properties got at the partition continued to be joint family properties in the hands of the assessee to be a karta of the Hindu undivided family consisting of himself, his wife and two minor daughters. Dealing with a similar situation, the Supreme Court in *Gowli Buddanna Vs. Commissioner of Income Tax, Mysore, Bangalore*, and *N.V. Narendranath Vs. Commissioner of Wealth-tax, Andhra Pradesh*, has held that a coparcener getting a share in the ancestral properties in a partition takes the properties on behalf of the joint family of himself and his wife and minor daughters and that it is not necessary that there should be two male members to constitute a joint family. The said decisions of the Supreme Court support the view taken by the Tribunal in these cases that 37.98 acres obtained by the assessee on partition continued to belong to the joint family of himself, his wife and two minor daughters. Therefore, we have to proceed on the basis that the lands obtained on partition by the assessee were not the separate properties but the properties of joint family of the assessee, his wife and two minor daughters.

7. After the partition, the assessee has settled portions of the properties obtained on partition on his minor daughters for the purpose of meeting the cost of their education, marriage expenses, etc. Though the settlement has been executed by the assessee, it should be taken to have been made by him in his capacity as a karta of the Hindu undivided family and, therefore, he cannot treat these properties as his personal properties for the purpose of executing the settlement deed. Therefore, the settlements made by the assessee would be taken to have been made by the Hindu undivided family and not by the assessee in his personal capacity.

8. Similarly, an extent of 3.59 acres left by his father at the time of his death came to the assessee as ancestral property and, therefore, it should be taken to belong to the Hindu undivided family of the assessee, his wife and minor daughters. For the reasons stated above, the lands held in the assessee's name and the lands which came to the assessee from his father and the lands acquired

by the assessee in benami names from and out of the income from the properties allotted to his branch should all be taken as the properties of the Hindu undivided family. This is exactly what the Tribunal has done.

9. So far as the properties settled on the minor daughters are concerned, the same cannot be included in an assessment made on the Hindu undivided family. Section 9(2) has no application in these cases. As a matter of fact, a Division Bench of this court in a decision rendered in *STATE OF TAMIL NADU Vs. A. SADHANANDAM AND OTHERS.*, has held that Section 9(2) of the Agricultural Income Tax Act has no application if the assessment is made on the father in the status of a Hindu undivided family and Section 9(2) will come into play only when the assessment is made on the father in his individual capacity. Therefore, the exclusion of the lands held by the minor daughters from the assessment of the assessee in his status as Hindu undivided family by the Tribunal also appears to be legal.

10. So far as the lands left by the grandmother are concerned, the assessee is found entitled to only 1/21 share and since the assessee has succeeded through the grandmother to the extent of 1/21 share, that cannot come to the Hindu undivided family but to the assessee in individual capacity. Therefore, that extent acquired by him from the grandmother has to be assessed in his individual capacity without including the same in the assessment of the assessee in the status of a Hindu undivided family. In this view of the matter, we see no reason to differ from the view taken by the Tribunal. Hence, T.Cs. Nos. 361 of 1978 and 1219 of 1979 which arise out of the said common judgment of the Tribunal fail and they are dismissed. No costs.

11. Coming to the Tax Cases Nos. 171, 172 and 173 of 1969, we find that the Tribunal has followed its decision rendered in the assessee's own case for the assessment years 1975-76 and 1976-77. In these cases, apart from the general contention, an additional contention has been raised by the learned Additional Government Pleader. It is pointed out by him that in all the three cases relating to the assessment years 1972-73, 1973-74 and 1974-75, immediately after the assessment u/s 17(4) of the Act, the assessee filed revision petitions before the Commissioner of Income Tax (Agricultural) questioning the status in which the assessment was made on the assessee and also the quantum and that the Commissioner, after holding that the assessee has been rightly assessed in the status of an individual and that the income from the properties settled on the daughters should also be clubbed with the income from other lands held by the assessee, remitted the matter to the assessing authority to make a fresh assessment after giving an opportunity to the assessee to file a return. The remand order proceeds on the basis that the returns have already been filed by the assessee but the assessing authority had ignored those returns and made a best judgment assessment. Subsequent to the remand order, the assessing authority passed fresh assessment orders u/s 17(3). The assessee reiterated the contention that the assessee should be assessed only in the status of a Hindu

undivided family and the income from the land settled on the minor daughters should not be clubbed with the other income of the assessee on the basis of Section 9(2). Naturally, the assessing authority rejected the said contention in view of the decision of the Commissioner of Income Tax while remitting the matter for fresh consideration to the assessing authority. Then, there was an appeal by the assessee to the Appellate Assistant Commissioner who also refrained from considering the tenability of the objection in view of the opinion expressed by the Commissioner in the remit order. There were further appeals to the Tribunal and in those appeals, the Tribunal has taken the view, as already stated, that the assessment has to be made on the assessee only in the status of a Hindu undivided family and that the income from the properties settled on the minor daughters cannot be clubbed with the income of the Hindu undivided family on the basis of Section 9(2). According to the learned Additional Government Pleader, once certain issues are decided by the Commissioner, they cannot be reopened either by the authorities below or by the Tribunal in the proceedings arising out of the remit order passed by the Commissioner. According to him, the theory of merger applies to this case and the opinion expressed by the Commissioner on the question of status and on the question of applicability of Section 9(2) should be taken to have become final since the assessee had not challenged the findings given by the Commissioner by filing a revision before this court and such a finding which has become final cannot be interfered with in the subsequent proceedings arising out of the remit order. We find it difficult to accept this argument of the learned Additional Government Pleader. Once a direction is given by the Commissioner to make a fresh assessment, as against the fresh assessment order passed by the assessing authority, the assessee has a right of appeal to the Appellate Assistant Commissioner and a further appeal to the Tribunal. Though the assessing authority and the Appellate Assistant Commissioner are bound by the findings given by the Commissioner who is their superior authority, so far as the assessee is concerned, he is entitled to challenge the subsequent order passed by the assessing authority after the remand order in all its aspects and when such a challenge is made, the assessing authority as well as the appellate authority have to deal with the matter. In this case, the assessing authority as well as the appellate authority have in fact considered those objections but felt bound by the opinion expressed by the Commissioner. Therefore, they have considered and rejected the assessee's contentions as regards the status in which the assessment has to be made as regards the applicability of Section 9(2). The assessee, therefore, filed an appeal before the Tribunal and the Tribunal, while dealing with the assessee's contention, is not bound by the opinion given by the Commissioner in the remit order as the Tribunal is not an authority subordinate to the Commissioner. As a matter of fact, the jurisdiction of the Tribunal is unfettered and it can give its opinion in all the matters arising in regularly constituted appeals before it, including the matters on which the Commissioner has already expressed an opinion. We do not see how the Tribunal should be taken to be powerless to decide the question as to the status in which the

assessment has to be made and on the applicability of Section 9(2), merely because at an earlier stage of the proceedings before the assessment was made, the Commissioner has expressed a particular opinion. In our view, the Tribunal is right in dealing with the contention raised by the assessee on the question of status and on the applicability of Section 9(2) without reference to the opinion expressed by the Commissioner and in expressing its independent opinion.

12. The learned Additional Government Pleader lays considerable emphasis on the theory of merger and seeks to apply that theory to the facts of this case. He also referred to the decision of this court in *Puthuthotam Estates (1943) Ltd. Vs. State of Tamil Nadu*, , in support of his submission that the theory of merger will apply and the opinion expressed by the Commissioner should be deemed to form part of the order of the assessing authority. The said decision, in fact, does not accept the theory of merger on the facts of that case, for the opinion expressed by the Tribunal on appeal filed against the order of the Appellate Assistant Commissioner was held to be not a bar for invoking the suo motu powers of revision of the Commissioner in respect of the matters which were not canvassed before the Tribunal. On the facts of this case, we do not see how the theory of merger will come into play. For the application of the theory of merger, there should be one order which is made either the subject-matter of an appeal or revision. But here there are two separate orders, one an earlier order which was the subject-matter of revision before the Commissioner and the other a later order passed in pursuance of a remit order passed by the Commissioner. We are not in a position to hold that the remit order passed by the Commissioner has merged with the fresh order of assessment passed by the assessing authority. Normally, the lower authority's order will merge with the order of an appellate or a revisional authority. In these cases, the theory of merger is invoked in support of the contention that the order of a superior authority has merged with the order of a lower authority. We are, therefore, of the view that the theory of merger has no application at all in these cases.

13. Since the additional contention raised by the learned Additional Government Pleader fails, these tax revision cases have also to be dismissed following the decision rendered by us in T.Cs. Nos. 361 of 1968 and 1219 of 1979 and they are accordingly dismissed. There will, however, be no order as to costs in any of these cases.