
(1997) 06 KAR CK 0017

In the Karnataka High Court

Case No : Writ Petitions No's. 33498 and 33499 of 1994

T. Govindappa Setty

APPELLANT

Vs

Income Tax Officer and another

RESPONDENT

Date of Decision : 26-06-1997

Acts Referred:

Income Tax Act, 1961 — Section 143 (1) (a), 154, 244 A, 249

Citation : (1997) ILR (Kar) 2854 : (1998) 231 ITR 892

Hon'ble Judges : P. Vishwanatha Shetty, J

Bench : Single Bench

Advocate : Deokinandan, for the Appellant; K.M.L. Majele, for the Respondent

Judgement

P. Vishwanatha Shetty, J.—The petitioner in these petitions has prayed for quashing the intimation dated March 22, 1993, issued by the first respondent u/s 143(1)(a) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") for the assessment years 1991-92 and 1992-93, copies of the same have been produced as annexures "B" and "C", respectively; and also the order dated April 19, 1994, passed by the second respondent, a copy of which has been produced as annexures "H", rejecting the appeal filed by the petitioner against the orders passed by the first respondent refusing to rectify the intimations. Annexures "B" and "C", issued by him pursuant to the applications filed u/s 154 of the Act and for a further direction in the nature of mandamus directing the first respondent to assess the income in the status of an Hindu undivided family at nil for the said assessment years and to issue refund of advance tax paid for the said assessment years by the petitioner with appropriate interest thereon u/s 244A of the Act.

2. The brief facts of the case which are relevant for the disposal of these petitions may be set out as hereunder :

The petitioner in both the petitions was a member of the Hindu undivided family consisting of himself and his wife, Smt. Godavari Bai, and they were assessed as

a Hindu undivided family till the assessment year 1991-92. The said Godavari Bai expired on September 19, 1991. The return for the assessment year 1991-92 was filed on December 31, 1991, declaring a total income of Rs. 1,49,960 in the status of an Hindu undivided family. The return for the assessment year 1992-93 was filed on February 8, 1993, declaring a total income of Rs. 77,390 in the status of an Hindu undivided family. The returns filed by the petitioner for the years 1991-92 and 1992-93 were processed by the first respondent on March 22, 1993, accepting the income shown in the returns filed and an intimation u/s 143(1)(a) was issued to the petitioner along with the challan for Rs. 16,154 for the assessment year 1991-92 and intimation was also issued for the assessment year 1992-93 along with the challan for Rs. 3,645.

3. Aggrieved by the intimation issued by the first respondent, as stated above, for the assessment years 1991-92 and 1992-93, the petitioner filed two applications seeking for rectification of the intimation issued u/s 154 of the Act. The first respondent by means of his two orders dated July 21, 1993, rejected the applications filed by the petitioner u/s 154 of the Act for the assessment years 1991-92 and 1992-93. Copies of the said orders have been produced as annexures "F" and "G" in these petitions.

4. Not satisfied with the said orders, the petitioner filed two appeals against the said orders, before the second respondent u/s 249 of the Act. The second respondent by means of his common order dated April 19, 1994, a copy of which has been filed as annexure-H, rejected the said two appeals at the admission stage itself on the ground that the petitioner had failed to pay the tax amount due by him before filing the appeals and, therefore, in view of sub-section (4) of section 249 of the Act no appeal was maintainable. Aggrieved by the said order, these petitions have been presented by the petitioner.

5. Sri Sarangan, learned senior counsel appearing along with Sri S. Parthasarathy, submitted that the orders impugned are totally illegal and suffer from errors apparent on the face of the records, inasmuch as, since there was no Hindu undivided family both on the date of filing of the returns and also on the date of assessment, the intimation given by the first respondent as per the orders impugned is one beyond the power conferred on the first respondent u/s 143(1)(a) of the Act. He further submitted that the first respondent has seriously erred in law in not rectifying the intimation issued when applications were filed seeking rectification of the same u/s 154 of the Act. In support of his submission, he relied upon a Division Bench decision of this court in the case of Commissioner of Wealth Tax Vs. G.E. Narayana and others, , wherein this court has taken the view while considering the provisions of the Wealth-tax Act that without the presence of the assessee, it is not possible to make an order of assessment unless the law provides a machinery to assess the erstwhile Hindu undivided family, by enabling the assessment proceedings to be initiated or continued against a proper successor. Secondly, he submitted that the view taken by the second respondent that the appeal filed by the petitioner was not

maintainable as the petitioner had not deposited the balance of returned income of Rs. 16,154 and Rs. 3,645 for the assessment years 1991-92 and 1992-93 is erroneous in law. According to learned senior counsel, since it was the case of the petitioner that the intimation given was one without the authority of law and the petitioner was not liable to be assessed for tax and the petitioner was not liable to pay the amount in question, the question of the petitioner paying the amount in question before filing the appeal did not arise for consideration and, therefore, the interpretation placed by the second respondent on subsection (4) of section 249 of the Act is erroneous in law.

6. Sri M. V. Seshachala, learned counsel appearing for the respondents, strongly supported the orders impugned. He submitted that the first respondent has accepted the returns filed and consequently sent the intimation to the petitioner asking him to pay the balance tax after adjusting advance tax as per the return submitted and, therefore, no fault can be found with regard to the intimation issued by the first respondent in exercise of the power conferred on him u/s 143(1)(a) of the Act. Therefore, he would further submit that the first respondent was also fully justified in rejecting the applications filed for rectification of the intimation issued u/s 154 of the Act. It is his further submission that there is no error in order, annexure "H", passed by the second respondent rejecting the appeal at the admission stage as the petitioner did not pay the amount as per the challan along with the intimations issued to the petitioner. According to him, since as per the return filed by the petitioner himself, the petitioner was required to pay the arrears of tax of Rs. 16,154 for the assessment year 1991-92 and a sum of Rs. 3,645 for the assessment year 1992-93, the second respondent was fully justified in dismissing the appeals at the admission stage itself. He further submitted that the decision relied upon by learned counsel has no bearing on the facts of the present case as the said decision was rendered while considering the provisions of the Wealth-tax Act. He further submitted, as rightly pointed out by the respondents, that the decision relied upon by the petitioner and also the cases referred to in the said decision where the Hindu undivided family ceased to be an Hindu undivided family after the filing of the return and before the return was assessed, and this is not one such case as the returns were admittedly filed after the Hindu undivided family ceased to be an Hindu undivided family consequent upon the death of Smt. Godavari Bai.

7. In the light of the submissions made by the learned counsel appearing for the parties, as stated above, the two questions that would fall for my consideration are :

(1) Whether the view taken by the second respondent that the appeal filed by the petitioner was not maintainable was justified having regard to the provisions of section 249(4) of the Act ?

(2) Since the Hindu undivided family of which the petitioner was a member has ceased to be an Hindu undivided family with effect from September 19, 1991,

whether it was not permissible for the first respondent to issue an intimation as provided u/s 143(1)(a) of the Act treating the return filed as the one on behalf of the Hindu undivided family ?

8. Now, let me deal with the first question that arises for consideration. Section 249 of the Act provides for the form of appeals and limitation. It is useful to extract sub-section (4) of section 249 of the Act, which has a direct bearing to decide this question. It reads thus :

"(4) No appeal under this Chapter shall be admitted unless at the time of filing of the appeal, -

(a) where a return has been filed by the assessee, the assessee has paid the tax due on the income returned by him or

(b) where no return has been filed by the assessee, the assessee has paid an amount equal to the amount of advance tax which was payable by him :

Provided that, in a case falling under clause (b) and on an application made by the appellant in this behalf, the Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals) may, for any good and sufficient reason to be recorded in writing, exempt him from the operation of the provisions of that clause."

9. Sub-section (4) of section 249 of the Act, extracted above, provides that no appeal under Chapter XX is admitted unless at the time of filing of the appeal, where the return is filed by the assessee, the assessee has paid the tax due on the income, or where no return has been filed by the assessee, the assessee has paid an amount equal to the amount of the advance tax which was payable by him.

10. Relying upon clause (a) of sub-section (4) of section 249, Sri Seshachala submitted that since the petitioner has filed the return and as per the return filed the petitioner was liable to pay the tax notified in the intimation issued and the same has not been paid, the appellate authority was justified in not admitting the appeal on the ground that the petitioner has not paid the tax due on the income returned by him. I am unable to accept the submission of Sri Seshachala. What is contemplated by clause (a) of sub-section (4) of section 249 is that when there is an undisputed liability, the appeal filed by the assessee in respect of the disputed liability cannot be admitted unless the assessee pays the admitted liability. The object of clause (a) of sub-section (4) of section 249 is not to entertain the appeal where the assessee fails to pay the undisputed tax liability. In the instant case, it is the case of the petitioner that the intimations issued were wholly illegal and on that basis the petitioner sought for rectification of the intimations issued by filing applications u/s 154 of the Act; and since the first respondent failed to allow the applications filed by the petitioner or rectify the intimations issued, the petitioner had preferred appeals against the intimations issued and the orders passed u/s 154 of the Act. Therefore, it is clear

that though the petitioner had filed the returns, the petitioner had disputed his liability to be assessed as Hindu undivided family and pay the tax liability imposed on him. Under these circumstances, I am of the opinion that the view taken by the second respondent that the appeals filed by the petitioner cannot be admitted since the petitioner had failed to pay the tax due on income shown by him in the return filed by him is erroneous in law. Sub-section (4) of section 249 has to be construed in the backdrop of the right to appeal provided to an assessee u/s 246 of the Act. Under these circumstances, while interpreting sub-section (4) of section 249 of the Act, the court will have to keep in mind the object of sub-section (4) of section 249 of the Act and also the right to prefer an appeal guaranteed to an assessee. In that view of the matter, sub-section (4) has to be liberally construed to serve the object of the right of appeal provided to an assessee, and not with a view to deprive the right provided to an assessee to prefer an appeal. When the very liability is disputed by the petitioner on the ground that the petitioner could not have been assessed as an Hindu undivided family as on the date of filing of the return and on the date of the assessment there was no Hindu undivided family in existence, the right guaranteed to the petitioner to prefer an appeal cannot be deprived by taking the view that the petitioner has failed to pay the tax due on the income shown in the return filed. Therefore, I am of the view that the order annexure "H" passed by the second respondent is liable to be quashed.

11. So far as the second question is concerned, I find considerable force in the submission of Sri Sarangan, learned senior counsel appearing for the petitioner. In the case of Commissioner of Wealth Tax Vs. G.E. Narayana and others, , this court while considering the provisions of the Wealth-tax Act, took the view that the existence of the assessee as an Hindu undivided family at the time of making the assessment order was an absolute necessity and where it is not in existence, in the absence of specific provisions to assess the income of the erstwhile Hindu undivided family, it is not permissible to assess the erstwhile Hindu undivided family or a member of the erstwhile Hindu undivided family. In the present case, admittedly, Smt. Godavari Bai who was a member of the Hindu undivided family expired on September 19, 1991. No doubt, returns of income for the assessment years 1991-92 and 1992-93 were filed on December 31, 1991, and February 8, 1993, respectively, i.e., after the death of Smt. Godavari Bai, treating the status of the assessee as Hindu undivided family as was done for the earlier period. The first respondent accepting the return filed by the petitioner issued intimations as per annexures "B" and "C" for the years 1991-92 and 1992-93. The petitioner aggrieved by the intimations, annexures "B" and "C", filed the applications u/s 154 of the Act seeking rectification of the error. It is the case of the petitioner that in the statement accompanying the return of income filed, the petitioner had specifically by means of a note annexed to the return filed brought to the notice of the first respondent that his wife, Smt. Godavari Bai, had died on September 19, 1991, and, therefore, there was no Hindu undivided family in existence. Further, it is also on record that before issue of intimations, the petitioner wrote

a letter dated July 18, 1992, a copy of which has been produced as annexure "A" to the petition, claiming that the Hindu undivided family was no more in existence and, therefore, the assessee cannot be assessed as Hindu undivided family. It is not in dispute that though the petitioner in his application annexures "D" and "E" filed seeking rectification of the intimations issued for the assessment years 1991-92 and 1992-93, respectively, had made a specific statement that in the note filed by the petitioner along with the return of income filed he had brought to the notice of the first respondent that his wife had expired on September 19, 1991, the said position has not been denied or controverted in the orders, annexures "F" and "G", dated July 21, 1993, passed by the first respondent rejecting the applications of the petitioner seeking rectification of the intimations issued to the petitioner for the assessment years 1991-92 and 1992-93. The first respondent has rejected the prayer of the petitioner for rectification on the sole ground that the first respondent has proceeded to issue intimations u/s 143(1)(a) of the Act without making any additions or deletions to the income return filed by the assessee and the status of the assessee shown in the return was also not altered. It is further observed in the said orders that the statement or note filed by the assessee along with the return was not taken into consideration as, according to the first respondent, it has nothing to do with the adjustment u/s 143(1)(a). It is useful to extract the said portion of the order, annexure "F", dated September 21, 1993, passed rejecting the request of the petitioner seeking rectification of the intimation issued for the year 1991-92. It reads as hereunder :

"On receipt of the return filed by the assessee the return of income was merely processed u/s 143(1)(a) without making any additions or deletions to the income returned by the assessee. The status of the assessee shown in the return was also not altered. The only point which was not taken into consideration was the note of the assessee in the statement of total income, since it has nothing to do with the adjustment u/s 143(1)(a), the intimation u/s 143(1)(a) was accordingly issued for the tax on the income returned by the assessee."

12. Similar is the view expressed in annexure "G" for the year 1992-93. The first respondent further proceeded to distinguish the decision of this court in the case of Commissioner of Wealth Tax Vs. G.E. Narayana and others, on the ground that the facts of the said case are different from the facts of the present case, inasmuch as, in the case of Commissioner of Wealth Tax Vs. G.E. Narayana and others, , the return was filed at the time when the Hindu undivided family was still in existence, but was reduced to a single member at the time of passing of the assessment, whereas in the case of the petitioner, the return itself was filed when the Hindu undivided family consisted of only one member. I am of the view that both the reasons assigned by the first respondent refusing to rectify the intimations issued are unsustainable in law and in that view of the matter I am unable to accede to the strenuous submissions made by Sri Seshachala in support of the orders impugned.

13. When it is not in dispute that the petitioner has annexed a note to the return filed bringing to the notice of the first respondent that one of the members of the Hindu undivided family, i.e., Smt. Godavari Bai, had expired on September 19, 1991, it would be manifest that Smt. Godavari Bai had expired during the middle of the assessment year 1991-92 and there was no Hindu undivided family either on the date of completion of the assessment or issuance of intimations to the petitioner. Further, the note filed clearly demonstrates that the Hindu undivided family had ceased to be an Hindu undivided family long prior to the commencement of the assessment year 1992-93 consequent upon the death of Smt. Godavari Bai. When a note is annexed to the return filed, the said note or a statement filed along with the return must be treated as a part and parcel of the return filed, especially when the assessing authority proceeds u/s 143(1)(a) of the Act. It is not permissible for the assessing authority to ignore the statement or note filed along with the return of income filed by the assessee and proceed u/s 143(1)(a) of the Act. It is relevant to point out that the assessing authority is proceeding to assess u/s 143(1)(a) of the Act without giving an opportunity to the assessee and hearing him. Under these circumstances, the assessing authority must consider the return filed along with the note, explanation or statement annexed to the return filed. Further, as stated earlier, it is on record that the petitioner also in his letter annexure "A", dated July 18, 1992, asserted that the assessee had ceased to be an Hindu undivided family. Therefore, the view taken by the first respondent that the assessing authority was not required to consider the note or the statement filed by the petitioner that the Hindu undivided family had ceased to be an Hindu undivided family consequent upon the death of Smt. Godavari Bai was not required to be taken into account, is erroneous in law.

14. The next question that would arise for consideration is whether the principle laid down by this court in the case of Commissioner of Wealth Tax Vs. G.E. Narayana and others, , applies to the facts of the present case. In the case of Commissioner of Wealth Tax Vs. G.E. Narayana and others, , this court while considering the provisions of the Wealth-tax Act, after referring to the decisions of the Bombay High Court in the case of Commissioner of Wealth-tax, Bombay City-II Vs. Keshub Mahindra, , and also of the Madras High Court in the case of Seethammal Vs. Commissioner of Income Tax, , has taken the view that on the valuation date under the Wealth-tax Act, an order of assessment cannot be made if there is no Hindu undivided family on the said date. In the said decision, this court, at page 47, has observed thus :

"The forerunner to this principle is found in the decision of the Bombay High Court in Commissioner of Income Tax Vs. Ellis C. Reid, , wherein the Bombay High Court held that, when a person died after the commencement of the assessment year but before his income for the relevant accounting year was assessed, his executor was not liable to pay the tax. After this decision, section 24B was introduced in the earlier Indian Income Tax Act, 1922 (similar to the present section 159). That the existence of the assessee at the time of the

assessment order is an absolute necessity is a matter which has been recognised in all these decisions and if the assessee is not in existence, there should be a specific provision to assess the said income which was liable to be taxed under the provisions of the Income Tax Act. The same logic governs the Wealth tax Act also.

In Commissioner of Wealth-tax, Bombay City-II Vs. Keshub Mahindra, , the Bombay High Court has pointed out the distinction between the Income Tax Act and the Wealth-tax Act and there is an observation that the liability to tax arises on the valuation date under the Wealth-tax Act. This observation was sought to be developed by Mr. G. Chander kumar in support of his contention, but we are of the view that the observation has to be understood in the context of the case and, actually, the Bombay High Court held that, if a person is not alive on the valuation date and he dies during the course of the previous year before the valuation date, then no liability arises under the Act so far as the said person is concerned. Similarly, the decision of the Madras High Court in A and F. Harvey Ltd. (As Agents to executors of the A. and F. Harvey Ltd. as Agents to Executors of the Estate of Late Andrew Harvey Vs. Commissioner of Wealth-tax, is of no assistance to Mr. Chander kumar. The decision of the Calcutta High Court in Commissioner of Wealth Tax Vs. Executors to the Estate of Sir E.C. Benthall (Deceased), , is also of no avail to learned counsel for the Revenue. Commissioner of Wealth-tax Vs. Ridhkaran and Others, is a decision of the Rajasthan High Court which again has no relevance to the facts of the instant case. The Rajasthan High Court pointed out that, when a return is filed under a particular status and the Assessing Officer does not accept it as a proper status, a fresh notice shall have to be issued to the proper person.

An identical situation arose before the Madras High Court in Seethammal Vs. Commissioner of Income Tax, , though under the provisions of the Income Tax Act. There were only two members constituting an Hindu undivided family; one of them died; consequently, the Hindu undivided family ceased to exist. The question was whether section 171(1) of the Income Tax Act could be applied to make an order of assessment assessing the erstwhile Hindu undivided family. The Madras High Court pointed out that there was no provision at all to make the assessment on the Hindu undivided family, even though the income was earned during the accounting year when there was an Hindu undivided family. Section 171 of the Income Tax Act did not make any provision to meet such a contingency. It is thus clear that a specific provision is necessary to make an order of assessment against a taxable entity which does not exist on the date of the assessment, even though the said entity was in existence when the liability to tax arose.

The Hindu undivided family is an assessable entity; without the presence of the assessee, it is not possible to make an order of assessment, unless the law provides a machinery to assess the erstwhile Hindu undivided family by enabling the assessment proceedings to be initiated or continued against a proper

successor. Section 19 is one such provision which enables the initiation of proceedings against the legal representatives of the deceased person who was liable to pay the tax under the Act. Sections 19A, 20 and 21 are also enacted to provide for certain similar contingencies. But, nowhere is a provision found in the Act enabling the Assessing Officer to make an order of assessment against the person who succeeded to the wealth of an erstwhile Hindu undivided family which was in existence on the date of the valuation date, but ceased to exist by the time the order of assessment is made, the said cessation being due to natural causes as happened in the instant case. Section 20 covers an entirely different field wherein the Hindu undivided family ceases to exist by act of parties."

15. The first respondent has also distinguished the decision of this court in the case of Commissioner of Wealth Tax Vs. G.E. Narayana and others, on the ground that in the said case on the date of filing of the return the Hindu undivided family was in existence and the same ceased to exist at the time of passing an order of assessment, which is not the position in the present case. I am of the view whether the Hindu undivided family was in existence on the date of filing of the return and ceased to be in existence only on the date of passing of order of assessment or the Hindu undivided family was not in existence both on the date of filing of the return and passing of the order, does not make any difference. The principle is that in the absence of any machinery provided under the Act to assess the erstwhile Hindu undivided family, it is not possible to assess either the erstwhile Hindu undivided family or a member of the erstwhile Hindu undivided family. Since, admittedly, the Hindu undivided family was not in existence both on the date of filing of the return and also on the date of issue of the intimations, which are impugned in these petitions, which position was made clear in the note given to the statement filed along with the return, the first respondent ought not to have issued the intimations to the petitioner assessing the petitioner as an Hindu undivided family. Under these circumstances, the first respondent pursuant to the applications filed by the petitioner u/s 154 of the Act ought to have rectified the mistake that had crept in which was apparent from the records. The conclusion I have reached above shows that the intimations issued which are impugned in these petitions were erroneous in law and therefore I am of the view that the first respondent ought to have exercised the power conferred on him u/s 154 and rectified the error. Since an intimation is issued u/s 143(1)(a) of the Act without hearing the assessee and issuing notice to him, when an apparent error is brought to the notice of the assessing authority, the concerned authority is required to rectify the error. That is the object and purpose behind section 154 of the Act.

16. As stated earlier, while considering the first question, since I have taken the view that the order annexure "H" passed by the second respondent rejecting the appeal at the stage of admission was unsustainable in law, I would have normally remitted these matters for fresh consideration to the appellate authority, however, since these petitions are pending before this court ever since the year

1994, and in view of my finding recorded above that the intimations issued are unsustainable in law, I am of the view, that it is in the interest of justice to quash the impugned intimations and the orders, instead of compelling the parties to again approach the appellate authority. Therefore, the intimations which are impugned in these petitions and also the orders passed rejecting the applications filed by the petitioner seeking rectification of the intimations issued are liable to be quashed.

17. In the light of the conclusions I have reached above, I make the following order :

(i) Intimations, annexures "B" and "C", both dated March 22, 1993, and the orders annexure "F", dated July 21, 1993, annexure "G", dated July 21, 1993, and annexure "H", dated April 19, 1994, are hereby quashed.

(ii) The respondents are directed to refund the advance tax paid for the assessment years 1991-92 and 1992-93 within three months from today.

(iii) Accordingly, these petitions are allowed. Rule issued is made absolute.

(iv) However, having regard to the facts and circumstances of the case, no order is made as to costs.