
(1986) 07 CAL CK 0038
In the Calcutta High Court
Case No : Matter No. 138 of 1979

Tolaram Jalan

APPELLANT

Vs

Commissioner of Wealth Tax

RESPONDENT

Date of Decision : 25-07-1986

Acts Referred:

Wealth Tax Act, 1957 — Section 35, 5(1)

Citation : (1988) 169 ITR 239 : (1986) 29 TAXMAN 441

Hon'ble Judges : Monjula Bose, J;Dipak Kumar Sen, J

Bench : Division Bench

Judgement

Dipak Kumar Sen, J.—Smt. Panna Jalan, the assessee, was assessed to wealth-tax for the assessment years 1965-66 to 1969-70. The assessee claimed before the Wealth-tax Officer that her entire jewellery valued at over Rs. 5 lakhs was exempt from wealth-tax u/s 5(1)(viii) of the Wealth-tax Act, 1957 ("the Act"). The Wealth-tax Officer held that a part of the jewellery of the assessee of the value of Rs. 22,000 was not intended for her personal use and, therefore, was not entitled to exemption as claimed. In respect of the balance of the jewellery, the assessee's claim for exemption was accepted". The assessments were completed accordingly.

2. Appeals were filed against the assessment order by the assessee before the Appellate Assistant Commissioner and thereafter before the Tribunal on other issues. The said appeal before the Appellate Assistant Commissioner was decided on February 4, 1971, and the appeal before the Tribunal was decided on March 22, 1973.

3. In the meantime, Section 5(1)(viii) was amended by the Finance (No. 2) Act, 1971. By the said amendment, jewellery was excluded from the items exempted under the said section with retrospective effect from April 1, 1963. An Explanation defining the expression " jewellery " was inserted in the said subsection with effect from April 1, 1972.

4. At this stage, it will be convenient to note Section 5 as it stood before and after the amendment :

Before the amendment:

" Exemptions in respect of certain assets.--(1) Wealth-tax shall not be payable by an assessee in respect of the following assets, and such assets shall not be included in the net wealth of the assessee--...

(viii) furniture, household utensils, wearing apparel, provisions and other articles intended for the personal or household use of the assessee."

After the amendment :

"(1) Subject to the provisions of Sub-section (1A), wealth-tax shall not be payable by an assessee in respect of the following assets, and such assets shall not be included in the net wealth of the assessee--...

(viii) furniture, household utensils, wearing apparel, provisions and other articles intended for the personal or household use of the assessee, but not including jewellery:

Provided that the furniture, utensils or other articles are neither made wholly or partly of, nor contain (whether by way of embedding, covering or otherwise), gold, silver, platinum or any other precious metal or any alloy containing one or more of such precious metals:...

Explanation 1.--For the purposes of this clause and Clause (xiii), "jewellery" includes--

(a) ornaments made of gold, silver, platinum or any other precious metal or any alloy containing one or more of such precious metals, whether or not containing any precious or semi-precious stone, and whether or not worked or sewn into any wearing apparel;

(b) precious or semi-precious stones, whether or not set in any furniture, utensil or other article or worked or sewn into any wearing apparel. "

5. On the basis of the said amended section of the Act, the Wealth-tax Officer proceeded to rectify the assessments u/s 35 of the Act. The assessee objected to the proposed rectification contending that there was no mistake apparent from the record and that the amendment was discriminatory and otherwise bad. The contentions of the assessee were rejected. The assessments in respect of each of the said assessment years were rectified accordingly and the exemption granted in respect of the jewellery of the assessee was withdrawn.

6. Being aggrieved, the assessee preferred an appeal before the Appellate Assistant Commissioner. It was contended before the Appellate Assistant Commissioner on behalf of the assessee that the amended section was not applicable where the assessment had already been completed and that the provisions of Section 35 did not empower the Wealth-tax Officer to rectify the

assessment already made as the said assessment had become final. Several decisions of the Supreme Court as also of the Bombay High Court were cited before the Appellate Assistant Commissioner.

7. The Appellate Assistant Commissioner accepted the contentions of the assessee and held that it was debatable whether the amended provisions would apply where the assessments were completed and against which no further proceedings were pending on the date of the amendment. There could be two possible opinions on the point and Section 35 had been improperly applied. He directed that the exempted jewellery which had been subsequently brought to tax should be excluded. The appeals were allowed.

8. Being aggrieved, the Revenue went up on a further appeal before the Tribunal. It was contended before the Tribunal on behalf of the Revenue that against the assessment order in question, appeals had been filed both before the Appellate Assistant Commissioner and the Tribunal and, therefore, on the date of the amendment of the section, that is, August 10, 1971, it could not be said that proceedings in respect of the said assessment had already been completed and were not pending before any authority. It was also contended that the right to rectify the assessment u/s 35 had not become barred by limitation on the date of the amendment.

9. It was contended on behalf of the assessee that though the appeals were filed against the assessment orders, the same were finally disposed of by March 22, 1973. The appeals were on different issues.

10. The Tribunal held that by reason of the appeals filed against the orders of assessment, it could not be said that the assessment proceedings had been completed and were not pending before any authority on the date, i.e., August 10, 1971, when the said Section 5 was amended. The Tribunal held further that by reason of the amendment of Section 5 with retrospective effect it must be held that the said section stood amended at the relevant time when the orders of assessment were made and, therefore, the said orders must be deemed to suffer from a mistake apparent from the record even though the same were a result of a fiction created by the retrospective operation of the statute. The Tribunal noted that the rectification proceedings had not become barred by limitation on the date Section 5 was amended. The Tribunal, accordingly, allowed the appeals of the Revenue.

11. On an application of the assessee u/s 27(1) of the Act, the Tribunal has referred 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 and on a proper interpretation of Section 5(1)(viii) of the Wealth-tax Act, 1957, its retrospective amendment by the Finance (No. 2) Act, 1971, and Section 35 of the said Act, the Tribunal was correct in holding that the rectification orders passed by the Wealth-tax Officer were justified and were wrongly cancelled by the Appellate Assistant

Commissioner ? "

12. At the hearing, the learned advocate for the assessee contended before us that the Explanation introduced u/s 5(1)(viii) was not given retrospective effect and came into effect on and from April, 1, 1972. He submitted that before the aforesaid Explanation came into force, ornaments made of precious metals if the same did not contain any precious or semi-precious stone could not be considered to be jewellery and if intended for personal use would still be exempt from wealth-tax under the said section up to the date the Explanation came into force.

13. In support of his contentions, learned advocate for the assessee relied on and cited Commissioner of Wealth Tax Vs. Aditya Vikram Birla, , where it was held by a Division Bench of this court, inter alia, that before the Explanation introduced in Section 5(1)(viii) came into force, the expression " jewellery " had to be construed independently of the Explanation. It was held that the dictionary meaning of the word " jewellery " was not so wide as to bring within its ambit all valuable ornaments. It was held that both in Bengali and Hindustani, there was a clear distinction between ornaments made of gold or silver and jewellery. It was for that reason that the Explanation had to be introduced in the section to include ornaments made out of gold, silver and platinum or any other precious metals irrespective of the fact whether they contained precious stones or not. In the facts of the case, it was held that at the relevant time when the assessment was made for the assessment year 1970-71, the ornaments of the assessee without precious stones and meant for personal use would not be includible in the net wealth of the assessee as the Explanation introduced by way of amendment to Section 5(1)(viii) had not come into operation.

14. The learned advocate for the assessee contended further that, in the instant case, the rectification suffered from several infirmities. The Wealth-tax Officer was bound to make a further inquiry as to which part of the jewellery of the assessee consisted of ornaments of gold, silver and precious metal without stones and which part of the jewellery contained stones. Without such an inquiry and determination, no rectification could be made. Such inquiry was not possible in rectification proceedings where the Wealth-tax Officer had to proceed only on the basis of a mistake apparent from the record.

15. The learned advocate for the assessee did not dispute that by reason of the amendment to Section 5(1)(viii), it could be contended that the original assessments were erroneous. He also did not dispute that, in the facts of the instant case, the rectification proceedings were not barred by limitation and were permissible even though the assessments had been completed.

16. The learned advocate for the Revenue contended on the other hand that the assessee at no point of time contended that part of her ornaments did not come within the mischief of the amended Section 5(1)(viii). No evidence was adduced to show the particulars of the jewellery owned by the assessee. It was not open

to the assessee to impugn the rectification proceedings on a point of fact which was not on record.

17. The learned advocate for the Revenue drew our attention to a decision of the Supreme Court in J.M. Bhatia, Appellate Assistant Commissioner of Wealth Tax and Others Vs. J.M. Shah, , where it was held by the Supreme Court that notwithstanding the fact that no appeal had been preferred against an order of the Appellate Assistant Commissioner or the prescribed time for appeal had been allowed to expire, it could not be contended that the order of the Appellate Assistant Commissioner had become final and the same continued to be liable to be modified u/s 35 within the period of limitation.

18. In the case before the Supreme Court, the rectification was effected on the basis of the amended Section 5(1)(viii) which withdrew the exemption granted in respect of the jewellery with retrospective effect.

19. On the facts on record, it appears to us that the assessee claimed and was allowed exemption in respect of items which she described as jewellery.

20. By rectification on the basis of the amended Section 5(1)(viii), the exemption allowed to the assessee was withdrawn. It cannot be said that the rectification proceedings were without jurisdiction or were inherently impermissible. It is not the case of the assessee that she would be entitled to exemption in respect of all items of jewellery. The contention of the assessee is that by rectification the exemption granted in respect of her ornaments made of precious metals which did not contain any precious or semi-precious stone could not be withdrawn.

21. It was open to the assessee to bring to the notice of the Wealth-tax Officer during the rectification proceedings that part of the items of jewellery consisted of ornaments of precious metal without precious or semi-precious stones and, therefore, would still be entitled to exemption as the same were not jewellery within the meaning of the amended section. This, the assessee did not do. The assessee continued to treat all items exempted as " jewellery " and the exemption was withdrawn in respect of all the items.

22. In our view, it is not open to the assessee to challenge the rectification proceedings on this ground. The challenge is based on a fact which is not on record. To entertain the contention of the assessee, we have to assume that the jewellery of the assessee consisted both of ornaments which did not contain any precious stones and ornaments which contained such stones. This assumption we are unable to make in the absence of any fact found or on record. The said fact was not even asserted by the assessee earlier.

23. The learned advocate for the assessee sought to circumvent the difficulty by relying on a decision of the Supreme Court in COMMISSIONER OF Income Tax, WEST BENGAL I Vs. INDIAN MOLASSES CO. P. LTD., , where it was laid down that on a question" of law raised before the Tribunal, even if an aspect of the question was not raised or argued, the same could be urged in a reference

before the High Court. In our view, the said decision does not. help the case of the assessee. The question which the assessee seeks before us is not essentially a question of law. What the assessee seeks to contend is a question of fact or at best a mixed question of law and fact without the facts being found or brought on record.

24. For the reasons aforesaid, the case of the assessee fails. We answer the question referred in the affirmative and in. favour of the Revenue.

25. There will be no order as to costs. Monjula Bose, J.

26. I agree.