

(2004) 09 AHC CK 0302

In the Allahabad High Court

Case No : WT Reference No. 132 of 1982 27 September 2004

Wife of Rakesh Mohan (P) Trust

APPELLANT

Vs

CWT

RESPONDENT

Date of Decision : 27-09-2004

Acts Referred:

Income Tax Act, 1961 — Section 10, 147, 161, 263
Transfer of Property Act, 1882 — Section 13

Citation : (2005) 142 TAXMAN 267

Hon'ble Judges : R.K. Agrawal, J;K.N. Ojha, J

Bench : Full Bench

Advocate : C.S. Agrawaland Vikram Gulati, for the Assessee. A. N. Mahajan, for the Revenue, for the Appellant;

Judgement

R.K. Agrawal, J.

At the instance of the assessee who are four in numbers, the Income Tax Appellate Tribunal, Allahabad, by a consolidated order dated 24-3-1982, has referred the following two common questions of law u/s 27(1) of the Wealth Tax Act, 1957 (hereinafter referred to as "the Act") for opinion to this court :

" 1. Whether, on the facts and in the circumstances of the case and on a true interpretation of the trust deeds, the Appellate Tribunal was justified in law in concluding that the interest of each of the beneficiaries under these trusts on each of the valuation dates, was indeterminate and the beneficiaries were unknown and accordingly in holding that the assessments of the beneficial interests in the trust properties of the beneficiaries could be made on the trustees only u/s 21(4) of the Wealth Tax Act, 1957 ?

2. Whether, on the facts and in the circumstances of the case and on a true interpretation of the provisions of section 25(2) of the Wealth Tax Act, 1957, the Commissioner had validly assumed jurisdiction and was justified in law in holding that the assessment made by the Wealth Tax Officer u/s 21(2) of the Wealth Tax

Act, 1957 were erroneous ?"

It may be mentioned here that in respect of the wife of Rakesh Mohan Private Trust, the assessment years involved are 1974-75 to 1976-77 whereas in respect of the other three assessees, the assessment years involved are 1973-74 to 1977-78.

2. Briefly stated, the facts giving rise to the present reference are as follows:-

Each of the assessees is a private Trust. The following is the table of relationships :

Padmshri N.N. Mohan (deceased)

Paadmbhushan Lt. Col.

Sukhdeo Mohan

Lt. Col. Kapil Mohan

V.R. Mohan (Died)

Rakesh Mohan

Pankaj Mohan

Vinay Mohan

Hemant Mohan

Lt. Col. Kapil Mohan executed a deed dated 20-10-1973 in respect of 60,000 equity shares of Mohan Meakins Breweries Limited for the benefit of the wife of Rakesh Mohan. Under clause 2 of the said trust deed, in the event of her death or her otherwise becoming incapable of acquiring any interest in the property, the beneficiary was to be the second wife of Rakesh Mohan (in case he married again) and in case his wife (first) became incapable of acquiring property, then the first son of Shri Rakesh Mohan on his attaining majority. In clause 3 it was further provided that if the said Shri Rakesh Mohan did not marry and/or in any manner all possibilities of his marriage disappeared, the beneficiary of the trust was to be Shri Pankaj Mohan (upon his attaining majority) and failing him, to the other surviving heirs of Shri Pankaj Mohan. In clause 4 it was provided that the trustee shall hold the trust property absolutely in trust for and for the benefit of the beneficiary named hereinbefore and administer the same in the manner provided therein. In clause 6 of the deed it was provided that the trust shall come to an end upon the transfer and delivery of the trust property and all the accumulation thereto to the beneficiary in the manner indicated therein whereupon the trustee shall stand discharged, otherwise the trust shall remain in full force.

3. Three similar trusts were earlier created on 22-5-1973 in respect of 60,000 equity shares of Mohan Meakins Breweries Limited (i) by Rakesh Mohan for the

benefit of the first son of Shri Pankaj Mohan (in any circumstance), (ii) by Smt. Comilla Mohan for the benefit of the first son of Shri Hemant Mohan and (iii) by Lt. Col. Kapil Mohan for the benefit of the first son of Rakesh Mohan. In these trusts it was provided that in case the son named therein died before attaining the age of majority or otherwise became incapable of acquiring any interest in property, the beneficiary will be the next surviving male child. They also provided that if Shri Pankaj Mohan, Hemant Mohan or Rakesh Mohan (as the case may be) did not beget a son and in any manner all possibilities of begetting a son disappeared and/or the male children having been born, died before attaining majority, the beneficiary would be Shri Pankaj Mohan, Hemant Mohan or Rakesh Mohan himself (as the case may be).

Accordingly, the trustees named in each case, for the valuation dates as on 31-3-1973 to 31-3-1977 filed the return of wealth declaring the value of shares and accretions in regard thereto in the assessment years subsequent to 1973-74. The Wealth Tax Officer completed the assessments of these assesseees in the status of individuals by invoking the provisions of section 21(1)/21(2) of the Act on the basis that on each of the valuation dates the beneficiaries were known and that their shares were determinate. Subsequent to the making of these assessments and in view of the objection raised in the audit note the Wealth Tax Officer sought to rectify the assessments by issuing notices dated 27-8-1979 u/s 35 of the Act on the ground that the status of the assesseees had been wrongly adopted. However, the Wealth Tax Officer dropped the reassessment proceedings after considering the replies of the assesseees.

4. Thereafter, the Commissioner acting u/s 25(2) of the Act, issued notices to the assesseees on 13-12-1979 to the effect that the assessments made by the Wealth Tax Officer u/s 16(3) were erroneous insofar as they were prejudicial to the interest of the revenue inasmuch as the Wealth Tax Officer had assessed the assesseees in the status of the individuals on the ground that the shares of the sole beneficiaries were determinate and had allowed exemptions u/s 5(1A). After considering the replies dated 20-10-1979 filed by each of the assesseees, the Commissioner held that the beneficiaries for whom the assets were held by the trustees, were indeterminate and unknown and that the assesseees should have been assessed to tax u/s 21(4) of the Act. The exemption u/s 5(1A) was also held to be inadmissible and, therefore, the tax was held to be leviable at the higher rate of 1.5%. He held that on the relevant valuation date Shri Rakesh Mohan had not married, Sarvshri Pankaj Mohan and Hemant Mohan were themselves minors, and that Shri Rakesh Mohan had no son as he was married only in April, 1977.

5. The assesseees being aggrieved preferred separate appeal before the Tribunal. The Tribunal after considering the submissions made by the respective parties was of the view that on each of the valuation date, there was no beneficiary named in the trust deed who could be said to have vested interest in the property of the trust and everyone named as beneficiary in the trust deed was to

have a contingent interest which was incapable of getting vested on each of the valuation dates. Therefore, it was held that the assessment of beneficial interest in the trust property of the beneficiaries could be made on the trustees only u/s 21(4) of the Act. The order passed by the Commissioner was upheld.

6. We have heard Sri C.S. Agrawal, the learned senior counsel assisted by Sri Vikram Gulati, Advocate, on behalf of the applicants, and Sri A.N. Mahajan, the learned Standing counsel appearing for the revenue.

The learned counsel for the applicants submitted that each of the trusts has been validly created. The beneficiaries and their interest was also known and determinate and, therefore, they were assessable u/s 21(1) of the Act and not u/s 21(4) of the Act. He further submitted that the Commissioner had initiated proceedings u/s 25(2) of the Act on the basis of an audit objection to which the stand of the department was that the trust is assessable u/s 21(1) of the Act and, therefore, the assessment order could not have been said to be either erroneous or prejudicial to the interest of the revenue. He submitted that the proceeding initiated u/s 25(2) of the Act was wholly illegal and unwarranted. He relied upon the following decisions:

- (i) CIT v. Brig. Kapil Mohan (2001) 252 ITR 830
- (ii) MALABAR INDUSTRIAL CO. LTD. Vs. COMMISSIONER OF INCOME TAX,
- (iii) Commissioner of Income Tax Vs. Jagadhri Electric Supply and Industrial Co.,
- (iv) Oswal Traders v. CIT(1997) 228 ITR 195
- (v) Indian and Eastern Newspaper Society, New Delhi Vs. Commissioner of Income Tax, New Delhi,
- (vi) Commissioner of Wealth Tax, Gujarat Vs. Arundhati Balkrishna Trust and Others,
- (vii) Jeewanlal (1929) Ltd. Vs. Additional Commissioner of Income Tax and Others,
- (viii) CIT v. Arvind Jewellers (2003) 259 ITR 5025
- (ix) Padmavati Jaykrishna Trust and Another Vs. Commissioner of Wealth Tax, Gujarat,
- (x) CIT v. P Bhandari (1984) 147 ITR 5006
- (xi) L. Gouthamchand and Another Vs. Commissioner of Income Tax,
- (xii) Sirpur Paper Mills Ltd. Vs. The Commissioner of Wealth Tax, Hyderabad, and
- (xiii) Aditanar Educational Institution Vs. Additional Commissioner of Income Tax, .

7. Sri A.N. Mahajan, the learned counsel for the revenue, however, submitted

that from a perusal of the trust deed it is clear that beneficiaries were not in existence on the relevant valuation dates in respect of each assessment years in question and, therefore, the beneficiaries were indeterminate and the provision of section 21(4) of the Act was applicable. According to him, the Wealth Tax Officer had assessed the trust u/s 21(1) of the Act which order was not only erroneous but also prejudicial to the interest of the revenue and the Commissioner was within his right to exercise his jurisdiction u/s 25(2) of the Act on the basis of the audit objection. He relied upon the following decisions:

(i) Malabar Industrial Co. Ltd. (supra); and

(ii) The Commissioner of Wealth Tax, Andhra Pradesh, Hyderabad Vs. Trustees of H.E.H. Nizam's Family Hyderabad, .

8. Having heard the learned counsel for the parties, we find that the Wealth Tax Officer has assessed each of the applicants u/s 21(1) of the Act. Subsequently, on the basis of the objection raised in the audit note, the Wealth Tax Officer sought to rectify the assessment by issuing notice u/s 35 of the Act on the ground that the status of the assessee had been wrongly adopted which proceeding was subsequently dropped. Thereafter, the Commissioner initiated the proceeding u/s 25(2) of the Act on the ground that the assessment order are erroneous and prejudicial to the interest of the revenue. The said action has been taken on the basis of the audit objection.

9. In the case of Indian & Eastern Newspaper Society (supra), the Apex Court has held that the opinion of an internal audit party of the Income Tax Department on a point of law cannot be regarded as information within the meaning of section 147(b) of the Income Tax Act, 1961 for the purpose of reopening an assessment. It has further held that although an audit party does not possess the power to pronounce on the law, it nevertheless may draw the attention of the ITO to it. Law is one thing and its communication another.

10. In the case of Jagadhri Electric Supply & Industrial Co. (supra), the Punjab and Haryana High Court has held that only if the order is erroneous and is likely to prejudice the interest of the revenue, the provision of section 263(1) of the Income Tax Act, 1961 which is analogous to the provision of section 25(2) of the Act, shall be attracted.

11. In the case of Malabar Industrial Co. Ltd. (supra), the Apex Court has held that the prerequisite for exercise of jurisdiction by a Commissioner suo motu u/s 263 of the Income Tax Act, 1961 is that the order of the ITO is erroneous insofar as it is prejudicial to the interest of the revenue. The Commissioner has to be satisfied of the twin conditions, namely, (i) the order of the assessing officer sought to be revised is erroneous; and (ii) it is prejudicial to the interest of the revenue. If one of them is absent, i.e., if the order of the ITO is erroneous but is not prejudicial to the interest of the revenue or if the order of the ITO is not erroneous but is prejudicial to the interest of the revenue, recourse cannot be had to section 263(1) of the Income Tax Act, 1961 and the provision cannot be

invoked to correct each and every type of error committed by the assessing officer. It is only when an order is erroneous then the section will be attracted. The Apex Court has further held that the incorrect assumption of fact or incorrect assumption of law will satisfy the requirement of order being erroneous. The phrase "prejudicial to the interest of the revenue" is of wide import and is not confined to loss of tax. If due to an erroneous order of the ITO, the revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the revenue. The Apex Court has further held that every loss of revenue as a consequence of an order of the assessing officer, cannot be treated as prejudicial to the interests of the revenue, for example, when an ITO adopted one of the course permissible in law and it has resulted in loss of revenue and where two views are possible and the ITO has one view with which the Commissioner does not agree, it cannot be treated as erroneous order prejudicial to the interests of the revenue unless the view taken by the ITO is unsustainable in law.

12. In the case of Jeewanlal (1929) Ltd. (supra), the Calcutta High Court has held that the notice u/s 263 of the Income Tax Act, 1961 at the instance of the Audit Department without exercising his own discretion and judgment cannot be sustained.

13. In the case of Arvind Jewellers (supra), the Gujarat High Court has followed the principle laid down by the Apex Court in the case of Malabar Industrial Co. Ltd. (supra).

14. In the case of Sirpur Paper Mill Ltd. (supra), the Apex Court has held that the power of revision conferred on the Commissioner by section 25 of the Act is not administrative but is quasi-judicial and in exercise of that power the Commissioner must bring to bear an unbiased mind, consider impartially the objections raised by the aggrieved party and decide the dispute according to procedure consistent with principles of natural justice. He cannot permit his judgment to be influenced by matters not disclosed to the assessee nor by direction of another authority.

15. In the case of Brig. Kapil Mohan (supra), the Delhi High Court has held that the first son of Rakesh Mohan trust to be valid trust.

16. In the case of P. Bhandari (supra), the Madras High Court has held that if a trust specifies the condition laid down in section 13 of the Transfer of Property Act, 1882 a trust may be created even in favour of an unborn person.

17. In the case of L. Gouthamchand (supra), the Madras High Court has held that a valid trust can be created for prospective wives of minor sons.

18. In the case of Aditanar Educational Institution (supra), the Apex Court has held that the language of section 10(22) of the Income Tax Act, 1961 is plain and clear and the availability of exemption should be evaluated each year to find out whether the institution existed during the relevant year solely for educational

purposes and not for purposes of profit. The emphasis is that for considering the exemption evaluation should be made each year regarding the purpose for which the institution existed.

19. In the case of Smt. Arundhati Balkrishna Trust (supra), the Gujarat High Court has held that section 21(4) of the Act would apply where the shares of the beneficiaries were indeterminate or unknown, i.e., where the settler had not determined or specified the shares.

20. In the case of Oswal Trader (supra), the Madhya Pradesh High Court was considering a case u/s 161(1) of the Income Tax Act, 1961. In that case., a registered settlement deed on 26-11-1979 was executed by Neelam Chand Berdia creating a private clause 4 of the deed dealt with the distribution. It provided that the date of distribution means the day on which shall expire the period of 20 years after execution of the settlement or such earlier or later day as the trustees may in their absolute discretion at any time appoint. The shares of the beneficiaries were also specified. The Madhya Pradesh Court had held that the beneficiaries were not required to do anything but to stand wait for something to fall to their respective shares in accordance with the settlement deed, They were merely body of individual and not an association of persons with any intention to carry on common activity to produce taxable income and, therefore, the assessment of the trust would be made u/s 161(1) of the Income Tax Act, 1961.

21. In the case of Padmavati Jaykrishna Trust (supra), the Gujarat High Court was considering a case where under the term of the trust deed the income from the trust properly was made payable to the daughter, in law of the settler for. a life and thereafter the corpus was to be divided and distributed in equal shares amongst the male child or children of the settler's son. During the accounting year relevant to "the assessment year 1958-59, the settler's son had two sons, namely, 31-12-1957, the number of beneficiaries was definite and their shares were equal, there was no question of their shares being indeterminate and unknown and, consequently, the provisions of sub-section (4) of section 21 would not apply. It further held that the possibility of a variation in the constitution of the family in future was immaterial and the assessment would have to be made u/s 21(1) of the Act.

22. In the case of Trustee of HEM Nizam's Family (Remainder Wealth) Trust (supra), the Apex Court has held that the question in regard to applicability of sub-section (1) or (4) of section 21 of the Act has to be determined with reference to the relevant valuation date. The Wealth Tax Officer has to determine who are the beneficiaries in respect of the remainder on the relevant valuation date and whether their shares are indeterminate or unknown. It is not at all relevant whether the beneficiaries may change in subsequent years before the date of distribution depending upon contingencies which may come to pass in future and so long it is possible that the beneficiaries are known and their shares are determinate, the possibility that the beneficiaries may change by reason of

subsequent events such as birth or death would not take the case out of the ambit of sub-section (1) of section 21 of the Act. It has further held that if on the relevant valuation date it is not possible to say with certainty and definiteness as to who would be the beneficiaries and whether their shares would be determinate and specific, if the event on the happening of which the distribution is to take place occurred on that date, the case will be governed by sub-section (4) of section 21 of the Act. The Apex Court has further held that when the beneficiaries are indeterminate or unknown then obviously their shares would also be indeterminate and unknown and they cannot conceive of a case where the share would be determined or named while the beneficiaries are indeterminate or unknown. According to the Apex Court, the expression "where the shares of the beneficiaries are indeterminate or unknown" carries with it, by necessary implication, a situation where the beneficiaries themselves are indeterminate or unknown.

23. In the case of A.V. Reddy Trust and Others Vs. Commissioner of Wealth Tax, , the Apex Court was considering the following clauses of the trust deed executed by Sri A.V. Reddy of Kadiam in East Godavari District for the benefit of his three grandchildren and daughter:--

"18. The trustee for the time being may, at his discretion, apply the whole or any portion of the income of the trust fund for the maintenance, education or advancement in life of the beneficiary and shall accumulate all the residue by investing the same in the aforesaid manner.

20. On the beneficiary completing the age of 25 years, the trustee shall transfer and make over to the beneficiary all the trust funds and on so transferring, this trust deed shall stand cancelled and be of no effect.

21. If the object for which the trust has been created fails and cannot be fulfilled, the trustee for the time being shall be at liberty to apply the trust property to the benefit of the other sons, daughters of my last daughter, Mrs. Margeret Anne Reddy Sear, in the proportion of one share for a son and half-share for a daughter". (p. 414)

The Apex Court has held that-

"On the basis of the aforesaid terms and conditions, it is apparent that the rights of the beneficiaries to get the corpus of the trust fund come into existence at the future date when the condition regarding the survival is fulfilled. The High Court, therefore, rightly arrived at the conclusion that interest of beneficiary is indeterminate or unknown and is contingent and, therefore, held that section 21(4) would be applicable. In this view of the matter, there is no substance in the contention of learned counsel for the appellant that the trust should be assessed under section 21(1) of the Wealth Tax Act." (p. 414)

24. From a perusal of the notice issued u/s 25(i) of the Act, it appears that the Commissioner had examined the assessment record of each of the assesseees and

had independently arrived at the conclusion that the orders passed u/s 16(3) of the Act by the Wealth Tax Officer was erroneous and prejudicial to the interest of" the revenue. The audit objection was only a piece of opinion which might have been taken into consideration by the Commissioner but his decision is not solely based on (lie audit objection. He has also applied his independent mind and, therefore, in view of the principle laid down by the Apex Court in the cases of Trustee of HEM Nizams Family (Remainder Wealth) Trust (supra) and A.V. Reddy Trust (supra), the view taken by the Wealth Tax Officer that the assessment should have been made tinder section 21(1) of the Act is unsustainable in law. Thus, the orders are not only erroneous but also prejudicial to the interest of the revenue. In this view of the matter, the Commissioner was justified in assuming jurisdiction u/s 25(2) of the Act..

25. So far as the question as to whether the shares of the beneficiaries were determined or not, it may be mentioned here that each of the four trust deeds contained identical clauses with variations in the names. In the trust deed dated 20-10-1975, executed by Major Kapil Mohan, on 20-10-1975, the beneficiaries of the trust had been the wife of Sri Rakesh Mohan son of late Padma Bhushan Col. V.R. Mohan. The following clauses 2 and 3 of the said trust deed are relevant and are reproduced below:-

"2. That the beneficiary of this trust is and shall be the wife of Sri Rakesh Mohan son of Padma Bhushan Lt. Col. V.R. Mohan and in case she dies or otherwise becomes incapable of acquiring any interest in property the beneficiary of this trust shall be the second wife of Sri Rakesh Mohan in case he marries again and in case his first wife becomes incapable of acquiring property, then the first male child of Sri Rakesh Mohan on the attainment of majority of such male child.

3. If the said Sri Rakesh Mohan does not marry and/or in any manner all possibilities of marrying shall disappear then and in that event the beneficiary of this trust shall be the first son of Sri Pankaj Mohan son of" Padma Bhushan Lt. Col. V.R. Mohan upon his attaining majority and failing him to the other surviving heirs of Sri Pankaj Mohan son of Padma Bhushan Lt. Col. V.R. Mohan."

26. It is admitted that Rakesh Mohan was not married on the valuation date of each of the assessment years in question nor Rakesh Mohan, Pankaj Mohan and Hemant Mohan had any son on the respective valuation date. Thus, the beneficiary was unknown. Even though a trust can be created in respect of future wife or an unborn child but the position in law would be that the beneficiary is unknown. As held by the Apex Court in the cases of Trustee of HEM Nizam's Family (Remainder Wealth) Trust (supra) and A.V Reddy Trust (supra), where the beneficiaries are unknown, the shares would also be taken to be indeterminate. In this view of the matter, the provision of section 21(4) of the Act would be applicable and not section 21(1) of the Act. The Tribunal has rightly applied the provisions of section 21(4) of the Act.

27. In view of the foregoing discussion, we answer both the questions of law

referred to us in the affirmative, i.e., in favour of the revenue and against the assesseees. There shall be no order as to costs.