

In the High Court of Judicature at Madras

Dated : 23.3.2016

Coram :

The Honourable Mr.Justice V.RAMASUBRAMANIAN

and

The Honourable Mr.Justice M.DURAI SWAMY

Tax Case Appeal No.199 of 2016

Commissioner of Income Tax
VIII, Chennai.

...Appellant

Vs

Shri.M.Hemanathan

...Respondent

APPEAL under Section 260A of the Income Tax Act, 1961 against the order dated 11.9.2015 made in I.T.A.No.1286/Mds/2014 on the file of the Income Tax Appellate Tribunal 'C' Bench, Chennai for the assessment year 2009-10.

For Appellant : Mr.R.Swaminathan assisted by
Mr.K.Sureshkumar & Ms.V.Pushpa

Judgment was delivered by V.RAMASUBRAMANIAN,J

This tax case appeal is filed by the Revenue under Section 260A of the Income Tax Act, 1961. The Revenue has come up with the above appeal raising the following substantial questions of law :

"(1) Whether on the facts and in the circumstances of the case, the Tribunal was right in law in quashing the order of the Commissioner of Income Tax passed under Section 263 of the Income Tax Act on a dead person without noting that the Commissioner of Income Tax has impleaded the legal heirs of the assessee? and

(2) Whether on the facts and circumstances of the case, the Tribunal was right in not considering the crucial fact that the notice under Section 263 of the Income Tax Act was served on the legal representative and the opportunity of being heard was given to the legal representative and his authorised representative appeared and attended the hearings before the Commissioner of Income Tax during the proceedings under Section 263 of the Income Tax Act ?"

2. Heard Mr.M.Swaminathan, learned Standing Counsel for the appellant/Department.

3. The respondent is the legal heir (the son) of one late M.A.Margesan. For the assessment year 2009-10, the assessee filed a return of income on 3.6.2009 admitting a total income at Rs.39,26,390/-. The return was processed under Section 143(1). It was selected for scrutiny and a notice under Section 143(2) was issued. The assessee participated in the proceedings, produced books of accounts and presented his case through an authorised representative. Thereafter, the Assessing Officer passed an order

dated 23.6.2011, recomputing the income and ultimately arriving at the conclusion that an amount of Rs.57,162/- was due as refund by the Department to the assessee. It must be noticed that this is a case of scrutiny assessment.

4. After two years of passing of the assessment order, the Commissioner of Income Tax issued a show cause notice under Section 263 on 6.9.2013. The show cause notice was addressed to the assessee Mr.M.A. Margesan. But, at least three months before the date of issue of the show cause notice, the assessee had passed away. He is stated to have died on 13.6.2013.

5. As a result, the show cause notice dated 6.9.2013, sent by post, was returned with the endorsement 'addressee deceased'. This fact was intimated by the Income Tax Officer to the Assistant Commissioner by a communication dated 23.9.2013.

6. It appears that thereafter the Department served the very same show cause notice on the son of the deceased assessee through a messenger. Left with no alternative, the son engaged the services of an authorised representative, who participated in the proceedings under Section 263.

7. Eventually, an order was passed by the Commissioner on 21.3.2014, sustaining the show cause notice, setting aside the scrutiny assessment order dated 23.6.2011 and remitting the matter back to the

Assessing Officer to pass orders afresh.

8. Pursuant to the said order, the Assessing Officer passed a giving effect order computing the total tax payable as Rs.29,01,959/-. As against the order passed under Section 263, the assessee filed an appeal to the Tribunal in I.T.A.No.1286/Mds/2014. This appeal was allowed by the Tribunal by an order dated 11.9.2015 holding that the order passed under Section 263 against a dead person is a nullity. Aggrieved by the said order, the Revenue is before us.

9. The contentions of Mr.M.Swaminathan, learned Standing Counsel for the Revenue are three fold namely

(i) that the Tribunal was wrong in setting aside the order under Section 263 as a nullity only on the basis that it was passed against a dead person without realising that the legal heir had participated in the proceedings

(ii) that under Section 292BB, the notice issued against a dead person, cannot be taken to be a nullity under certain circumstances and

(iii) that under Section 159(2), the legal representatives become obliged to answer such notices and orders in certain circumstances.

10. We have carefully considered the above submissions.

11. The first contention of the learned Standing Counsel for the Department is that the notice, despite having been issued against the dead person, was served on the legal heir and the legal heir also participated in the proceedings. Therefore, it is his contention that it is not open to the legal

heir now to take a position that the entire proceedings are a nullity.

12. But unfortunately, the said contention loses sight of the settled position that any proceeding initiated against a dead person is a nullity. The contention of the learned Standing Counsel for the Department loses sight of one important distinction between a case where the proceedings are initiated against a person, who is alive, but continued after his death and a case of proceedings initiated against a dead person himself. If the proceedings had been initiated against a person, who was alive, and they were continued after his death after putting his legal heirs on notice, those proceedings, under certain circumstances, may be saved. Such a situation is also contemplated in civil proceedings and a provision is made in the Civil Procedure Code itself under Order XXII Rule 4. Therefore, the cases where the very proceedings are initiated against a dead person stand apart from those proceedings where they are initiated against a live person, but continued after his death against the legal heirs. Hence, the first contention is rejected.

13. The second contention revolves around Section 292BB of the Act, which reads as follows :

"292BB. Notice deemed to be valid in certain circumstances.

Where an assessee has appeared in any proceeding or co- operated in any inquiry relating to an assessment or reassessment, it shall be deemed that any notice under any provision of this Act, which is required to be served upon him, has

been duly served upon him in time in accordance with the provisions of this Act and such assessee shall be precluded from taking any objection in any proceeding or inquiry under this Act that the notice was--

(a) not served upon him; or

(b) not served upon him in time; or

(c) served upon him in an improper manner:

Provided that nothing contained in this section shall apply where the assessee has raised such objection before the completion of such assessment or reassessment."

14. A cursory look at Section 292BB would show that the same would apply only to two types of proceedings namely (i) proceedings, in which, the assessee had appeared and (ii) any inquiry, in which, the assessee had cooperated.

15. In the case on hand, the assessee was dead. It was the assessee's son, who appeared and perhaps cooperated. Therefore, the primary condition for the invocation of Section 292BB is absent in the case on hand.

16. Section 292BB is in place to take care of contingencies where an assessee is put on notice of the initiation of proceedings, but who takes advantage of defective notices or defective service of notice on him. It is trite to point out that the purpose of issue of notice is to make the noticee aware of the nature of the proceedings. Once the nature of the proceedings is made known and understood by the assessee, he should not be allowed to take

advantage of certain procedural defects. That was the purpose behind the enactment of Section 292BB. It cannot be invoked in cases where the very initiation of proceedings is against a dead person. Hence, the second contention cannot also be upheld.

17. The third contention revolves around Section 159(2). It will be useful to extract Section 159 in entirety. It reads as follows :

"159. Legal representatives.--(1) Where a person dies, his legal representative shall be liable to pay any sum which the deceased would have been liable to pay if he had not died, in the like manner and to the same extent as the deceased.

(2) For the purpose of making an assessment (including an assessment, reassessment or re-computation under Section 147) of the income of the deceased and for the purpose of levying any sum in the hands of the legal representative in accordance with the provisions of Sub-Section (1),--

(a) any proceeding taken against the deceased before his death shall be deemed to have been taken against the legal representative and may be continued against the legal representative from the stage at which it stood on the date of the death of the deceased ;

(b) any proceeding which could have been taken against the deceased if he had survived, may be taken against the legal representative; and

(c) all the provisions of this Act shall apply

accordingly.

(3) The legal representative of the deceased shall, for the purposes of this Act, be deemed to be an assessee.

(4) Every legal representative shall be personally liable for any tax payable by him in his capacity as legal representative if, while his liability for tax remains undischarged, he creates a charge on or disposes of or parts with any assets of the estate of the deceased, which are in, or may come into, his possession, but such liability shall be limited to the value of the asset so charged, disposed of, or parted with.

(5) The provisions of Sub-Section (2) of Section 161, Section 162 and Section 167, shall, so far as may be, and to the extent to which they are not inconsistent with the provisions of this Section, apply in relation to a legal representative.

(6) The liability of a legal representative under this section shall, subject to the provisions of Sub-Section (4) and Sub-Section (5), be limited to the extent to which the estate is capable of meeting the liability."

18. Sub-Section (1) of Section 159 would apply to a case where a liability has already crystallised. The death of an assessee would not absolve the legal heirs of the assessee of any liability that the assessee had incurred during his life time. In the case on hand, the liability, if any, would have arisen only after an order is passed under Section 263. Therefore, Sub-

Section (1) of Section 159 will not apply to the case on hand. Sub-Section (2) of Section 159 deals primarily with two contingencies. The first is dealt with in Clause (a) of Sub-Section (2) of Section 159. This Clause (a) contemplates the contingency of a proceeding taken against the deceased before his death.

19. In this case, the very initiation of proceedings under Section 263 was done after the death. Clause (a) of Sub-Section (2) uses the expression 'before his death'. Therefore, Clause (a) would not apply to the case on hand.

20. Clause (b) is probably more advantageous to the Revenue, if at all it could be taken advantage by the Revenue. Clause (b) attempts to save the situation where the right of the Revenue to proceed against the assessee was available at the time when the assessee had passed away. Take for instance cases where the Appellate Authority has decided an issue in favour of the assessee and before the time limit available for the Department to file a further appeal, the assessee had died. In such situation, the right to file further appeal is a right to take any proceeding that was available to the Department as if the deceased assessee had survived. Therefore, it is only those circumstances that can be said to be taken care of under Clause (b).

21. In any case, in the case on hand, the Department was made aware of the fact that the assessee was dead. The Income Tax Officer's letter dated 23.9.2013 informing his superior that the notice under Section 263 returned with the endorsement of the Postal Department to the effect that the

addressee was dead, clinches the fact. Despite being put on notice that the noticee was dead, the Department chose to pursue the very same notice. In such circumstances, Clause (b) of Sub-Section (2) of Section 159 cannot be taken advantage of by the Department.

22. Sub-Section (3) of Section 159 contains a deeming fiction. It states that the legal representative of the deceased shall, for the purposes of this Act, be deemed to be an assessee. Therefore, it is contended by Mr.M. Swaminathan, learned Standing Counsel for the Department that the respondent should be deemed to be an assessee and the service of notice on him should be deemed to be sufficient service.

23. In other words, the contention of the learned Standing Counsel is that the respondent herein automatically becomes a deemed assessee in terms of Sub-Section (3) and hence, his participation would pre-empt him from taking objection to the fact that the notice was addressed to a dead person.

24. Though at first blush, the contention appears to be well founded, we do not think that the Department can raise it in this case. As we have pointed out earlier, the original order of assessment was a scrutiny assessment passed under Section 143(3) on 23.6.2011. After two years, the Commissioner sought to invoke Section 263. The assessee had died in the meantime on 13.6.2013. The show cause notice under Section 263 was issued on 6.9.2013.

25. We can give the benefit to the Department that they were not aware of the death of the assessee on that date. But, this notice dated 6.9.2013, sent by post, returned with the endorsement that the addressee was dead. Thereafter, the Department served the very same notice on the legal heir through a messenger. Therefore, the Department cannot now take advantage of Sub-Section (3) of Section 159. If the Department had issued the notice addressed to the legal heir himself, by taking recourse to Section 159(3), the deeming fiction could have been taken advantage of by the Department. It is too late in the day for the Department to take advantage of the same.

26. Mr.M.Swaminthan, learned Standing Counsel drew our attention to the decision of the Madhya Pradesh High Court in ***Smt.Kaushalyabai Vs. CIT [238 ITR 1008]*** and contended that once the legal heir of the deceased assessee had participated in the proceedings, the defect in the notice stood automatically cured.

27. We have gone through the decision of the Madhya Pradesh High Court. As seen from the facts, out of which, the said case arose, the proceedings for assessment for the years 1975-76 to 1980-81 were completed by the Department. Thereafter, the Department noticed that the share income of the wife of the assessee, which should have been included in the assessee's hands under Section 64, had escaped assessment. Therefore, the proceedings were initiated under Section 147. In the meantime, the

assessee expired on 12.1.1981. Notices were issued on 3.3.1981 and they were received by the legal heirs. In response to the notices, the legal heirs actually filed returns for all these years under protest.

28. Therefore, there are two reasons as to why we cannot go by the ratio decidendi in *Kaushalyabai*. The first is that in response to the notices, the assessee's legal heirs filed returns of income. In other words, they submitted to the jurisdiction. Moreover, what was sought to be done was actually to include the income of the wife under Section 64.

29. The second reason is that with great respect to the Madhya Pradesh High Court, the principle of law that they had mentioned therein does not appear to be correct. A notice sent to a dead person is actually a nullity. There is only one exception in so far as civil proceedings are concerned, which could be traced to Order XXII Rule 4. Section 159 of the Income Tax Act also carves out an exception. Since service of notice on the legal heir of a dead person falls under the category of an exception to the general rule, the same cannot overtake the rule in the absence of a specific provision.

30. A Bench of this Court, to which, one of us (VRSJ) was a party, had pointed out in ***Gopalakrishnan G.S. Vs. State of Tamil Nadu [2006 (4) CTC 757]***, that a distinction has always to be maintained between judicial/quasi judicial proceedings and other proceedings. In ***Savithriammal Vs. State of Tamil Nadu [2006 (3) MLJ 389]***, a Division Bench of this Court

had categorically pointed out that the notification issued in the name of a dead person is a nullity. In ***Smt. Lila Vati Bai Vs. State of Bombay [AIR 1957 SC 521]***, the Constitution Bench of the Supreme Court had carved out an exception.

31. The case on hand will not fall under the said exception. Therefore, the very initiation of the proceedings against the dead person and the continuation of the same despite having noticed the factum of death of the assessee, cannot be approved.

32. Hence, the tax case appeal is dismissed and the questions of law are answered against the Department.

23.3.2016

Index : Yes
Internet : Yes

To
The Income Tax Appellate Tribunal 'C' Bench, Chennai

RS

V.RAMASUBRAMANIAN,J

AND

M.DURAI SWAMY,J

RS

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