

*** HON'BLE THE CHIEF JUSTICE SRI KALYAN JYOTI SENGUPTA
AND
HON'BLE SRI JUSTICE K.C. BHANU
+ R.C.No.53 of 1993**

% **Date: 27-09-2013**

Between:

Commissioner of Income Tax, AP-I, Hyderabad

..... Applicant

And

\$ Trustees of HEH the Nizam's Mukarramjah Trust for Education & Learnings, Hyderabad.

..... Respondent

! **Counsel for the Applicant: S.R. Ashok, Standing Counsel**

^ **Counsel for the Respondent: Sri S. Ravi**

< **Gist :**

> **Head Note:**

? **Cases Referred:**

1. [1984] 150 ITR 508 (Andhra Pradesh)
2. [1987] 166 ITR 580 (Madhya Pradesh)
3. [1987] 163 ITR 129 (Madras)

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HON'BLE THE CHIEF JUSTICE SRI KALYAN JYOTI SENGUPTA

AND

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ORDER: (Per Hon'ble the Chief Justice Sri Kalyan Jyoti Sengupta)

This case has been referred under Section 256 of the Income Tax Act, 1961 (hereinafter referred to as 'said Act') by the learned Income Tax Appellate Tribunal, Hyderabad, on the application made by the Revenue by order dated

06-01-1993 for the opinion of this Court on the following questions:

1. Whether, on the facts and in the circumstances of the case, the ITAT is justified in setting aside the orders passed by the CIT, AP-I, under Section 263 of the said Act, consequently restoring the original assessment orders, thereby rejecting the stand of the department to assess the capital gains chargeable to tax arising out of the compensation amount of Rs.30,19,257/- awarded by the State Government on 04-02-1983 for the compulsory acquisition of the property known as Kothi Asafia on 23-09-1981?

2. Whether, on the facts and in the circumstances of the case, the ITAT should not have interpreted that the settler of the Trust also being the accountable person of the late Nizam had enured the benefit of reduction in Estate Duty liability of late Nizam to the extent of the compensation amount awarded, consequently attracting the provisions of Section 13(1)(c) read with Section 13(3) of the said Act?

2. While reading the above two questions, we are of the view that the second question is absolutely redundant and no opinion is called for in the event the first question is answered by expressing opinion.

3. The fact leading to filing of this case is as follows:

The assessee-Trust acquired property known as Kothi Asafia by an oral gift from the settler Prince Mukarram Jah Bahadur on 29-12-1972. The settler got this property by inheritance on the death of his grandfather Nizam Osman Ali Khan with the liability of payment of estate duty of his grandfather. Thus it was subjected to first charge under Section 74(1) of the Estate Duty Act. The Government of Andhra Pradesh acquired this property under the provisions of Land Acquisition Act, 1894 and while doing so, had taken possession on 23-09-1981. However, the compensation of Rs.30.19 lakhs was awarded by notice dated 04-02-1983.

The entire compensation amount was appropriated towards estate duty arrears by virtue of the first charge created on the property under Section 74(1) of the Estate Duty Act. In the assessment proceedings for the assessment years 1982-83 and 1983-84, the assessee-Trust claimed that it had not violated the provisions of Section 13(1)(c) and therefore, it was eligible for exemption under Section 11 of the said Act. The Inspecting Assistant Commissioner, under the provisions of Section 144A of the said Act, held that the Trust had not violated the provisions of Section 13(1)(c) read with Section 13(3) of the said Act and can be treated as a Charitable Trust provided that no other conditions requisite were violated. The Assessing Officer, accordingly, extended the benefit of Section 11 of the said Act to the Trust.

4. Thereafter, the Commissioner of Income Tax, in exercise of his power under Section 263 of the said Act, formed opinion that both the Inspecting Assistant Commissioner and the Assessing Officer were in error and the assessments were prejudicial to the interests of Revenue. He held that the appropriation of this amount of compensation tantamounts to application of the property of the Trust directly or indirectly for the

benefit of the settler and consequently the provisions of Section 13(1)(c) read with Section 13(3) of the said Act were attracted. He, therefore, set aside the assessment orders for both the years and directed the Assessing Officer to re-assess the same by applying the provisions of Section 13(1)(c) read with Section 13(3) and also to bring to chargeability of tax on the heading capital gain arising from the transaction worked out at Rs.19,60,693/- in the total income for the assessment year 1982-83 or 1983-84. The said orders of the Commissioner of Income Tax passed under Section 263 of the said Act were taken to the appellate forum being the Tribunal. The learned Tribunal, after hearing, held that the assessee-Trust cannot be said to have made the payment of estate duty on behalf of the settler. It was also held by the Tribunal that the Commissioner of Income Tax had not held that the Inspecting Assistant Commissioner was wrong to conclude that the Trust had not violated the provisions of Section 13(1)(c) read with Section 13(3) of the said Act and consequently the Assessing Officer should not have extended the benefit of Section 11 of the said Act to the Trust in pursuance of the directions given by the Inspecting Assistant Commissioner under Section 144A of the said Act. The assessment of capital gains is entirely different question which had to be answered considering whether the assessee-Trust was the absolute owner. At the time of transfer, the property was subjected to charge and the assessee-Trust did not acquire any title overcoming Section 74 of the Estate Duty Act. The Tribunal held that the Inspecting Assistant Commissioner has taken decision after duly examining all the facts and legal position and the points involved.

5. Mr. S.R. Ashok, learned counsel for the Revenue, relying on the decision of the Division Bench of this Court in the case of **COMMISSIONER OF INCOME-TAX v. BILQUIS JAHAN BEGUM** ^[1], submits that the recovery of estate duty from the compensation

amount cannot be said to be costs and expenses of acquisition of the said property, moreover the payment of estate duty does not also constitute a valid deduction under Section 48 of the said Act. He submits, pointing out the aforesaid decision, that payment of estate duty is really payment on behalf of the settler and such payment is made for the benefit of the settler to discharge its statutory duty. Hence, the entire amount of compensation received should have been brought to tax under the head of capital gains.

6. Mr. S. Ravi, learned counsel for assessee-Trust, on the other hand submits that the duty paid under Section 74 of the Estate Duty Act constitute a statutory charge over the property and this property was taken with this liability and the amount of compensation did not come really to the hands of the assessee-Trust. Despite due protest, the estate duty amount was realised from the source and this payment was not made by the assessee-Trust voluntarily. Undisputedly the assessee is a charitable Trust. Therefore, the aforesaid payment is allowable deduction under Section 11 of the said Act and the provisions of Section 13(1)(c) read with 13(3) are not attracted in this case as factually payment was not made by the assessee-Trust and the aforesaid recovery of estate duty cannot be said to be a payment made for the benefit of the settler. Factually the settler was Prince Mukarram Jah Bahadur who inherited the property from his grandfather late Nizam Osman Ali Khan and this estate duty was paid in relation to the death of the said Nizam Osman Ali Khan, but not in relation to the settler.

Next he contends, citing a decision of Madhya Pradesh High Court in the case of **COMMISSIONER OF INCOME TAX v. GOVINDRAM SEKSARIYA CHARITY TRUST** ^[2], that if the income tax officials below, after considering the factual and legal position, passed an order, the same cannot be revised under Section 263 of the said Act by the Commissioner of Income Tax, and this is not

within the purview of the aforesaid Section. In support of his contention, he has also relied on a decision of Madras High Court in the case of **VENKATAKRISHNA RICE COMPANY v. COMMISSIONER OF INCOME TAX** ^[3].

7. We have heard both the learned counsel and considered the factual aspect.

8. In order to give answer to the aforesaid question, the issue involved in this case is whether the recovery of estate duty from the compensation amount can be said to be an expenditure incurred for the benefit of the settler of the Trust to attract the provisions of Section 13(1)(c) read with Section 13(3) of the said Act and consequently the entire compensation amount is chargeable to tax under the head of capital gains.

9. It appears from the decision of this Court in the case of ***Bilquis Jahan Begum*** (supra) that it is settled that the estate duty corresponding to the property inherited does not constitute expenditure referable to the property as such by the assessee. The provisions of Section 74(1) of the Estate Duty Act are merely intended to safeguard the interests of the Revenue by creating a first charge against the property and do not support the proposition that because of such charge, the payment of estate duty is directly connected with the asset inherited. Even the estate duty paid does not qualify itself to be treated either as cost of acquisition of the asset or cost of improvements to the asset. Under these circumstances, the estate duty does not also constitute a valid deduction under Section 48 of the said Act. It appears from the fact that the assessee-Trust acquired the property from Prince Mukarram Jah Bahadur who, before creation of the said Trust, did not pay the estate duty payable on account of the death of his grandfather Nizam Osman Ali Khan. Thus this property was transferred by way of a gift for the charitable purposes along with the aforesaid liability of

making payment of estate duty. It appears, on careful reading of the factual and legal position, that the assessee-Trust did not get any income on account of compensation paid and almost entire compensation amount was eaten up on account of payment of estate duty.

10. Charitable Trust is disentitled to get benefit under Section 11 of the said Act if any part of any income or any property of the Trust or institution is, during the prevision year, used or applied directly or indirectly for the benefit of any persons amongst others of the author of the Trust or the founder of the institution or any person who has made substantial contribution to the Trust or institution under

sub-sections (1)(c)(ii) and (3) of Section 13 of the said Act. Here firstly the property cannot be said to have been acquired absolutely free from encumbrance until and unless the payment of estate duty is made. The amount of estate duty recovered cannot be said to be a property which has been acquired by the assessee-Trust. What has been acquired by the Trust in respect of the property is the right, title and interest in the property excluding the liability of charge.

In other words, charge for payment of estate duty cannot be said to be a property of the Trust. The compensation amount is received with liability. Admittedly here no part of the compensation amount, after deducting the amount of estate duty, was utilised or spent by the assessee-Trust. Hence, we think that, in the facts and circumstances of this case, the mischief of Section 13 sub-section (1) clause (c)(ii) read with Section 13 sub-section (3) of the said Act is not attracted. Thus the benefit under Section 11 of the said Act will be applicable. Consequently, the property acquired by the assessee-Trust and award of compensation amount cannot be taxable. Moreover, we have gone through the judgment of the Tribunal and we think it has been rightly concluded by the Tribunal that the revisional authority

did not have any material worth that the Inspecting Assistant Commissioner is wrong to conclude that the Trust had not violated the provisions of Section 13(1)(c)(ii) read with Section 13(3) and consequently, the Assessing Officer should not have extended the benefit of Section 11 of the said Act.

11. It has been rightly contended by Mr. Ravi, learned Senior counsel for the assessee-Trust, and we find support from the decision of Madhya Pradesh High Court in the case of **Govindram Seksariya Charity Trust** (supra), that when the Income Tax officer, after considering the relevant facts and provisions of law, has passed an order, it was not within the purview of Section 263 of the said Act to reopen the issue in the name of alleged prejudicial to the interests of the Revenue. In the said judgment of the Madhya Pradesh High Court, it was held on the proposition of law that since the income tax officer was alive to the relevant facts and provisions of law before proceeding to frame the assessment, the Tribunal was right in holding that it was not open for the Commissioner of Income Tax to interfere under Section 263 of the said Act. We find that similar view was taken by the Madras High Court in the case of **Venkatakrishna Rice Company** (supra). We quote the relevant portion of the judgment as follows:

“The scope of interference under Section 263 is not to set aside merely unfavourable orders and bring to tax some more money to the treasury nor is the section meant to get at sheer escapement of revenue which is taken care of by other provisions in the Act. The prejudice that is contemplated under Sec. 263 is prejudice to the income tax administration as a whole. Section 263 is to be invoked not as a jurisdictional corrective or as a review of a subordinate’s order in exercise of the supervisory power but it is to be invoked and employed only for the purpose of setting right distortions and prejudices to the Revenue which is a unique conception which has to be understood in the context of and in the interest of revenue administration. Such a power cannot, in any manner, be equated to, or regarded as approaching in any way the appellate jurisdiction of even the ordinary revisional jurisdiction conferred

on the Commissioner under Section 264.”

12. In view of the discussion as above, we are of the view that the learned Tribunal is justified in setting aside the orders of the Commissioner of Income Tax passed under Section 263 of the said Act on the facts and circumstances of this case. Consequently, we answer the only question in affirmative and against the Revenue.

13. This Reference Case is, accordingly, disposed of.

K. J. SENGUPTA, CJ

K.C. BHANU, J

Date: 27-09-2013

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NOTE: L.R. COPY TO BE MARKED: **YES**

[\[1\]](#) [1984] 150 ITR 508 (Andhra Pradesh)

[\[2\]](#) [1987] 166 ITR 580 (Madhya Pradesh)

[\[3\]](#) [1987] 163 ITR 129 (Madras)