

Kapil Mohan

Vs

Commissioner of Income Tax, Delhi

Civil Appeal No. 5264 of 1990

(S.P. Bharucha, D.P. Mohapatra JJ)

18.12.1998

JUDGMENT

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S.P. BHARUCHA, J. –

1. The following question, referred to the High Court of Delhi under Section 256(1) of the Income-tax Act, 1961, was answered in the affirmative and in favour of the Revenue.

"Whether on the facts and in the circumstances of the case, the Tribunal was justified in holding that the refund of annuity of Rs. 12,013/- to the assessee as Executor of the Estate of his late father Padam Shree N.N. Mohan was his income and assessable in his hands as Executor of the estate of the deceased ?"

The annuity referred to in the question was a payment under the Annuity Deposit Scheme. The Delhi High Court followed its judgment in an earlier case. The Gujarat High Court had taken a similar view. The High Court of Karnataka and the High Courts at Bombay and Madras have taken the contrary view.

2. The facts, briefly stated, are these : One N. Mohan had deposited the sum of Rs. 1,57,250/- under the Annuity Deposit Scheme framed under Chapter XXII-A of the Income-Tax Act, 1961. The same was refundable to him in 10 equal instalments of principal and interest under the provisions of Section 28-D of the Act. The said Mohan having died on 15th July, 1969, the instalment of principal and interest in the sum of Rs. 12,013/- payable to him under Section 280-D was paid to the assessee, his son and executor. For the Assessment Year 1970-71 the Income-Tax Officer treated the sum of Rs. 12,013 as income in the hands of the assessee. On appeal, the Appellate Assistant Commissioner held that the said sum was not taxable in the assessee's hands. The Tribunal reversed the Appellate Assistant Commissioner and, at the behest of the assessee, referred the aforesaid question to the Delhi High Court. The Delhi High Court, by the judgment and order under appeal, held against the assessee.

3. Section 2(24)(viii) of the Act defines "income" to include "any annuity due, or commuted value of any annuity paid, under the provisions of Section 280-D". Chapter XXII-A of the Act provides for Annuity Deposits. "Annuity" is defined by Section 280-B(4) to mean "any annual instalment of principal and interest thereon payable by the Central Government under the provisions of Section 28-D". A "depositor" is defined by Section 280-B(6) "to mean a person to whom the provisions of this Chapter apply". Section 280-C requires an assessee covered by Chapter XXII-A to make for

every assessment year an annuity deposit with the Central Government at the rate prescribed in respect of his total income for the previous year. Section 280-D deals with the repayment thereof and states :

"Subject to the provisions of this Chapter and any scheme framed thereunder, the Central Government shall repay to the depositor the annuity deposit made or recovered in any year in ten annual equated instalments of principal and interest at such rate as may be notified by the Central Government in the Official Gazette."

(The proviso to Section 280-D does not concern this case.) Section 280-W empowers the Central Government to frame Annuity Deposit Schemes and these may, *inter alia*, provide for the manner and the intervals at which the annuities would be paid.

4. The Annuity Deposit Scheme, 1964, was framed under Section 280-W and came into force on 1st October, 1964. With effect from 8th February, 1967, sub-paragraph 4(a) thereof read : "In the case of a deceased depositor who has not made a nomination under paragraph 11, the annuity shall payable to his legal representative." Paragraph 6 thereof provided for payment to the depositor of the annuity. Paragraph 7 provided for the refund of annuity deposits but it did not cover the case of a depositor who had died. Paragraph 9 dealt with nominations; it said, "A depositor, being an individual, may nominate in Form No. 7, or as near thereto as may be, one or more individuals who shall be entitled to receive the annuity payable to him in the event of his death."

5. The Delhi High Court, in the judgment under appeal, followed its earlier judgment in *Commissioner of Income-Tax, Delhi-II v. O.N. Talwar, 123 ITR 80*. This was a case where the assessee was the 'karta' of a Hindu undivided family. The assessee had made annuity deposits under the Annuity Deposit Scheme, 1964, on behalf of the HUF. Thereafter, the HUF was partitioned and the assessee received to his share repayments against the annuity deposits. The Appellate Tribunal held that, since the assessee was not the depositor, the repayment would not be taxable in his hands except to the extent of the interest that was included therein. The Delhi High Court answered the question that was referred to it in this behalf against the assessee holding that no only the interest element but also the principal element of the annuity, to the extent of the share of the assessee in the annuity deposits, was taxable in his hands. It said that the annual repayment was deemed to be income and, whether received by the depositor himself or the nominee or the legal representative, it would be subjected to tax only when the total income exceeded the maximum not chargeable to tax. It could not be the intention of the Legislature that it would necessarily be taxed on receipt or taxed at the same rate at which the annuity deposit would have been liable to tax had it not been deducted from the total income in the year of deposit. The only idea was that since the amount of deposit was excluded from the total income at that time, the annual payments should be included in the total as and when received. The deposit having been made under the Scheme, the repayment had been obtained thereunder. The Delhi High Court assumed that even when there was no specific provision under the Act or the Rules for repayment, it would still be possible for the legal representatives of a depositor to obtain repayment of the deposit made by the deceased by recourse to legal action but the repayment in the case before it had not been made in any such manner. It was repayment made ostensibly and purportedly under the Act and the Scheme and, hence, it should be treated as a payment made under the Scheme and so under the provisions of the Act. The Delhi High Court approved of view taken by the Gujarat High Court in *Commissioner of Income-Tax, Gujarat-III v. Narottamdas K. Nawab, 102 ITR 455*.

6. The Gujarat High Court in Nawab's case (aforementioned) was required to answer this question :

"Whether, on the facts and in the circumstances of the case, the instalment of annuity deposit received by the karta of the assessee as nominee/legal representative of the deceased depositor was liable to be assessed as income of the assessee ?"

There was no dispute that under the provisions of the Act and the Scheme, so far as the depositor himself was concerned, the payments or instalments which he received were income in his hands. The question was : did it make any difference when the amount of the annuity was received by the nominee or the legal representative of the depositor ? Section 280-D opened with the words "Subject to the provisions of this Chapter and any scheme framed thereunder". Under the Scheme the annuity was payable to the depositor's legal representative or, if he had made a nomination, to the nominee. It was, therefore, clear that under the Scheme the nominee or legal representative of the original depositor was a person to whom the amount of annuity became due under the Scheme and it could not be said that only the provisions of Section 280-D which provided for repayment to the depositor should be looked at. The provisions of Section 280-D were subject to the provisions of any Scheme and under the Scheme, in the event of the death of the original depositor, the amount of the annuity became due to the legal representative, in case there was no nomination, or the nominee, if there was one. Counsel for the assessee contended that under the general law what the legal representative received was not an annuity but the return of capital and what he would be receiving was an instalment of the capital. The Gujarat High Court did not agree. It held :

"In the instant case we find that a portion of the income of the original depositor which had been withheld as a measure to prevent inflation and was thus impounded, is being released over a period of ten years and since the money was made available to the Government some amount of interest was also included with the amount so repaid by ten equal instalments. Ordinarily, the word "instalment" is associated with return of capital. But in this particular cause what we find is that the Government which had impounded the income in the particular year in which the deposit was made, returns the same amount with some amount of interest in ten equal instalments. For having deposited the particular amount in the year in which the deposit was made, the depositor got certain relief in his own income-tax assessment and was not subjected to the extra amount of income-tax which he was liable to pay under section 280X for failure to make the deposit under the provisions of Chapter XXII-A and the Annuity Deposit Scheme framed thereunder. Under these circumstances, even if the question were to be considered from the larger point of view as Mr. Patel wanted us to consider, we come to the conclusion that in the instant case when the amount is being returned, it is not the return of capital but the return of the original item of income which is now spread over a period of ten years. Under these circumstances, even considered from the larger point of view, it is not possible to accept Mr. Patel's contention that this was a return of capital and not a return of income. Moreover, that which would have been income in the hands of the original depositor does not cease to be so by the mere circumstance that the depositor died and the money is being received by the legal representative or by the nominee. That which was otherwise income retains its character of income notwithstanding the fact that the original depositor died in the meanwhile. Under these circumstances, considered from either point of view, namely, from the point of view of the provisions of the Act and the paragraphs of the Annuity Deposit Scheme, taken together, or considered from the point of view of general law, the result would be the same, namely, that these annuity payments which are a creature of statute and statutory powers, are income in the hands of the nominee, legal representatives of the

original depositor."

7. The Karnataka High Court in the *K. Bhoomiamma and another v. Controller of Estate Duty, Mysore, Bangalore 115 ITR 703*, was concerned with several questions, of which the first two are relevant :

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that a sum of Rs. 48,777/- on account of annuity deposits was rightly included in the principal value of the estate of the deceased ?

(2) If the answer to the first question is in the affirmative, whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that no deduction should be made out of the value of the annuity deposits on account of income-tax payable by the legal heirs of the deceased on the instalments of annuity deposits receivable by them ?"

No argument was addressed to the High Court on the first question and the High Court said that it was clear that the beneficial interest in the annuity deposits made by the deceased and the right to recover them passed on the death of the deceased to his heirs and they, therefore, came within the definition and ambit of the expression "property passing on the death of the deceased". The second question arose out of the contention raised on behalf of the accountable person that the valuation of the annuity deposits without taking into consideration the income-tax payable by the heirs of the deceased when the annuity deposits were realised from time to time was wrong. The Karnataka High Court held that the income-tax which the accountable person was likely to pay had no relevance to the valuation of the annuity deposits at the time of death of the deceased. The value of the estate of the deceased had to be determined on the death of the deceased and it was not the value of estate in the hands of the accountable person subsequently.

8. The decision of the Bombay High Court in *Commissioner of Income-Tax v. Dr. Rodhan H. Shroff, 207 ITR 957*, is squarely in favour of the assessee. The questions to be answered read thus :

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that there was no provision in the Income-tax Act whereby the repayment of annuity deposit made to a legal heir could be deemed to be the income in the hands of the legal heir ?

(2) Whether, on the facts and in the circumstances of the case, the repayment of annuity deposits can properly be taxed in the hands of the assessee, who is a nominee of the depositor, under the provisions of Section 2(24)(viii) read with section 280-D of the Income-tax Act, 1961 since the repayment of annuity deposit is actually received by the assessee ?"

The Bombay High Court said that the annuity deposit or any amount under the Annuity Deposit Scheme which was paid to a nominee on the death of the depositor was not covered in the definition of income under Section 2(24)(viii). This Section included in the definition of income only the amount paid under Section 280-D to a depositor. Hence, the Court said, "we do not see how a payment which is made to a nominee upon the death of the depositor, in respect of the annuity deposits made by the depositor, would fall within the definition of income under Section 2(24)(viii) of the Income-tax Act, 1961". The Bombay High Court relied upon the judgment of the Madras

High Court in *CIT v. M.M. Muthiah* 109 ITR 463, where it had been held that there was a fictional inclusion of the annuity referred to in Section 280-D in the income of the depositor. It was only in the circumstances set out in Section 280-D and by a statutory fiction that the annuity repaid in instalments could be income in the hands of the depositor. There was no such statutory provision which would cover the receipt of such an instalment in the hands of the nominee, as income of the nominee. Unless the charging section was expressive and clear, it was not possible to include all amounts received by the assessee as his income only on the contention that it would be equitable to do so. Reliance was laid on this Court's judgment in *CIT v. Hukumchand Mohanlal*, 82 ITR 624, where it had been held that if the Income-tax Act did not contain any provision making a successor in business or the legal representative of an assessee liable to pay tax on the deemed profits of the original assessee, the legal representative could not be so taxed. The reasoning of the Madras High Court in the case of *M.M. Muthiah* was followed by it in the subsequent decision in *CIT v. S.M. Ebrahim*, 134 ITR 599. The Bombay High Court agreed with the reasoning and conclusions of the Madras High Court. It disagreed with the view taken in *Nawab's* case because, in its view, the Gujarat High Court had failed to take into account the express provisions of Section 2(24)(viii) wherein the repayments received only by the depositor were deemed to be his income. The Bombay High Court also considered the decision of the Delhi High Court in *Talwar's* case and held that it was inapplicable to a case like the one before it where the deposit had not been received by the depositor in any sense of the term. Section 280-D in terms referred only to repayment to the depositor. All that it said was that such repayment to a depositor would be subject to other provisions in the scheme. Section 280-D did not cover any payment either to a nominee or to a legal representative of a deceased depositor. Therefore, the definition of income under Section 2(24)(viii) did not cover a repayment of annuity deposit received by a nominee or a legal representative.

9. Reliance was placed by the learned Additional Solicitor General on Section 159 of the Income-tax Act, which says, "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 some extent to the deceased". It was submitted that, in any event, the assessee was liable to be taxed on the amount of the annuity on this account. The submission can be disposed of immediately, before we go to the main contention. Section 159 applies to income that had accrued to the deceased when he was alive; it would not apply to a case such as the present.

10. The argument on behalf of the Revenue runs thus : Sub-paragraph 4(a) of the Scheme says that "the annuity shall be payable to his legal representatives" if the deceased depositor has not made a nomination. It was, therefore, that the annuity had been paid to the assessee; it had been paid under the Scheme. Section 280-D requires the Central Government, subject to the provisions of Chapter XXII-A and any Scheme framed thereunder, to repay the annuity deposit. The payment to the assessee being under the Scheme, it is a payment under the provisions of Section 280-D. It is, therefore, income as defined by Section 2(24)(viii) and taxable as such in the assessee's hands.

11. As we read it, Section 280-D, which has been quoted above, states that the requirement of repayment to the depositor of the annuity deposit "in ten annual equated instalments of principal and interest at such rate as may be notified" is subject to the other provisions of Chapter XXII-A and any Scheme framed thereunder; that is to say that the Scheme may provide for a different manner of repayment to the depositor. In any event and assuming that the Scheme can provide that the repayment be made to someone other than the original depositor and payment is made accordingly, it is payment under the Scheme and not payment under Section 280-D. Section 280-D does not apply to anyone other than the original depositor. Only to the original depositor is the annuity paid under the provisions of Section 280-D. It is, therefore, only in the hands of the original depositor

that the annuity is income, by reason of the inclusive definition in Section 2(24)(viii) and taxable as such.

12. The amount of the annuity deposit was income in the hands of the original depositor and taxable as such. The provisions of the Act and the Scheme obliged him to make the deposit thereof instead of paying income-tax thereon. The annuity deposit, when made, became capital. When returned, either as a whole or by instalments, it was not liable to tax as income. For this reason Section 2(24)(viii) was enacted, whereby the instalment or annuity was treated as income, provided it was received under Section 280-D, that is to say, the annuity was to be treated as income if received by the original depositor. On the original depositor's death the balance of the annuity deposit that he had made became part of his estate and was liable to tax as such, as the Karnataka High Court rightly held in Bhoomiamma's case. Becoming a part of his estate, his legal representatives became entitled to recover it, and they would under the general law be entitled to recover it in one lump sum, paying no tax on it (except estate duty, should a statute levying it be on the statute book at the relevant time). Sub-paragraph 4(a) of the Scheme does no more than recognise that the unpaid balance of the annuity deposit has to be paid over to the original depositor's legal representatives, adding only this : that it would be paid in instalments as annuity. Though so paid in annuity form the repayment is of capital. It cannot be taxed as income in the hands of the legal representative unless the statute were expressly to deem it to be income in his hands.

13. As to the argument based on equity, it has long been recognised that tax and equity are strangers. Just as reliance upon equity does not avail an assessee, so it does not avail the Revenue. The legal representative of a deceased depositor cannot be made to pay income-tax upon the annuity only because the original depositor had not been required to pay income-tax on the amount of the annuity deposit, on the basis that what the Revenue had lost out on then should be recouped to it now. The original depositor did not voluntarily make the annuity deposit; he was required by the Act and Scheme to do so. Insofar as he was concerned, the Act provided that the annuity he received would be taxable as income. Whether advisedly or otherwise, the Act did not provide that the annuity would be taxed as income in the hands of his legal representative, and there it must remain.

14. The appeal is allowed. The judgment and order under appeal is set aside. The question is answered in the negative and in favour of the assessee.