(2009) 04 GUJ CK 0059

In the Gujarat High Court

Case No : Tax Appeal No''s. 226, 227 and 230 to 234 of 1999

Assistant Commissioner of Gift Tax APPELLANT

Vs

Synbiotics Ltd. RESPONDENT

Date of Decision : 08-04-2009

Acts Referred:

Essential Commodities Act, 1955 — Section 3, 3(2)
Gift Tax Act, 1958 — Section 4(1)(a), 5(1)(xiv)

Citation : (2009) 224 CTR 46

Hon'ble Judges : S.R. Brahmbhatt, J;D.A. Mehta, J

Bench : Division Bench

Advocate : K.M. Parikh, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

D.A. Mehta, J.—At the time of admission on 6th Dec, 2000 following two questions were formulated by the High Court as substantial questions of law:

1. Whether, the Tribunal is right in law and on facts in holding that the sale of bulk drugs by the assessee to its sister concern at a price lower than the price fixed by the Government should not be treated as deemed gift u/s 4(1)(a) of the GT Act ?

2. Whether, the Tribunal is right in law and on facts in holding that the deemed gift in the assessee''s case was exempt u/s 5(1)(xiv) of the GT Act ?

2. All the appeals have been heard together as common issue is involved for asst. yrs. 1981-82 to 1985-86 under the GT Act, 1958 (the Act).

3. Before proceeding further it may be noted that insofar as question No. 2 is concerned, the Tribunal has categorically observed:

...With regard to the other grounds i.e. applicability of Sections 45(c), 45(d) and Section 5(1)(xiv) of the Act which are not required to be discussed, since we have already held that it is not a case of gift.

In light of this finding learned advocate for the appellant-Revenue was not in a position to make any submission as regards question No. 2. Accordingly, question No. 2 is held to be a question not arising out of impugned order of Tribunal dt. 15th Jan., 1999 and is not required to be answered in the facts of the case.

4. Insofar as question No. 1 is concerned, the Tribunal has found that the assessee was a manufacturer of basic drug known as Streptomycin, which was sold in bulk to a sister company known as Sarabhai Chemicals. The said concern viz. Sarabhai Chemicals is a division of Karamchand Premchand (P) Ltd., who was granted an industrial license by the Government of India to manufacture Streptomycin in bulk in 1960. Accordingly, Sarabhai Chemicals negotiated with E.R. Squibb & Sons. U.S.A. for technical know how for manufacture of Streptomycin. Hence, a new company, namely, Synbiotics Ltd., respondent herein, was floated during 1960. The industrial license was transferred to the respondent company with prior approval of the Government. Admittedly, the bulk drug manufactured by the assessee company was used for manufacture of finished formulations manufactured by Sarabhai Chemicals.

5. In exercise of powers under the Drugs (Prices Control) Order, 1979 (DPCO) Government fixed pooled price and retention price for selling bulk drug @ Rs. 660.75 per kg. and Rs. 459.31 per kg. respectively. The assessee-company sold such manufactured bulk drug to Sarabhai Chemicals at the retention price. According to the AO, the assessee was thus selling the bulk drug to the sister concern at a price lower than the price fixed by the Government. In other words, according to the AO, the sale of bulk drug at retention price and not at pooled price fixed by the Government was a transaction which could be treated as a deemed gift within the meaning of Section 4(1)(a) of the Act. The contentions raised by the assessee before AO were turned down and a sum of Rs. 2,26,76,217 was determined to be the value of deemed gift u/s 4(1)(a) of the Act for asst. yr. 1981-82. Similar assessments were framed under the Act for other assessment years at different figures which are not reproduced here.

6. All the assessments were challenged by way of appeals before CIT(A). The assessee succeeded in such appeals as CIT(A) upheld the contentions of the appellant that there was no transfer of property otherwise than for adequate consideration, and that pooled price could not be equated with market value of the manufactured goods. Revenue carried the matter in second appeals for all the assessment years before the Tribunal but the Tribunal, vide its common order dt. 15th Jan., 1999, did not accept the case of Revenue and upheld the orders of CIT(A) for all the assessment years in question.

7. Heard the learned Counsel for the appellant-Revenue. Though served, there is no appearance on behalf of the respondent-assessee.

8. The learned advocate for the appellant-Revenue submitted that both CIT(A) and the Tribunal had erred in reading the provisions of DPCO. That as per scheme of DPCO, a manufacturer was entitled to charge the pooled price on sale

of bulk drugs, retain the retention price, and deposit the difference between pooled price and retention price in the Drugs Prices Equalisation Account as provided in para No. 17(1)(a)(ii) of DPCO. That, therefore, the AO had rightly treated the difference between the retention price, charged by the assessee as sale price, and the pooled price as deemed gift within the meaning of provisions of Section 4(1)(a) of the Act.

Referring to corresponding proceedings for the very same assessment years under the IT Act, 1961 it was submitted that merely because addition of identical amounts as income was not sustained under the IT Act cannot be a ground for holding that the assessee was not liable to be taxed under the Act. It was submitted that the assessee had made a claim in Income Tax proceedings of identical amounts as being an accrued liability by virtue of a demand made by the Government of India in terms of provisions of DPCO and such claim had not been upheld by the High Court would not mean that there was no gift within the meaning of provisions of Section 4(1)(a) of the Act. In this context the learned Counsel read extensively from copy of Tribunal''s order dt. 31st Aug., 1995 in the form of statement of case for asst, yr. 1982-83 in Ref. Appln. Nos. 613 and 614/ Ahd/1987 as well as unreported judgment between the same parties in IT Ref. No. 34 of 1998, dt. 16th April, 2008, to submit that in Income Tax proceedings while dealing with the addition of identical amount the Tribunal had observed that such a situation may be covered by deeming provisions of GT Act. Therefore, according to the learned Counsel, the impugned order of Tribunal in the present proceedings was required to be set aside and orders made by the AO under the Act charging gift-tax were required to be upheld. In the course of submissions learned Counsel also extensively read from judgment of the High Court in the case of Synbiotics Limited Vs. Commissioner of Income Tax,

9. The definition of ''gift'', as appearing in Section 2(xii) of the Act, reads as under:

(xii) gift means the transfer by one person to another of any existing movable or immovable property made voluntarily and without consideration in money or money''s worth, and includes the transfer or conversion of any property referred to in Section 4, deemed to be a gift under that section;

10. Section 4(1)(a) of the Act, as is material for the present, reads as under:

4. Gifts to include certain transfers.-(1) For the purpose of this Act,:

(a) where property is transferred otherwise than for adequate consideration, the amount by which the market value of the property at the date of the transfer exceeds the value of the consideration shall be deemed to be a gift made by the transferor:

11. Thus, on a plain reading, for any transaction to be treated as a gift the basic requirement is that there should be transfer of any existing movable or immovable property by one person to another voluntarily and without

consideration in money or money''s worth, or transfer of any property otherwise than for adequate consideration. In the facts of the present case therefore it will have to be examined as to who are the transferor and the transferee and which is the property which is transferred otherwise than for adequate consideration.

12. Section 4(1)(a) of the Act requires transfer of a property otherwise than for adequate consideration, and only if such a transfer is shown to have occurred viz. without adequate consideration, the amount by which the market value of the property at the date of transfer exceeds the value of consideration such amount shall be deemed to be a gift made by the transferor.

13. The assessee in the present case has been treated as the transferor. The question that is required to be posed and answered is as to who is the transferee considering the transaction in question and the provisions of DPCO. Admittedly, the assessee sold bulk drug to Sarabhai Chemicals and, therefore, at the first blush it would seem that Sarabhai Chemicals is the transferee. However, as the case of Revenue is based on provisions of DPCO one will have to examine the scheme of the said order.

14. u/s 3 of the Essential Commodities Act, 1955 Central Government has been vested with powers to control production, supply, distribution, etc. of essential commodities. The relevant extract of the said provisions, as is material for the present, reads as under:

3. Powers to control production, supply, distribution, etc. of essential commodities.-(1) If the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, (or for securing any essential commodity for the defence of India or the efficient conduct of military operations), it may, by order, provide for regulating or prohibiting the production, supply and distribution thereof and trade and Commerce therein.

(2) Without prejudice to the generality of the powers conferred by Sub-section (1), an order made thereunder may provide:

(a) for regulating by licenses, permits or otherwise the production or manufacture of any essential commodity;

(b) for bringing under cultivation any waste or arable land, whether appurtenant to a building or not, for the growing thereon of food crops generally or of specified food crops, and for otherwise maintaining or increasing the cultivation of food crops generally, or of specified food crops;

(c) for controlling the price at which essential commodity may be bought or sold;

(d) for regulating by licenses, permits or otherwise the storage, transport, distribution, disposal, acquisition, use of consumption of, any essential commodity;

(e) for prohibiting the withholding from sale of any essential commodity ordinarily kept for sale;

15. Thus, not only for the purposes of securing equitable distribution but also for ensuring fair price Central Government may, by order, provide for regulating or prohibiting the production, supply and distribution of the essential commodity and trade and commerce in such essential commodity. Under Sub-section (2) of Section 3 of the Essential Commodities Act the Central Government is further empowered to make an order for controlling the price at which an essential commodity may be bought or sold [Section 3(2)(c) of the Essential Commodities Act].

16. In exercise of such powers the Drugs (Prices Control) Order, 1979 has been issued by the Central Government. Under para No. 3 of DPCO the Central Government is vested with powers to fix the maximum sale price of indigenously manufactured bulk drugs specified in First Schedule or Second Schedule. Sub-para (1) of para No. 3 of DPCO makes it clear that the said power is to be exercised for the purposes of regulating equitable distribution of an indigenously manufactured bulk drug and making the same available at a fair price. Sub-para (3) of para No. 3 of DPCO places an embargo to the effect that no person shall sell a bulk drug at a price exceeding the price notified under sub-para (1), plus local taxes, as may be applicable. Under sub-para (4)(a) of para 3 of DPCO, a manufacturer is permitted to sell the bulk drug at a price not exceeding the price notified under sub-para (1). In other words, an indigenous manufacturer of bulk drug is entitled to sell the manufactured goods at a price which is less than the maximum price fixed in exercise of powers available in para No. 3 of DPCO.

17. The next power which is available to the Central Government is by virtue of para No. 7 entitling the Central Government to fix retention price and pooled price for the sale of bulk drug specified in First or Second Schedule, as the case may be. The relevant part of the said para reads as under:

7. Power to fix retention price and pooled price for the sale of bulk drugs specified in First Schedule or Second Schedule indigenously manufactured as well as imported.-(1) Where a bulk drug specified in the First Schedule or the Second Schedule is manufactured indigenously and is also imported, the Government may, having regard to the sale prices prevailing from time to time in respect of indigenously manufactured bulk drugs and those of imported bulk drugs, by order, fix with such adjustments as the Government may consider necessary,:

(a) retention prices for individual manufacturers, importers or distributors of such bulk drugs;

(b) a pooled price for the sale of such bulk drugs.

On a plain reading it transpires that if the conditions for exercise of the powers are shown to be satisfied the Central Government may fix retention price for individual manufactures, etc. and pooled price for sale of such bulk drugs.

18. Para No. 17 of DPCO permits the Central Government to maintain an account to be known as Drugs Prices Equalisation Account and which has to be credited with the difference between the pooled price over retention price by the manufacturer, etc., as the case may be. In other words, by way of an illustration, if the manufacturer manufactures a drug at say cost of Rs. 40 per kg. and the retention price is fixed at Rs. 50 per kg., with the pooled price at Rs. 100 per kg. by virtue of operation of para No. 17 of DPCO the difference of Rs. 50 between the pooled price and the retention price (Rs. 100 minus Rs. 50) has to be credited to the Drugs Prices Equalisation Account, manufacturer being entitled to retain the sale price to the extent of Rs. 50, the same being retention price fixed under DPCO.

19. On a conjoint reading of the scheme which unfolds from para Nos. 3, 7 and 17 of DPCO, one can say that the manufacturer is entitled to sell the manufactured goods at the maximum price or any price lower than that; the pooled price may be the maximum price. The manufacturer can sell at the pooled price or the retention price or any other price lower than the retention price which the manufacturer may choose. In the illustration aforesaid, a manufacturer may sell at any price between Rs. 40 to Rs. 50 and there shall be no obligation in law to credit any amount in the Drugs Prices Equalisation Account. However, the moment the sale price is fixed by the manufacturer at a figure more than Rs. 50 i.e. the retention price, such difference will have to be credited to the Drugs Prices Equalisation Account. The aforesaid scheme cannot be read to mean that there is any compulsion on a manufacturer to sell the manufactured goods at pooled price only and not at any other lower price. Even if, for the sake of argument, such a contention is available to Revenue, the remedy for such default viz. selling at a price lower than the pooled price, would be as provided in DPCO and would have no bearing on the liability to pay tax by treating the transaction as a gift.

20. As noted hereinbefore, the transaction, by which a property is transferred, can be treated as a deemed gift if the property is-firstly, transferred otherwise than for adequate consideration, and secondly, then and only then, the amount by which the market value of the property so transferred on the date of the transfer exceeds the value of consideration for transfer, can such difference be treated as amount liable to be taxed as a deemed gift. The basic requirement being that the parties to the transaction remain the same, namely, the transferor and the transferee to the transaction remain the same. When the provisions of the GT Act are read in conjunction with the provisions of DPCO it becomes clear that the term adequate consideration as understood for the purposes of the GT Act can be any value upto retention price and need not necessarily be anything more than the retention price, the manufacturer not being entitled to retain anything over and above the retention price fixed by the Central Government.

21. The equating of the pooled price with the market value of the property transferred by the Revenue is based on a fallacious premise and overlooks the

object of provisions of Section 3 of the Essential Commodities Act and the purpose for which DPCO has been framed and issued. Once the powers are exercised by the Central Government for the purpose of ensuring equitable distribution of indigenously manufactured drug at fair price, it is not possible to state that the pooled price is equal to the market value of the property transferred. In fact when one reads provisions of the Essential Commodities Act and DPCO together it becomes clear that because the market price of an essential commodity was such which resulted in the goods not being equitably distributed and not being made available at a fair price, the Government was required to step in and exercise powers under the said statute for remedial measure. Therefore, the basic premise adopted by the Revenue of equating the pooled price with market price itself being fallacious, the end result is not the correct result in law.

22. There is another aspect of the matter as noted hereinbefore. Even if a manufacturer sells the goods at pooled price the only amount which the manufacturer can retain as sale price is the retention price fixed by the Central Government and thus, when the difference is to be credited to the Drugs Prices Equalisation Account to be maintained by the Central Government, it cannot be stated that the difference between the pooled price and the retention price is available to the assessee, the transferor, for being gifted to the transferee, namely, the purchaser. Hence, neither under DPCO nor under the GT Act can it be stated that the basic ingredients for treating the transaction as a deemed gift are fulfilled. In fact insofar as the difference between the pooled price and retention price is concerned, such difference is not available to the seller-transferor, either for retaining or for gifting to the purchaser-transferee, such difference being required to be credited to the Drugs Prices Equalisation Account.

23. In the aforesaid fact situation, it is not possible to find any legal infirmity in the impugned order made by the Tribunal holding that provisions of Section 4(1)(a) of the Act are not attracted in the facts of the case. Accordingly, question No. 1 is answered in the affirmative i.e. in favour of the assessee and against the Revenue in all the tax appeals. As recorded hereinbefore, it is not necessary to answer question No. 2 as the same does not arise out of the impugned order of the Tribunal.

24. All the appeals are accordingly dismissed with no order as to costs.

25. Registry to place a copy of this order in connected matters.

