
(2002) 03 CAL CK 0008

In the Calcutta High Court

Case No : IT Ref. No. 3019 of 1992 27 March 2002 A.Y. 1973-74

CGT

APPELLANT

Vs

Surendra Paul

RESPONDENT

Date of Decision : 27-03-2002

Acts Referred:

Gift Tax Act, 1958 — Section 4(1)(c)

Citation : (2002) 175 CTR 212

Hon'ble Judges : Maharaj Sinha, J;Ajoy Nath Ray, J

Bench : Full Bench

Judgement

By the court

In respect of two different assesseees the same two questions have come up for answer by us.

The questions are as follows :

1. "Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the assessee had no right or claim over the amount of Rs. 18,32,426 brought in the books of account on 31-3-1973 of the firm in which he was a partner till 31-3-1972, when the amount in question, was earned by the firm prior to 31-3-1972 ?
2. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that there was no nucleus of the partnership property in the impugned sum of Rs. 18,32,426 brought into the books of the firm on 31-3-1973, when the said sum was earned by the firm during which the assessee was a partner in the firm ?"

Before we proceed any further we make it clear that in the last part of the second question the word "which" should be struck out and after the word "during" the words "the period when" should be inserted.

2. The facts which have given rise to these questions are briefly as follows :

Upto 31-3-1972, there were four partners of the firm Amirchand Pyarelal of whom two were Surendra Paul and Swaraj Paul.

With expiry of the said date these two assesseees retired from the firm. They were apparently both assesseees and partners in their respective capacity as Karta of the Hindu undivided family M/s Surendra Paul and others and Karta of the Hindu undivided family Swaraj Paul and others.

On the 1-4-1972 some children of the two retiring partners were introduced as minor partners in the firm of Amirchand Pyarelal. The number of minors so introduced was 8. Along with the two other major Pauls the number of partners came to 10. It appears that a sum of Rs. 18,32,426 had been earned by the firm during the period when the two retiring major partners were in the firm as partners; but the books of the firm upto the date 31-3-1972, did not show this sum under any head of account at all.

In the next accounting year, however, this sum came into the accounts through the P&L appropriation account.

The Gift Tax Officer was of the opinion that the retiring partners had rights over the said sum to the extent of their partnership share, which was 25 per cent for each of the two. According to the Gift Tax Officer these two retiring partners relinquished their rights over the said sum of money and it passed on to the others of the firm. The officer held that this was a case of gift. Although it was not a case of an ordinary direct gift with a donor and a donee ascertained, yet it was a case of deemed gift coming within the ambit of section 4(1)(c) of the Gift Tax Act, 1958.

3. The finding of the Gift Tax Officer was reversed in appeal. The appellate officer records that for reasons not exactly ascertainable by him, in spite of his best efforts, the said sum of Rs. 18,00,000 and odd never found its way into the books of the firm upto to 31-3-1972. Apparently, this was interest income for periods prior thereto. For such prior periods, the appellate authority recorded, that income tax dues of the firm were in arrears for a long time and huge amounts were paid at one time covering long periods. We need not inquire into whether the payment of large amounts also implied the leaving unpaid of large amounts but we cannot say that the thought has not crossed our mind.

4. To come back to the main issue, the appellate authority held as follows :

"In such a case it has got to be held that the partners already retired on 31-3-1972, would not be entitled to any portion thereof. Anyway it is difficult to arrive at a different conclusion in that regard.

The sum referred to above is the said sum of Rs. 18,32,426. The Tribunal opined that"..... We do not see anything that the assessee had any such right and they have surrendered anything knowing fully well".

The Tribunal also noted with favour that" It was submitted that the Hindu

undivided family cannot gift anything to its members because its members of the Hindu undivided family had a right by hereditage or otherwise in the property of the Hindu undivided family Thirdly, the Tribunal was of the opinion that there is no infirmity in the contention that even if the gift is assumed to have been made by the retired partners with the end of the accounting year 1971-72 yet the claiming of gift-tax for such gift for the next accounting year 1972-73 was wrongful. They said as follows :

"Lastly, the assessee" claim that they were fully paid their credit balance on 31-3-1972, and if any act of surrender can be construed it can be construed on 31-3-1972, only then if any assessment of deemed gift is to be made it should have been made in the assessment year 1972-73 and not in the assessment year 1973-74 as done. We do not find any infirmity in this contention because some interest income was credited caused to appear in the books of account of the firm of M/s Amirchand Pyarelal on 31-3-1973, that does not mean that the revenue got any cause of action to assess the deemed gift in the assessment year 1973-74.

5. A number of cases were cited by both sides. In regard to the main issue, i.e., whether in the facts and circumstances of this case a case of gift can at all be made out, the case of CGT v. T.M. Louiz was relied on behalf of the assessee. The Supreme Court there was of the opinion that in case of a retiring partner, the assets and "the goodwill of the firm did not attract gift-tax by being a transfer by way of settlement within the meaning of the Transfer of Property Act.

However, the case referred to in para 10 of the said judgment is, in our respectful opinion, more in line with the facts of our case. That case is of CGT v. Chhotalal Mohanlal AIR 1987 SC 1412. In that case the giving of 3 annas share of a partner in favour of his minor sons happened to attract gift-tax.

6. In our case we are of the opinion that the relinquishment of the rights of the two retiring partners in respect of their shares in the said sum of Rs. 18,32,420, was certainly a gift within the meaning of section 4(1)(c) of the Gift Tax Act, since the said sum was not even entered into the books of account and it happened to drop in there in the next year. Had the sum been in the books of account the case of gift would be undeniable and we explain why this is so hereunder. Because of the sums not being in the books into 31-3-1972, the position of the assessee could not improve, nor could they benefit from their own wrong. Had the sum been in the books the giving up of that sum without any consideration to the 10 partners would be gift even in the direct sense of the term. The definitions of "gift", "donor" and "donee" as given in section 2(xiii), section 2(ix) and section 2(viii) of the Gift Tax Act, 1958, would all fit the giving up of the sum to the subsequent partners and the same would be voluntary and without consideration. It would thus be a clear case of gift.

7. As regards the assessment years being different i.e., the giving up taking place on 31-3-1972, and the taking thereof taking place on 1-4-1973, there is no

problem. No gift is complete until taken. As such the correct previous year for gift-tax would be 1972-73 corresponding to the assessment year 1973-74.

8. As regards Hindu undivided family Karta being unable to make a gift to some members of the very same Hindu undivided family, some cases were cited to us to which we do not have to make any detailed reference. It is not possible in our opinion for a particular assessee even if he describes himself as a Karta of an Hindu undivided family to be an assessee, and a partner, and to be a distinct legal personalities for these purposes, and yet to cease to be such a distinct personality as soon as a question of gift to one of the members of the Hindu undivided family comes in.

In other words, if the assesseees claim themselves to be legal persons entitled to separate assessment (and they most certainly do so claim themselves to be), and the assesseees also claim themselves to have been 25 per cent profit-sharing and loss-bearing partners of the firm Amirchand Pyarelal, as separate and distinct legal personalities (and they do claim themselves to be so once again), then and in that event, they are not permitted to say that they are not such distinct and separate legal personalities in capacities as donor within the meaning of section 2(ix) of the Gift Tax Act, 1958.

In the facts and circumstances of this case, accordingly, the assesseees have no way of substantiating their case that they had no right over the said sum of Rs. 18,32,426; their only case is that the sum had not found its way into the books of Amirchand Pyarelal prior to their retirement on 31-3-1972. Books of accounts can never taken precedence over the reality of the situation in taxation matters. This principle has been reiterated again and again. That the sums had been earned during the continuance of the assesseees as partners is not disputed. In view of this the Tribunal should have taken the simple and ordinary step of concluding that the assesseees made a gift of their rights in the said sum to the next partners attracting the usual incidents of gift-tax.

The questions are, therefore, both answered in the negative and in favour of the revenue.

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