

(1974) 08 MAD CK 0024

In the Madras High Court

Case No : Tax Case No. 218 of 1968 (Referred Case No. 63 of 1968)

Commissioner of Gift-tax

APPELLANT

Vs

B. Sathiar Singh

RESPONDENT

Date of Decision : 21-08-1974

Acts Referred:

Companies Act, 1956 — Section 75(1)
Gift Tax Act, 1958 — Section 4, 4(2), 6
Income Tax Act, 1922 — Section 12B(2)

Citation : (1975) 98 ITR 316

Hon'ble Judges : V. Ramaswami, J;G. Ramanujam, J

Bench : Division Bench

Advocate : V. Balasubrahmanyam and J. Jayaraman, for the Appellant; S. Narayanaswami and T.V. Ramanathan, for the Respondent

Judgement

Ramanujam, J.—The assessee who was carrying on business as a bus operator, formed a private limited company under the name of P. S.

S. Transport (Private) Ltd. on March 31, 1959. He transferred 20 buses belonging to him to the company on July 1, 1959, for a total

consideration of Rs. 2,58,604 which was the written down value of these buses in the assessee's accounts. On July 1, 1959, the amount of Rs.

2,58,604 was credited to his account in the company's books and later on Rs. 90,000 out of the said amount was adjusted towards the shares

allotted to him and the balance together with the value of the sundry assets sold by him aggregating to Rs. 1,83,133 continued to his credit in the company's accounts.

2. The assessee, his wife and two of his close relatives were the shareholders in the company. The assessee held shares to the value of Rs. 90,000

while the paid-up capital of the company was Rs. 1,00,000. The Income Tax

Officer, in the Income Tax assessment for the assessment year

1960-61, relevant to the accounting year ending December 31, 1959, felt that the assessee was substantially interested in the company and applied

the first proviso to Section 12B(2) of the Indian Income Tax Act, 1922, hereinafter referred to as "the Act", and determined the fair market value

of the 20 buses transferred to the company at Rs. 5,28,840 and brought a sum of Rs. 2,16,703 to tax as capital gains. This assessment was

confirmed by the Commissioner of Income Tax u/s 33A(2) of the Act.

3. In the gift-tax assessment for the assessment year 1960-61, the Gift-tax Officer held that the difference between the fair market value of Rs.

5,28,840 and the actual amount received as consideration for the buses amounts to a gift u/s 4(2) read with Section 6 of the Gift-tax Act. He,

therefore, levied gift-tax on Rs. 2,70,236. The assessee preferred an appeal to the Appellate Assistant Commissioner of Gift-tax contending that

as he had the controlling interest in the company, he retained the same value of the buses even after they were transferred to the company, that

there was no element of gift in the transfer and that the fair market value fixed is also incorrect. The Appellate Assistant Commissioner held that, as

the transferor and the transferee were not identical, there was no justification to treat the transaction as anything other than a gift, and confirmed the

order of the Gift-tax Officer.

4. There was a further appeal by the assessee to the Tribunal. The Tribunal held that the consideration for the transfer of 20 buses was the

allotment of 900 fully paid-up shares of Rs. 100 each in the company plus a sum of Rs. 1,83,133 credited to the assessee's current account with

the company, that the real value of these 900 shares cannot be taken to be their face value of Rs. 90,000, that the real value of the shares should

be taken as 90 per cent. of the real value of the buses transferred, that if so taken, the transfer of the 20 buses by the assessee to the company

would be for adequate consideration and that the assessee was not, therefore, liable to gift-tax.

5. At the instance of the revenue the following question has been referred to this court for opinion u/s 26 of the Gift-tax Act :

Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that the transfer of 20 buses by the

assessee to the company was for adequate consideration u/s 4(2) of the Gift-tax Act?

6. The learned counsel for the revenue, firstly, contends that the Tribunal has made an erroneous approach to the question involved in the case and

that the question whether the transfer of 20 buses by the assessee to the company was for adequate consideration or not has to be decided strictly

with reference to the form of the transaction entered into between the company and the assessee and not with reference to the substance or the

ultimate effect of the transaction. According to Mr. Balasubrahmanyam for the revenue the doctrine of substance cannot be imported or applied in

tax matters and how a transaction has been put through by the parties is alone material in considering the taxability or otherwise of that transaction.

It is pointed out that in this case there has been first a transfer of buses by the assessee to the company for a specific price and a subsequent

allotment of 900 shares by the company to the assessee of the face value of Rs. 90,000 and that these transactions have been kept apart and

treated as separate transactions by both the parties as would be clear from the entries in the accounts of the company. Secondly, it is pointed out

by the learned counsel that the allotment of the shares can only be for cash consideration in this case and, therefore, the Tribunal was in error in

treating the 900 shares of the company allotted to the assessee as part of the consideration for the transfer of buses. Thirdly, it is contended that

even if the transfer of buses and the allotment of shares are treated as forming part of a single transaction, the view of the Tribunal that the real

value of 900 shares will be 90 per cent. of the real value of the buses transferred cannot at all be sustained as the real value of the shares of the

company has to be determined after providing for all debts due by the company and that in this case admittedly the company was due to the

assessee in a sum of Rs. 1,83,133.

7. Before dealing with the above contentions it would be useful to refer to certain facts which are quite material. The written-down value of the 20

buses transferred by the assessee to the company in his books on the date of the transfer was Rs. 2,58,604. The transfer is admitted to be for the

same consideration as the written down value of Rs. 2,58,604. In the Income Tax assessment the fair market value of these buses was fixed at Rs.

5,28,840. The Gift-tax Officer treated the difference between the fair market value and the actual amount received by the assessee as

consideration for the buses as a gift under the Gift-tax Act. Though the assessee contended before the Gift-tax Officer and the Appellate Assistant

Commissioner that as he had the controlling interest in the company it should be taken that the transferor and the transferee were identical and that,

therefore, there was no element of gift involved in the transfer of buses by him to the company, but that contention was given up at the stage of the

appeal to the Tribunal. Before the Tribunal it was contended that the transfer of the buses by the assessee to the company was for adequate

consideration, that the fair market value of the buses as determined by the Gift-tax Officer was arbitrary and excessive and that the fair market

value adopted in the Income Tax assessment on a notional basis cannot properly be adopted for gift-tax purposes. On the question as to whether

the transfer of the buses by the assessee to the company was for adequate consideration, the Tribunal accepted the assessee's case that the

consideration for the transfer of 20 buses consisted of an allotment of 900 fully paid up shares of Rs. 100 each and a credit entry for Rs. 1,83,133

in his current account with the company and that, therefore, if the fair market value of the said 900 shares instead of their face value is taken into

account, then the consideration for the transfer of the buses would be adequate. According to the Tribunal the fair market value of the 900 shares

allotted was 90 per cent. of Rs. 5,28,840, i.e., Rs. 4,75,956. The said sum along with a cash credit of Rs. 1,83,133 was Rs. 6,59,089 which is

more than Rs. 5,28,840, the market value of the buses as determined in the Income Tax assessment. On the decision of the Tribunal two main

questions arise, namely, (1) what is the consideration for the transfer of 20 buses, and (2) whether that consideration is adequate.

8. Firstly, it has to be seen whether the Tribunal is right in treating the consideration for the transfer of buses as comprising 900 fully paid up shares

of the face value of Rs. 100 each plus a cash consideration of Rs. 1,83,133 or whether the transfer was for a cash consideration of Rs. 2,58,604.

Secondly, it has to be seen whether the consideration for the transfer, whatever it be, is adequate.

9. The statement of the case proceeds on the basis that there was a transfer of 20 buses by the assessee to the company for a total consideration

of Rs. 2,58,604 on July 1, 1959, and in fact the said amount stood credited to the assessee in the company's books and it is later that the assessee's account had been debited with a sum of Rs. 90,000 being the value of the 900 shares allotted to the assessee by the company. If really the consideration for the buses compiled of the value of 900 fully paid up shares plus a cash of Rs. 1,83,133 as has been assumed by the Tribunal, one would have expected a credit entry in favour of the assessee in the company's accounts only for Rs. 1,83,133 and not Rs. 2,38,604. The entries in the company's accounts wherein the total consideration of Rs. 2,58,604 has been credited in favour of the assessee and later he has been debited with a sum of Rs. 90,000 being the face value of the shares allotted to him, prima facie, show that the transfer of the buses and the allotment of shares have been treated as two independent transactions. These entries indicate that the assessee received a consideration of Rs. 2,58,604 for 20 buses and later purchased 900 shares for a sum of Rs. 90,000 from and out of the sale proceeds received by him on the sale of buses. Apart from the entries in the accounts of the company there is no other material to indicate that the transfer of buses and the allotment of shares formed part of a single transaction. The assessee's contention is that whatever be the form and manner in which the transaction has been put through it is only the substance of the transaction that has to be taken note of to find out whether there was sale of buses by the assessee first and then the purchase of the shares later, or whether they formed part of a single transaction which was one and entire. If the entries in the books of accounts of the company are taken, they would suggest that transaction of sale of buses and the transaction of purchase of shares are separate and independent, and that there was an earlier transfer of buses for a price and a subsequent allotment of shares also for a price. It is for this reason the assessee contended that the manner in which the transaction has been recorded in the accounts cannot be taken to be material and that it is the substance of the transaction that matters. and that contention was accepted by the Tribunal. The learned counsel for the revenue contends that it is the form in which the transaction is put through by the parties that is material in tax matters and that the doctrine of substance has no application. He refers to the following decided cases on the point.

10. In *Duke of Westminster v. Commissioners of Inland Revenue*, [1935] 19 TC 490 (HL). an assessee had covenanted by a number of deeds to make payments to his employees. The deeds were not all in the same form but were substantially the same. In most of the cases the deed of covenant provided for payment of a certain weekly sum to an employee in recognition of his past services during their joint lives or for a period of seven years. These deeds were followed up by a letter wherein the employer had explained that the deed did not prevent the employee from receiving any remuneration for any future work that he may perform for the employer but that he was expected to be content with the provision made for him by the deed, with the addition of such sum, if any, as might be necessary to bring the total periodical payments while he was still in the service of the employer up to the amount of the salary or wages which he had lately been receiving. The employees acknowledged the said letter. It was found that the employees were in fact getting the amounts which they respectively would have received as wages or salaries if they lived during the period and continued in their employment. The question arose as to whether the payments made to his employees under the deeds could be said to be payments of salary or wages or whether they were annual payments from which the Income Tax was deductible and as such admissible deductions in computing the assessee's income for surtax purposes. It was contended for the revenue that in addition to the deed there is another collateral contract between him and the employees to the effect that the employer would still serve him in consideration of a salary or wage equal to the salary or wage he was receiving before the deed was executed and that he will accept what he receives under the deed in part satisfaction of his salary or wage and that, therefore, the annuity so long as the employee remains in the employer's service is of a changed nature and is no longer a payment which the employee is entitled to deduct from his income for surtax purposes. It was contended for the employer that the payments were annual payments which he was entitled to deduct. The crucial question in that case, therefore, was whether the annual payments made were for remuneration for service or not. If it was the former, the employer was chargeable, otherwise he was not. Lord Tomlin, dealing with the contention of the revenue based on the doctrine of substance, that there was another collateral contract in addition to the deed executed by the

employer in the form of the letter which changed the character of the transaction covered by the deeds, stated:

Apart, however, from the question of contract with which I have dealt it is said that in revenue cases there is a doctrine that the court may ignore

the legal position and regard what is called "the substance of the matter" and that here the substance of the matter is that the annuitant was serving

the Duke for something equal to his former salary or wages and that, therefore, while he is so serving, the annuity must be treated as salary or

wages. This supposed doctrine (upon which the Commissioners apparently acted) seems to rest for its support upon a misunderstanding of

language used in some earlier cases. The sooner this misunderstanding is dispelled and the supposed doctrine given its quietus the better it will be

for all concerned, for the doctrine seems to involve substituting "the uncertain and crooked cord of discretion" for "the golden and straight mete

wand of the law" Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise

would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his

fellow tax-payers may be of his ingenuity, he cannot be compelled to pay an increased tax. This so-called doctrine of "the substance" seems to me

to be nothing more than an attempt to make a man pay notwithstanding that he has so ordered his affairs that the amount of tax sought from him is

not legally claimable.

11. In *Potts Executors v. Commissioners of Inland Revenue*, [1950] 32 TC 211 (HL), Lord Nonnand pointed out that:

The court is not entitled to say that for the purposes of taxation the actual transaction is to be disregarded as "machinery" and that the substance

or equivalent financial results are the relevant consideration. It may indeed be said that if these loose principles of construction had been liberally

applied, they would in many instances have been adequate to deal with tax evasion and there would have been less frequent cause for the

intervention of Parliament.

12. In *Commissioners of Inland Revenue v. Fleming & Co, (Machinery) Ltd.*, [1951] 33 TC 57, 63. a company carrying on business as

manufacturers' agents were sole selling agents for certain products of a

manufacturer from 1903. But the sole selling agency was terminated by an agreement in 1948 under which the company received, inter alia, a payment as compensation for the loss of the agency. The question arose as to whether the said compensation was a capital receipt or a trading receipt Lord President (Cooper) felt that if the attention is concentrated upon the substance of the transaction, the payment should be treated as capital payment whereas if attention is concentrated on the form of the payment, the transaction should be treated as a trading payment and proceeded to say:

... it is not legitimate to look behind the form and strict legal effect of a transaction to its so-called "substance" in order to impose upon a taxpayer a liability not otherwise enforceable against him ; and the converse of this proposition must be equally valid. The company have only themselves to blame if we take them at their word, for the transaction could have been carried through in a manner which would have obviated the present difficulty.

13. Lord Russell also stated in that case that it was not permissible to ignore the legal aspect of a document construed in its surrounding circumstances and to have regard merely on what is called the substance of the matter. In *Bank of Chettinad Ltd. v. Commissioner of Income Tax*, [1940] 8 ITR 522. the Judicial Committee has also considered the applicability of the doctrine of substance to revenue matters and stated :

Their Lordships think it necessary once more to protest against the suggestion that in revenue cases "the substance of the matter" may be regarded as distinguished from the strict legal position.

14. In *Commissioner of Income Tax, Gujarat Vs. Keshavlal Lallubhai Patel*, . the Supreme Court, while dealing with the contention based on the doctrine of substance ""urged by the revenue has cited with approval the observations of Lord Normand in *Potts' Executors v. Commissioners of Inland Revenue*, referred to above.

15. The above decisions clearly lay down that in tax matters one cannot go behind the form and only look at the substance and that rights and liabilities cannot be disregarded and a different legal right and liability substituted in its place by the application of the doctrine of substance and that the courts normally view with disfavour such a doctrine. If the doctrine of substance merely means that having once ascertained the legal rights of

parties one can disregard the mere nomenclature and decide the question of taxability in accordance with the legal rights, no exception can be

taken to that doctrine, but if on the other hand this doctrine means that one can brush aside and disregard the legal rights and liabilities arising under

the contract between the parties, and decide the question of taxability or otherwise on the foot that the rights and liabilities of the parties being

different from what in law they are, then the courts must dissent from such a doctrine.

16. The learned counsel for the assessee, however, does not question the general principle laid down in the above decisions. But what he contends

is that the transaction between the assessee and the company not having been reduced to writing its nature has to be gathered from the surrounding

circumstances, that the revenue is not justified in relying only on the entries in the accounts of the company ignoring the true nature of the

transaction, that the mere entries in the accounts of the company will not prove an earlier sale of the buses by the assessee to the company and

then a later allotment of the shares by the company to the assessee, that both the transfer of buses and the allotment of shares form part of the

same transaction, that the allotment of shares by the company to the assessee cannot be dissociated from the transfer of buses, and that the bargain

between the company and the assessee was that in lieu of the transfer of buses by the assessee he will get from the company 900 shares as also a

cash consideration of Rs. 1,83,133. It is also contended for the assessee that the Tribunal having given a finding that the transfer of buses to the

company and the allotment of shares to the assessee formed part of a single transaction, that finding of fact has to be accepted and that it is not

possible for this court to interfere with that finding. But, as already pointed out, on the transfer of the buses by the assessee to the company the

assessee has been credited with a sum of Rs. 2,58,604 being the sale consideration for the buses transferred. It is only later the assessee's

accounts had been debited with a sum of Rs. 90,000, being the value of the 900 shares allotted by the company to the assessee. From these

entries it is clear that the transfer of buses by the assessee and the allotment of shares by the company were for cash consideration. The Tribunal

has taken the view that the substance of the transaction is that the assessee got 900 shares from the company plus Rs. 1,83,133 as consideration

for the 20 buses transferred and, therefore, the transfer of buses should be taken to be partly for cash and partly for shares. This view of the

Tribunal proceeds on the basis that the allotment of shares was in exchange for some of the buses. Apart from the fact that the entries in the

accounts do not show that the buses were transferred partly for cash and partly for shares, the question is whether the company could have

allotted its shares for anything other than cash under the provisions of the Indian Companies Act. Section 75(1) of the Companies Act, before its

amendment in 1965, so far as it is relevant, was as follows :

Whenever a company having a share capital makes any allotment of its shares, the company shall, within thirty days thereafter :--

(a) file with the Registrar a return of the allotments, stating the number and nominal amount of the shares comprised in the allotment, the names,

addresses and occupations of the allottees and the amount, if any, paid or due and payable on each share;

(b) in the case of shares (not being bonus shares) allotted as fully or partly paid up otherwise than in cash, produce for the inspection and

examination of the Registrar a contract in writing constituting the title of the allottee to the allotment together with any contract of sale, or a contract

for services or other consideration in respect of which that allotment was made, such contracts being duly stamped, and file with the Registrar

copies verified in the prescribed manner of all such contracts and a return stating the number and nominal amount of shares so allotted, the extent

to which they are to be treated as paid up, and the consideration for which they have been allotted ;

17. The following proviso was added to Section 75(1)(a) by the Companies (Amendment) Act, 1965 :

Provided that the company shall not show in such return any shares as having been allotted for cash if cash has not actually been received in

respect of such allotment.

18. This proviso specifically imposes a duty on the promoters and directors of a company to ensure that the share capital reflects cash or other

valuable assets and is not supported by merely book adjustments. Section 75(1) (b) enjoins on the promoters or the directors of a company in the

case of shares allotted otherwise than for cash to produce before the Registrar of

Companies the contract in writing setting out the consideration

other than cash in respect of which the allotment was made. Admittedly, in this case there is no contract between the company and the assessee

under which the company has undertaken to allot shares to the assessee in lieu of the transfer of his buses to the company. It is not the case of the

assessee that Section 75(1)(b) had been complied with. Of course the proviso to Section 75(1)(a) which came to be introduced in the year 1965

cannot apply to the assessment year in question. It is also not in dispute that the account books of the company show the shares as having been

allotted for cash. If really the shares have been allotted for consideration other than cash, one would have expected the company to follow the

procedure u/s 75(1)(b) and, apart from the statement made by the assessee, no material has been produced to show that the allotment of shares

was in lieu of the buses taken over from the assessee and not for cash as has been entered in the accounts of the company.

19. In Palmer's Company Law, twenty-first edition, at page 190, dealing with the allotment of shares by a company, the author says ;

The consideration for the allotment may be money or, with the consent of the company, money's worth, e.g., the transfer to the company of

property or the rendering to it of services

If a valid contract is made for the acceptance by the company of specified property or services of substantial value in payment or part payment of

shares, the court will not, whilst the contract stands, inquire into the value of the consideration even at the instance of the liquidator. A contract to

pay for shares can, therefore, be satisfied by accord and satisfaction but it is not open to a company to agree with the holder or proposed holder

of its shares to replace the statutory liability by a special contract sounding in damages only, e.g., for future services.

Where a company owes a creditor a debt presently due, that debt may be used as consideration against an allotment of shares to the creditor and

such arrangement is proof of payment for the shares (the allotment being treated as for cash), but if shares are allotted to a creditor by way of

accord and satisfaction, the allotment is not for cash and a contract has to be filed u/s 52(2).

20. Gower in his treatise, Modern Company Law, second edition, at page 100,

has pointed out in the foot-note as follows :

Under Section 52 (of the English Companies Act) (corresponding to Section 75 of the Indian Companies Act) the documents on the company's

file must show that shares have been issued for a consideration other than cash and must contain a contract evidencing the consideration. Those

requirements are often evaded by an arrangement whereby the vendor purports to sell for cash and to subscribe the corresponding shares for cash,

he and the company exchanging cheques, or relying on a set-off without the formality of an exchange of cheques. That this amounted to an issue for

cash was established by Spargo's case.

21. In Spargo's case, [1873] 8 Ch App 407. a company at its first meeting resolved that a certain sum be credited to one Spargo for the lease of

a mine and that the sum be paid out of the share capital of the company by issuing to him certain shares for which he had subscribed in the

memorandum of association as fully paid up. But, on the date of the resolution, Spargo had only a verbal agreement with the parties who were

equitably entitled to the lease of the mine, which was afterwards put into writing. The company subsequently made agreement with Spargo and the

other parties on the footing of that agreement. But in consequence of some difficulties as to the form of the lease it was never executed. Upon the

winding up of the company it was contended that the transaction between the company and Spargo was equivalent to an exchange of cheques and,

therefore, a cash payment by him and consequently it was not a contract required to be made valid by registration u/s 25 of the Companies Act

and that the company having had full knowledge of the nature and the title of Spargo and having acted upon it, cannot later allege that the

consideration proceeding from Spargo had failed and that even if the consideration is taken to have failed, the original payment was none the less a

cash payment though the failure of consideration might be subject to an action for damages. James L.J. accepted the said contention saying :

It appears to me, it did appear to me in Fothergill's case, [1873] 8 Ch App 270., and does appear to me now that this Act of Parliament did not

make it necessary that the formality should be gone through of the money being handed over by one and taken back from the other by the same

person. If it came to that, that is to say, that there was a debt in money payable

immediately by the company to the shareholders and an equal debt payable also immediately by the shareholders to the company and that the one was accepted in full payment of the other on both sides, the company could have pleaded payment in an action brought against them, and the shareholder could have pleaded payment in cash in a corresponding action brought by the company against him for calls. That is of course where the transaction is an honest transaction, and where there is no fraud of any kind. It would be a payment in cash : that is to say, it might be proved as payment upon a plea of payment in cash, if these were the words of the contract, or it was a promissory note. It would be sufficient evidence in support of a plea of payment in cash in a court of law; and it appears to me that it is sufficient for this court sitting in a winding-up matter.

22. The other learned judge, Mellish L.J., said :

It is a general rule of law that in every case where a transaction resolves itself into paying money by A to B and then handing it back again by B to

A, if the parties meet together and agree to set one demand against the other, they need not go through the form and ceremony of handing the money backwards and forwards.

23. This decision came to be approved by the Privy Council in *Arsene A, Larocque v. Hyacinths Beauchemin*, [1897] AC 358 (PC).. In that case

the shares of promoters of a company had been credited as paid in full under an arrangement by which half the amount thereof was paid by cash

and half by receipts on account of the purchase price of the property acquired by the company. The question arose as to whether the shares were

rightly credited as paid in full under the provisions of Article 4722 of the Revised Statutes of Quebec. The Privy Council found on the evidence that

there was an agreement on the part of the promoters to take so many shares presently payable in cash, and an independent agreement by the

company to purchase the property for so much money down and that the facts attracted the principle of *Spargo's* case and stated:

Their Lordships are not prepared to dissent from the decision in *Spargo's* case. It is a decision of the highest authority. It was pronounced by

James and Mellish L. JJ., and the view which those eminent judges expressed had, as appears from their judgments, the approval of Selborne

L.C.

24. In *Huson and Robinson, the Secretaries for the Thodapuzha Rubber Company, Ltd. Vs. The Registrar and Asst. Registrar of Joint Stock*

Companies, a Division Bench of this court had to consider the scope of the expression "as fully paid up otherwise than in cash" occurring in

Section 104(1)(b) of the Indian Companies Act, 1913, In that case there was an allotment of a fully paid up share to a debenture-holder . in

exchange of his debenture pursuant to a condition in the debenture deed. The question arose whether such an allotment was or was not an

allotment of share "as fully paid up otherwise than in cash". The Bench expressed the view that the share allotted under those circumstances was

allotted "as fully paid up otherwise than in cash" and, therefore, came within the provisions of Section 104(1)(b) of the Act. The court distinguished

Spargo's case on the ground that the money was actually due by the company to *Spargo* to whom the share was allotted, whereas in the case

before it the debenture has not yet become payable to the allottee and, therefore, there was nothing which can be made the subject of a set-off and

that unless a debt is actually due and owing by the company, the doctrine of *Spargo's* case cannot be applied.

25. The question whether the allotment of shares was for cash or for any consideration other than cash has to depend on the facts of each case.

Lord Justice Hailsham laid down a test which he had formerly elaborated in *Futergill's* case that the shares must be treated as paid for in cash if

what had been done would give rise to a good plea of payment as distinct from a plea of accord and satisfaction. The expression "share fully paid

up in cash" would seem to import a handing over of money, including, of course, negotiable instruments, in return for the shares. In *Spargo's* case

in the books of the company the allotment of shares was partly for cash and partly for a leasehold right. It was held that the allotment of shares was

for cash for the reason that as there were debts presently due to either side, it was unnecessary to go through the form of cash on one transaction

and return it immediately on the other. But the question in such cases is to find out whether there was a single transaction or whether there is a

conflation of two transactions.

26. In *Commissioner of Income Tax, Hyderabad Vs. Motors and General Stores*

(P.) Ltd., a company had transferred to another all the assets of its cinema house for a consideration of Rs. 1,20,000 in the shape of certain preference shares in a sugar company of the face value of Rs. 1,20,000. The question was whether the transaction was a sale so as to attract Section 10(2)(vii) of the Income Tax Act. The Supreme Court held that in essence the transaction between the parties was one of exchange and there was no sale of the assets of the cinema house for any money consideration and, therefore, the provisions of Section 10(2)(vii) cannot be applied. The court also observed that the presence of money consideration is an essential element in a transaction of sale and that if the consideration is not money but some other valuable consideration, it may be an exchange or barter but not a sale. But, on the facts of this case, the transaction between the company and the assessee cannot be treated as an exchange or a barter, for the company cannot own or sell its shares. In the above two cases the Supreme Court treated the transactions as either an exchange or a barter in view of the fact that the assets were exchanged for shares. But, in this case, the assessee had transferred buses for money consideration, which had been paid partly in cash and partly in shape of shares, and the accounts of the company show that the parties themselves treated the transfer of shares as one for price and the allotment of shares by the company also for cash. As per the principle in Spargo's case the allotment of shares was for discharging the company's liability for payment of the consideration for the buses. That means the company should be deemed to have allotted the shares for cash and the value of the shares due from the assessee has been set off against his dues from the company. If the transfer of buses and allotment of shares are treated as two separate transactions, then it is not possible to assume that the arrangement between the parties is one of exchange or a barter. We are of the view that having regard to the entries in the accounts of the company the transfer of buses by the assessee should be taken to be by way of sale and the allotment of shares by the company to the assessee was independent though it might have been contemplated even at the time of the transfer. Once there is a sale the question arises as to whether the sale was for inadequate consideration so as to attract the charge u/s 4 of the Gift-tax Act.

27. As already stated, in the Income Tax assessment the fair market value of the buses has been determined at Rs. 5,28,840 and the actual amount credited to the assessee in the company's books was Rs. 2,58,604 which has been paid partly in cash and partly in shares. Therefore, the transfer of 20 buses by the assessee to the company was prima facie for inadequate consideration. This leads to the further question urged by the assessee as to whether the face value of the shares allotted to the assessee or its real value should be taken into account. The Tribunal has taken the view that, after the acquisition of buses, real share value should be considerably more than its face value, and that, therefore, the value of 900 shares allotted to the assessee should be taken as 90 per cent. of Rs. 5,28,840, the fair market value of the buses. It is true that the fair market value cannot be taken to be the face value of the shares on the facts of this case, but in the calculation of the real value of shares the Tribunal has not only overlooked the debt of Rs. 1,83,133 due by the company to the assessee as part of the consideration for the buses as also other liabilities and assets of the company. The real value of the shares has to be worked out, if need be, by applying the break-up method. As we are, however, holding that the transactions of transfer of buses and allotment of shares are two independent transactions, it is not necessary to go into the question as to what is the real value of the shares. That will be relevant only if the transaction is treated as one of exchange ignoring the form in which the transaction has been put through in the accounts of the company.

28. We have to, therefore, answer the question in the negative and against the assessee, and we answer accordingly. The revenue will be entitled to its costs from the assessee. Counsel's fee, Rs. 250.