

(1977) 07 BOM CK 0018
In the Bombay High Court
Case No : G.T. Ref. No. 1 of 1967

Commissioner of Gift Tax

APPELLANT

Vs

Jagdish Mohan Nayar

RESPONDENT

Date of Decision : 14-07-1977

Acts Referred:

Gift Tax Act, 1958 — Section 26(1), 4

Citation : (1977) 6 CTR 601

Hon'ble Judges : V.D. Tulzapurkar, J; R.M. Kantawala, J

Bench : Division Bench

Advocate : R.J. Joshi, for the Appellant; R.J. Kolah, for the Respondent

Judgement

Tulzapurkar, J.—In this reference made under S. 26(1) of the Gift Tax Act by the Tribunal to this Court, the following question has been referred for our opinion :

"Whether on the facts and in the circumstances of the case, the Tribunal rightly held that no gift-tax was chargeable on the respondent ?"

2. This is a consolidated reference arising out of gift-tax assessments made in respect of eight respondent assessees. The common question arising in the case of each one of the respondents relates to the assessment year 1960-61. It appears that the eight respondents previously constituted a firm styled "Messrs. India Woollen Textile Mills, Amritsar." All the partners held equal share therein. With effect from 1-7-1959, the business of the firm was taken over by a private limited company named Indian Woollen Textile Mills Private Ltd., Bombay, whose shareholders were the partners of the erstwhile firm. In this limited company all the partners had equal share-holding. Under the agreement of sale dated 24-7-1959 the total consideration paid by the limited company was Rs. 15,03,496.13 np. which, inter alia, included a sum of Rs. 5 lakhs as the value of the goodwill. Clause 7 of this agreement which has a bearing on this aspect may be quoted :

"7. A credit of Rs. 5 lakhs shall represent the value of the goodwill of the said

business of the vendors which shall be satisfied by the allotment to the Vendor and/or their nominees of 4,998 fully paid-up equity shares of Rs. 100/- each. As to the residue, credit shall be given to the deposit accounts of the vendors for the sum of Rs. 200/- bearing interest " 9%p.a."

It may be stated that the Schedule to the agreement set on the several assets such as machinery, motor cars and trucks, furniture stock and stores, share investment, sundry debtors, bank balance and cash in hand totalling to Rs. 10,10,355/- which was added to the item of goodwill at Rs. 5 lakhs, making an aggregate total of Rs. 25,10,355. From this total value of the assets liabilities to the tune of Rs. 10,06,858.87 were deducted and the net value of assets transferred was to the tune of Rs. 15,03,496.13. As stated above, the value of the goodwill was allotted to the vendor by issuance of 4,998 fully paid-up equity shares of Rs. 100/- each and the balance was credited to the deposit accounts of the vendors, the same carrying interest at 9% p.a. This good-will was credited equally to the accounts of the eight partners and they were all subjected to capital gains tax on the sum of Rs. 62,500/- which fell to the share of each partner. Thereafter the Gift-tax Officer was of the opinion that apparently the goodwill of Rs. 5 lakhs that was charged to the company was too low having regard to the reputation of the erstwhile partners and the business that was carried on by the partners till the date of transfer, and according to him S. 4(a) of the Gift-tax Act was attracted. He, therefore, issued notices to the Respondents calling upon them to show cause why each one should not be charged with gift-tax on the amount representing the differences between the real market value of the goodwill and the goodwill of Rs. 5 lakhs actually charged by the firm to the limited company under the document. The Gift-tax Officer, in the proceedings that ensued, calculated the market value of the goodwill at Rs. 13,51,981/- and for this purpose he took the average profit of the firm for the past three years and multiplied the same by three. According to him, therefore, deducting the amount of Rs. 5 lakhs, the balance of Rs. 8,51,981/- was deemed as a gift within the meaning of S. 4(a) of the Act. One-eighth share of the above sum of Rs. 8,51,981, which came to Rs. 1,66,498/- was subjected to gift-tax in the hands of each of the respondents.

3. The aforesaid assessments were challenged by the Respondents before the Appellate Assistant Commissioner. Several contentions were urged on behalf of the Respondent-assesses. Principally, it was contended that the partners who also constituted the shareholders of the limited company, could not make any profit by transferring the business to the company and as such no gift-tax was chargeable. In other words, the contention was that it was merely a readjustment of the affairs of the partnership when the respondents converted their partnership firm into a limited company and no transfer in the commercial sense was involved. Secondly, it was urged that the valuation of the goodwill at Rs. 13,51,981/- was in any case excessive. The A.A.C. did not accept the first legal contention that was urged by the assesseees. He took the view that the firm and the limited company were two different entities and when the business was

taken over from the firm by the limited company, there was a transfer between the two legal entities. He however, did not accept the method of valuation of the goodwill made by the Gift-tax Officer and all the assessments made by the Gift-tax Officer were set aside with directions as to how the taxable gifts should be computed.

4. The Respondent-assesses preferred second appeals to the Appellate Tribunal and before the Tribunal two contentions were strongly urged : (i) that the provisions of the Gift-tax Act were not applicable to the assessee's case, and (ii) that in any case the value of the goodwill as worked out by the Gift-tax Officer was not correct. In support of the first contention reliance was placed on two decisions of this Court, one in the case of Commissioner of Income Tax vs. Homi Mehta's Executors and the other in the case of Messrs. Rogers & Co. vs. Commissioner of Income tax. On behalf of the Revenue it was contended that these two cases which were under the Income Tax Act could not be availed of by the Respondent-assesses and the question was required to be considered under the Gift-tax Act. The Tribunal accepted the main contention urged on behalf of the Respondent assessee that though technically and legally there were two entities, one being the firm and other being the limited company, from commercial point of view the transfer was from a set of persons to themselves inasmuch as the Respondents who were partners of the firm had transferred their business to a limited company whose shareholders were the respondents themselves. The Tribunal, therefore, took the view that if the person who transferred the property and the person who received the same were identical i.e. if they were one and the same, then just as there could be no sale by one person to himself and just as no one person could make profit out of himself so also there could be no transfer by one person to himself and consequently there could be no gift by one person to another within the meaning of the provision of the Gift-tax Act, and strong reliance was placed on the two decisions of the Bombay High Court reported in Commissioner of Income Tax v. Sir Homi Mehta's Executors, (Bom.) and Rogers and Co. Vs. Commissioner of Income Tax, Bombay City-II, . In view of this conclusion which the Tribunal arrived at viz. that no gift-tax was chargeable because there was no transfer as such when the business was transferred from the firm to the limited company, the Tribunal did not go into any of the other contentions that were urged by the respondent assessee before it. It, therefore, took the view that no gift-tax was chargeable on the so-called transfer of the goodwill by the firm to the limited company. At the instance of the Commissioner of Gift-Tax the question set out at the Commencement of the judgment has been referred to us for our decision.

5. Mr. Joshi appearing for the Revenue has brought to our notice that the view taken by this court in Commissioner of Income Tax v. Sir Homi Mehta's Executors, (Bom.) and Rogers and Co. Vs. Commissioner of Income Tax, Bombay City-II, has now been reversed by the Supreme Court in the case of Commissioner of Income Tax Gujarat II vs. B. M. Kharwar and in view of this Supreme Court decision it will be difficult to sustain the view taken by Tribunal that no transfer

was involved if the transaction took place between the Respondent firm on the one hand and the limited company on the other and the Tribunal's decision based on that view will have to be set aside and the question will have to be answered in favour of the Revenue.

6. Mr. Kolah appearing for the Respondent assesseees has fairly conceded that in view of the Supreme Court decision in B. M. Kharwar's case it will not be possible to sustain the view taken by the Tribunal that there was no transfer involved in the transaction between the firm on the one hand and the limited company on the other in the instant case, but he contended that that was urged by the Respondent assesseees before the Tribunal for supporting the plea that no gift-tax was chargeable on the respondent assesseees and he wanted to urge the same as the other fact of contention before us viz. that having regard to the admitted fact that in the instant case the goodwill had been transferred by the firm to the limited company, not for any cash consideration of Rs. 5 lakhs but in lieu of that goodwill which was valued at Rs. 5 lakhs the Respondent-assesseees had received 4998 fully paid up equity shares of Rs. 100/- each, there can be no deemed gift within the meaning of S. 4(a) of the Gift-Tax Act because the transfer is for adequate consideration and for this reason also no gift-tax would be chargeable on the respondents. He also wanted to urge before us the alternative submission that was put before the Tribunal that the valuation of the goodwill made by the Gift-tax Officer was excessive and even the directions given by the A.A.C. to arrive at a proper valuation of the goodwill would result in excessive valuation of such goodwill. We must, however, point out that none of these aspects or arguments have been actually dealt with by the Tribunal at all in its order and, therefore these contentions cannot be said to arise out of the Tribunal's order. It is true that the question as framed by the Tribunal and referred to this Court is in very wide terms and would include the other facet which has been pressed by Mr. Kolah before us. Since however that facet of the contention has not been dealt with by the Tribunal at all, it could not be convenient for this Court to entertain that contention and dispose of the question referred to us without the Tribunal's considered decision on that aspect being available to us. We would, however, like to make it clear that the only aspect which was considered by the Tribunal was whether the transaction between the firm on the one hand and the limited company on the other amounted to transfer or not and it is only that decision of the Tribunal which we are not upholding therefore it would be open to the assesseees to urge before the Tribunal when the matter will go back, such other contentions which they want to urge and which have not been dealt with by the Tribunal in its order under reference. In these circumstances we answer the question referred to us thus : On the facts and in the circumstances of the case, the Tribunal was not right in holding that no gift-tax was chargeable on the respondents on the ground that the transaction between the firm and the limited company did not amount to a transfer.

7. We would again make it clear that when the matter would be heard by the Tribunal afresh, it would be open to the Respondent-assesseees not merely to raise

the contention that the valuation of the goodwill as has been adopted by the Gift Tax Officer is excessive or as has been directed to be arrived at by the A.A.C. would be excessive, but also to contend that the capital asset of goodwill was not transferred otherwise than for adequate consideration i.e. it was transferred for adequate consideration.

8. Since the matter was disposed of by the Tribunal by its order dated 23-12-1965 and since this Gift Tax Reference of 1967 has been disposed of by this Court now, we would direct the Tribunal to take up for consideration the matter and dispose of the same within a period of three months from the date of the receipt of the papers by the Tribunal.

9. There shall be no order as to costs.