

(1975) 11 BOM CK 0019

In the Bombay High Court

Case No : Gift Tax Reference No. 4 of 1966

Commissioner of Gift-tax

APPELLANT

Vs

Nagji Dullabhji

RESPONDENT

Date of Decision : 20-11-1975

Acts Referred:

Gift Tax Act, 1958 — Section 2, 3, 4

Citation : (1979) 118 ITR 804

Hon'ble Judges : S.K. Desai, J;J.R. Vimadalal, J

Bench : Division Bench

Judgement

Desai, J.—This is a reference at the instance of the CGT made by the Income Tax Appellate Tribunal under s. 26(1) of the G.T. Act, 1958. By the said reference, the following question has been referred to us :

"Whether, on the facts and in the circumstances of the case, the decision of the Tribunal that the sum of Rs. 94,658 or any part thereof is not taxable under the provisions of the Gift-tax Act is legally sustainable in law ?"

2. A few facts may be stated. In this reference, we are concerned with assessment year 1960-61, the corresponding accounting period being Samvat year 2015 (12th November, 1958, to 31st October, 1959). One Nagji Dullabhji was carrying on the business of purchasing and selling cloth in the name and style of M/s. Vasantraai Nagji which was his sole proprietary concern. The main business of this concern was to purchase cloth from textile mills or credit and selling it thereafter. Nagji Dullabhji did not possess any quota rights or rights under agreements with purchaser textile mills. Because of his advanced age and failing health, Nagji Dullabhji decided to take his son, Girishchandra, as a partner to carry on this business. Girishchandra was already a creditor of the sole proprietary concern, and the amount due to Girishchandra in the books of the business was a little over Rs. 26,000. With effect from 12th November, 1958, a partnership was formed between the father and the son. The terms of this partnership were recorded in a deed of partnership dated 12th November, 1958.

A copy of the said deed of partnership is annexed to the statement of case as annex."A". Under this partnership deed, the business was, after the 12th of November, 1958, to be carried on by the firm consisting of Nagji Dullabhji and Girishchandra, the share of the father being 60 nP. and that of the son 40 nP. It has been found that the son also brought in fresh capital of Rs. 25,000 which was credited to his account on 12th November, 1958, i.e., with the further amount brought in as capital, the amount earlier lent to the sole proprietary business of the father was retained in the business of partnership.

3. The assessee (Nagji Dullabhji) filed a voluntary returns declaring a gift of Rs. 30,000 to his son. However, there were several objections raised to the assessment. The GTO did not accept the contentions advanced on behalf of the assessee, both as regards the sustainability as well as the quantum. Various contentions were advanced on behalf of the assessee to the effect that gift-tax was not attracted. These were not accepted, and it was held that there was a gift of the value of Rs. 1,35,960 of which exemption of Rs. 10,000 was available under s. 5 of the G.T. Act.

4. The matter was carried in appeal to the AAC before whom the same contentions as to sustainability under the G.T. Act as were originally raised before the GTO were repeated. The AAC held that the admission of Girishchandra as a partner in the firm of M/s. Vasantrai Nagji was without any consideration or without adequate consideration and a right and interest in the property and assets of the firm had been gifted, which was assessable to gift-tax. As regards the quantum, he reduced the value of gift to Rs. 94,658 from which amount the statutory exemption available under s. 5 was allowed. Gift-tax, accordingly, was sought to be levied on Rs. 84,658.

5. The assessee, being aggrieved with this decision, carried the matter further by way of appeal to the Tribunal. The Tribunal held that the son was taken in as a partner in consideration of his contributing Rs. 25,000 as capital and his retaining the amount earlier advanced to the proprietary concern in the partnership business, and also agreeing to work an active partner in the business. According to the Tribunal, neither during the continuance of the partnership nor after its dissolution could a partner claim that he was entitled to any part of the property and the assets of the partnership, even after dissolution, would continue to belong collectively to the association of partners as one unit as before. In this view, according to the Tribunal, the assessee could not be said to have held any specific interest in the goodwill of the firm and, therefore, the question as to the assessee having transferred any interest therein in favour of his son did not arise at all. Further, according to the Tribunal, s. 2(xxiv) of the G.T. Act was not applicable. In its view, the word "partnership" to be found in sub-cl.(b) might have been used with reference to a partnership in immovable property, and not a partnership in business, as was the case in the matter being considered in appeal by it. In the result, the Tribunal held that the provisions of the G.T. Act were not attracted. The Tribunal rightly did not go into the question of valuation of the

purported gift. It is this decision of the Tribunal that has been assailed by Mr. Joshi on behalf of the Commissioner in the reference before us.

6. A similar point has been considered by us only recently in Gift-tax Reference No. 3 of 1966, decided on 18th November, 1975 Commissioner of Gift-tax, Bombay City II Vs. Lalita B. Shah, The only distinction between the facts which were for our consideration in that reference and the facts which arise for consideration in the present reference is that in Gift-tax Reference No. 3 of 1966, a person carrying on business or profession as chartered accountant and tax consultant formed a partnership with his son, also a chartered accountant, to carry on the business or profession in partnership in almost the same name thereafter whereas in the present matter we have a partnership constituted to carry on not a profession, but what may be purely regarded as a business, viz., of selling cloth. There is one significant difference, however, in the case of the partnership constituted in Gift-tax Reference No. 3 of 1966 CGT v. Lalita B. Shah-see page 794 supra. The son who joined his father (presumably because it was a professional partnership) was not required to bring in any capital. In the present case, however, there is a finding that the son, Girishchandra, brought in capital in the amount of Rs. 25,000, and further that the amount previously advanced by the son to the sole proprietary business of the father was allowed to be retained in the partnership business. It is pertinent to note that there was no provision in the partnership deed dated 12th November, 1958, providing for transfer of the goodwill of the sole proprietary concern to the new partnership. It may be mentioned as a matter of interest that the position was exactly the same in the matter of the partnership, being considered by us in Gift-tax Reference No. 3 of 1966 CGT v. Lalita B. Shah-see page 794 supra.

7. It is possible to agree with Mr. Joshi that the observations made by the Tribunal in para. 22 of its order, and the view taken by it of the provision contained in s. 2(xxiv) of the G.T. Act, 1958, are not correct and do not represent the correct view of the said statutory provision. In Gift-tax Reference No. 3 of 1966 CGT v. Lalita B. Shah-see page 794 supra, we had been referred to Commissioner of Gift-tax Vs. Ganapathy Moothan, , and it would be proper to hold that (as explained by Mathew J., as he then was, in the Kerala case) there was a transfer by way of transmission to the extent of 40% of the father's interest in the goodwill of the sole proprietary business which he carried on prior to 12th November, 1958.

8. Section 2(xii) of the G.T. Act, 1958, defines "gifts". The latter part of the said definition includes transfers or conversions of property referred to in s. 4 of the said Act which may be described as "deemed gifts". It is important to note that no argument whatsoever was advanced before the Tribunal by the revenue under s. 4(a), and, therefore, we are not concerned in this reference with the question of there being any deemed gift and, therefore, a gift falling within s. 2(xii). Even conceding that there was a transfer of transmission of the father's interest in goodwill which transfer would be within the definition of transfer of property as

defined by s. 2(xxiv) of the Act, it would not necessarily follow that such transfer would amount to a gift under the first part of s. 2(xii) of the G.T. Act, 1958. One of the requirements postulated by the statutory provision is that the transfer must be without consideration in money or money's worth.

9. In Gift-tax Reference No. 3 of 1966 CGT v. Lalita B. Shah-see page 794 supra, we have had occasion to consider the nature of consideration for the formation of a partnership. After setting out a passage from Lindley on Partnership 13th edn., at page 113, I had expressed in my judgment in the said reference that by an agreement of partnership, there is conferment of mutual rights and undertaking of reciprocal obligations which would constitute for each of the parties the respective consideration for its share in the profits and assets. It was further expressed that it would be impermissible to consider the question of transmission or transfer of goodwill de hors the formation of the partnership. It is required to be considered as part and parcel of the same transaction.

10. It is clear, therefore, that in such a case the transfer of transmission of the erstwhile proprietary interest in the goodwill which is not by any separate instrument, but incidental to the formation of the partnership, must be regarded as one being with consideration. The only question which, perhaps, may require a little cogitation is, whether there is consideration in money or money's worth. On the facts of the present case, however, as has been found by the Tribunal, it is impossible to say that there was no consideration in money or money's worth. I have already referred to the fact that the son brought in capital of Rs. 25,000 and that he allowed to be retained in the partnership business the amount earlier advanced by him to the father's proprietary concern. It has also been found by the Tribunal that the partnership was formed by reason of the old age and failing health of Nagji. Even ignoring the last aspect of the matter for the time being, it is clear that there was consideration which may be regarded as consideration in money or money's worth for the formation of the partnership.

11. Our attention had been drawn during the course of arguments of Gift-tax Reference No. 3 of 1966 CGT v. Lalita B. Shah-see page 794 supra, to two decisions, one of them being the decision of the Gujarat High Court and the other of the Allahabad High Court, which would seem to have a bearing on the question posed for our determination in this reference. In Commissioner of Gift Tax, Gujarat I Vs. Karnaji Lumbaji, , the Gujarat High Court was considering the case where the sons of the assessee as well as two employees were made partners. No amount had been brought by these persons. Even then, it was held that there was consideration, that they were admitted as partners for consideration, and it was expressed that the consideration was that with their experience gained by them, they would attend to the business of the firm, that no remuneration was payable to them as was being done till their admission as partners, and that they would share not only in the assets, but also in the liabilities of the firm, and they would also participate in the future losses of the firm, if any. The other decision is Commissioner of Income Tax Vs. Sardar Wazir

Singh, . One Sardar Singh was running his business as a sole proprietor. On account of the expansion of the business and his age and ill health, he was not able to manage it properly. Hence, he converted the business into a partnership with three other persons. The three new partners had contributed part of the capital of the new firm. It was held, on these facts, that the transfer of Sardar Wazir Singh's rights in the business, including the goodwill, was for consideration. The partners were taken in so that the business would run better. The partners brought in some capital. There was no finding that the consideration was inadequate. According to the Allahabad High Court, the transfer was for consideration, and it was not a gift which would be liable to gift-tax.

12. The facts placed before us by the Tribunal in this reference are substantially similar to the facts before the Allahabad High Court. It has been found that Nagji was constrained to form the partnership because of his old age and failing health. There is a finding that Girishchandra brought in Rs. 25,000 as capital. It has not been argued that the consideration in terms of actual money brought in was inadequate, and, indeed, it could not be so argued inasmuch as it appears to me that apart from the goodwill attached to the sole proprietary business, there was no actual physical asset of the proprietary concern. It has not been the case of the revenue before the Tribunal that there was inadequate consideration for the notional transmission of goodwill, and, indeed, the matter has not been argued on the footing of a deemed gift under s. 4(1) of the G.T. Act, 1958. This is, even if we ignore which would not be proper, the amount in excess of Rs. 26,000 which was allowed to be retained in the partnership business.

13. The position, in my opinion, is quite clear. There was no gift made by the assessee to his son, Girishchandra, by forming the partnership dated 12th November, 1958, as would be liable to the levy of gift-tax under the G.T. Act, 1958, and the question would be required to be answered in favour of the assessee.

Vimadalal, J.

12. I agree and have nothing to add.

The Court

13. The question referred to us is answered as follows :

14. The decision of the Tribunal that the sum of Rs. 94,658 was not taxable under the provisions of the G.T. Act, 1958, is correct and sustainable in law. The Commissioner to pay the assessee's costs of this reference.