(1996) 06 KL CK 0002

In the High Court Of Kerala

Case No : IT Reference No''s. 203 of 1989 and 3 of 1990

Commissioner of Gift Tax APPELLANT

Vs

N.C.J. Rajan RESPONDENT

Date of Decision : 26-06-1996

Acts Referred:

Income Tax Act, 1922 — Section 34(1)(b)
Income Tax Act, 1961 — Section 143(b)

Citation : (1996) 89 TAXMAN 302

Hon'ble Judges : V.V. Kamat, J;P.A. Mohammed, J

Bench : Division Bench

Advocate : P.K.R. Menon, for the Appellant; C. Kochunni Nair, M.A. Firoze and Dale P. Kurian, for the Respondent

Judgement

Kamat, J.—In fact the proceedings of I.T. Reference Nos. 2 and 3 were before us in pursuance of the common order of the Tribunal, Cochin Bench. However, in view of the statutory provision that the initial notice created a bar of limitation in regard to consideration of the provisions of section 16(1)(b) of the Gift-tax Act, 1958 (''the Act'') yesterday we decided IT Reference No. 2 of 1990 along with IT Reference No. 4 of 1990, in view of the situation that the submission with regard to resort to section 16(1)(b) being out of time, no other result would follow. The present two references, though relating to identical question under reference, enabled the learned senior tax counsel to urge before us the possibility of resort to section 16(1)(b). The question in these two references is as follows :

Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was justified in cancelling the reassessment by holding that the assessee cannot be said to have failed to disclose fully and truly the material particulars necessary for completing the assessment ?

It needs to be stated that in IT Reference No. 203 of 1989, the assessment year is 1975-76, the previous year ending on 31-3-1975, whereas in IT Reference No. 3 of 1990, the assessment year is 1974-75, the previous year ending on 31

-3-1974. Similarly in IT Reference No. 203 of 1989 the notice u/s 16(1)(a) was served on the assessee on 26-3-1980 (within four years) and in IT Reference No. 3 of 1990 also notice was similarly served within the statutory period of four years.

2. It would be seen from the orders of the lower authorities that it is held that the necessary material had been placed before the GTO at the time of original assessment. In fact, the paragraph quoted in the statement of case from the order of the Tribunal would clearly show that the balance sheets of the company were also filed before the GTO and in fact he had accepted the original valuation of the shares gifted because they were based on the latest available balance sheet figures. It would be more appropriate to reproduce the said paragraph :

The assessee is on further appeal before us. We find that the balance sheet of the company were already filed by the GTO and in fact he had accepted the original valuation of the shares gifted because they were based on the latest available balance sheet figures. Now in the reassessment, the GTO is attempting to tax as deemed gift the difference in value as fixed by him in respect of some of the shares sold to his wife. As far as the deemed gift is concerned, it is for the revenue to draw on inference that a gift is involved under the provisions of section 4(1)(a). The relevant material particulars to be furnished is the sale of the shares and the rate at which it was sold. We had asked the D.R. whether the assessee had disclosed the particulars. We were told that these particulars were made available by correspondence entered into between the assessee and the department. Thus the materials were before the GTO and it is for him to draw the necessary inference thereon. The assessee cannot be said to have failed to disclose fully and truly the material particulars.

Reading the judgments of the two appellate authorities it would appear as an accepted situation between both the parties that the balance sheet of the company were already filed by the GTO and in fact the GTO had accepted the original valuation of the shares gifted because they were based on the latest available balance sheet figures.

3. It is on the basis of this specified situation reinforced by the two fact- finding appellate authorities, the Department of Revenue had approached this Court for answer to the question reproduced at the outset. The question is as to whether the Tribunal was justified in cancelling the reassessment on the basis that the assessee could not be understood to have failed to disclose fully and truly the material particulars necessary for completing the assessment.

4. These references are u/s 26(1) of the Act. The said statutory provision provides for a reference to this Court on any question of law arising out of the order of the Tribunal. In accordance with the said statutory provision this Court is to decide the question referred to it.

5. This Court gets power to decide the question raised in the reference made by the Tribunal and is, therefore, only concerned with the statement of the case

drawn up by the Tribunal in regard thereto. No doubt that if a point of law is implicit in or covered by the question referred to by the Tribunal, and no additional facts are necessary to support that point, such a question may be raised for the first time before this Court even though it was not considered as not raised before the Tribunal. However, a new point or plea which depends upon the factual situation needing investigation is normally not considered for the first time by this Court and in this context it needs to be emphasised that the question sought to be raised, though outside the purview of the question referred, must be found to have been raised even by implication before the authorities below be cause this Court does not get power with regard to the questions not in issue before the authorities below and, therefore, not decided by the Tribunal and at times such questions cannot be decided and should not be decided by this Court even in a situation where necessary facts appear in the statement of case. In substance, this Court, acting u/s 27 of the Act, has to concentrate only on the question which are actually referred to by the Tribunal. This Court also may have power to reframe the questions formulated by the Tribunal before answering them and all this is with the intention of bringing out the real issues between the parties. In other words, the question which is sought to be raised beyond the ambit of the question referred must be found to be a question in issue between the parties before the lower authorities. The question also be of such a character that it should be a pure question of law not requiring any factual matrix in regard thereto. In addition, this Court has to find out as to whether there is any kind of whisper in the proceedings is regard to which submissions are made for the first time besides the question that is referred.

6. It would be seen at once that when the assessee has successfully got over, the finality of the finding that there could not be said to be any material which could be stated to be a failure to disclose fully and truly all material facts necessary for assessment of the gifts made by him, as a result of which there could be any escapement of assessment, it would not be permissible to resort to the alternative situation in the absence of any pleading, much less the material in regard thereto even by way of a whisper before the three lower authorities.

7. The learned senior tax counsel took us through the statutory provision of section 16. The provision contemplates two situations as alternative to initiate action against the assessee in a situation of escapement of assessment. The first one is available at clause (a) of the said provision. It requires situational omission or failure on the part of the assessee, with regard to a return or also with regard to full and true disclosure of all material facts necessary for the assessment of the gift made by him. The proceedings have initiated and have terminated up to the stage of the Tribunal on the basis of consideration of this clause (a) alone.

8. The other alternative mode is available in clause (b) of the said provision. The statutory requirement empowers the GTO, if he has any information in his possession and in consequence thereof has reason to believe that any taxable

gift has escaped assessment, the provision can be resorted to.

9. Although the statutory provision has to be further found in the text thereof, requires the GTO to serve on the assessee a notice in regard thereto containing all or any of the requirements, the position is more than settled. The decision of the Patna High Court in Commissioner of Income Tax Vs. Surendra Kumar Bhadani, relying on the Full Bench decision of the Calcutta High Court in Nirmala Birla and Others Vs. The Wealth Tax Officer, ''M'' Ward Dist. V(I), Calcutta and Others, as well as the decision of the Punjab and Haryana High Court in Commissioner of Income Tax Vs. Ess Ess Kay Engineering Co. Pvt. Ltd., settled the question that if the notice is issued within the period provided by the provision, resort can be had to either of the two clauses and it is not necessary that the two clauses arc required to be involved separately and independently by separate and distinct notices. The Patna High Court had before it a directly referred question to that effect as question No. II therein. Consequently, seeking help from the authority to pronouncement of the Supreme Court in Commissioner of Income Tax, Bombay Vs. Onkarmal Meghraj (H.U.F.), , it is further ruled that the provisions of section 143(b) of the income tax Act, 1961 clearly show that the contents of the two clauses (a) and (b) do not deal with two separate jurisdictions. The position that would just be taken as settled would be that in order to initiate action in accordance with the provisions of section 16(1)(b) of the Gift-tax Act, independent and separate notice in regard thereto may not be a legal requirement. The learned counsel then contended that the provision of section 16(1)(b) requiring statutorily is acting in consequence of any information in his possession with regard to the escapement of assessment, although would mean information subsequent in the context of time with regard to the assessment in question, such information need not be considered to be one emanating necessarily from any other source than the record of the assessment itself. The learned counsel contended that information would have to mean anything imparting knowledge and details in regard thereto available to the concerned ITO, may be in the papers filed before him also. The learned counsel urged that this imparting of knowledge with regard to the situation of escapement of assessment may be much subsequent, in the context of time, may even be from the papers or even otherwise. The learned counsel contended that what is important and vital in the context is the situation of awareness of the ITO and it may be for the first time much after the filing of the papers and even completion of the assessment in regard thereto. Once there is compliance with the statutory provision of notice within the period of limitation, and notice may be under the other clause in regard thereto, the situation of awareness of legal battle and the ITO has to take steps in the matter. The learned counsel further emphasised that what is important is the situation of awareness and along with it is the situation of escapement of assessment. He urges that if the statutory requirement of the compliance of notice is no hurdle, then the Court will have to concentrate on the situation of awareness together with the situation of escapement of assessment. The learned counsel placed reliance on the

decision of this Court in United Mercantile Co. Ltd. Vs. Commissioner of Income Tax, Kerala, where also the question was under direct reference with regard to the validity of reassessment proceedings initiated u/s 34(1)(b) of the Indian income tax Act, 1922, provisions of which are similar to section 16(1)(b) of the Gift-tax Act. The learned counsel invited our attention to reference to the decision of the Supreme Court with regard to what is to be understood as information in Maharaj Kumar Kamal Singh Vs. The Commissioner of Income Tax, Bihar and Orissa, in the context of the situation.

10. The learned counsel contended that when the GTO on the basis of fact finding arrived at by the lower authorities, accepted the balance sheet filed by the assessee before him as well as the valuation report regarding the original valuation of the shares on the ground that they were based on latest available balance sheet figures, the authorities have obviously acted contrary to law. In this context the learned senior tax counsel placed reliance on the decision of the Supreme Court in Bharat Hari Singhania and others Vs. Commissioner of Wealth Tax (Central) and others, in support of the submission that the Apex Court has laid down in details the steps to be taken in the process of valuation in accordance with the concerned statutory provisions of the Act and the Rules. The Apex Court dealt with a batch of petitions under the Wealth-tax Act, 1957 relating to the validity of rule ID of the Wealth-tax Rules, 1957 introduced with effect from 6-10-1967, which came to be incorporated in Schedule III to the Act in pursuance of the Direct Tax Law (Amendment) Act, 1989. It is stated that rule 11 in the said Schedule corresponded to rule ID under consideration before the Apex Court.

11. Among the companies incorporated in India more than 85 per cent. it is observed, are private companies in regard to which there is always a restriction upon the transfer of shares leading to the situation that the shares are not quoted on the stock exchange. Where the shares are quoted on the stock exchange, obviously their value on the valuation date would be the value for the purposes of this Act. However, the problem relates to the unquoted shares for which by way of a formula rule ID came on the statute to provide for the situation. We have been taken through the decision in extenso. It is observed that the balance sheet of the company would constitute the basis for working the rule and the rule for ascertainment of the valuation of unquoted shares would not be workable without the balance sheet and if the date of the balance sheet and the valuation are the same, the problem would not arise at all. The learned counsel contended that the Apex Court has succinctly observed that where there is a rule prescribing the manner in which a particular property has to be valued, the authorities under the Act have to follow it and no other system.

12 With regard to the factual matrix, the learned counsel contended that what is available is the blind acceptance by the GTO of the balance sheet produced and a statement that the original valuation of the shares gifted based on the latest available balance sheet figures is the only material. It is contended that

escapement of assessment is obvious in view of the situation that the known method not permitting any deviation in regard thereto would have to be said to be the information required for the purpose of satisfaction of section 16(1)(b).

13. The learned counsel also reinforced his submission on the basis of the decision of this Court in COMMISSIONER OF WEALTH-TAX Vs. DOMINIC JOSEPH., to submit that the rules made under a statute are meant for observance for all purposes and if the procedure is prescribed for determination of the market value of an unquoted equity share of any company other than an investment company or a managing agency company, it is the plain and unambiguous language employed in the rule that is to govern the situation. This is in the spirit of the approach of the Court for an endeavour to make every part of the statute effective, harmonious and sensible.

14. With anxiety we have deliberated and considered the above submissions in regard to which as position of law there may not be any dispute whatsoever. We must state that even a contemplation for a resort to the provisions of section 16(1)(b) is wholly conspicuous by its absence before the three authorities below. The two fact finding authorities - the first appellate authority - the Commissioner, and the Tribunal - have been invited to deliberate not in the least with regard to the submission now sought to be placed before us for our consideration. We have already observed that even the question referred to us sets upon us inbuilt limitations to consider whether the assessee failed to disclose fully and truly the material particulars necessary for completing the assessment. We have already stated that not only that the question is closed by the finality of the fact finding, but added to it, the question is also consistently approached and decided by this Court in a similar situation.

15. Resort to section 16(1)(b) has failed for the first time in the submissions of the learned senior tax counsel and that too on the basis of the above decision of the Supreme Court in Bharat Hari Singhania''s case (supra).

16. We would require to say as above because the situation cannot be understood to be one occurring for the first time as a result of the decision of the Apex Court. The statutory provision of rule 1D has already been the subject-matter of the decision of this Court in Dominic Joseph''s case (supra). Apart therefrom, the situation of a possibility of a resort to section 16(1)(b) in the absence of a notice in regard thereto would also have to be considered as a situation more than settled at least by two consecutive decisions of the Apex Court in Sodagar Ahmed Khan v. ITO [1968] 701 TR 79 and Kantamani Venkata Narayana and Sons Vs. First Additional Income Tax Officer, Rajahmundry, . Similarly what is to be understood legally in regard to information is also more than settled not only by the decision of this Court in United Mercantile Co. Ltd.''s case (supra), but also by the Supreme Court in Maharaj Kumar Kamal Singh''s case (supra). In such a situation especially when the question referred to us also is a process of continuity in the same direction emphasising failure to disclose fully and truly the material particulars in spite of a situation of finality, it would

be more than difficult for us to entertain this submission on a hypothetical basis that the decision of the Apex Court is a situation of awareness. It would mean that the situation of awareness placed before us in the submission by the learned senior tax counsel would have to be understood as synonymous with the awareness of the ITO which is a statutory requirement. Apart therefrom what flows from the surface of the record is that in spite of this position, the Department of Revenue has travelled in one direction and there is no whisper otherwise anywhere in regard to the submission sought to be made by the learned counsel by heavily relying on the decision of the Apex Court for the first time during the hearing of these references of 1989 and 1990.

17. For these reasons, in our judgment, it is not possible to consider the submissions of the learned senior tax counsel to think of initiation u/s 16(1)(b).

18. Even the learned senior tax counsel could not tell us that the authorities were aware of a resort to section 16(1)(b) any time earlier than the occasion of the submissions of the learned senior tax counsel. For the above reasons we answer the question in the affirmative - against the revenue and in favour of the assessee.

