

(2002) 10 KL CK 0013

In the High Court Of Kerala

Case No : IT Ref. No's. 315 of 1997 and 81 of 2000

Commissioner of Gift Tax

APPELLANT

Vs

Popular Auto Spares (P) Ltd.

RESPONDENT

Date of Decision : 24-10-2002

Acts Referred:

Gift Tax Act, 1958 — Section 4(1)

Citation : (2003) 183 CTR 515 : (2003) 264 ITR 171

Hon'ble Judges : K. Balakrishnan Nair, J;G. Sivarajan, J

Bench : Division Bench

Advocate : P.K. Ravindranatha Menon and George K. George, for the Appellant;
P. Balachandran, for the Respondent

Judgement

G. Sivarajan, J.—These two references at the instance of the Revenue arise from a common order of the Tribunal, Cochin Bench, in GTA Nos. 15 & 16/Coch/1987 in respect of the asst. yrs. 1975-76 and 1976-77. IT Ref. No. 81 of 2000 arises from GTA No. 15/Coch/1987 for 1975-76 and IT Ref. No. 315/1997 arises from GTA 16/Coch/1987 for the asst. yr. 1976-77.

2. The question referred by the Tribunal pursuant to the direction issued by this Court in the judgment dt. 15th Nov., 1994, in O.P. Nos. 10415/1992 and 10416/1992 in both these cases reads as follows :

"Whether, on the facts and in the circumstances of the case the Tribunal is right in holding that there is no gift involved in the facts of the present case ?"

3. The assessee, a limited company, was carrying on business in automobile parts since 1st Oct., 1971. On 1st Oct., 1974, it entered into a partnership with 4 other persons. Clause (4)(a) of the partnership deed dt. 1st Oct., 1974, provides that the business which the assessee-company had been carrying on at (1) Banerji Road, Ernakulam, including the petrol pump, (2) Pattalam Road, Trichur, and (2) Sardar Patel Road, Bombay, together with the assets and liabilities of the said business appearing in its books of account as on 30th Sept., 1974, and

summarised in Schedule No. 1 to the partnership deed was as a whole brought by the assessee to the common stock of the partnership-firm and that the capital account of the assessee-company in the books of the firm was credited with a sum of Rs. 4,97,998.89. The debts and liabilities due by the assessee-company and due to the assessee-company, telephone installation, licences, quotas, permits, telegraphic addresses, dealership or agency agreements belonging to the assessee-company were also either assigned or transferred or otherwise given to the partnership-firm and that all the terms under which the asset and liabilities of the assessee-company are brought were stipulated in the partnership deed. As per the partnership deed the assessee-company was entitled to 10 per cent profit of the partnership-firm. The AO, viz., the CTO, Ernakulam, has taken the view that in the process of transfer of the assets of the company in favour of the partnership firm there was a gift to the extent of 90 per cent. The assessing authority has also calculated the gift on the basis of the previous 3 years' profit totalling Rs. 38,21,450 and by deducting 10 per cent representing the assessee's share, 90 per cent, i.e., Rs. 34,39,305 was taken as the gift made by the assessee in favour of the firm.

4. Before the first appellate authority the assessee raised two contentions : (1) that the transfer of assets, if any, in the transaction is supported by consideration and that (2) even if there is a deemed gift it is entitled to exemption u/s 5(1) (xiv) of the GT Act. The first appellate authority accepted both the contentions and allowed the appeal. The Department took up the matter in appeal before the Tribunal, Cochin Bench. The Tribunal, relying on the decision of the Supreme Court in *Sunil Siddharthbhai Vs. Commissioner of Income Tax, Ahmedabad, Gujarat*, held that in a case of formation of partnership, the consideration which the incoming partner gains by way of share interest in the firm at the time of entry into the partnership cannot be evaluated in terms of Rule 2 of the WT Rules and, therefore, the transaction is not exigible to gift-tax. The Tribunal also considered the question as to whether the transfer is supported by consideration and held that it is supported by consideration. It was further held in para 18 of the appellate order that the partnership was required in business interest and that it was in business interest that the assessee became a partner and such business interest must be given paramount importance in spite of incidental tax savings that might accrue to the assessee. The contention of the Department that the arrangement was a tax evading device was also rejected.

5. We have heard Shri P.K.R. Menon, learned senior counsel for the Department, and Shri P. Balaohandran, learned counsel for the respondent. The senior counsel submitted that the Tribunal has confirmed the order of the first appellate authority relying on the decision of the Supreme Court in *Sunil Sidharthbhai's* case mentioned supra and that a Division Bench of this Court in *Commissioner of Gift-tax Vs. Sree Narayana Chandrika Trust*, has held that the principles laid down by the Supreme Court in the decision in *Sunn Sidharthabhai's* case were in connection with capital gains u/s 48 of the Act and that the said principles cannot be imported to a case of gift. The senior counsel accordingly submitted that the

finding of the Tribunal that there is no gift involved in the transaction cannot be sustained. The senior counsel further submits that the findings of the Tribunal that the transfer of the business is supported by consideration is also not justified.

6. The counsel for the assessee, on the other hand, relies on the decision of the Full Bench of this Court in COMMISSIONER OF GIFT-TAX Vs. SMT. C. K. NIRMALA., as also the decision of the Karnataka High Court in D.C. Shah and Others Vs. Commissioner of Gift Tax, Karnataka, as affirmed by the Supreme Court in Commissioner of Gift-tax Vs. D.C. Shah and Others, and submits that the transfer of the business of the assessee-company to the partnership-firm is supported by consideration. He also submits that the finding of the first appellate authority that the gift, if any, is exempted u/s 5(1)(xiv) is confirmed by the Tribunal in the appellate order and that there is no question raised regarding the said issue in the reference.

7. We have perused the orders of the AO as well as the two appellate authorities. The AO has in fact invoked the provisions of Section 4(1) of the GT Act and took the view that the transfer is not supported by consideration to the extent of 90 per cent of the assets brought into the partnership-firm as quantified by him and on that basis he took 90 per cent of the amount so fixed as deemed gift. The first appellate authority without going into the various details such as the valuation of the assets brought in by the assessee-company as well as the other partners with reference to the partnership has decided the matter by holding that the transfer is supported by consideration. It is also seen that the first appellate authority has entered a finding that the gift is exempted u/s 5(1)(xiv) of the Act as according to it, the transaction was with a view to carrying on the business in a better manner. The Tribunal has also entered a finding in para 18 of the appellate order to the effect that the arrangement was made in business interest. After a close reading of the orders of the authorities including the Tribunal, we are of the view that all the authorities have failed to ascertain the relevant basic facts necessary to adjudicate the question whether any gift is involved in this case, i.e., the worth of the assets which was brought in by the assessee, the worth of the assets and/or" consideration brought in by the other partners in the partnership-firm. Only after a proper ascertainment of the aforesaid factual situation the question as to whether there is any gift involved in the transaction can be arrived at. It would appear from the order of the AO that instead of valuing the worth of the asset brought in by the company to the partnership firm the AO picked up the goodwill of the company and determined the value of the asset by adopting previous three years" profit. A Full Bench of this Court in CGT v. Smt. C.K. Nirmala (supra) considered a question whether a transaction similar to the present one is exigible to gift-tax. In the Full Bench case a proprietary business was converted into a partnership business and the other partners were her two major daughters and her husband in his capacity as trustee of a trust. The assessee had 35 per cent share, her two daughters 15 per cent share each and the remaining .35 per cent went to the trust. The GTO took the view that

there was gift to the extent of 65 per cent in favour of the incoming partners. The three incoming partners brought Rs. 10,000 each towards their share capital in the business. The assessee contended that the transfer was supported by consideration, Though the authorities rejected the said contention the Tribunal accepted it. The Full Bench after considering the assets brought by the assessee and by the partners held that there was no gift exigible to tax. The Karnataka High Court in D.C. Shah and Ors. v. CGT (supra) considered a case of a reconstitution of a partnership-firm by inducting the son of one of the partners as a new partner and the share of the father was reduced. A further reconstitution of the partnership-firm with four new partners and four minors were admitted to the benefits of the partnership was made evidenced by a new partnership deed. The shares of the existing partners were also reallocated. The incoming partners and the minors admitted to the partnership also contributed to the capital of the firm and the new partners agreed to work for the firm, The Karnataka High Court held that since there was capital contribution by the incoming partners and by the minors admitted to the benefits of partnership that would constitute sufficient consideration and hence no gift is involved. This decision was taken up before the Supreme Court and the same was affirmed in CGT v. D.C. Shah (supra). The question of law considered by the Supreme Court was as to "whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that there was a taxable gift by the assessee when his share of profit in the firm was reduced from 19 paise to 14 paise and thus the share of his son Kiran D. Shah was increased from 9 paise to 14 paise ?" The Supreme Court in that context noted as follows :

"The High Court noted that the son had brought into the firm a contribution of capital in the sum of Rs. 2.33 lakhs. He had been in the business for nearly four years and the High Court found it reasonable to assume that the increase in his share of profits was on account of his experience and capacity to shoulder more responsibilities. Merely because the share of the father had come to be reduced by five paise and there was a corresponding increase so far as the son was concerned did not lead to the inference that the five paise share of the father had been transferred to the son."

It was further observed as follows :

"That the share of one partner is decreased and that of another partner correspondingly increased does not lead to the inference that the former had gifted the difference to the latter. The profit-sharing ratio in a firm can vary for a number of reasons, among them the ability of the partners to devote time to the business of the firm. The gift of a part of a partner's share to another partner has to be established by relevant evidence. The onus of doing so is on the Revenue. It has not been discharged in the present case."

8. A Division Bench of this Court in Commissioner of Gift Tax Vs. H. Subramanian, Bhima Jewellers, also considered the question of sufficiency of the consideration and on finding that there was no proper consideration of the same

remanded the matter "back to the Tribunal for fresh consideration. The senior standing counsel also relied on a decision of the Supreme Court in Salem Co-operative Central Bank Limited Vs. Commissioner of Income Tax, to the effect that it is for the Tribunal to consider on all points irrespective of whether the parties have argued or not.

9. Taking into account all the circumstances of the case, we are of the view that the main question as to whether there is any gift at all in the transaction of the assessee entering into the partnership has to be considered afresh by the Tribunal after ascertaining the basic facts with regard to the assets brought in by the assessee-company as well as all other partners and in the light of the principles laid down by the Supreme Court and by this Court in the various decisions mentioned above. It is open to the Tribunal if they feel that the basic facts has to be ascertained and considered by the assessing authority in the first instance to remit the matter to the assessing authority also. The assessee is free to raise all contentions both regarding the exigibility to gift-tax and in regard to the quantum of liability, if any, before the Tribunal and in case the matter is remitted to the AO, before the said officer also. If for any reason it is found that there is a gift exigible to tax certainly it is open to the Tribunal to consider other aspects also. In these circumstances, we decline to answer the question referred to us. We accordingly set aside the order of the Tribunal and remit the matter to the Tribunal for fresh disposal in accordance with law and in the light of the directions contained in this judgment.

The IT references are disposed of as above.