(1971) 08 KL CK 0006

In the High Court Of Kerala

Case No : Income-tax Reference No. 14 of 1969

Commissioner of Gift-tax APPELLANT

Vs

R. Narasimhan Potti RESPONDENT

Date of Decision : 09-08-1971

Acts Referred:
Gift Tax Act, 1958 — Section 5(1)

Citation : (1972) 83 ITR 296

Hon'ble Judges : T.S. Krishnamoorthy Iyer, J;K.K. Mathew, J

Bench : Division Bench

Advocate : P.K. Krishnankutty Menon and C.T. Peter, for the Appellant; P.K. Kurien, V. Desikan, K.A. Nayar and K. Sukumaran, for the Respondent

Judgement

Krishnamoorthy Iyeh, J.—This is a reference at the instance of the Commissioner of Gift-tax, Kerala, u/s 26(1) of the Gift-tax Act, 1958, by the Income Tax Appellate Tribunal, Cochin Bench. The question referred is:

" Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in treating the transaction in question as exempt u/s 5(1)(xiv) of the Gift-tax Act, 1958 ? "

2. The reference relates td the assessment year 1964-65 the accounting period being the year ending with August 16, 1963. The assessee was the sole proprietor of a boarding and lodging house at Alleppey by name, Dhanalakshmi Vilas. With effect from August 17, 1962, the assessee converted his proprietary business into a partnership with N. Ramakrishnan Poti and N. Viswanathan Poti, who were his employees. The partnership is evidenced by the deed dated December 4, 1962, a copy of which is produced as annexure "A". The Gift-tax Officer took the view that by taking the two partners in the business the assessee parted with 2/3rd of his goodwill in favour of the partners and held that this is a gift of 2/3rd share of the goodwill in the business by the assessee. The Gift-tax Officer valued the goodwill at 11/2 times the average of the last 5 years'' profit and determined the sum at Rs. 42,105. 2/3rd of this, viz., Rs. 30,000, was

brought to tax.

3. In the appeal before the Appellate Assistant Commissioner, the assessee contended that there was no passing of property on account of the partnership deed and the gift was made in the course of carrying on the business and for the purpose of the business and, therefore, it was exempt u/s 5(1)(xiv) of the Gift-tax Act. Though the Appellate Assistant Commissioner rejected these contentions he reduced the value of the goodwill by Rs. 9,000. The Tribunal left open the question whether the goodwill of a business could form the subject-matter of gift but held that the gift is exempted u/s 5(1)(xiv) of the Gift-tax Act.

4. The preamble of the partnership deed (annexure " A") does not give any specific reasons for converting the proprietary business into a partnership concern. Apart from producing the partnership deed the assessee has not adduced evidence to prove the circumstances under which the business was converted into a partnership firm. Section 5(1)(xiv) of the Gift-tax Act reads:

"5. Exemption in respect of certain gifts.--(1) Gift-tax shall not be charged under this Act in respect of gifts made by any person-- . . . ;

(xiv) in the course of carrying on a business, profession or vocation, to the extent to which the gift is proved to the satisfaction of the Gift-tax Officer to have been made bona fide for the purpose of such business, profession or vocation. "

5. Two conditions must be satisfied in order that the above proviso can apply. The first is that the gift should be made in the course of carrying on a business. The second is that the gift should have been made bona fide for the purpose of the business.

6. In Commissioner of Gift Tax, Kerala, Ernakulam Vs. Dr. George Kuruvilla, Thiruvalla, . in interpreting Section 5(1)(xiv) of the Gift-tax Act, 1958, a Division Bench of this court took the view that the above provision can apply ii it is shown that the gift was made on grounds of commercial expediency and in order to directly or indirectly facilitate the carrying on of the business, profession or vocation. The learned judges observed :

" We feel it difficult to resist the conclusion that in the background and circumstances, the gift could well be regarded as having been made for the better ordering of the business of the assessee. It seems to us that it would be enough to show that the gift was made on grounds of commercial expediency and in order to directly or indirectly facilitate the carrying on of the business, profession or vocation."

7. In reversing the decision of this court their Lordships of the Supreme Court in Commissioner of Gift-tax v. Dr. George Kuruvilla, disapproving the observations quoted above, observed :

" We are unable to agree with the views so expressed. The donor is exempt u/s

5(1)(xiv) from liability to pay tax only if the gift is in the course of carrying on a business, profession or vocation and is made bona fide for the purpose of such business, profession or vocation. The clause does not enact that a gift made by a person carrying on any business is exempt from tax, nor does it provide that a gift is exempt from tax merely because the property is used for the purpose for which it was used by the donor. Without deciding whether the test of '' commercial expediency '' is strictly appropriate to the claim for exemption u/s 5(1)(xiv), we are of the view that there is no evidence on the record to prove that the gift to Thomas was ''in the course of carrying on the business'' of the donor, and '' for the purpose of the business ''."

8. The assessee was claiming the benefit of an exemption from liability to pay tax and the burden is on him to prove facts which will entitle him to the benefit of Section 5(1)(xiv) of the Gift-tax Act, 1958. Apart from producing the gift deed no evidence was adduced by the assessee. The Appellate Tribunal upheld the claim for exemption merely on the ground that the gift was made on commercial expediency and in order to directly or indirectly facilitate the carrying on of the business. The preamble of the partnership only shows that N. Ramakrishnan and N. Viswanathan were helping the assessee in his business and they were being remunerated by salary and since the assessee has agreed to admit them in the partnership the partnership has been formed. These recitals, apart from anything else, are absolutely insufficient to uphold the claim for exemption u/s 5(1)(xiv) of the Gift-tax Act, 1958.

9. We, therefore, answer the question in the negative, that is, in favour of the revenue and against the assessee. There will be no order as to costs.

10. A copy of this judgment will be forwarded to the Income Tax Appellate Tribunal, Cochin Bench, under the seal of this court and the signature of the Registrar.

