
(2002) 05 P&H CK 0103
In the Punjab And Haryana At Chandigarh
Case No : Gift-tax Reference No. 1A of 1994

Commissioner of Gift-tax

APPELLANT

Vs

Satya Nand Munjal

RESPONDENT

Date of Decision : 16-05-2002

Acts Referred:

Citation : (2002) 176 CTR 529 : (2002) 256 ITR 516

Hon'ble Judges : N.K. Sud, J;Jawahar Lal Gupta, J

Bench : Division Bench

Advocate : R.P. Sawhney and Salil Bali, for the Appellant; A.K. Mittal, Subhash Aggarwal and Akshay Bhan, for the Respondent

Judgement

Jawahar Lal Gupta, J.—The assessee made a gift of 4,000 equity shares of Hero Cycles Private Limited to Satyanand Munjal Trust No. 1. He valued these shares at Rs. 170 per share. He also made a revocable gift of 6,000 equity shares of Hero Cycles Private Limited to Yogesh Chander and Brothers by a revocable gift deed. According to the terms of the deed, the assessee had the right to revoke the gift after completion of 74 months from the date of transfer but before the expiry of 82 months. A return as contemplated under the Gift-tax Act, 1958, for the assessment year 1982-83 was filed by the assessee on July 27, 1982. He declared a total gift of Rs. 4,64,280. Gift to Satyanand Family Trust. No. 1 was valued at Rs. 3,81,000. The revocable gift of 6,000 equity shares was valued at Rs. 83,280.

2. The Gift-tax Officer examined the matter. He made a reference u/s 15(6) of the Act read with Section 16A of the Wealth-tax Act, 1957, to the Valuation Officer. On receipt of the reference, the Valuation Officer gave a notice to the assessee. After receipt of requisite information, the Valuation Officer took the view that "the value of shares should be based on the balance-sheet as on June 30, 1981, and not on the balance-sheet as on June 30, 1982, because when the shares were gifted, the immediate preceding balance-sheet was that of June 30, 1981". He also noticed the fact that 28 lakhs fresh shares had been issued by the

company on December 24, 1981. After examination of the balance-sheet, the Valuation Officer fixed the value of each share at Rs. 383.75.

3. The Gift-tax Officer accepted this valuation and found that the value of the gift made to Satyanand Munjal Trust No. 1 was Rs. 12,36,000. So far as the transfer of 6,000 equity shares to Yogesh Chander and Brothers is concerned, he came to the conclusion that the "gift is wholly void". He further came to the conclusion that "the shares being transferred are of Hero Cycles (P.) Ltd. in whose control and management the assessee is directly interested. These shares have a very high assessable value under the Wealth-tax Act... By keeping the option of (sic) (to) revoke the transfer after six years the assessee will not pay wealth-tax on the assets so transferred. Moreover during the period of six years the bonus shares issued by Hero Cycles (P.) Ltd., Ludhiana, will become the property of the transferee without any gift-tax being levied. Following the decision of their Lordships of the Supreme Court in McDowell and Co. Ltd. Vs. Commercial Tax Officer, , he held that "the gift is void". He made protective assessment in the hands of the assessee. Thus, the value of taxable gift was fixed at Rs. 13,14,280.

4. The assessee was aggrieved by the order passed by the Gift-tax Officer. He filed an appeal. The Commissioner of Gift-tax (Appeals) held that the value of the shares has to be determined under Rule 10(2) of the Gift-tax Rules, 1958. The assessing authority has "got the valuation of shares determined by the official valuer . . .". The valuer had assessed the value with reference to the balance-sheet. He had taken into account the total assets and after allowing for the liability, determined the value of each share. After going through the report of the Official Valuer, the appellate authority held that he did not "find any infirmity in that report . . .". The assessee's contention that "the assets in the balance-sheet do not depict the true picture ..." was rejected. Thus, it was held that "the action of the Gift-tax Officer for determining the share value of the Hero Cycles Ltd. at Rs. 383.75 per share on February 9, 1982, on the basis of break up value method in view of Rule 10(2) is in order and the written submission of the appellant (assessee)... based on yield method ... is not applicable. . .".

5. In so far as the issue of revocable gift of 6,000 shares is concerned, the view taken by the Assessing Officer was affirmed. The gift was held to be void. It was further held that the gift being void, the levy of tax on protective basis could not be sustained.

6. The assessee approached the Tribunal. On consideration of the matter, the Tribunal took the view that the "valuation of unquoted equity shares has to be on the basis of the yield method ..." So far as the revocable gift is concerned, the Tribunal held that the valuation has to be under "Rule 11 of the Gift-tax Rules". In case, the donor did not exercise any option to revoke the gift within a period of 82 months, a further valuation of the residuary interest shall be made. Thus, the assessee's appeal was allowed.

7. The Revenue filed a petition u/s 26(1) of the Gift-tax Act, 1958, for reference

to this court. The Tribunal, after examination of the matter, has referred the following two questions for the opinion of this court :

"1. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that the valuation of the shares gifted by the assessee must be made on the basis of the yield method and not on break-up method under Rule 10(2) of the Gift-tax Rules ?

2. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that the gift made by the assessee with right of revocation during a certain period was a valid gift ?"

Regarding 1 :

8. Mr. Sawhney, learned counsel for the Revenue, has contended that the Gift-tax Officer had rightly accepted the value as determined under Rule 10(2) by following the break-up method. The view was affirmed by the appellate authority. The Tribunal has erred in adopting the yield method. The claim made on behalf of the Revenue has been controverted by counsel for the assessee. He contended that in view of the decision of their Lordships of the Supreme Court in Commissioner of Gift Tax, Bombay Vs. Smt. Kusumben D. Mahadevia, , and that of the Bombay High Court in Seth Memant Bhagubhai Magatlal Vs. N. Rama Iyer, Gift-tax Officer and another, , the order passed by the Tribunal is legal and valid.

9. The matter pertains to the assessment year 1982-83. The value of a gift was to be assessed in accordance with the provisions of Section 6 as it existed prior to the passing of the Direct Tax Laws (Amendment) Act, 1989. At the relevant time, Section 6 provided as under ;

"6. Value of gifts, how determined.--(1) The value of any property other than cash transferred by way of gift, shall, subject to the provisions of Sub-sections (2) and (3), be estimated to be the price which in the opinion of the Assessing Officer it would fetch if sold in the open market on the date on which the gift was made.

(2) Where a person makes a gift which is not revocable for a specified period, the value of the property gifted shall be the capitalised value of the income from the property gifted during the period for which the gift is not revocable.

(3) Where the value of any property cannot be estimated under Sub-section (1) because it is not saleable in the open market, the value shall be determined in the prescribed manner."

10. A perusal of Sub-section (1) would show that the value of the property transferred by way of gift was to be estimated as the price "it would fetch if sold in the open market on the date when the gift was made". So far as the provisions of Sub-sections (2) and (3) are concerned, these do not relate to the controversy.

11. Another relevant provision is contained in Rule 10 of the Gift-tax Rules,

1958. At the relevant time, Rule 10(2) provided as under :

"(2) Where the articles of association of a private company contain restrictive provisions as to the alienation of shares, the value of the shares, if not ascertainable by reference to the value of the total assets of the company, shall be estimated to be what they would fetch if on the date of gift they could be sold in the open market on the terms of the purchaser being entitled to be registered as holder subject to the articles, but the fact that a special buyer would for his own special reasons give a higher price than the price in the open market shall be disregarded."

12. A perusal of the above provision would show that the value of shares had to be primarily determined "by reference to the value of the total assets of the company". In case, it was not ascertainable by this method, then, the value had to be estimated on the basis of the price that the shares would fetch if on the date of the gift they were to be sold in the open market. In other words, under the rule, the value has to be primarily determined with reference to the total assets of the company. In common parlance, it is called the break-up method.

13. Mr. Mittal, learned counsel for the assessee, contended that it is only in the case of a company in liquidation that the break-up method has to be followed. Otherwise, the yield method was applicable.

14. We have considered the matter. Valuation of the shares has to be normally done by the valuer. Courts not only lack the expertise but are also handicapped by the fact that proper data is not available. Thus, there is a need to normally depend upon the report of the valuer.

15. If the matter is examined from a purely conceptual view point, it may be possible to contend that the balance-sheet gives only the depreciated value of the assets, It is not the prevailing price which the assets would fetch in the market. The correct value can only be assessed at the time of the sale of the unit. Thus, the value of a share of a going concern, shall be better assessed by following the yield method. However, in the case of a closely held company, if on the basis of the balance-sheet the value of the share is higher than that fixed by following the yield method, the assessee cannot, normally, be permitted to question it. It is only when the assessee is able to show that on account of competition, recession or any other relevant factor, the actual yield value is less than that determined with reference to the value of the assets, that his request for adopting the latter method may be accepted. It can happen that a company has assets of billions. However, its product does not sell. The cash flow may be poor. In such a situation, the assets may not reflect the actual value of the shares of the concern. On the other hand, it can also happen that a company with no tangible assets may have a huge cash flow. A booming software company can be convenient example. Thus, no hard and fast rule can be laid down. Each case has to be examined in the context of the peculiar facts and the law applicable at the relevant time.

16. In the present case, it is the admitted position that Rule 10(2) was in force at the relevant time. Under this rule, the value of the shares has to be primarily assessed with reference to the assets of the company. It is only when the Assessing Officer comes to the conclusion that the value is not ascertainable with reference to the assets that he can resort to some other method.

17. There is another aspect of the matter. In the normal course of events, the balance-sheet of the company with a good cash flow should reflect the correct value of the shares. It is only when the company fiddles with the figures and shows inflated expenses or losses that a situation may arise where it may not be possible to ascertain the correct value of the shares with reference to the assets as declared in the balance-sheet. In such a situation, it would be open to the assessing authority to follow the yield method. It may be added that normally it would not be open to the company or the individual concerned with its affairs to say that the balance-sheet does not reflect the correct position regarding the assets or that the value of the shares cannot be ascertained with reference thereto. Such an objection can be raised only by the Revenue. The company and the individual managing its affairs should be bound by the value of the assets as disclosed in the balance-sheet.

18. What is the position in the present case ? The assessee has not even remotely suggested that the company did not have good cash flow. It is not even the assessee's case that the value of the assets as shown in the balance-sheet is not correct. Thus, it cannot object to the view taken by the valuer that the value has to be assessed with reference to the assets.

19. Still further, as observed by the Gift-tax Officer, the assessee is "directly interested" in the "control and management" of Hero Cycles Private Limited. In our view, such being the position, he is bound by the value of the assets as declared in the balance-sheet. In the normal course of events, it would not be open to him to even suggest that the value of the assets is not correct or that the shares cannot be evaluated with reference to the balance-sheet. A fact which deserves mention is that the Valuation Officer had issued a notice to the assessee and asked for the relevant information. Mr. Mittal has produced before us a copy of the report given by the Valuation Officer as also the letter dated December 26, 1986, sent by the Valuation Officer to the assessee and Brijmohan Lal Munjal, Satyanand Munjal, Som Parkash and Smt. Ved Wati. In this letter, it had been specifically pointed out that in view of the statutory provisions of Rule 10 "it would not be proper to adopt any other method for valuation of shares". The break-up method for the valuation of shares as laid down in Rule 10(2), is, therefore, applicable . . ." Thus, the valuation was done on the basis of the value of the assets as mentioned in the balance-sheet. Despite this position, nothing is shown to have been placed by the assessee on the record before the assessing authority, the appellate authority or the Commissioner to show that it was not possible to accurately assess the value of the shares on the basis of the assets. In this situation, it is clear that the Assessing Officer and the appellate authority

had adopted the correct method for assessing the value of the shares.

20. Mr. Mittal points out that in view of the decision of their Lordships of the Supreme Court in *Commissioner of Gift Tax, Bombay Vs. Smt. Kusumben D. Mahadevia*, , the view taken by the Tribunal in adopting the yield method is correct and legal. Reliance has also been placed by learned counsel on the decision of Mr. Justice S. P. Bharucha (as his Lordship then was) in *Seth Memant Bhagubhai Magatlal Vs. N. Rama Iyer, Gift-tax Officer and another*, .

21. We have considered the contention. A perusal of the decision of their Lordships of the Supreme Court in *Commissioner of Gift Tax, Bombay Vs. Smt. Kusumben D. Mahadevia*, shows that the provisions of Rule 10(2) did not arise for consideration of the court. At page 48, their Lordships were pleased to observe as under ;

"Now, it is difficult to see how the question whether the valuation of the shares should have been made on the basis of the break-up method by reason of Rule 10, Sub-rule (2) of the Gift-tax Rules, can be required to be referred by the Tribunal to the High Court, It is well settled that no question can be referred to the High Court unless it arises out of the order of the Tribunal. . . It is obvious that this question sought to be raised on behalf of the Revenue was neither raised before the Tribunal nor decided by it and the only argument advanced before the Tribunal was that the mean of the values arrived at on an application of the profit earning method and the break-up method should be taken to be the value of the shares. There was no argument addressed to the Tribunal that the break-up method should be adopted because that was the primary method prescribed by Rule 10, Sub-rule (2), and the Tribunal had, therefore, no occasion to deal with such argument. This question obviously, therefore, does not arise out of the orders of the Tribunal and it cannot be required to be referred to the High Court."

22. Thus, it is clear that the issue of Rule 10 was not involved in *Commissioner of Gift Tax, Bombay Vs. Smt. Kusumben D. Mahadevia*, .

23. We have also perused the decision of the Bombay High Court in *Seth Memant Bhagubhai Magatlal Vs. N. Rama Iyer, Gift-tax Officer and another*, . It was specifically recorded that (headnote): "What the Supreme Court said in regard to Section 6(3) and Rule 10(2) of the Gift-tax Rules, 1958, was that it had not been argued before the Tribunal that the break-up method was the primary method to be applied". Thus, the court had taken the view that the decision in *Commissioner of Gift Tax, Bombay Vs. Smt. Kusumben D. Mahadevia*, would mean that the yield method had to be followed unless the company was in liquidation. With respect, we are unable to follow this view. In fact, the matter has been considered by their Lordship of the Supreme Court in a later decision in *Bharat Hari Singhania and others Vs. Commissioner of Wealth Tax (Central) and others*, . Their Lordships have categorically held that the authorities are bound by the statutory rules. No hard and fast rule regarding the method to be followed

for valuation of shares can be laid down. The method would depend upon the facts of each case. A specific reference may be made to the following observations at page 16. It was observed as under :

"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. They cannot devise their own ways and means for valuing the assets."

24. Still further, after consideration of the decisions of their Lordships of the Supreme Court in *Commissioner of Gift Tax, Bombay Vs. Smt. Kusumben D. Mahadevia*, as also in *Commissioner of Wealth Tax Vs. Mahadeo Jalan and Mahabir Prasad Jalan and Others etc.*, their Lordships were pleased to hold as under (page 20) :

"The statement of law in the decision would thus establish that it does not purport to "lay down any hard and fast rule". It recognises that various factors in each case will have to be taken into account to determine the method of valuation to be applied in that case. The dividend yield method is not the only method indicated in the case of a going concern ; there is the "earning method" and then a combination of both methods. The several qualifications added to the above rules, as already stated, make them highly cumbersome and time-consuming. The Wealth-tax Officer has to examine the facts and circumstances of each case including the nature of the business, the prospects of profitability and similar other considerations before finally determining whether to apply the dividend method or the yield method or whether the break-up method should be followed. . . . Merely because the yield method may be more advantageous from the assessee's point of view, it does not follow that it alone leads to the ascertainment of the true market value and that all other methods are erroneous or misleading. This aspect we have emphasised hereinbefore too."

25. In view of the above, it is clear that the interpretation placed upon the decision in *Commissioner of Gift Tax, Bombay Vs. Smt. Kusumben D. Mahadevia*, by the Bombay High Court does not reflect the correct position of law.

26. Mr. Sawhney, learned counsel for the Revenue, has also referred to the decision of their Lordships of the Supreme Court in *Commissioner of Wealth Tax, Meerut Vs. Sharvan Kumar Swarup and Sons*, . He contended that the rules for valuation embody machinery provisions. These can be applied retrospectively. Thus, the rule as existing today in the form of Schedule II which provides for the breakup method should be followed.

27. It is undoubtedly correct that their Lordships of the Supreme Court while dealing with Rule 1BB of the Wealth-tax Rules, 1957, have observed that (head-note) : "The rule is procedural and not substantive and is applicable to all proceedings pending on April 1, 1979, when the rule came into force." Specific observation has been recorded at page 895. Despite this, we are unable to accept the contention of learned counsel in the context of the facts and circumstances of the present case. It is the admitted position that the gift was

made in the year 1982. At that time, the unamended provisions of Section 6 and Rule 10 were in force. The provision of Section 6 was amended with effect from April 1, 1989. Schedule II was introduced in 1993. There was nothing in the Schedule to indicate that it was intended to have retrospective operation. Under the law, every statute is prospective unless it is specifically made retrospective. In the present case, the Schedule was not made retrospective. In any event, at the crucial time, viz., the year 1982, the unamended provision of the Act and Rule 10(2) were in force. Thus, these provisions would govern the determination of the value of the shares. The contention based on the decision in the case of Commissioner of Wealth Tax, Meerut Vs. Sharvan Kumar Swarup and Sons, , cannot be accepted in the facts and circumstances of the present case in so far as this aspect of the matter is concerned. Of course, even in this case, it was held that the rule of valuation was binding on the authorities.

28. A perusal of the order of the Tribunal shows that despite a specific contention regarding Rule 10(2) having been raised, it did not advert to the provision while deciding the case. Still further, while placing reliance on the decisions of their Lordships of the Supreme Court, it failed to notice the categorical observations in the context of the present case. It is undoubtedly correct, as observed by the Tribunal, that under article 141 of the Constitution of India, the law declared by the Supreme Court is binding on all courts. However, a decision is an authority for the proposition that it lays down. The observations of the Supreme Court regarding Rule 10(2), as noticed above, were completely missed by the Tribunal.

29. In the present case, nothing was pointed out on behalf of the assessee to show that the value was not ascertainable with reference to the assets of the company. Thus, the findings recorded by the Gift-tax Officer and the appellate authority which were based on the provision of Rule 10(2), deserve to be affirmed. In this situation, the answer to the first question has to be in favour of the assessee. It is held that the Tribunal was not right in holding that the valuation of shares gifted by the assessee must be made on the basis of the yield method. The first question is answered accordingly.

Regarding 2 :

30. Mr. Sawhney contended that the assessee had adopted a device to escape the levy of tax. The revocable gift was wholly repugnant to the provisions of Section 126 of the Transfer of Property Act, 1882. Thus, the Tribunal had erred in upholding the same. The claim made by counsel for the Revenue was controverted by Mr. Mittal, who appeared for the assessee.

31. It is undoubtedly correct that under the general law, a gift which is "revocable wholly or in part at the whims of the donor is void". However, the Gift-tax Act embodies a special law. Section 6(2) (as it existed at the relevant time) specifically provided for valuation of "a gift which is not revocable for a specified period". This special provision would override the general law and a gift which is revocable after a specified period cannot be held to be void. Still further,

according to the provision, the value has to be fixed by the method of capitalisation. A detailed provision in this behalf has been made in Rule 11 of the Gift-tax Rules, 1958. In this situation it cannot be said that the gift made by the assessee which was revocable after 74 months but before the expiry of 82 months was void.

32. Mr. Sawhney contended that a revocable gift is a device to escape assessment. Reliance was placed on the decision of their Lordships of the Supreme Court in the case of McDowell and Co. Ltd. Vs. Commercial Tax Officer, .

33. It is undoubtedly true that in the case of McDowell and Co. Ltd. Vs. Commercial Tax Officer, their Lordships have adverted to "the evil consequences of tax avoidance". The practice has been clearly deprecated. However, the observations have been explained in Commissioner of Wealth Tax, Gujarat-II, Ahmedabad Vs. Arvind Narottam (Individual), in the following words (page 487) :

"It is true that tax avoidance in an under-developed or developing economy should not be encouraged on practical as well as ideological grounds. One would wish, as noted by Reddy J., that one could get the enthusiasm of Justice Holmes that taxes are the price of civilization and one would like to pay that price to buy civilisation. But the question which many ordinary taxpayers very often, in a country of shortages with ostentatious consumption and deprivation for the large masses, ask is, does he with taxes buy civilisation or does he facilitate the waste and ostentation of the few. Unless waste and ostentation in Government spending are avoided or eschewed, no amount of moral sermons would change people's attitude to tax avoidance."

34. Besides the above, it deserves mention that the law provides for rebate in payment of tax in respect of deposits made up to a particular limit in public provident fund or in post offices. The deposit is apparently made with the intention of saving on tax. It is a legitimate attempt on the part of the assessee to save money by following a legal method. If on account of a lacuna in the law or otherwise the assessee is able to avoid payment of tax within the letter of law, it cannot be said that the action is void because it is intended to save payment of tax. So long as the law exists in its present form, the taxpayer is entitled to take its advantage. We find no ground to accept the contention that merely because the gift was made with the purpose of saving on payment of wealth-tax, it needs to be ignored. Thus, the second question is answered in favour of the assessee. No other point was raised.

35. The reference is answered in the above terms. The matter shall now go back to the Tribunal for passing an appropriate order. In the circumstances, there would be no order as to costs.