
(1989) 02 KL CK 0035

In the High Court Of Kerala

Case No : Income-tax Reference No's. 255 and 270 of 1982

Commissioner of Gift-tax

APPELLANT

Vs

U.S.M. Fernandez

RESPONDENT

Date of Decision : 13-02-1989

Acts Referred:

Gift Tax Act, 1958 — Section 5(1)

Citation : (1989) 178 ITR 577

Hon'ble Judges : K.S. Paripoornan, J;K.A. Nayar, J

Bench : Division Bench

Advocate : P.K.R. Menon, for the Appellant; None, for the Respondent

Judgement

K.S. Paripoornan, J.—These are connected cases. Identical questions arise for consideration in both the cases. At the instance of the Revenue (Commissioner of Gift-tax, Trivandrum), the Income Tax Appellate Tribunal has referred the following four questions of law, in both the cases, u/s 26(1) of the Gift-tax Act, 1958, for the decision of this court:

"(1) Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was correct in law and fact in finding that the assessee is entitled to exemption u/s 5(1)(vii) and Section 5(1)(xii) of the Gift-tax Act ?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law and fact in finding that though the daughter, Kumari Arora Fernandez, had income of her own, the fact of such income would not exclude her from the class of relative dependent upon the asses-see for maintenance and support ?

(3) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in finding that for the purpose of Section 5(1)(xii), only the intention of the donor is material and not the actual utilisation by the donee ?

(4) Whether, on the facts and in the circumstances of the case, the finding of the

Tribunal that "we are satisfied that the assesseees have established that the gifts have been made for the education of the children" based on sufficient materials ?"

2. ITR No. 255 of 1989 is filed against R. A. No. 431 (Coch)/1981 in GTA No. 8(Coch)/1979 and ITR No. 270 of 1982 is filed against R. A. No. 432/Coch/1981 in GTA No. 9 (Coch)/1979. The respondents in both the cases are assesseees under the Gift-tax Act. In ITR No. 255 of 1982, it is the husband and in ITR No. 270 of 1982, it is the wife. The gifts were made to the three children by their parents, the respondents in these references.

3. The respondents in the two referred cases, the husband and the wife, respectively, made gifts to their three daughters in the accounting period relevant for the assessment year 1977-78. The gift to their daughter, Kumari Arora Fernandez, was just before her marriage and the respondents made a gift of Rs. 50,000 each to the said daughter. The respondents also made gifts of Rs. 10,000 each to their two daughters who are students. For the gifts made to Kumari Arora Fernandez, just before her marriage, exemption was sought u/s 5(1)(vii) of the Gift-tax Act. For the gifts made to the two daughters by the assesseees, exemption was sought u/s 5(1)(xii) of the Gift-tax Act.

4. The Gift-tax Officer held that Kumari Arora Fernandez had income of her own being the income from the running of a lorry and that therefore, she cannot be considered to be dependent upon either of her parent. Exemption pleaded u/s 5(1)(vii) of the Act was negatived for this reason. Regarding the gift of Rs. 10,000 each to the two daughters by both the respondents, the Gift-tax Officer held that the parents had given the gifts with intimation to the two daughters that they should invest the money as capital in a partnership with the other daughter for the purpose of running the lorry business and use the income from such business for the purposes of their education. The Gift-tax Officer held that it was so done by the assesseees with the intention of expanding the lorry business run by Kumari Arora Fernandez and not for meeting the donees' educational expenses. On these grounds, exemption pleaded by the respondents (parents) u/s 5(1)(xii) of the Gift-tax Act was negatived. The Gift-tax Officer took the view that the amount gifted if invested in the business, may result in income or loss and if the business fails, the capital would be depleted and there would not be any capital balance for meeting the educational expenses. In the appeals, the Appellate Assistant Commissioner concurred with the above reasoning and conclusion of the Gift-tax Officer. It was held that Kumari Arora Fernandez had independent income and so she cannot be considered to be dependent upon the respondents/assesseees for support and maintenance as required by Section 5(1)(vii) of the Gift-tax Act. Similarly, the gifts made by the two assesseees to the two daughters cannot be considered to be for the purpose of their education, since the amount was invested in a partnership. In second appeals filed by the assesseees as G.T.A. Nos. 8 and 9 (Coch)/1979, the Income Tax Appellate Tribunal passed a common order dated July 27, 1981, and held that both the assesseees

are entitled to the relief contemplated u/s 5(1)(vii) of the Act in the sum of Rs. 10,000 for each assessee out of the amount gifted to Kumari Arora Fernandez. The Tribunal held that even though the daughter, Kumari Arora Fernandez, has income of her own, the fact of such income would not exclude her from the class of relatives dependent upon the two assessees for maintenance and support. Regarding the exemption pleaded by the two assessees in respect of the gifts made to the other two daughters, in the sum of Rs. 10,000 each, the Appellate Tribunal held that what is required u/s 5(1)(xii) of the Act is not the actual utilisation by the donees for the purpose of education but the intention of the donor-assessees that the gifts are made for the education of their children and, on facts, the Tribunal held that they are satisfied that the assessees, in the instant case, have established that the gifts have been made for the education of the children. The gifts made by the assessees of Rs. 10,000 to each of the donees were considered to be reasonable for the purpose of the education of the children. The assessees were held entitled to the exemption of the entire gift of Rs. 20,000 made by each one of them to the two daughters.

5. Aggrieved by the common order so passed in the two appeals filed by the husband and wife (parents of donees) dated July 27, 1981, the Revenue filed applications (R. A. Nos. 431 and 432 (Coch)/1981) to refer certain questions of law which, according to the Revenue, arose out of the appellate order passed by the Tribunal dated July 27, 1981. Accordingly, the Tribunal has referred the questions of law, extracted hereinabove, for the decision of this court.

6. We heard counsel for the Revenue, Mr. P.K.R. Menon. The assessees were not represented before us. In order to understand the controversy in this case, it will be useful to extract Section 5(1)(vii) and Section 5(1)(xii) of the Gift-tax Act. :

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

to any relative dependent upon him for support and maintenance, on the occasion of the marriage of the relative, subject to a maximum of rupees ten thousand in value in respect of the marriage of each such relative ;

(xii) for the education of his children, to the extent to which the gifts are proved to the satisfaction of the Gift-tax Officer as being reasonable having regard to the circumstances of the case ;"

7. In holding that both the assessees are entitled to the relief contemplated u/s 5(1)(vii) of the Act, in the sum of Rs. 10,000 for each assessee out of the amounts gifted to Kumari Arora Fernandez, the Appellate Tribunal relied on the following passage from the book "The Three New Taxes" by A.C. Sampath Iyengar, Vol. II, 5th Edition, page 167 :

"It is not common in our society that marriages are solemnised only at the time when the bridegroom has sufficient income for his livelihood, and therefore, if the word "dependent" is interpreted in the restricted sense, the exemption will

become meaningless so far as the gifts on the occasion of marriage to the bridegroom are concerned. More so, children remain dependent on their parents or guardians, in spite of any income of their own, in our present system of society. Again they are dependent not only on their father but on both the parents, since the mother provides support to them by doing the family chores. Therefore, in view of the above arguments, it may be said that the gifts on the occasion of marriage of a relative shall be exempt up to a maximum limit of rupees ten thousand, if the relative has been dependent on the assessee and it will be immaterial whether the relative was having sufficient income for livelihood or not."

8. Citing the above passage with approval, the Appellate Tribunal held that even though the daughter, Kumari Arora Fernandez, has income of her own, the fact of such income would not exclude her from the class of relatives dependent upon the two assessees for maintenance and support. With great respect to the learned author, we are unable to endorse the above view as representing the correct law on the subject. The plea of the assessees was one of claiming exemption u/s 5(1)(vii) and Section 5(1)(xii) of the Gift-tax Act. It is settled law that the person who claims exemption should establish it. A statutory provision affording exemption should be strictly construed-- The Union of India (UOI) Vs. The Commercial Tax Officer, West Bengal and Others, and Kedarnath Jute Manufacturing Co. Vs. Commercial Tax Officer, Calcutta and Others, . Bearing these basic principles in mind, is it permissible to say that Kumari Arora Fernandez, who has income of her own, can still be considered as a relative dependent upon the father or mother for maintenance and support ? In this case, the Appellate Tribunal has held that both the assessees (father and mother) are entitled to the relief contemplated u/s 5(1)(vii) of the Act. Can it be said that Kumari Arora Fernandez was a relative dependent upon both the parents for maintenance and support ? We are of the view that, ordinarily, a child is dependent, primarily, on its father. It may be that if the father is not an earning member or affluent, the child may be dependent on the mother. But the child cannot be dependent on both. u/s 5(1) of the Act, gift-tax shall not be charged under the Act in respect of gifts made by any person to any relative "dependent" upon "him" for maintenance and support. The donee should be a relative dependent upon the assessee for support and maintenance. Ordinarily, the child can be considered to be dependent, primarily, on the father. As in the instant case, where both the father and mother have separate earnings and the gifts were made by both of them on the occasion of the marriage of the child, will both gifts be exempt ? No. In our view, only that gift made by the parent on whom the donee is dependent for support and maintenance will be exempt. The further question is, can a child (donee) who has income of her own, be said to be dependent upon the parent for support and maintenance ? The legal right of support and maintenance is conditioned by the word "dependent". Maintenance and support will take in food, shelter, clothing, education, medical care, etc. It will take within its fold provisions of the necessities and conveniences of life.

Since Section 5(1)(vii) of the Act should be construed strictly, being an exemption provision from taxation, we are of the view that if the relative (donee) has got sufficient income of his/her own, the said relative cannot be considered to be dependent upon the assessee (donor) for support and maintenance. The statement of the law to the effect that exemption will be available and it will be immaterial whether the relative has sufficient income for livelihood or not is too broadly stated and cannot be supported. The question whether the relative is dependent upon the assessee for support and maintenance is a question of fact to be decided depending upon the facts and circumstances of each case ; what is the nature and quantum of the income of the relative who is said to be dependent upon the assessee ; is the said relative dependent upon the assessee for support and maintenance, in the sense that the relative is dependent upon the assessee for provision of the necessities and conveniences of life ; is the income of the relative only insignificant or trivial or insufficient to meet the requirements and conveniences of life, like food, shelter, clothing, education, medical care, etc. ; these aspects should be evaluated. Unless it is established that the income of the relative is such that it will not be sufficient or significant to meet the above essentials of life, the said relative cannot be said to be dependent on the assessee for support and maintenance. The matter has not been viewed from this perspective by the Appellate Tribunal. We are unable to endorse the statement of the law by the Tribunal that even though the daughter, Kumari Arora Fernandez, has income of her own, the fact of such income would not exclude her from the class of relatives dependent upon the two assessees for maintenance and support. The Tribunal should first find out whether Kumari Arora Fernandez was a relative dependent upon the father or the mother. Thereafter, it should find out the quantum and nature of the income of Kumari Arora Fernandez. It is only based on these two findings that the Tribunal could say whether Kumari Arora Fernandez is a relative dependent upon the assessee/ assessees for support and maintenance. In the absence of an evaluation and appraisal of these basic facts and findings thereon, the Appellate Tribunal clearly erred in law in holding that the two assessees (both the parents) are entitled to the relief contemplated u/s 5(1)(vii) of the Act in the sum of Rs. 10,000 for each assessee. The Tribunal has not approached the question from a proper angle. In the absence of a proper approach, the finding entered by the Tribunal that the assessees are entitled to the relief contemplated u/s 5(1)(vii) of the Act, in the sum of Rs. 10,000 for each assessee, is a clear error. In this perspective, we decline to answer questions Nos. 1 and 2, in so far as it deals with the exemption u/s 5(1)(vii) of the Act.

9. We direct the Appellate Tribunal to restore the appeals to its file and dispose of the matter afresh in the light of the observations contained hereinabove.

10. The next question is regarding the exemption allowed by the Appellate Tribunal u/s 5(1)(xii) of the Act to the two daughters. The Appellate Tribunal has allowed exemption u/s 5(1)(xii) of the Act holding that the assessees are entitled to the exemption of the entire gift of Rs.20,000 made by each one of them to the

daughters. The Tribunal adverted to the fact that the assesseees have intimated the daughters (donees) as to how such gifts should be utilised to their advantage. It has been suggested that the donees should invest the gifts in the partnership business as their capital and utilise the income from such capital for the purpose of their education. The Appellate Tribunal has held that what is required u/s 5(1)(xii) of the Gift-tax Act is not the actual utilisation by the donees for the purposes of education but the intention of the donors-assesseees that the gifts are made for the education of their children. We are of the view that the mere fact that the gifts made to the donees were directed to be utilised in a more advantageous way on income-yielding asset, as in this case, investment by way of capital in the business, will cease to be one for the education of the children. The intention of the donors-assesseees is very relevant. They have effected the gifts for the education of their children. In what form the gift--the property--should be and in what way it should be utilised by the donees for the purpose of their education are beside the point. The sole question that will arise for consideration is whether the intention of the donor-assessee in making the gift was for the education of his children. When once such an intention on the part of the donor-assessee is established, the manner of utilisation of that amount, in whatever form or manner, will not in any way derogate from the purpose of the gift and entitlement to exemption.

11. In this view of the matter, we concur with the conclusion of the Appellate Tribunal that, the assesseees are entitled to the exemption of the entire gift of Rs. 20,000 made by each one of them to the two daughters, u/s 5(1)(xii) of the Gift-tax Act.

12. We answer the latter part of question No. 1 and questions Nos. 3 and 4 in the affirmative, in favour of the assesseees and against the Revenue.