
(1982) 03 BOM CK 0039

In the Bombay High Court

Case No : Estate Duty Reference No. 3 of 1972

Controller of Estate Duty, Bombay City-III

APPELLANT

Vs

D.B. Sanghavi

RESPONDENT

Date of Decision : 27-03-1982

Acts Referred:

Estate Duty Act, 1953 — Section 2(15), 27(1), 9

Citation : (1983) 32 CTR 298 : (1982) 138 ITR 500 : (1982) MhLj 851 : (1983) 12 TAXMAN 207

Hon'ble Judges : M.N. Chandurkar, J;Kania, J

Bench : Division Bench

Judgement

Kania, J.—This is a reference on a case stated under s. 64(1) of the E.D. Act, 1953 (referred to hereinafter as "this said Act"). The person whose estate is in question is one Babubhai M. Sanghavi who died on January 24, 1960. The accountable person in respect of the said estate is the present respondent, being the son of the said deceased. On August 17, 1959, i.e., within a very prior to his death, the said deceased sold 498 ordinary shares of Bhavanagar Vegetable Products Ltd., of the face value of Rs. 100 each at Rs. 125 per share to the sons and daughters of one Nagardas Ranchhoddas Sanghavi, a partner of the said deceased in the firm of M/s. R. Ratilal & Company, but who was not related to the said deceased. On the same date, the said Nagardas sold an identical number of ordinary shares of the said company at the price of Rs. 125 per share to the wife, daughters and daughter-in-law of the said deceased. In the Income Tax proceedings, the ITO invoked the provisions contained in the proviso to s. 12B(2) of the Indian I.T. Act, 1922, for the assessment year 1960-61, on the ground that the sales were effected by the deceased with the object of avoidance or reduction of his liability to tax on the capital gains. There was some controversy about the fair market value of the shares, but the same has been finally determined at Rs. 230 per share. In the Income Tax proceedings, it has been held by a Division Bench of this court in Babubhai M. Sanghvi Vs. Commissioner of Income Tax, Bombay City II, , that the first proviso to s. 12B(2)

of the Indian I.T. Act, 1922, does not make any provision for levying a tax on fictional or deemed capital gains which ought to have been received by the transferor. The incidence being on the capital gains actually received by the assessee, the only possible manner in which the second condition mentioned in the proviso could be satisfied would be by showing that the actual consideration received by the assessee was higher than the one mentioned in the deed itself. It is quite possible that though the fair market value of a particular capital asset is high, the assessee may transfer it to a person directly or indirectly connected with him for a nominal sum, for more than one reason, and such reasons cannot partake of the object mentioned in the second condition of the proviso. It was held that where a person transferred shares in a company to a person connected with him for much less than the fair market value of the shares, the first proviso to s. 12B(2) would not apply and tax could not be levied on the deemed capital gains based on the market value of the shares. Thus the assessee succeeded in respect of the question regarding the capital gains. The amount worked out on the basis of the difference between the fair market value of the said shares and the price at which the assessee had sold them, was next sought to be taxed as a gift under the G.T. Act, but it was held that no liability to gift-tax arose on the facts and circumstances of the case. On the same facts, the Asst. Controller held that there was a gift of property by the said deceased to the transferee, namely, the sons and daughters of Nagardas, represented by the difference between the fair market value of the said shares and the actual consideration received by the deceased and as the said gift was made within a year prior to his death, the provisions of s. 9 of the said Act, became applicable and the property should be deemed to pass on his death. On an appeal by the accountable person, the Appellate Controller held that the aforesaid amount of difference was liable to be taxed as a gift by virtue of the provisions of s. 9 and s. 27(2) of the said Act. On a further appeal by the assessee to the Tribunal on a consideration of the arguments advanced before it, held that Expln. 2 to s. 2(15) of the said Act was inapplicable to the present case, because that Explanation spoke of an extinguishment of right, whereas the deceased had no right against anybody to receive, on the sale of the shares, their market value as at the time of sale. The Tribunal held that the transaction was one of sale for consideration and the provisions of s. 9(1) of the said Act had, therefore, no application to the facts of the case. The Tribunal further held that the provisions of s. 27(1) of the said Act had also no application to the facts of the case, as there was no transfer made by the said deceased in respect of the said shares in favour of any relatives. On these facts, the Tribunal allowed the appeal of the assessee. Arising from this decision of the Tribunal, the following question has been referred to us for determination.

"Whether, on the facts and in the circumstances of the case, the provisions of section 9(1) read with section 27(1) of the Estate Duty Act, 1953, are applicable in this case ?"

2. Before going into the arguments advanced before us, we may refer to the

relevant sections of the said Act as they stood at material time.

3. Sub-s. 1 of s. 9 of the said Act reads as follows :

"9. (1) Property taken under a disposition made by the deceased purporting to operate as an immediate gift inter vivos whether by way of transfer, delivery, declaration of trust, settlement upon persons in succession, or otherwise, which shall not have been bona fide made one year or more before the death of deceased shall be deemed to pass on the death :

Provided that in the case of gifts made for public charitable purposes, the period shall be six months."

4. The relevant portion of sub-s. (1) of s. 27 reads thus :

"27. (1) Any disposition made by the deceased in favour of a relative of his shall be treated for the purposes of this Act as a gift unless -

(a) the disposition was made on the part of the deceased for full consideration in money or money's worth paid to him for his own use or benefit; or....

Provided that where the disposition was made on the part of the deceased for partial consideration in money or money's worth paid to him for his own use or benefit, the value of the consideration shall be allowed as a deduction from the value of the property for the purpose of estate duty."

5. The first submission of Mr. Naik learned counsel for the Controller, is that the case is covered by the provisions of s. 9 of the said Act as, in effect, the said deceased had made a gift of the said shares to the children of his partner, Nagardas, by selling them at undervalue. In our view, this contention has to be rejected. A gift is a transfer without consideration, according to the well-settled notion of the general law, and hence the transfer of the said shares at an undervalue, cannot be regarded simpliciter as a gift under s. 9 of the said Act. It was urged by Mr. Naik in the alternative, that the sale of the said shares by the deceased to the children of Nagardas amounts to a disposition made by the deceased in favour of a relative, as there was really a sale of these shares indirectly to the children and daughter-in-law of the deceased. It was pointed out by him that this was a case of an indirect transfer by way of cross-transfer of shares and hence the amount of difference between the fair market value of the shares and the price at which they were sold should be treated as a disposition under sub-s. (1) of s. 27 of the said Act and was liable to tax as the property deemed to pass on the death of the deceased under the provisions of the said sub-section read with sub-s. (1) of s. 9 of the said Act. In support of this contention, reliance was sought to be placed by Mr. Naik on the decision of the Supreme Court in Commissioner of Income Tax, Madras Vs. C.M. Kothari, Madras (Dead), and after him his Legal Representative, . In our view, Mr. Naik can seek no support from this decision, because that decision is based on the construction of s. 16(3)(a)(iii) of the Indian I.T. Act, 1922, which, in terms, covered the case of an indirect transfer or cross-transfer whereas there is nothing in the provisions

of s. 27(1) or sub-s. (1) of s. 9 of the said Act to show that it was intended under those provisions to cover a case of cross-gifts or cross-transfers at any time. It was next sought to be urged by Mr. Naik that, in this case, the provisions of Expln. 2 to cl. (15) of s. 2 of the said Act were applicable, that there was an extinguishment of a debt or right as contemplated by the said Explanation and this amounted to a disposition. In our view, it is quite patent that where a deceased sold shares in a company to his children at an under-value, there is no question of any extinguishment of any debt or other right at the expense of the deceased as contemplated by Expln. 2 of cl. (15) of s. 2 of the said Act. In this connection, reliance was placed by Mr. Naik on the decision of the Supreme Court in *Controller of Estate Duty, Gujarat Vs. Kantilal Trikamlal*, . In that case it was held that where on the partition of an HUF property, a coparcener takes less than his share, there is a "disposition" within the meaning of Expln. 2 to s. 2(15) of the E.D. Act, 1953, by him of that part of his share which he relinquishes and on his death within two years of the partition that part of his share would be property deemed to pass under s. 9(1) read with s. 27(1) and Expln. to s. 2(15). In our view, the ratio of this decision has no application to the case before us, because the case of a partition is altogether different from the case of the sale such as the one we have before us.

6. In the result, the question referred to us is answered in the negative and in favour of the assessee. The Commissioner to pay costs of this reference to the assessee.