

(1986) 05 CAL CK 0007

In the Calcutta High Court

Case No : Appeal from the Original Order No. 171 of 1976

Gift Tax Officer and Others

APPELLANT

Vs

ICI (India) P. Ltd.

RESPONDENT

Date of Decision : 23-05-1986

Acts Referred:

Gift Tax Act, 1958 — Section 16(1), 4

Citation : (1987) 62 CTR 83 : (1987) 164 ITR 574

Hon'ble Judges : Mukul Gopal Mukherji, J; Dipak Kumar Sen, J

Bench : Division Bench

Advocate : B.K. Bagchi, S. Bhattacharjee and B.K. Naha, for the Appellant; Debi Pal, P.K. Pal and M. Seal, for the Respondent

Judgement

Dipak Kumar Sen, J.—ICI (India) Pvt. Ltd., the respondent in this appeal, is an Indian company and is assessed to Income Tax in India as an ordinary resident.

2. Imperial Chemical Industries Ltd., London (hereafter referred to as "ICI"), is a company incorporated under the laws of the United Kingdom and is a non-resident company within the meaning of the Income Tax Act, 1961. At the material time, ICI (India) Pvt. Ltd. was a 100% subsidiary of ICI.

3. The facts and proceedings leading up to this appeal are, inter alia, as follows :

(i) With the object of manufacture in India of diverse products, ICI, in 1937, promoted a company in India named Alkali & Chemical Corporation of India Ltd. (hereafter referred to as "ACCI"), for the manufacture of caustic soda and chlorine products.

(ii) After the last World War, ICI decided further to make substantial investments in India for the manufacture of an extended range of products which were previously imported. Accordingly, the existing company, ACCI, was substantially expanded and two other new companies named Indian Explosives Ltd. (hereafter referred to as "IEL") and Atic Industries Ltd. (hereafter referred to as "ATIC") were promoted. The expansion of ACCI contemplated a project for the setting up

of a plant for production of polythene granules; IEL was promoted for the manufacture of commercial blasting high explosives and ATIC was promoted for the manufacture of dye stuffs.

(iii) The Government of India had also requested ICI to consider manufacture of commercial blasting high explosives in India some time in 1949.

(iv) To finance the aforesaid projects, ICI made available sterling loans to the respondent to enable the respondent to advance loans to ACCI, IEL and ATIC. The respondent advanced the loans to the said three companies on condition, inter alia, that the respondent would take up equity shares in the said three companies initially in its own name with an understanding to transfer the same to ICI as and when ICI would call upon the respondent to do so at par or at the issue price in satisfaction of the said loans from ICI to the respondents.

4. It was open to ICI to subscribe for and hold directly the shares of the said three manufacturing companies, viz., ACCI, IEL and ATIC. But ICI decided to hold such shares initially through and in the name of the respondent for the following reasons :

(a) Tax reliefs were available for new industrial undertakings under Sections 15C and 56A of the Indian Income Tax Act, 1922.

(b) If ICI held the shares directly, the reliefs under the said Sections would be nullified as the dividends on which relief could be obtained in India would be fully taxed in the U.K.

(c) The procedure would also be administratively convenient. The terms and conditions of the said loans and the method of financing was made known to and was concluded with the concurrence of the Controller of Capital Issues, the Reserve Bank of India and the Central Board of Revenue. The method of financing in the case of IEL was specifically outlined, discussed and accepted at two meetings held on October 1, and 6, 1953, between the representatives of the Government of India and the respondent. The Joint Secretaries of the Ministry of Commerce and Industry and the Ministry of Finance and other officials were also present at the said meetings. The arrangement arrived at at the said meetings were set out in a letter dated November 5, 1953, described as the declaration of intention.

5. So far as the transaction with ACCI was concerned, a letter dated December 13, 1955, was addressed by the chairman of the respondent to the Secretary, Ministry of Commerce and Industry, setting out the terms and conditions of the loan arrangement. The said terms and conditions were also communicated to the Controller of Capital Issues on March 24, 1956, the Central Board of Revenue on July 4, 1956, and the Reserve Bank of India on March 1, 1957.

6. In the case of ATIC, the terms and conditions of the loan arrangement were similarly recorded in a document dated August 4, 1955, described as a declaration of intention wherein the respondent, ICI, Atul Products of Bombay

and one Kasturbhai Lalbhai were parties. The terms and conditions of this arrangement were duly communicated to the Reserve Bank of India.

7. Pursuant to the aforesaid, between 1954 and 1959, loans were advanced to the respondent which in turn advanced loans to IEL each year aggregating to Rs. 2,40,00,000 against the shares of IEL which were issued in the name of the respondent.

8. Between 1956 and 1958, ICI advanced loans each year to the respondent aggregating to Rs. 1 crore which were utilised by the respondent for subscribing to the shares of ATIC.

9. In 1957, ICI advanced loans to the respondent aggregating to Rs. 1,75,30,720 which was in turn advanced to ACCI in three instalments in May, July and November.

10. The entire amount of the loans as aforesaid was utilised by the respondent for subscribing for equity capital in the said manufacturing companies, On the completion of the new issues, the respondent held 80% shares in IEL, 50% shares in ATIC and 76% shares in ACCI.

11. The provisions for taxing dividends were altered by the Finance Act, 1959. As a result of the change, double taxation came to be imposed on dividends passing from the manufacturing companies to ICI through the shareholdings set up under the above arrangement. This resulted in a liability of an additional dividend tax of over Rs. 12 lakhs in India for the accounting year 1960 for which no relief would be available to ICI under the taxation laws of the U.K.

12. In view of the changed legal position, ICI, by a cable dated February 15, 1961, and confirmed by a letter dated February 16, 1961, called upon the respondent to transfer to ICI, the shares of IEL, ATIC and ACCI, in satisfaction of the respective loans in terms of the arrangement between the parties. The transfers were duly approved by the Reserve Bank of India by its letter dated February 23, 1961.

13. Accordingly, the respondent transferred to ICI the shares in ACCI on March 17, 1961, the shares in IEL on March 25, 1961, and the shares in the ATIC on April 8, 1961. The transfers were effected at issue price in full satisfaction of the aforesaid loans advanced to the respondent by ICI in accordance with the contract or arrangement.

14. For the assessment years 1962-63, the respondent was assessed to Income Tax. The Income Tax Officer added to the total income of the respondent a sum of Rs. 14,40,62,901 as notional capital gains u/s 52 of the Income Tax Act, 1961, on the ground that the market value of the shares of the said three companies was higher than the face value at which they had been transferred and that the transfers had been made with the object of avoiding capital gains tax.

15. On appeal, the Appellate Assistant Commissioner deleted the said addition on

account of notional capital gains.

16. The Revenue went up in appeal before the Income Tax Appellate Tribunal. The Tribunal, by its order dated February 19, 1969, confirmed the decision of the Appellate Assistant Commissioner. It was contended on behalf of the respondent before the Tribunal that ICI had intended to acquire the said shares through the respondent and the respondent was not intended to be the real beneficial owner of the said shares. The respondent held the said shares initially for a time for the convenience of ICI so that the tax advantages would accrue to ICI. The specific arrangement was that the shares would be transferred by the respondent to ICI at issue price in discharge of the loans whenever the respondent would be called upon to do so.

17. The Tribunal accepted the contentions of the respondent and held that it was established, *inter alia*, that:

(a) The assessee was to hold its shares temporarily, the period being co-extensive with the availability of relief u/s 15C and Section 56A of the Indian Income Tax Act, 1922.

(b) Ultimately, the ICI intended to take over the said shares.

(c) It was not intended that the respondent would be the real beneficial owner of the said shares.

(d) The said scheme of financing had been recorded in the minutes of the meeting held with the officers of the Central Government and had been reduced to writing in clear terms. The respondent was obliged and bound under the aforesaid arrangements to transfer to ICI at issue price and there was no case for the application of Section 52 of the Income Tax Act, 1961.

18. The Revenue did not accept the decision of the Tribunal and applied to the Tribunal for reference of certain questions of law for the opinion of this court. One of the questions which the Tribunal was called upon to refer was whether, on the facts and circumstances and on a proper construction of the relevant documents, the Tribunal was right in finding that the transfer of the shares to ICI at issue price was throughout the basis of the advance of loans to the respondent. By its order dated July 28, 1969, the Tribunal dismissed the reference application.

19. On an application of the Revenue, this court by its order dated September 8, 1970, directed the Tribunal to refer the said questions to this court for its opinion. The respondent preferred an appeal to the Supreme Court against the said order of this court. The said appeal was allowed and the order of this court was set aside by the Supreme Court by its judgment and order dated January 28, 1972. The Supreme Court held, *inter alia*, that the findings of the Tribunal were supported by evidence and were reasonable and could not be disturbed by the High Court.

20. It is on record that in respect of the said assessment year 1962-63, the Income Tax Officer in 1968 reopened the Income Tax assessment of ICI u/s 147 of the Income Tax Act, 1961. On May 7, 1970, the proceedings were dropped but immediately thereafter on May 26, 1970, the said proceedings were recommenced. It was alleged that taking over of shares at par when their market value was higher was a part of the business transactions of ICI and had resulted in a profit. The ICI challenged the said proceedings by a writ petition being Matter No. 220 of 1971. The challenge was ultimately successful before a Division Bench of this court in appeal. The decision of the Division Bench, a reported decision, has been considered hereafter.

21. On March 29, 1967, the Gift-tax Officer issued to the respondent a notice u/s 16(1) of the Gift-tax Act, 1958, alleging, inter alia, that a gift made by the respondent assessable to gift-tax for the assessment year 1962-63 had escaped assessment and that the Gift-tax Officer intended to assess the said gift. The respondent was called upon to furnish a return in the form attached to the said notice within 35 days.

22. By its reply dated May 15, 1967, the respondent contended that there had been no gift escaping assessment and accordingly submitted a "nil" return.

23. The respondent thereafter referred the matter in writing to the Central Board of Direct Taxes contending that the transfer of the shares had been under a contractual obligation and that the Gift-tax Act was not attracted to the facts. The Central Board was informed that the respondent was submitting a nil return and that it should be accepted that no gift-tax can be assessed and that the Gift-tax Officer should be directed to withdraw or cancel the said notice dated March 29, 1967.

24. By its letter dated June 30, 1967, the Central Board of Direct Taxes informed the respondent that the Department had not accepted that there was a contractual obligation under which the transfer was made and the question of (liability) to gift-tax had to be considered. The respondent was directed to co-operate with the Gift-tax Officer in finalising the gift-tax assessment.

25. By a letter dated July 22, 1969, the Income Tax Officer, "B" Ward, Companies, Dist. IV, called for further information in respect of the proposed gift-tax assessment.

26. By a letter dated August 18, 1969, the respondent furnished the information called for to the Income Tax Officer concerned and reiterated that no gift-tax was leviable in respect of the transactions in the relevant assessment year.

27. The matter rested there till 1973. On March 14, 1973, the Gift-tax Officer issued a notice u/s 15(2) of the Gift-tax Act, 1958, on the respondent asking the latter to attend his office on March 22, 1973, for furnishing further information in connection with the return submitted for the assessment year 1962-63. The respondent replied to the said notice by a letter dated March 19, 1973,

challenging the validity of the notice issued u/s 16 of the Gift-tax Act, 1958, as also the subsequent notice issued u/s 15(2) of the said Act. It was contended that the said notice had been issued mala fide and in perverse exercise of the jurisdiction. It was contended that it had been decided by the Income Tax Tribunal that the transfer of the shares at par by the respondent to ICI was pursuant to an enforceable arrangement and that such finding had been upheld by the Supreme Court. It was contended that the Gift-tax Act was in any event not attracted to the facts of the case, as the respondent was a 100% subsidiary of ICI. Copies of the order of the Income Tax Appellate Tribunal and the judgment of the Supreme Court on the question of capital gains were forwarded to the Gift-tax Officer under cover of a letter dated March 20, 1973.

28. The writ application out of which the appeal arises was filed on March 22, 1973, when a rule nisi was issued calling upon the respondents viz., the Gift-tax Officer, "B" Ward, Companies Dist. IV, Calcutta, the Commissioner of Income Tax, West Bengal III, and the Union of India to show cause why appropriate writs should not be issued restraining them from taking any steps or proceedings in enforcement furtherance or implementation of the said notices respectively dated March 29, 1967, and March 14, 1973, issued respectively under Sections 16(1) and 15(2) of the Gift-tax Act, 1958, and from proceeding to make an assessment on the respondent under the Gift-tax Act and also for setting aside, cancelling or quashing the said notices.

29. M. Ramanathan, the then Gift-tax Officer, "B" Ward, Companies Dist. IV, Calcutta, affirmed in an affidavit on August 24, 1973, which was filed in opposition to the said writ petition and in answer to the said rule. It was contended in this affidavit, inter alia, that the respondent did not have any contractual obligation to transfer the shares of the said three companies to ICI at par or the issue price as contended by the respondent.

30. It was contended further that the Supreme Court in its judgment dated January 29, 1972, did not at all decide the question whether there was any binding legal agreement between the respondent and ICI for transfer of the said shares at par with the issue price. It was contended that the only question mooted before the Supreme Court and considered was whether Section 52 of the Income Tax Act, 1961, applied to the facts of the case. The question of the validity of the legal agreement between the respondent and ICI was not relevant to the said question.

31. It was further contended that the Income Tax Appellate Tribunal also was concerned with the question whether Section 52 of the Income Tax Act, 1961, was applicable in the facts and that was the only question involved in the appeal before the Tribunal.

32. It was alleged that the proceedings under the Gift-tax Act, 1958, were validly and lawfully initiated as the respondent had transferred shares valued at Rs. 19,55,93,621 to ICI at Rs. 5,25,30,720. It was contended that as a result of the

aforesaid transfer, a gift valued at Rs. 14,40,62,901 had been made by the respondent to ICI as the transaction was without adequate consideration and was in settlement of loans of only Rs. 5,25,30,720. It was denied that there was any contractual or legal obligation at any point of time on the respondent to transfer the said shares at par to ICI. There was no contract or agreement in writing in respect of the transfer of the said shares and there was no firm offer or acceptance between the parties. It was contended that the action of the Gift-tax authorities was neither mala fide nor perverse and that the said proceedings were initiated lawfully and validly on a proper and bona fide application of mind by the authority concerned. There were valid and substantial materials on which the said proceedings were initiated. It was contended further that ICI was not a company within the meaning of Section 2(vii) of the Gift-tax Act.

33. Bimalaksha Dasgupta, a constituted attorney of the respondent, affirmed an affidavit on December 3, 1973, which was filed in reply to the aforesaid affidavit of M. Ramanathan. It was contended in this affidavit, inter alia, that apart from the question of applicability of Section 52 of the Income Tax Act, 1961, this court also directed the Tribunal to refer two other questions. The said questions were, inter alia, whether the Tribunal was right in finding that the transfer of the shares to ICI, London, at the issue price at par was throughout the basis of advance of loans by ICI to the respondent and whether in arriving at the said finding, the Tribunal misdirected itself in law by relying on a part of the evidence and ignoring other material evidence. The Supreme Court set aside the judgment of this court holding, inter alia, that the questions of law sought to be raised by the Revenue did not arise from the order of the Tribunal inasmuch as the decision of the Tribunal was supported amply by evidence and was otherwise reasonable. The Tribunal, it was contended, had specifically observed in its order that the contention of the Revenue that there was no enforceable agreement between ICI and the respondent was erroneous and disclosed a lack of comprehension. The other allegations in the said affidavit have been denied and the contentions disputed.

34. The said writ petition I.C.I. (India) Pvt. Ltd. Vs. Gift Tax Officer, "B" Ward and Others, , was disposed of by a judgment and order dated March 9, 1976. The learned judge, in the first court, held that the material question for determination was whether it could be said that there were materials to believe that the shares had been transferred otherwise than for adequate consideration. Taking into account the order of the Income Tax Appellate Tribunal and the judgment of the Supreme Court in respect of the assessment under the Income Tax Act, 1961, of the respondent, the learned judge found that there was a scheme or arrangement on the basis of which the respondent had obtained loans from ICI. It was a condition of the said scheme or arrangement that the respondent would invest the loans in purchasing or acquiring the shares of the three new companies. Subject to certain terms, the respondent could enjoy the dividends declared on the said shares so long as the respondent retained the same. The respondent would hold the shares beneficially but as and when called upon the

respondent would transfer the said shares to ICI at par value.

35. The learned judge noted that it was the contention of the respondent that the transfer of the said shares took place by virtue of the above scheme or arrangement.

36. The learned judge rejected the contention of the Revenue that there was no legal or contractual obligation on the respondent to transfer the said shares on such terms and held that in the facts of the instant case, it was indisputable that there was an agreement. It was found that there was mutual consideration between the respondent and ICI and that the said agreement had not been shown to be contrary to any provision of law or illegal. It was noted that neither the existence nor the bona fide nature of the agreement had been doubted or called into question. The learned judge held that though the said agreement was not embodied in any formal document or recorded, it would not detract from the enforce-ability of the arrangement under which the respondent would be bound to transfer the said shares at par value as and when called upon to do so by ICI. The learned judge came to the conclusion that it could not be said that the transfer was otherwise than for adequate consideration and that it was not the case of the Revenue that the arrangement entered into between the parties prior to November, 1956, was not for any adequate consideration. The learned judge held that there was no material for holding that there was any gift in the instant case or that any gift assess-able to tax had escaped assessment.

37. The learned judge noted the contention of the Revenue that u/s 4 of the Gift-tax Act, in certain circumstances, the gift could be deemed to have taken place. Transactions specified in Section 4 of the said Act could be considered to be gifts irrespective of and independent of the question whether the same amounted to a gift under the general law, or under the Transfer of Property Act. The learned judge also noted the contentions of the Revenue that a transaction might be liable both to capital gains tax and at the same time to gift-tax also. The learned judge, however, held that, as in the instant case, the shares had been transferred pursuant to the said arrangement, there was no question of the said transfers being transfers without adequate consideration u/s 4(a) of the Gift-tax Act and there was no gift involved.

38. The learned judge allowed the writ application. The impugned notices were quashed and the authorities were restrained from giving any effect to the same. It was directed that if any assessment had been made pursuant to the said notices, the same would also stand quashed and set aside. The rule was made absolute to the extent as aforesaid.

39. The present appeal is from the said judgment and order dated March 9, 1976. (I.C.I. (India) Pvt. Ltd. Vs. Gift Tax Officer, "B" Ward and Others,).

40. At the hearing of this appeal, the learned advocate for the appellant drew our attention to Section 16 of the Gift-tax Act, 1958, set out as follows:

" 16. (1) If the Gift-tax Officer-

(a) has reason to believe that by reason of the omission or failure on the part of the assessee to make a return u/s 13 of the gifts made by him or any other person in respect of which he is assessable under this Act for any assessment year, or to disclose fully and truly all material facts necessary for assessment of the gifts made by him or such other person for that year, any taxable gift has escaped assessment for that year, whether by reason of underassessment or assessment at too low a rate or otherwise ;.....

he may, in cases falling under Clause (a) at any time within eight years..... serve on the assessee a notice containing all or any of the requirements which may be included in a notice under Sub-section (2) of Section 13, and may proceed to assess or reassess any taxable gift which has escaped assessment..... "

41. Construing the said section, the learned advocate contended that in the instant case, the escapement alleged was on account of non-filing of the return and, therefore, it was not a case of reopening but a case of opening. The learned advocate submitted that the preconditions in cases of opening of assessments differed from those in case of reopening, where an already completed assessment was reopened on examination of primary facts.

42. The learned advocate for the appellant next submitted that before the issue of a notice u/s 16 of the Act, it was necessary for the Gift-tax Officer to have some material before him for the purpose of forming the belief that a gift chargeable to tax had escaped assessment and such escapement was on account of non-submission of a return. Such belief was necessarily tentative and prima facie. In this appeal, the question was not whether on assessment, which would be made pursuant to the said notice, it would be established whether gift-tax was leviable in law or not. The question was whether an assessment should at all be made.

43. The learned advocate submitted that in the instant case, the admitted position was that no return under the Gift-tax Act had been filed by the respondent. The further admitted position was that shares worth Rs. 19,55,93,621 had been transferred by the respondent to ICI at a value of Rs. 5,15,30,720. A surplus of Rs. 14,40,62,201 admittedly accrued in the hands of ICI. The question was whether on these materials, the Gift-tax Officer was entitled to open the assessment proceedings.

44. The learned advocate submitted that at the time of reopening of proceedings, it was not necessary for the authority concerned to come to a conclusive finding. All that the authority required was material to come to a prima facie and tentative belief that a gift chargeable to tax had escaped assessment. Whether there was in fact a gift in law or whether there was adequate consideration for the transaction were essentially questions touching on the merits of the case which would be gone into during the proceedings once the same were reopened

and could be left in the hands of the adjudicating officer.

45. The learned advocate submitted that the learned judge in the first court was called upon to examine whether the notice u/s 16 of the Gift-tax Act could be sustained. But the learned judge had gone into the entire facts and material on record and had come to a finding as to whether the assessment could be sustained. It was submitted that the learned judge in the first court should not have substituted his own inferences and finding for that of the adjudicating officer. The learned judge, it was contended, failed to appreciate that at the material stage, the merits of the controversy, viz., whether the gift-tax was at all attracted to the transaction or not should not have been gone into. In particular, it was contended that the finding of the Tribunal and the Supreme Court in collateral proceedings u/s 52 of the Income Tax Act, 1961, should not have been applied.

46. The learned advocate submitted that the decision of the Supreme Court in the case of the respondent which was strongly relied on by the respondent and on which the judgment under appeal was based did not record any finding which could be final and binding so far as the gift-tax proceedings in the instant case was concerned. The finding in the case before the Supreme Court was in the background and context of Section 52 of the Income Tax Act, 1961, and the same would not have any binding effect in determining whether a notice u/s 16 of the Gift-tax Act was valid and binding.

47. The learned advocate for the appellant next submitted that there was no question of res judicata in taxation and findings in Income Tax proceedings will not constitute res judicata in gift-tax proceedings.

48. The learned advocate for the appellant next submitted that the fact that some officers of the Central Government had taken part in the deliberations and negotiations leading up to the transactions involved would not stand in the way of the Gift-tax Officer in initiating proceedings under the Gift-tax Act. There could be no estoppel against the statute and the fact that officers of the Government of India had been party to any arrangement or any transaction or that the same had been concluded with their knowledge or even approval could not fetter the jurisdiction of the Gift-tax Officer. Such jurisdiction could neither be conferred nor taken away by consent. On the basis of the aforesaid, the learned advocate for the appellant contended that the judgment under appeal should be set aside and the rule nisi issued in the writ petition should be discharged. In support of his contentions, the learned advocate for the appellant cited the following decisions :

(a) *Absalom v. Talbot* [1944] 26 TC 166:

This decision was cited for the proposition that in matters of taxation, there can be no scope for extra-legal concession.

(b) *IRC v. Peter McIntyre Ltd.* [1926] 12 TC 1006 : In this case, during the relevant accounting period, the conduct of the entire business of a private limited

company was in the hands of the managing director who held more than half of the shares in the company. The balance shares were held by relatives. The company claimed exemption from excess profit duty in respect of professional fees on the basis of an arrangement made in 1919 between the Commissioners of Inland Revenue and the Surveyors' Institution and the Auctioneers for grading fees received under the Meat Control Order, 1917, and sale of livestock. It was held that the exemption was not conferred by the Finance Act and that the company could not be said to have personal qualifications on which its profits were dependent. As such, the company) was not entitled to claim such exemption.

(c) Commissioner of Income Tax, Madras Vs. V. Mr. P. Firm, Muar, : This decision was cited for the following observations of the Supreme Court (headnote at page 67):

"The doctrine of "approbate and reprobate" is only a species of estoppels; it applies only to the conduct of parties. As in the case of estoppel, it cannot operate against the provisions of a statute. If a particular income is not taxable under the Income Tax Act, it cannot be taxed on the basis of estoppel or any other equitable doctrine. Equity is out of place in tax law ; a particular income is either exigible to tax under the taxing statute or it is not. If it is not, the Income Tax Officer has no power to impose tax on the said income. "

(d) Joint Family of Udayan Chinubhai, etc. Vs. Commissioner of Income Tax, Gujarat, :

This decision of the Supreme Court was cited for the following observations (at page 423):

"It is true that an assessment year under the Income Tax Act is a self-contained assessment period and a decision in the assessment year does not ordinarily operate as res judicata in respect of the matter decided in any subsequent year.....A decision reached in one year would be a cogent factor in the determination of a similar question in a following year.... "

(e) M.M. Ipoh and Others Vs. Commissioner of Income Tax, Madras, :

This decision was cited for the following observation of the Supreme Court (at page 118):

"The assessment and the facts found are conclusive only in the year of assessment: the findings on questions of fact may be good and cogent evidence in subsequent years, when the same question falls to be determined in another year, but they are not binding and conclusive."

(f) Commissioner of Income Tax, Kerala Vs. Manick and Sons, :

In this case, in an appeal from an order of assessment for the assessment year 1953-54, the Tribunal aggregated the income of the assessee for the assessment years 1952-53 and 1953-54, rounded it off and apportioned it in equal shares as

income for each of the said two years. The Tribunal recorded an undertaking of the assessee to file a voluntary return for assessment on the basis of the total income as determined. On these facts, it was held by the Supreme Court that it was beyond the jurisdiction of the Tribunal to reopen the concluded assessment for the assessment year 1952-53. The Supreme Court held that the Tribunal could not give directions for reassessment in respect of a period not covered by the year under appeal. There was no sanction in law to enforce the undertaking given by the assessee in the subsequent assessment year to make a voluntary return for the earlier assessment year. Even if the assessee carried out the undertaking, the assessment for the earlier year could not be reopened otherwise than in the manner prescribed by law. The undertaking therefore had to be ignored.

(g) Smt. Parbati Devi Vs. Commissioner of Income Tax and Others, :

In this case, proceedings were initiated against a firm u/s 34 of the Indian Income Tax Act, 1922. The assessee had a share in the capital of the said firm. A compromise was arrived at to the effect that the assessee would file a voluntary return and the Revenue would drop the proceedings against the firm u/s 34 of the said Act. The assessee filed a voluntary return of income for 1953-54 in February, 1966. An assessment was made on the said return on April 1, 1966, and a demand was raised. The assessee thereafter moved the Commissioner of Income Tax in revision against the said order of assessment unsuccessfully and thereafter moved the Allahabad High Court under Article 226 of the Constitution challenging the validity of the assessment, the order of the Commissioner and the notice of demand on the ground that the assessment was barred by time.

The contention of the assessee was upheld by the High Court which held that the voluntary return not having been filed within the prescribed period, the return filed on the compromise and the assessment on the said return were also invalid. It was held further that the fact that the assessee had agreed to file a voluntary return as a result of a compromise did not bar the contention that the return filed was barred by time.

(h) Ganga Saran and Sons (Huf) Vs. Income Tax Officer, Company Circle-IV, New Delhi and another, :

In this case, the assessee had challenged the validity of a notice under Sections 147 and 148 of the Income Tax Act, 1961, in a writ petition before the Delhi High Court. The High Court held that the impugned notice was not one without jurisdiction and upheld the contentions of the Revenue. The High Court observed as follows (at page 222):

"We would only add that we do not express any opinion regarding the merits of the reassessment.....These are all matters which can be agitated by the assessee in the course of the reassessment proceedings. We have addressed ourselves only to a very short question as to whether, on the material placed on record, the Income Tax Officer had the jurisdiction to initiate proceedings u/s

147."

(i) K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another, :

In this case, the Supreme Court construed Section 52(2) of the Income Tax Act, 1961, and observed as follows (at page 617):

"The construction which we are placing on Sub-section (2) also marches in step with the Gift-tax Act, 1958. If a capital asset is transferred for a consideration below its market value, the difference between the market value and the full value of the consideration received in respect of the transfer would amount to a gift liable to tax under the Gift-tax Act, 1958, but if the construction of Sub-section (2) contended for on behalf of the Revenue were accepted, such difference would also be liable to be added as part of capital gains taxable under the provisions of the Income Tax Act, 1961. This would be an anomalous result which could never have been contemplated by the Legislature, since the Income Tax Act, 1961, and the Gift-tax Act, 1958, are parts of an integrated scheme of taxation and the same amount which is chargeable as gift could not be intended to be charged also as capital gains."

(j) McDowell and Co. Ltd. Vs. Commercial Tax Officer, :

In this case, the Supreme Court deprecated the tendency of assesseees to invent devices to avoid taxation and observed that the courts should refuse judicial approval to such conduct.

49. The learned advocate for the respondent contended, on the other hand, that for assumption of jurisdiction u/s 16(1)(a) of the Gift-tax Act, 1958, two conditions were to be satisfied. First, the Gift-tax Officer should have had reason to believe that any taxable gift had escaped assessment and second, that such escapement had occurred by reason either of the omission or failure on the part of the assessee to submit a return or the omission or failure on the part of an assessee to make a full and true disclosure of all material facts necessary for the assessment.

50. In the instant case, it was necessary for the court to decide whether such conditions precedent for the assumption of jurisdiction by the Gift-tax Officer u/s 16 of the Act had been satisfied. The court first had to decide whether there was at all any taxable gift arising from the transaction. Whether there was a taxable gift in the instant case was a jurisdictional fact and only on the establishment of such jurisdictional fact could the Gift-tax Officer assume jurisdiction. The question whether such a jurisdictional fact had been rightly decided or not was a question which was open for examination and justiciable by the court in an application under Article 226 of the Constitution. If the court came to the conclusion that the Gift-tax Officer had assumed jurisdiction by deciding a jurisdictional fact erroneously, then the error could be corrected by an appropriate writ. In all cases where jurisdiction of an administrative authority depended upon a primary fact, the court was entitled in a writ proceeding to

determine independently whether or not such primary fact had been correctly established.

51. The learned advocate for the respondent next submitted that though this court was not called upon to investigate into the adequacy or sufficiency of the reasons weighing with the Gift-tax Officer in arriving at his belief, the court would certainly examine whether the reasons were relevant and had a bearing on the matters on which the Gift-tax Officer was required to entertain the belief before he issued a notice u/s 16, If there was no rational or intelligible nexus between the reasons and the belief and if the reasons recorded were such that no person could reasonably come to hold the belief on the same as held by the Gift-tax Officer, it must be held that the Officer did not have the reason to believe that any gift chargeable to tax had escaped assessment. The belief required to be arrived at by the Gift-tax Officer should not be arbitrary or irrational or a mere pretence. The reasons disclosed by the Gift-tax Officer were certainly justiciable.

52. In the instant case, the Income Tax Officer who had dealt with the transaction in the relevant assessment year 1962-63 in the Income Tax assessment proceedings of the assessee from which appeals were preferred right up to the Supreme Court was also the Gift-tax Officer who had issued the impugned notice on March 29, 1967. The Gift-tax Officer who was also the Income Tax Officer could not proceed for the purpose of the Income Tax Act on the basis that the value of the consideration for which the transfer was made was the market value of the shares and at the same time for the purpose of the Gift-tax Act proceed on a different basis that the shares had been transferred at a much lesser figure, viz., at par value at the issue price of the said shares. Such reasons and such belief could not have been held to have been arrived at in good faith and should be held to be a mere pretence for starting a fishing investigation.

53. In the instant case, the materials which were on record must be held to have been there before the Gift-tax Officer who was also the Income Tax Officer and established an arrangement or agreement which was enforceable in the sense that the respondent was bound to transfer shares at par value as and when called upon by ICI. The agreement or arrangement when it was entered into could not have been said to be without adequate consideration. This conclusion has been arrived at by the learned judge in the first court on the materials before him and in support of such conclusion, the learned judge relied upon the findings of the Tribunal which were approved of by the Supreme Court.

54. The Income Tax Officer who sought to invoke Section 52 of the Income Tax Act, 1961, to impose capital gains tax on the respondent in respect of the said transaction took the stand that there was no contractual or legal obligation on the respondent to transfer the said shares of ICI at par. The same stand was now being taken by the same officer now acting as Gift-tax Officer. The transaction involved in the proceedings for imposing capital gains tax under the Income Tax Act and the impugned proceedings under the Gift-tax Act were the same and in both the cases a question arose whether the contract or agreement or

arrangement between the parties was in existence and was binding. In the Income Tax proceedings, the Tribunal specifically went into the said question and the decision of the Tribunal is based on a finding of fact that there was an enforceable agreement between the parties. The Revenue sought to question the finding of the Tribunal. The question was not allowed to be raised by the Tribunal. The decision of the Tribunal was upheld by the Supreme Court.

55. In the proceedings initiated against ICI u/s 147 of the Income Tax Act, 1961, the same facts and transaction as in the instant case were considered by a Division Bench of this court. It was found that the transaction between the parties was under the arrangement or the agreement arrived at between ICI, the respondent and the Government of India as recorded in the declaration of intention. The Division Bench noted that the nature of the transaction had been determined *prima facie* by the Tribunal and was confirmed by the Supreme Court. The Division Bench held that the transfer of shares was under such agreement or arrangement. This decision of the Division Bench in *Imperial Chemical Industries Ltd. Vs. Income Tax Officer, "B" Ward and Others*, is considered hereafter.

56. In still another proceeding against the respondent, a Division Bench of this court again had interpreted the same documents and transactions in the same manner. This decision is *Commissioner of Income Tax Vs. Imperial Chemical Industries*, .

57. The learned advocate for the respondent submitted that though the doctrine of *res judicata* was not strictly applicable in fiscal matters in the sense that the decision on a question of fact or law in proceedings for one year would be binding in another year, it was also well settled that the findings of fact in one year may be good or cogent evidence in subsequent years when the same fact was required to be determined. The decision reached earlier would be a cogent factor in another year.

58. It was submitted that the finding in three different forums in three different proceedings, viz., the Supreme Court and the two Division Benches of this court on the interpretation and construction on the same transaction, documents and evidence, though no *resjudicata* constitute cogent and relevant material in the determination of a similar question in the instant proceedings. The finding had been arrived at not in another assessment year but in the same assessment year, i.e., 1962-63. Subsequent determination by a higher authority as to the quality or the impact of a particular evidence would be a relevant factor.

59. The learned advocate for the respondent further submitted that the respondent admittedly was a 100% subsidiary of ICI of London. Accordingly, there could not be a gift from a 100% subsidiary to a parent company inasmuch as the very nature of a gift postulates a transfer by one person to another person. In support of his submissions, the learned advocate for the respondent cited the following decisions :

(a) Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, :

This decision of the Supreme Court was cited to show the two conditions which were required to be satisfied in order to confer jurisdiction upon an Income Tax Officer to reopen assessments u/s 34 of the Indian Income Tax Act, 1922. The Supreme Court held that the first condition was that the Income Tax Officer must have reason to believe that income, profits and gains chargeable to Income Tax have been under assessed or escaped assessment and the second is that he must also have reason to believe that such underassessment or escapement has occurred by reason of either omission or failure on the part of the assessee to make a return of his income or to disclose fully and truly all material facts necessary for his assessment for that year.

(b) Modi Spinning and Weaving Mills Co. Ltd. Vs. Income Tax Officer, Special Investigation Circle (B), Meerut, :

In this case, the Supreme Court reiterated the proposition laid down by it in Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, , viz., that, two conditions have to be satisfied before the Income Tax Officer can have jurisdiction u/s 34 of the Indian Income Tax Act, 1922, to issue a notice for reassessment. It was held that the said conditions were cumulative and precedent to the exercise of such jurisdiction.

(c) Malegaon Electricity Co. P. Ltd. Vs. Commissioner of Income Tax, Bombay, In this case, the assessee sold some of its assets at a price higher than their written down value during the relevant assessment year. In the proceedings for assessment to Income Tax, the assessee disclosed the fact of the sale but did not disclose that any profits had resulted from such sale nor was it stated in the return that any excess had resulted from the price having been received over the written down value. The particulars of the price and that of depreciation accrued, allowed and unabsorbed were disclosed. After completion of the original assessment where the income was determined at nil, the Income Tax Officer reopened the assessment and reassessed the income. An appeal to the Appellate Assistant Commissioner was unsuccessful but on further appeal, the Tribunal held that the reassessment was invalid as the assessee had fully disclosed all primary facts relating to the sale of its assets at the time of assessment and the Income Tax Officer proceeded on a mere change of opinion. On a reference, the Bombay High Court held that the assessee had failed to disclose fully and truly all material facts and in the facts, the provisions of Section 34 of the Indian Income Tax Act, 1922, were properly applied. On further appeal, it was held by the Supreme Court that the Tribunal should have determined first whether any part of the sale price could be deemed to be profits u/s 10(2)(vii) of the Act. If it could be so deemed, then the assessee would have a duty to include it in its return and failure to do so would be failure to disclose fully and truly all material facts. The questions raised in the reference were not answered by the Supreme Court as it was held that the same could not be answered without determining

whether any part of the sale price amounted to profits.

(d) Raza Textiles Ltd. Vs. Income Tax Officer, Rampur, :

This decision was cited for the following observations of the Supreme Court (at page 541):

"No authority, much less a quasi-judicial authority, can confer jurisdiction on itself by deciding a jurisdictional fact wrongly. The question whether the jurisdictional fact has been rightly decided or not is a question that is open for examination by the High Court as the learned single judge has done in this case, that the Income Tax Officer had clutched at the jurisdiction by deciding a jurisdictional fact erroneously, then the assessee was entitled for the writ of certiorari prayed for by him."

(e) Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das, :

In this case, the Supreme Court considered and construed Sections 147 and 148 of the Income Tax Act, 1961, and held that two conditions had to be satisfied before an Income Tax Officer would acquire jurisdiction to issue notice u/s 148 for reassessment. The said conditions were that the Income Tax Officer must have reason to believe that income chargeable to tax has escaped assessment and further that such income has escaped assessment by reason of the omission or failure on the part of the assessee either to make a return for the assessment in question or to disclose fully and truly the material facts necessary for the said assessment. The Supreme Court also considered the question of sufficiency or adequacy of the reasons which would lead to the formation of the belief by the Income Tax Officer and held as follows (at pages 445 and 446):

"Once there exists reasonable grounds for the Income Tax Officer to form the above belief, that would be sufficient to clothe him with jurisdiction to issue notice. Whether the grounds are adequate or not is not a matter for the court to investigate. The sufficiency of the grounds which induce the Income Tax Officer to act is, therefore, not a justiciable issue. It is, of course, open to the assessee to contend that the Income Tax Officer did not hold the belief that there had been such non-disclosure. The existence of the belief can be challenged by the assessee but not the sufficiency of the reasons for the belief. The expression "reason to believe" does not mean a purely subjective satisfaction on the part of the Income Tax Officer. The reason must be held in good faith. It cannot be merely a pretence. It is open to the court to examine whether the reasons for the formation of the belief have a rational connection with or a relevant bearing on the formation of the belief and are not extraneous or irrelevant for the purpose of the section. To this limited extent, the action of the Income Tax Officer in starting proceedings in respect of income escaping assessment is open to challenge in a court of law."

(f) Imperial Chemical Industries Ltd. Vs. Income Tax Officer, "B" Ward and Others, :

In this case, the reassessment proceedings were initiated by the Income Tax Officer against ICI in respect of the assessment year 1962-63, initially by a notice dated September 29, 1968, u/s 148 of the Income Tax Act, 1961, alleging that ICI had made profits by transfer of the shares in the said three companies at face value which had escaped assessment. The said proceedings were dropped on May 7, 1970, but recommenced on May 8, 1970, by issue of another notice u/s 148 of the Act. The said notice was challenged by ICI in an application under Article 226 of the Constitution. The application was dismissed in the first court, but a Division Bench of this court allowed the appeal preferred by ICI against the judgment and order of the first court. The rule was made absolute and the impugned notice was quashed. It was held by the Division Bench that the transactions had been duly disclosed before the Income Tax Authorities with supporting records. The primary nature of the transactions had been examined by the Tribunal and confirmed by the Supreme Court in *I.C.I. (India) Private Ltd. Vs. The Commissioner of Income Tax, West Bengal*, . The impugned notices were not issued in good faith and were a mere pretence.

(g) *Dinubhai Ishvarlal Patel Vs. K.D. Dixit, Income Tax Officer, Ahmedabad and Others*, :

In this case, the proceedings initiated under Sections 147 and 148 of the Income Tax Act, 1961, were challenged in a proceeding under Article 226 of the Constitution. It was urged on behalf of the Revenue that the application was premature inasmuch as after the proceedings, it would be open to the assessee to avail of the regular machinery of appeals. It was held by the High Court that as the question involved was a question of jurisdiction, it would examine the matter on merits in proceedings under Article 226 of the Constitution.

(h) *Income Tax Officer and Others Vs. Madnani Engineering Works Ltd., Calcutta*, :

In this case, a notice issued by the Income Tax Officer u/s 148 of the Income Tax Act, 1961, to reopen an earlier assessment of the assessee was challenged in a proceeding under Article 226 of the Constitution. The proceedings were successful in the final appeal before the Supreme Court. This decision was cited for the following proposition laid down by the Supreme Court, viz., that the existence of reason to believe on the part of the Income Tax Officer was a justiciable issue and it was for the court to satisfy whether in fact the Income Tax Officer had reason to believe that income had escaped assessment by reason of the failure of the respondent to make a full and true disclosure.

(i) *Gift Tax Officer, "C" Ward Vs. Venesta Foils Ltd.*, :

In this case, by an agreement dated November 30, 1961, Venesta Foils Ltd., a U.K. company, sold its Indian business to its 100% subsidiary India Foils Ltd. In consideration of the transfer, India Foils transferred 998 shares of ₹1 each to Venesta Foils Ltd. It was contended that the consideration was not adequate and the Gift-tax Officer issued a notice to Venesta Foils Ltd. that a gift made by it and

chargeable to tax had escaped assessment. The said proceedings were challenged in an application under Article 226 of the Constitution. On these facts, it was held by a Division Bench of this court that on the terms of the agreement, the allotment of the shares was the consideration intended to cover the transfer of the entire assets less liabilities. Such consideration was held to be sufficient. It was also observed by the court that as Venesta Foils Ltd., the alleged donor, owned all shares of India Foils Ltd., the alleged donee, in any event, there could not have been any gift. Gift was basically a transfer from one person to another person. The impugned proceedings were quashed.

(j) Income Tax Officer, "M" Ward and Others Vs. Textile Mills Agents P. Ltd., :

This decision of a Division Bench of this court was cited for the observation made in a case of reopening of an assessment u/s 147 of the Income Tax Act, 1961, to the effect that it could not be disputed that subsequent determination by a higher authority as to the quality of the information was a relevant factor and had to be taken into consideration in determining the nature of the materials on which the Income Tax Officer acted.

(k) Commissioner of Income Tax Vs. Imperial Chemical Industries, :

In this case, the part of the loan transaction between ICI and ICI (India) P. Ltd. relating to Alkali & Chemical Corporation of India Ltd. (ACCI) came up before this court in a reference where the question was whether interest accrued on the loan granted by ICI to ICI (India) P. Ltd. for purchase of shares of ACCI was taxable in the hands of ICI.

60. A Division Bench of this court again considered and construed the transaction and held, inter alia, that:

(a) There was no clear-cut written agreement between the parties.

(b) The correspondence made it clear that the loan was for the purpose of buying the shares of ACCI.

(c) The loan was routed through ICI (India) P. Ltd. for ICI to obtain tax benefits in the U.K.

(d) No interest would accrue till the new shares became eligible for dividend and in no case would exceed the dividend.

(e) ICI would be entitled to call upon ICI (India) P. Ltd. to transfer the shares of ACCI at any point of time.

61. In the instant case, a challenge has been thrown by the respondent that there was no material before the Gift-tax Officer on which he could have reason to believe that any taxable gift has escaped assessment on account of non-filing of a return of gift-tax by the respondent and as such the conditions precedent for assumption of jurisdiction u/s 16(1) of the Gift-tax Act, 1958, have not been satisfied.

62. In answer, it is stated by the gift-tax authorities that the impugned proceedings were initiated on the ground that the respondent had transferred shares valued at over Rs. 19 crores to ICI for a consideration of approximately Rs. 5 crores and that as a result of such transfer, a gift valued at over Rs. 14 crores had been made by the respondent to ICI. It is alleged that the aforesaid transfer was prima facie without adequate consideration and in settlement of a loan of approximately Rs. 5 lakhs standing to the credit of ICI in the books of the respondent. It is further stated that there was no contractual or legal obligation on the respondent to transfer the said shares at par to ICI. There was no contract or agreement in writing between the parties and there was no firm offer or acceptance between the parties.

63. As can be noted from the decisions cited considered earlier, law stands settled that the existence of the belief of the Gift-tax Officer can be challenged and on such challenge, it would be open to the court to examine whether the reasons for the formation of the belief had a rational connection or a relevant bearing on the formation of the belief and also whether such reasons were extraneous or irrelevant for the purpose.

64. The transaction on which the impugned proceedings have been initiated had come up for consideration before the Revenue authorities in other proceedings as has been noted earlier. On the question of capital gains, the transaction was thoroughly scrutinised and examined. It was finally recorded by the Tribunal that there was a subsisting agreement or arrangement between the parties under which loans had been issued by ICI to the respondent on condition that the amount of loan would be utilised by the respondent to invest in shares of the said three Indian subsidiaries. The respondent would hold the shares temporarily and it was intended that ICI would ultimately take over the said shares. It was found by the Tribunal that the real beneficial owner of the shares would be ICI and not the respondent. The Tribunal also found that the above scheme of finance had been arrived at after negotiation and agreed to between the parties, in the presence of the officers of the Government of India and the respondent was obliged and bound under the said arrangements to transfer the said shares to ICI at issue price.

65. From the decision of the Tribunal, the Revenue sought to raise questions of law in reference proceedings. The matter was ultimately decided by the Supreme Court and it was held that the findings of the Tribunal were supported by evidence, were reasonable and could not be disturbed.

66. The aforesaid facts and findings relating to the same transaction are on record and it must be presumed that the Gift-tax Officer who was also the Income Tax Officer concerned had knowledge of the said proceedings and findings.

67. In spite thereof, it appears that the Gift-tax Officer has picked up and taken note of only certain aspects of the transaction and appears to have ignored or

overlooked the other aspects of the transaction which had been considered and endorsed by the highest judicial forum of the land.

68. In our view, the Gift-tax Officer was not entitled to do so.

69. The Gift-tax Officer appears to have proceeded on the basis of his own subjective satisfaction that a gift had been made by the respondent and the same escaped assessment. This cannot be held to be a valid reason leading to a genuine belief. It also cannot be held that such reason to believe was arrived at in good faith.

70. As noted in the judgment dated March 9, 1976, under appeal, there was an agreement for consideration in the instant case and the arrangement between the parties was enforceable. The fact that the agreement was not embodied in any formal document nor recorded in a formal manner was of no consequence, if otherwise the arrangement was enforceable. From the aforesaid, the learned judge came to the conclusion that there was no material for holding that the transaction involved amounted to a gift assessable to tax and that such a gift had escaped assessment.

71. We also note that apart from the proceedings in the Income Tax Act taken in respect of capital gains, the same transaction was sought to be made the basis of reopening of the assessment of ICI. The reassessment was challenged and considered by a Division Bench of this court. The Division Bench noted that the transaction had been duly disclosed with supporting records and that the primary nature of the transaction had been examined by the Tribunal.

72. The same transaction came up again for consideration before a Division Bench of this court in a reference where the question arose whether the interest accruing on the loan granted by ICI to the respondent for the purchase of the shares of one of the Indian subsidiaries was taxable in the hands of ICI. This Division Bench also found and recorded that under the terms of the loan, ICI would be entitled to call upon the respondent to transfer the shares of the Indian subsidiaries at any point of time.

73. In our view, it was not open to the Gift-tax Officer to shut his eyes to the successive judicial pronouncements on the nature and character of the transaction involved on record and arrive at a contrary opinion holding that the transaction was without consideration and unenforceable.

74. We also note that in Gift Tax Officer, "C" Ward Vs. Venesta Foils Ltd., , a Division Bench of this court on similar facts examined the transaction involved and held that the transaction of transfer of shares was for consideration and did not amount to a gift. In Malegaon Electricity Co. P. Ltd. Vs. Commissioner of Income Tax, Bombay, \ , the Supreme Court laid down that in adjudicating the validity of the reassessment proceedings, the Tribunal was required to enquire into and determine whether the item alleged to have escaped assessment constituted profits in the hands of the assessee or not.

75. For the reasons as aforesaid, we hold that the Gift-tax Officer concerned did not have any valid reason to believe that the transaction involved in the instant case was a gift. We agree with the opinion of the learned judge of the first court that the conditions precedent for proceedings u/s 16(1) of the Gift-tax Act were not fulfilled in the instant case, as the transfer, in the instant case, was not without adequate consideration and thus did not come within the mischief of Section 4(a) of the Gift-tax Act, 1958.

76. For the above reasons, the appeal is dismissed. In the facts and circumstances, there will be no order as to costs. Let the name of the respondent be corrected and recorded as IEL Ltd.

Mukul Gopal Mukherjee J.

77. I agree.