

(1979) 04 CAL CK 0031

In the Calcutta High Court

Case No : Appeal from Original Order No. 171 of 1973

Gift Tax Officer, "C" Ward

APPELLANT

Vs

Venesta Foils Ltd.

RESPONDENT

Date of Decision : 26-04-1979

Acts Referred:

Companies Act, 1956 — Section 78
Gift Tax Act, 1958 — Section 16, 2

Citation : (1980) 124 ITR 660

Hon'ble Judges : Sankar Prasad Mitra, C.J.; Salil Kumar Datta, J

Bench : Division Bench

Advocate : Balai Lal Pal, S.C. Sen and Samar Banerjee, for the Appellant; Debi Prosad Pal, P.K. Pal and M. Seal, for the Respondent

Judgement

Salil Kumar Datta, J.—This is an appeal against the judgment and order dated February 21, 1973, passed by T. K. Basu J., whereby the rule obtained by the respondent on an application under Article 226 of the Constitution was made absolute. According to its case, the petitioner-respondent, a company, was incorporated under the laws of the United Kingdom as a subsidiary of Venesta Ltd., a company similarly incorporated, for the purpose of acquiring its foil business (hereinafter referred to as "the undertaking") with an authorised share capital of ₹ 100 divided into 100 shares of ₹ 1 each. Out of the said shares, 2 shares as fully paid up were issued to Venesta Ltd. and the remaining shares were unissued. By and on the basis of an agreement dated December 31, 1959, the respondent purchased the undertaking as a going concern for consideration and under the terms and conditions mentioned therein. In pursuance of the agreement, the assets were taken over at their book value plus ₹ 8,63,000 being the surplus on revaluation of plant and buildings with liabilities and the residue of the consideration was paid and satisfied by the issue to Venesta Ltd. of 98 shares of ₹ 1 each of Venesta Foils Ltd. credited as fully paid up.

2. By and on the basis of another agreement dated November 30, 1961, India

Foils Ltd., a company similarly incorporated as a subsidiary to Venesta Foils Ltd., purchased and acquired from the said company with effect from January 1, 1961, as a going concern that part of its undertaking comprising the Indian business consisting of manufacture and sale of aluminium foils and foil products carried on at its factory at Kamarhatty near Calcutta. The Indian business consisted, inter alia, of buildings, plant, machinery, raw materials at their book value shown in the books of the respondent on the date of transfer. As a part of the agreement, India Foils Ltd. took over all liabilities of the Indian business including a liability of ₹ 2,04,328. The residue of the consideration for the sale and purchase was satisfied by the issue of 998 shares of ₹ 1 each credited as fully paid up of India Foils Ltd. in favour of the Venesta Foils Ltd., out of the authorised capital of ₹ 1,000 on 1,000 shares (of ₹ 1 each), two shares as fully paid up having been already issued in its favour earlier.

3. The agreement between Venesta Ltd. and Venesta Foils Ltd. came into effect on January 1, 1960, and the assets and liabilities of Venesta Ltd. were brought into the accounts of the respondent. The book value of such assets taken over were entered in its books of account and the excess of the net value over the aggregate of liabilities taken over and the sum of ₹ 98 paid in shares, amounting to ₹ 46,68,966, was credited in the share premium account in the books of the respondent, Venesta Foils Ltd.

4. According to the respondent, it has made no taxable gift u/s 13 of the G.T. Act, 1958, during the previous year relevant to the assessment year 1961-62. The appellant No. 1 issued a notice which is as follows :

" Notice u/s 16 of the Gift-tax Act,

1958 (No. 18 of 1958)

G.I.R. No. C-1/V-2/G.

Gift-tax Officer, Company District-I,

Calcutta.

Dated 31st March, 1970.

To

The Principal Officer,

M/s. Venesta Foils Ltd.

C/o. India Foils Ltd.,

4, Mangoe Lane,

Calcutta.

I have reason to believe that the gift made by you chargeable to tax for the assessment year 1961-62 has escaped assessment within the meaning of

Section 16 of the Gift-tax Act.

I, therefore, propose to assess the said gift that has so escaped assessment.

I hereby request you to deliver to me within 30 days of the receipt of this notice, a return in the attached form of your gifts chargeable to tax, along with such other particulars as are required to complete the form for the said assessment year.

(Sd.) Debi Dayal,

Gift-tax Officer, " G "-Ward

Circle/Dist., Company Dist. I,

Calcutta. "

5. On receipt of the notice the respondent called upon the appellant No. 1 to furnish the materials on which he had reason to believe that any gift had escaped assessment but no reason was disclosed. The respondent thereupon moved this court under Article 226 of the Constitution contending that there was no material before the appellant No. 1 on which he could have reasons to believe that gift chargeable to tax had escaped assessment and as such the condition precedent for the exercise of jurisdiction was nonexistent. Further, the appellant No. 1 was bound to disclose the materials for such belief before the jurisdiction could be assumed. The impugned notice was, therefore, illegal and invalid. In any event, it was contended by way of amendment of the petition that the alleged gift was not made during the previous year relevant to the assessment year.

6. On this application, this court issued a rule nisi on June 15, 1970, and the appellants on service entered appearance and contested the rule by filing an affidavit-in-opposition affirmed on December 4, 1971, by Debi Dayal, the GTO, G-Ward, who issued the impugned notice. It was stated there as follows :

"2. (a) Venesta Ltd, a company incorporated in U.K. by an agreement dated 31st December, 1959, transferred all its assets to Venesta Foils Ltd. (whose capital was 100 shares of ₹1 each). At the time of its incorporation two shares of ₹1 each had been issued to Venesta Ltd. As a consideration of the aforesaid transfer, Venesta Foils Ltd. took over all the liabilities of Venesta Ltd. and also transferred 98 shares of ₹1 each to Venesta Ltd.

(b) After the aforesaid transfer Venesta Foils Ltd. continued the business for about one year in India. By an agreement dated 30th November, 1961, Venesta Foils Ltd. (sold the Indian business) with effect from 1st January, 1961. As a result of the aforesaid transfer India Foils Ltd. took over the entire business in India of Venesta Foils Ltd. The authorised share capital of India Foils Ltd. was ₹ 1,000 divided into 1,000 shares of ₹1 each. Venesta Foils Ltd. at all material times held two shares of ₹1 each of India Foils Ltd. In consideration of the aforesaid transfer India Foils Ltd. transferred 998 shares of ₹1 each to Venesta

Foils Ltd.

(c) In the premises India Foils Ltd. did not pay adequate consideration and/or no consideration to Venesta Foils Ltd. for the transfer of its Indian business. As a result of the aforesaid transaction there was a gift by Venesta Foils Ltd. to India Foils Ltd. within the meaning of the Gift-tax Act, 1958. It is significant that in the aforesaid agreement dated 30th November, 1961, there is no provision for issue of shares by India Foils Ltd., at premium and/or adjustment of the excess of assets over the purchase consideration. "

7. It was further stated that the application was premature and it was reiterated that a gift was made by the respondent within the meaning of the G.T. Act in the relevant assessment year which was chargeable to tax and the respondent should have submitted a return under the provisions of the said Act.

8. An affidavit-in-reply by Rishikesh Mitra, constituted attorney of the respondent, affirmed on February 4, 1972, was filed wherein the above allegations were denied. A supplementary affidavit affirmed on September 27, 1972, by Deva Prasad Majumdar, GTO, " G " Ward, was filed in opposition to the amendment petition of the respondent stating that the alleged gift was not made in the assessment year 1961-62. It was denied that the gift was made in the course of the assessment year 1961-62 as the respondent had shown the transfer to (by ?) Venesta Foils Ltd. as taking place during the period ending with December 31, 1960, and also had claimed relief u/s 10(2)(vii) of the I.T. Act in the assessment year 1961-62, It was further stated as follows :

"5. I further say that the first Income Tax assessment on the petitioner-company was made on the 15th December, 1964. The petitioner had not been assessed to Income Tax when the aforesaid transfer was made by the petitioner-company to India Foils Ltd. By the aforesaid transfer India Foils Ltd. received assets amounting to Rs. 2,17,78,348.51. In consideration of the aforesaid transfer India Foils Ltd. was required to issue 998 shares of ?1 each credited as fully paid up. Inasmuch as the said transfer was shown by the petitioner-company to have taken place on January, 1961, the transaction had to be considered for the purpose of the Gift-tax Act in the assessment year 1961-62 for which the previous year was the year ending on 31st March, 1961. The petitioner-company had not hitherto been assessed to Income Tax. The gift-tax return should have been filed by the petitioner-company on the aforesaid transaction for the assessment year 1961-62 before 30th June, 1961. Inasmuch as no gift-tax return was filed by the petitioner-company on the aforesaid transaction the taxable gift escaped assessment for the assessment year 1961-62 by reason of the petitioner's omission or failure to make a return u/s 13 of the Gift-tax Act.

6. Inasmuch as assets valued at more than Rs. 2 crores had been transferred for a very nominal consideration, the Gift-tax Officer issued a notice u/s 16 of the Gift-tax Act for filing a return under the Gift-tax Act. The said notice was issued after fully recording the reasons for the issue of the said notice and after

complying with all the requirements of the Gift-tax Act by the then Gift-tax Officer, " G " Ward, Companies District I.

7. The said notice u/s 16 was issued on the ground that the Gift-tax Officer had reasons to believe that the petitioner-company had transferred its assets in India to M/s. India Foils Ltd. for a nominal consideration. The consideration at which the Indian business of the petitioner-company had been sold to India Foils Ltd. was far less than that of the fair market value. Since adequate consideration had not been paid there was a gift which was chargeable to gift-tax for the assessment year 1961-62. Inasmuch as the petitioner-company had not filed a gift-tax return and taxable gift had escaped assessment notice u/s 16 of the Gift-tax Act was issued. "

9. The matter came for hearing before T. K. Basu J. when it was noted that the assessment of deemed net profits u/s 10(2)(vii), second proviso, of the Indian Income Tax Act, 1922, for 1961-62 was made taking into account the actual value of the transfer and deducting therefrom the written down value of the assets transferred. The ITO and the GTO being the same person as required in law, it was held that the respondent could not be charged with omission or failure to disclose the very same facts which the same officer came to know as the ITO in the Income Tax proceedings. It was further noted that in the assessment order under the I.T. Act for the assessment year 1961-62 made on December 15, 1964, by T. B. Swaminathan, ITO, " G " Ward, the value of the transfer of assets was taken at Rs. 83,31,590 and the written down value of assets at Rs. 80,58,538 leaving a difference of Rs. 2,73,052 as the deemed profit of the transfer. In those circumstances, even if a return was filed by the respondent, it was not possible to hold that the transfer of assets was for a consideration of ? 998 and not more and thus inadequate u/s 4 of the Act. There could thus be no assessment to gift-tax u/s 16 of the G.T. Act. The notice accordingly was held to be without jurisdiction and void. The appeal is against this order.

10. Before we proceed to examine the respective contentions of the parties, certain provisions of the G.T. Act, 1958, may be noted.

" 2. Definitions.--In this Act, unless the context otherwise requires,--.....

(xii) " gift " means the transfer by one person to another of any existing movable or immovable property made voluntarily and without consideration in money or money's worth, and includes the transfer or conversion of any property referred to in Section 4, deemed to be a gift under that section ;

(xiii) " Gift-tax Officer " means the Income Tax Officer authorised to perform the functions of a Gift-tax Officer u/s 7."

"3. Charge of gift-tax.--Subject to the other provisions contained in this Act, there shall be charged for every assessment year commencing on and from the 1st day of April, 1958, a tax (hereinafter referred to as gift-tax) in respect of the gifts, if any, made by a person during the previous year (other than gifts made

before the 1st day of April, 1957) at the rate or rates specified in the Schedule. "

"4. Gifts to include certain transfers.--(1) For the purposes of this Act,--

(a) where property is transferred otherwise than for adequate consideration, the amount by which the market value of the property at the date of the transfer exceeds the value of the consideration shall be deemed to be a gift made by the transferor....."

" 7. Gift-tax Officers.--Every Income Tax Officer having jurisdiction or exercising powers as such under the Income Tax Act in respect of any person shall perform the functions of a Gift-tax Officer under this Act in respect of that person....."

"16. Gift escaping assessment.--(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 under-assessment or assessment at too low a rate or otherwise ; or

(b) has, in consequence of any information in his possession, reason to believe, notwithstanding that there has been no such omission or failure as is referred to in Clause (a), that any taxable gift has escaped assessment for any year, whether by reason of under-assessment or assessment at too low a rate or otherwise ;

he may, in cases falling under Clause (a) at any time within eight years and in cases falling under Clause (b) at any time within four years of the end of that assessment year, 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, and the provisions of this Act shall, so far as may be, apply as if the notice had issued under that sub-section..."

11. The first point for consideration is whether the conditions precedent were in existence for the assumption of jurisdiction by the GTO to issue notice u/s 16(1). The GTO must have the basic reason to believe that any taxable gift has escaped assessment. Further, such escapement under Clause (a) is by reason of the omission or failure on the part of the assessee either to make a return u/s 13 of the gifts made by him to any other person assessable under the Act for any assessment year or to disclose fully and truly all material facts necessary for assessment of gifts made by him for that year. Under Clause (b), even when there is no such omission or failure, the GTO may assume jurisdiction when he has reason to believe, in consequence of any information in his possession, that taxable gift has escaped assessment. Different periods of limitation for service of a notice on the assessee containing all or any of the requirements as of a notice

under Sub-section (2) of Section 13 have been provided, at any time within eight years under Clause (a) and four years under Clause (b) of the end of the assessment year and thereafter for assessment or reassessment of any taxable gift which has escaped assessment.

12. We are concerned here with Clause (a) since no return was filed by the respondent in respect of taxable gifts made by it during the previous year of the assessment year. According to the GTO as appearing from his affidavit the respondent transferred its assets in India to India Foils Ltd. for inadequate or no consideration. As a result of the aforesaid transaction there was a taxable gift in the relevant year for which the respondent should have filed a return under the provisions of the G.T. Act, 1958.

13. It has been contended Dr. D. Pal that it is nowhere stated in the affidavit that Debi Dayal, the officer who issued the notice and whose affidavit in evidence alone is to be considered, that a taxable gift escaped assessment by reason of the failure to file any return. There is no dispute that Clause (a) is applicable in this case as four years from the end of the assessment year had already passed when the notice was issued and there is no question of any under-assessment or assessment at too low a rate or otherwise for similar reasons. It is also evident that the latter part of Clause (a) is also not applicable here, as it is not the case of the respondent that there was any taxable gift. The earlier part of Clause (a) which provides for the reasonable belief for escapement of gift from assessment for omission or failure to file the return is applicable to this case. It is true that the affidavit (c)f Debi Dayal does not mention in terms that for omission or failure to file a return the GTO had reasons to believe that the taxable gift has escaped assessment. He had, however, stated in his affidavit that the gift was for no consideration or inadequate consideration and thus a gift within the meaning of the G.T. Act for which a return should have been submitted. The other requirement had been stated in the notice itself to the effect that gift chargeable to assessment had escaped assessment for which it was proposed to assess the gift and the respondent was called upon to submit a return in the attached form. The contention raised is too technical when the position was clear enough by the reading of the notice and affidavit of Debi Dayal, the erstwhile GTO, who issued the notice and affirmed the affidavit referred to above.

14. The assessee, Venesta Foils Ltd., the respondent herein, was the owner of the assets sold to it by Venesta Ltd. with effect from January 1, 1960, and carried on the business till about December 31, 1960, when the assets were sold to India Foils Ltd. The return of income for the year ending on December 31, 1960, assessment year 1961-62, was filed on March 30, 1962, for Rs. 70,34,020, enhanced later on by a further sum of Rs. 3,31,532. In computing the income of the respondent for the period, the ITO u/s 10(2)(vii), second proviso, accepted the gains of business for depreciable assets like building, machinery, etc., sold to India Foils Ltd. for an amount by which the sale price of such assets exceeded the written down value thereof. The book value of the assets was Rs. 83,31,590

on the date of transfer while the written down value was Rs. 80,58,538 so that net profit was assessed at Rs. 2,73,052. The sale price to India Foils Ltd. was accordingly accepted as the book value appearing in the books of the assessee-company on the date of transfer and the value of the shares was to be taken at the break-up value, that is, the value of the net assets of the company whose shares the transferor had received. If the ITO took a view relating to the transaction in regard to Income Tax assessment, could he, the same person, as a GTO, take a different view of the same transaction, which it is said, is the position in the present case ? According to the respondent, the case of the revenue that the taxable gift had escaped assessment was not on account of its non-filing of any return but by reason Of change of opinion of the GTO regarding the said price. In such a cage Section 16(1)(a) of the Act cannot be attracted as the second condition has not been satisfied.

15. The learned judge has taken the view that even if the assessee had filed a return, the GTO being the same person, could not have taken the view that the transfer was for a consideration of ? 998 and not more since he arrived at the figure of deemed profit as indicated above. Even if a return was filed having regard to the view taken by the I.T. authorities, there could not have been any assessment under the G.T. Act.

16. It has been contended by Mr. B. L. Pal on behalf of the I.T. department that an amount of taxable gift is to be determined in accordance with the provisions of the G.T. Act and its yardstick and not by those of the I.T. Act. The only point for consideration of the GTO was whether there was reason for the belief that there was a deemed gift within the meaning of Section 4(1)(a) of the Act. The relevant factors for determining a deemed gift are the market value of the property transferred and the value of the consideration for transfer and the excess amount after deduction of the consideration from the market value of the assets will be the deemed gift.

17. In the assessment under the I.T. Act, the ITO was concerned with the computation of the total income of the assessee during the previous year. There are several heads of income enumerated in Section 6 chargeable to Income Tax and one of the heads is " Profits and gains of business ". u/s 10, Sub-section (1) of the Indian I.T. Act, 1922, Income Tax shall be payable by an assessee under the head " Profits and gains of business " carried on by him. Sub-section (2) provides for computation of such profits or gains after making allowances like under Clauses (i) rent, (ii) repairs, (iii) interest on borrowings, (iv) premium for risk insurance, (v) current repair to building, machinery, etc., (vi) depreciation of buildings, machinery, plant, and furniture at such percentage on the original costs as may be prescribed, (vii) in the case of sale of any building, machinery or plant, either the amount by which the written down value thereof exceeds the amount for which such assets are actually sold or the excess of the sale price over the written down value of such assets. There are other allowable heads under Clauses (viii) to (xv) with which we are not concerned in these

proceedings. The computation of chargeable income in respect of the assets transferred was computed in this case, as we have already seen, on the basis of the price of the assets transferred at the book value of the assets appearing in the books of account of the assessee as on the date of transfer.

18. The respondent put great stress on the valuation of assets made by the ITO in regard to its assessment of income for the relevant assessment year. The ITO has accepted the value of assets transferred by the assessee to India Foils Ltd. at their book value in computing profits on such transfer of assets u/s 10(2)(vii), second proviso. This position is also accepted by the GTO as para. 5 of the affidavit of Deba Prasad Majumdar dated September 27, 1972, indicates. The point in controversy is not what was the value of assets transferred nor is it directly material for the G.T. Act. The material point is whether the consideration paid by the transferee-company for the acquisition of such assets for money or money's worth was adequate or inadequate. If the consideration so paid was adequate, there will not be any question of gift at all. The transferee may pay no consideration at all in which case, the value of the assets transferred will be the amount of gift. Where, however, the consideration is paid in money or money's worth but it is less than the value of the assets transferred, there will be a deemed gift for excess assets transferred after deducting from the value of assets the consideration paid. In the present case, it is not the case of the revenue that the assets transferred were under-valued. Its case is that the assets were transferred against some consideration, namely, payment of liabilities and after adjustment of the liabilities the balance of the assets appears to be of Rs. 1,87,38,320 acquired for 998 paid up shares in India Foils Ltd. of the face, value of ₹ 998 or Rs. 13,307. The consideration thus was highly inadequate and the excess amount is thus to be deemed a gift made by the respondent in favour of India Foils Ltd. The respondent was required by law to file a return u/s 13 and not having done so, the gift-tax had escaped assessment. The only point for consideration in the instant case is, therefore, whether there has been a deemed gift for inadequate consideration paid by the transferee to the transferor for the assets transferred on the yardstick of the G.T. Act, 1958.

19. The consideration for the sale was, inter alia, the allotment of 998 shares of ₹ 1 each in the transferee-company, India Foils Ltd., to the seller, Venesta Foils Ltd. It is again to be remembered that India Foils Ltd. is a subsidiary of Venesta Foils Ltd. which owns all its shares. Sale of assets by an owner of business or a company to another company for consideration, other than cash by allotment of shares of the transferee-company has been a usual feature of commercial transactions for a considerable time past and the Legislature has not been slow to take cognisance of such transaction and shape the law accordingly for providing a true and correct picture of the financial affairs of the company in public interest (Section 78 of our Companies Act, 1956). It often happens that the owner of the business who sells the business also owns the shares in the purchaser-company and the shares for acquisition of business are also to be

allotted but the value of such assets often exceed the value of shares.

20. In dealing with the transfer of assets to the company against shares" where the assets exceed the value of the share, a common feature in such transactions, Gower in his *The Principles of Modern Company Law*, 3rd Edn., p. 108, in discussing share premiums, observes that there is nothing to stop a company from issuing its shares at a price exceeding their nominal par value, that is, at a premium. Where a person owning a business of ₹ 10,000 sells it to a company in consideration of shares to him he will find it cheaper to form a company with ₹ 1,000 share capital than one with ₹ 10,000 for it makes no difference to him, if he obtains control of the whole of the shares, whether 1,000 of ₹ 1 shares (worth ₹ 10 each) or 10,000 shares (worth ₹ 1 each) are allotted to him and he will rather have 1,000 shares issued to him, in effect at a premium of ₹ 9 per share. In the case of a limited company, its assets will appear in the commencing balance-sheet as ₹ 10,000 with the share capital at the nominal par value of ₹ 1,000, and the remaining balance of ₹ 9,000 has to appear in the balance-sheet, on the same side as capital under some other title such as " share premium ". It is further observed (p. 108):

" Prior to 1948, share premiums could be treated totally differently from share capital...now Section 56 of the 1948 Act provides that where a company issues shares at a premium a sum equal to the total amount of the premium shall be transferred to the " Share Premium a/c " which for most purposes must be treated as though it were share capital. This reform is eminently sensible but it makes par value still more of a meaningless symbol for it frankly recognises that what is important is not the arbitrary par value but the value received for the shares when, issued. The section expressly applies whether the shares are issued " for cash or otherwise ", and hence it has been held that a share premium account must be established if the shares are allotted in consideration of a transfer of assets, the value of which exceeds the nominal value of the shares."

21. Accordingly the company's initial balance-sheet will show assets at a valuation as per books of account of the seller balanced on the left by an equivalent amount of capital. Capital now will be divided into two, issued share capital and share premium account on the left side, evenly balanced by assets on the right hand. "

22. In the list of assets of India Foils Ltd. as on January 1, 1961, handed over to us by the learned counsel for the respondent in the course of the hearing and in respect whereof there appears to be no dispute, it appears that the total assets transferred was Rs. 3,18,43,197 including depreciable fixed assets of Rs. 83,31,590 while liabilities taken over by India Foils Ltd. in India for Rs. 83,73,491, in U.K. for Rs. 47,31,386, other liabilities being 998 shares of ₹ 1 each (nominal value) Rs. 13,307, share premium (capital reserve) Rs. 1,87,25,013, all totalling to Rs. 3,18,43,197, thus evenly balanced, as it must be so.

23. According to the appellants' case on the basis of the second agreement Venesta Foils Ltd. sold to India Foils Ltd. all the assets at the book value of the vendor subject to liabilities. The residue of the consideration for sale was to be satisfied by the issue of 998 shares of ₹ 1 each credited as fully paid up in India Foils Ltd. allotted to the respondent. If, therefore, the net value of assets acquired was in excess of the consideration of ₹ 998 as the nominal or face value of shares, as is apparently so, the consideration of sale was not adequate. In such situation, if property is sold not for adequate consideration, the amount by which the market value exceeds the consideration is to be deemed a gift made by the transferor u/s 4(1) of the G.T. Act.

24. By the agreement of November 30, 1961, the assets of Venesta Foils Ltd. was agreed to be transferred to India Foils Ltd. and it was provided that the transferee was to pay all liabilities of Venesta Foils Ltd. in respect of the business under transfer and

" The residue of the consideration for the said sale and purchase hereby agreed to be made shall be paid and satisfied by the issue to Venesta Foils Ltd. or its nominees 998 shares of ₹ 1 each credited as fully paid in the capital of the subsidiary (that is in India Foils Ltd.)."

25. It is obvious that on the terms of the above agreement, the allotment of the shares as the residue of consideration was intended to cover the entire assets transferred less liabilities undertaken by the transferee-company.

26. " Gift" under the definition of Section 2(xii) is a transfer by one person to another of any existing movable and immovable property made voluntarily and without consideration in money or money's worth. The consideration of the sale before us is not without consideration though not of money, but undertaking of payment of liabilities as also allotment of shares. The liabilities as on the date of transfer had a worth in money and was in effect so quantified in terms of money. So when the transferee under the terms of agreement agreed to pay the liabilities attached to the business which was being transferred he was paying as consideration money's worth of the liabilities. The balance consideration was agreed to be satisfied in shares of the face value of ₹ 998 irrespective of the value of assets already vested in the transferee, Obviously, the balance value of assets vested in the transferee was much more than the face value of shares so that it could not be said that the shares at their face or nominal value was the consideration, unless of course it was a gift for the excess value resulting in the transaction being of inadequate consideration. In fact in the affidavit of Debi Dayal dated December 4, 1971, para. 2(b), it was stated that in the agreement of November 30, 1961, between Venesta Foils Ltd. and India Foils Ltd., there is no provision for issue of shares of the transferee-company at premium and/or adjustment of the excess of assets over purchase consideration. Even so, the transfer was in favour of the transferor itself as the holder of all shares of the transferee-company. The transferee-company had shown the excess value in share premium account and accepted the liabilities in respect of such share

premium in favour of Venesta Foils Ltd. as its shareholder as a result of increase of assets. The amount thus stood as liability for the entire excess value of assets along with the share capital while for the transferor the excess value had been shown as investment in subsidiary. The share premium account u/s 78 of our Companies Act, 1956, as also of Section 56 of the English Companies Act are to be treated as share capital but may only be utilised for various purposes mentioned therein. The amount is thus not a fictitious figure of no significance but one of full value's worth in the account of the companies. Accordingly it is impossible to say that the assets of much higher value were transferred for inadequate consideration so as to convert the transaction into a gift taxable under the law since the entire assets were fully accounted for in the accounts of both companies though under the requirement of the Companies Act.

27. There is another aspect to be considered. " Gift " basically is a transfer by one person to another person. In this case, there is really no such transfer since Venesta Foils Ltd., the alleged donor, owns all shares of the India Foils Ltd., the alleged donee, Viewed in this light also, it seems there was no gift in respect of the impugned transaction as defined in Section 2, Clause (xii), but we make it clear that we have not based our decision on this aspect, since no argument was advanced by the parties in this respect thereof.

28. A point was raised by Mr. P. Pal, learned advocate for the respondent, contending that there was no gift during the previous year relevant to the assessment year 1960-61. The year closed on December 31, 1960, while under the agreement, the assets were taken over with effect from January 1, 1961. The contention possibly sustainable otherwise, cannot be accepted as the transaction was accepted even by the assessee as having taken place on December 31, 1960. The contention not originally made before the trial court was introduced by an amendment. There is no averment or explanation in regard to the assessment of the respondent under the I.T. Act for the assessment year 1961-62 with accounting period ending on December 31, 1960, where the above transaction has been taken into consideration as taking place within the accounting period at the instance of the respondent. The said order of assessment has also been strongly relied on by the respondent. There is accordingly no substance in this contention which was not even raised before the trial court.

29. We accordingly dismiss the appeal and for reasons indicated above affirm the judgment and order under appeal. In the circumstances, the parties will bear their own costs in the appeal.

Sankar Prasad Mitra, C.J.

30. I agree.