(1999) 09 KL CK 0064

In the High Court Of Kerala

Case No : Income-tax Reference No. 59 of 1996

M.A. Ismail APPELLANT

Vs

Commissioner of Gift-tax RESPONDENT

Date of Decision : 20-09-1999

Acts Referred:

Citation : (1999) 157 CTR 557 : (1999) 240 ITR 539

Hon'ble Judges : Arijit Pasayat, C.J;K.S. Radhakrishnan, J

Bench : Division Bench

Advocate : P. Balachandran, for the Appellant; P.K.R. Menon and N.R.K. Nair, for the Respondent

Judgement

Arijit Pasayat, C.J.—Pursuant to the direction given by this court on an application u/s 26(3) of the Gift-tax Act, 1958 (in short "the Act"), the following questions have been referred by the Income Tax Appellate Tribunal, Cochin Bench (hereinafter referred to as the "Tribunal"), for opinion :

"1, Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was justified in holding that the appellant is liable to gift-tax for the amount of Rs. 1,25,000 ?

2. Whether, the Appellate Tribunal was justified in not adjudicating on the question of the applicability of Section 4(1)(a) and Section 4(1)(c) of the Gift-tax Act to the facts of the instant case ?

3. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal erred in not considering the question as to whether the assessee was entitled for exemption u/s 5(1)(xiv) of the Gift-tax Act?"

2. The facts as presented by the parties are essentially as follows : M. A. Ismail (hereinafter referred to as the assessee) along with his brother Dr. Abdulla, was carrying on business on a partnership basis as exhibitors of cinematographic films, under the name and style of "Zeenath Theatre" since 1965. For that

purpose, the firm occupied a portion of the land belonging to their father and constructed a theatre, and equipped it with projector and other necessary equipment. Subsequently, in the year 1969, their father gifted the entire property to the assessee and his brother. The value of the entire property of 68 cents of land was shown in the document at Rs. 60,000. Dr. Abdulla expired and thereafter his wife and minor children were admitted to the partnership. Subsequently, the property was partititioned among the assessee and the legal heirs of Dr. Abdulla. The assessee was allotted 38 cents of land, on which the theatre already constructed by the firm stood. The assessee transferred the said 38 cents of land to the firm showing its value at Rs. 75,000. On such transfer of land tax was levied on the ground that there was an element of capital gain, and a sum of Rs. 15,938 was subjected to capital gains tax. The Appellate Assistant Commissioner set aside the assessment so far as levy of capital gains. In the meantime, the Gift-tax Officer initiated proceedings on the ground that there was an element of gift. In response to the notice, the assessee filed a "nil" return of gift. Subsequently, the partnership was dissolved on April 15, 1981. At that time all the assets and liabilities were valued. So far as the value of the land and building thereon is concerned, it was stated at Rs. 3,75,000. The value of the land on which the superstructure was built, was agreed upon at Rs. 3,00,000. After deducting Rs. 75,000 towards the assessee''s share in the property, and allowing exemption u/s 5(2) of the Act, the taxable gift was arrived at Rs. 2,20,000 and tax was levied.

3. The matter was carried in appeal before the Commissioner of Gift-tax (Appeals) (hereinafter referred to as the appellate authority), who, by his order dated February 13, 1989, upheld the assessment. A second appeal was preferred before the Tribunal, which also did not give any relief to the assessee. An application filed u/s 26(1) was also rejected. The assessee moved this court u/s 26(3) of the Act for its opinion on the questions referred to above.

4. Mr. P. Balachandran, learned counsel appearing for the assessee, submitted that the approach of the authorities below is erroneous, inasmuch as at no point of time the difference was taken to be a gift. In any event, the value at the time of transfer and at a subsequent point of time, cannot always be the same. Learned counsel for the Revenue stated that the difference of amount was clearly taxable as the real value had not been reflected.

5. At this juncture Section 2(xxiv) of the Act defining "transfer of property" is relevant, which reads as follows :

"(xxiv) ''transfer of property'' means any disposition conveyance, assignment, settlement, delivery, payment or other alienation of property and, without limiting the generality of the foregoing, includes--

(a) the creation of a trust in property ;

(b) the grant or creation of any lease, mortgage, charge, easement, licence, power, partnership or interest in property ;

(c) the exercise of power of appointment (whether general, special or subject to any restrictions as to the persons in whose favour the appointment may be made) of property vested in any person, not the owner of the property, to determine its disposition in favour of any person other than the donee of the power ; and

(d) any transaction entered into by any person with intent thereby to diminish directly or indirectly the value of his own property and to increase the value of the property of any other person."

6. u/s 2(xii) of the Act, "gift" has been defined, which reads as follows :

" ''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."

7. It may be that in a given case the value as on the date of transfer may not be the same as that taken for some other purpose like determining the value of the assets at the time of dissolution. It would depend upon the time gap between the two events. In the instant case, it has been found by the authorities that the value for the purpose of working out the value of the assets came close on the heels of the date of transfer.

8. For deciding the question, it is necessary to take note of a decision of the apex court in Sunil Siddharthbhai v. CIT (Civil Appeal No. 1841 of 1981) and Sunil Siddharthbhai Vs. Commissioner of Income Tax, Ahmedabad, Gujarat, . It was, inter alia, observed that (headnote) :

"Where a partner of a firm makes over capital assets which are held by him to a firm as his contribution towards capital, there is a transfer of a capital asset within the terms of Section 45 of the Income Tax Act, 1961, because an exclusive interest of the partner in personal assets is reduced, on their entry into the firm, into a shared interest. . . .

The credit entry made in the partner''s capital account in the books of the partnership firm does not represent the true value of the consideration. It is a notional value only, intended to be taken into account at the time of determining the value of the partner''s share in the net partnership assets on the date of dissolution or on his retirement, a share which will depend upon deduction of the liabilities and prior charges existing on the date of dissolution or retirement. It is not possible to predicate beforehand what will be the position in terms of monetary value of a partner''s share on that date. At the time when the partner transfers his personal asset to the partnership firm, there can be no reckoning of the liabilities and losses which the firm may suffer in the years to come. All that lies within the womb of the future. It is impossible to conceive of evaluating the consideration acquired by the partner when he brings his personal asset into the partnership firm when neither can the date of dissolution or retirement be envisaged nor can there be any ascertainment of liabilities and prior charges which may not have even arisen yet. Therefore, the consideration which a partner acquires on making over his personal asset to the firm as his contribution to its capital cannot fall within the terms of Section 48. And as that provision is fundamental to the computation machinery incorporated in the scheme relating to the determination of the charge provided in Section 45, such a case must be regarded as falling outside the scope of capital gains taxation altogether."

9. Every alienation or transfer of property involves a reduction in the value of one''s estate and an increase in the value of estate of some other person. The same result may be achieved by means of a transaction which may not involve a transfer or alienation of property in the normal sense, that is, through intermediaries like firms, companies, etc. The result aimed in Clause (d) of Section 2(xxiv) is already caught in earlier clauses by increase in estate of donee ; the introduction of "intent" only cuts out the scope. The propositions established are :

1. The transaction referred to takes colour from the main clause, each of which deals with one or the other mode of transfer. It must be a transfer of property in some way.

2. The transaction must be with some other person and it cannot be a unilateral act.

3. The required intent must be shown to be existing. The clause is intended to cover transactions entered into with an intent to diminish the value, not of some property which is transferred to another person, but of the donor''s own property and to increase the value of the property of another. The heart of the operation of the clause is "intent". "Intent" means the main or substantial object of the transaction. When the statute brings in as a gift a transaction entered into with intent to diminish the value of one''s estate and to increase the value of another, what is hit at, by statute, is a transaction by which the person entering into it intends to have the effect stated in the sub-section. "Intent" can be equated with "object" and "objective". The crucial question is how to prove existence of intent and how to decide whether the transaction was or was not entered into with the required intent. The fact that the transaction had the effect described will not by itself be sufficient. It would depend upon the factual background of each case. The essence of the clause is, as indicated above, the diminution in the value of the property of the donor and increase of the value of the property of the donee. The provision does not require that the diminution and increase in value must necessarily be equal or correspond in amount. The purpose seems to rope in artificial devices which are intended to confer a gift on the donee.

10. Applying the principle laid down by the apex court in Sunil Siddharthbhai Vs. Commissioner of Income Tax, Ahmedabad, Gujarat, , the inevitable conclusion is that the authorities were justified in holding that the transfer would attract gift-tax u/s 4 of the Act. The Tribunal also took note of the fact that there were some

mitigating factors so far as the assessee is concerned regarding the value and, therefore, estimated the value at Rs. 2,00,000 instead of Rs. 3,00,000 as done by the Assessing Officer and the first appellate authority. The conclusion arrived at by the Tribunal is perfectly in order. Our answer to the questions referred are in the affirmative, in favour of the Revenue and against the assessee.

11. The reference is accordingly disposed of.

