
(1970) 01 AHC CK 0036
In the Allahabad High Court
Case No : Gift-tax Reference No. 196 of 1964

Mohd. Mustafa

APPELLANT

Vs

Commissioner of Gift Tax

RESPONDENT

Date of Decision : 01-01-1970

Acts Referred:

Gift Tax Act, 1958 — Section 2, 3

Citation : (1970) 76 ITR 205

Hon'ble Judges : T.P. Mukerjee, J; R.S. Pathak, J

Bench : Division Bench

Advocate : Iqbal Ahmed, for the Appellant; Shanti Bhushan, General and R.R. Misra, for the Respondent

Final Decision : Disposed Of

Judgement

R.S. Pathak, J.—The Appellate Tribunal has referred the following two questions for the opinion of this court:

"1. Whether the provisions of the Gift-tax Act would prevail upon the provisions of Mohamedan law so far as the gifts to the three sons are concerned ?

2. If the answer to the above question is in the negative whether, on the facts and in the circumstances of the case, it was rightly held that there was a delivery of possession of the subject-matter of the gift under the Mohamedan law in the present case and the gift-tax was rightly attracted ?"

2. The assessee, Mohammad Mustafa, was a member of a partnership firm, "Mohammad Mustafa and Sons" There were four partners in all, and three of them, including the assessee, "retired" from December 31, 1958. The assessee had contributed a capital of Rs. 31,016-12-0, and on his retirement that amount was divided between his three sons, Mohammad Masood, Mohammad Neman and Mohammad Suleman. It appears that the amount was transferred in three equal sums from the account of the assessee in the books of the firm to the respective capital accounts of the three sons on December 31, 1958.

3. The Gift-tax Officer treated the three transactions as gifts taxable under the Gift-tax Act, for the assessment year 1959-60. An appeal by the assessee was dismissed by the Appellate Assistant Commissioner of Gift-tax, and, thereafter, a second appeal was dismissed by the Appellate Tribunal. The Appellate Tribunal rejected the contention of the assessee that in Mohamedan law delivery of the gifted property was essential to constitute a gift, and, as delivery was wanting in the present case, there was no gift in the eye of law. The Appellate Tribunal held that, upon a correct appreciation of the Mohamedan law, there was a valid gift by the assessee in favour of his sons. Alternatively, the Appellate Tribunal expresses the view that even if the Mohamedan law required delivery of the property, no such requirement arose when considering a gift within the meaning of the Gift-tax Act and, inasmuch as the provisions of the Mohamedan law must be considered to have been superseded by those of the Gift-tax Act, which was a special enactment, the provisions of the Gift-tax Act must prevail.

4. At the instance of the assessee, the Appellate Tribunal has made the present reference.

5. It seems to us that the essential question attempted to be brought out in framing the above two questions is whether the transactions amounted to gifts taxable under the Gift-tax Act. Accordingly, we, reframe the two questions as a single question in the following terms ;

"Whether, on the facts and in the circumstances of the case, the transactions of December 31, 1958, evidenced by a transfer of capital from the account of the assessee to the accounts of his three sons represented gifts taxable under the Gift-tax Act ?"

6. It is contended for the assessee that there can be no gift under the Mohamedan law unless there has been delivery of the property gifted, and inasmuch as, in the instant case, there has been no actual delivery of property to the sons by the assessee, no valid gift in the eye of Mohamedan law came into existence. We are unable to accept this contention. Section 3 of the Gift-tax Act charges a tax in respect of gifts. Section 2(xii) of the Act defines a "gift" as a transfer of movable or immovable property by one person to another, and Section 2(xxiv) defines "transfer of property" as meaning any disposition, conveyance, assignment, settlement, delivery, payment or other alienation of property. Even assuming that the Gift-tax Act did not intend any departure from the Mohamedan law in respect of transactions governed by that law and that the words "disposition, conveyance, assignment, settlement, delivery, payment, or other alienation of property" must be construed in the light of that law, it cannot be disputed, we think, that the transactions must be considered as gifts for the purposes of the Mohamedan law. The capital invested by the assessee in the partnership firm was money to the repayment of which he had a right on the dissolution of the firm, and instead of exercising that right himself he assigned the right to his sons, in consequence of which the entries were made in the capital account of the assessee and corresponding entries were made in the

respective capital accounts of the sons. No dispute was ever raised at any stage as to the validity of this transfer. The question which arises here is, whether what was done resulted in a gift. The general principle as to gifts under Mohamedan law is set out by Sir D. F. Mulla in his Principles of Mohamedan Law, sixth edition, page 142, para. 150, where he states :

"It is essential to the validity of a gift that there should be a delivery of such possession, as the subject of the gift is susceptible of."

and then proceeds to say (page 148, para, 154):

"When the subject of the gift is incorporeal property or an actionable claim, the gift may be completed by any act on the part of the donor showing a clear intention on his part to divest himself in presenti of the property, and to confer it upon the donee."

7. In the case before us, it is clear that on the transfer entries made in the books of the firm the right to the amount must be considered as having been transferred by the father to the sons. There was a clear intention on the part of the assessee to divest himself in presenti of the property and to confer it upon the sons. Clearly, in our opinion, there was a gift in respect of each of the three sons. It was a transfer of property by the assessee to the sons and was taxable under the Gift-tax Act.

8. The question as reframed is answered in the affirmative. The Commissioner of Gift-tax is entitled to his costs, which we assess at Rs. 100.