
(2010) 04 BOM CK 0128
In the Bombay High Court
Case No : Gift-tax Reference No. 1 of 2000

Pannalal Silk Mills P. Ltd.

APPELLANT

Vs

Commissioner of Gift-Tax

RESPONDENT

Date of Decision : 27-04-2010

Acts Referred:

Citation : (2011) 338 ITR 1

Hon'ble Judges : V. C. Daga, J;K. K. Tated, J

Bench : Division Bench

Advocate : F. V. Irani with A. K. Jasani for the assessee, for the Appellant; D. K. Katnwal with H. D. Pandey for the Department, for the Respondent

Final Decision : Disposed Off

Judgement

V. C. Daga, J.—The income tax Appellate Tribunal, Bombay Bench, Bombay ("the Tribunal" for short) in exercise of power u/s 26(1) of the Gift-tax Act, 1958 ("Act" for short), vide its order dated June 11, 1994 has referred the following questions arising out of its order dated October 30, 1992, for the opinion of this court :

1. Whether, on the facts and in the circumstances of the case, the Tribunal erred in law in rejecting the applicants contention to the effect that as there was a family arrangement, there was no transfer and consequently no gift ?
2. Without prejudice to question No. 1, whether, on the facts and in the circumstances of the case and in law, the Tribunal erred in holding that there was no consideration for the alleged transfer by the applicant ?
3. Without prejudice to questions Nos. 1 and 2, whether, on the facts and in the circumstances of the case, the Tribunal ought, in any event, to have held that even if there was a gift by the applicant, such gift was exempt u/s 5(1)(xiv) of the Gift-Tax Act, 1958 ?

Statement of case

2. The aforesaid questions of law giving rise out of the order of the Tribunal were drawn up by the Tribunal based on the statement of case appearing hereunder :

(a) The assessee is a private limited company. This company was said to have been managed up to December 18, 1981, by the two groups of shareholders, viz., Kantilal group and the Pannalal group, each holding 747 shares of the face value of Rs. 1,000 each. Some dispute is alleged to have cropped up between these two groups, inter se and also between these groups and the company, inter alia, regarding the entitlement of the specific parties to the sum of Rs. 80 lakhs receivable from a firm called M/s. Seth and Mehta Associates for the sale of surplus FSI. The matter was referred to an arbitrator, who gave an award on December 18, 1981. This award was approved by this court on January 16, 1982. As per this award the Kantilal group transferred all their 747 shares in the assessee-company for a price of Rs. 100 per share to the Pannalal group. In the annual accounts, the value of the properties alienated to the Kantilal group was shown at Rs. 35 lakhs. The assessing officer held that the series of transactions indicated a transfer by the assessee-company to the Kantilal group of properties worth Rs. 35 lakhs without any consideration.

(b) It was contended before the assessing authority that the property was released to facilitate the smooth functioning of the company. Had this been not done, the company would have gone into liquidation. The arbitration also facilitated the company to receive Rs. 80 lakhs as consideration on sale of FSI which helped the company to survive since the company was passing through acute shortage of funds at that time. The above contentions were rejected by the assessing authority, vide its order dated March 29, 1990, on the grounds that the company being a corporate entity was in no way concerned with the dispute amongst its shareholders and need not pay anything to settle the dispute of the shareholders. That the smooth functioning of the company is dictated by the memorandum of association and articles of association and not by the conduct of its shareholders. The Revenue authorities concluded that the company gifted Rs. 35 lakhs without any consideration as such amount is exigible to gift-tax. This order of the assessing authority was affirmed by the Commissioner of Gift-tax (Appeals), vide his order dated July 3, 1991.

(c) Before the Tribunal in appeal, it was urged by the applicant that there was no liability to gift-tax as, inter alia, there was no transfer at all as the settlement was a family arrangement and, hence, there was no gift. That in any event, even if there was consideration for the alleged transfer and, therefore, no gift. That in any event, even if it was a gift, it was exempt u/s 5(1)(xiv) of the Gift-Tax Act. That the applicant could not be charged to gift-tax as the members of the Kantilal group had been charged to capital gains tax in respect of the same transaction.

(d) The Tribunal in appeal, held that a family arrangement was an agreement among the members of the same family, intended to be generally and reasonably for the benefit of the family, either by comprising doubtful or disputed rights or

by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honor. According to the Tribunal, no cogent material was placed to show that the arrangement or agreement was arrived at with the object of compromising disputable rights or for preserving the family property. The Tribunal observed that the company is a distinct legal entity. It has got its separate existence. The property of the company cannot be equated with the family property. More so, nothing was on record which could suggest the existence of a family dispute. According to the Tribunal, the shareholders imputed certain charges as regards the mismanagement of the company. Beyond that nothing was placed before the Tribunal to show the existence of a family dispute or possibility of a family dispute. In the absence of dispute, the Tribunal could not conclude that the arrangement was made to secure peace and harmony amongst the members as well as the properties belonging to them. The Tribunal held that there was no supporting material that the dispute before the arbitrator was concerning the properties of the company and was not in relation to the property of the family. As such, according to the Tribunal, the said transaction could not be put within the umbrella of family arrangement. The Tribunal was of the view that exigency for such arrangement might have cropped for some reasons, not known, but in the given circumstance, with a view to bring harmony among the family members. As such the Tribunal did not accept the contention of the applicant that it was a family arrangement.

(e) So far as the ground that the transaction is not exigible to gift-tax as capital gains tax was levied on the members of the Kantilal group, the Tribunal did not accept the said contention for want of material to show that the levy of capital gain tax was finally accepted by the Kantilal group. It was, therefore, held that in any case the issue raised in the appeal was to be adjudicated de hors any other proceeding to which recourse might have been taken by the Revenue. On the point of consideration, the Tribunal held that the aspect of consideration was totally lacking in the transaction. According to the Tribunal, the company and its shareholders being distinct legal entities, consideration accruing to the group of shareholders could not be deemed to be consideration accruing to the company.

(f) So far as the applicability of section 5(1)(xiv) of the Act is concerned, the Tribunal was of the view that the said section can be applied only if it is shown that the gift was made on the ground of commercial expediency or in order to directly or indirectly facilitate the carrying on of the business, profession or vocation. According to the Tribunal, the burden was on the assessee who claimed exemption u/s 5(1)(xiv) of the Act to prove that the gift was for the profitable Carrying on of the business. The Tribunal held that the assessee failed to discharge its burden as nothing was produced to show that the transfer of shares was made in the interest of business of the company. That the fact that the assessee got its due amount of Rs. 80 lakhs was not sufficient to prove the aspect of onus as this amount was received in the normal course of business. According to the Tribunal, one can always pursue the rightful and legal claims and not required to make such a heavy amount of gift for that. The Tribunal

upheld the finding of the Commissioner of Gift-Tax (Appeals) that the assessee's inherent right to receive Rs. 80 lakhs under the agreement with M/s. Sheth and Mehta Associates was not influenced by the settlement arrived at with the Kantilal group. That the entire settlement was apparently entered into with a view to benefiting certain shareholders and that the benefit to the shareholders could not be equated with the benefit to the company.

(g) It is stated that the essentials to be fulfilled in order to be a gift, within the meaning of the Gift-Tax Act are that there must be a transfer by one person to another; that the transfer should be of any existing movable or immovable property; that the transfer must be made voluntarily; and the transfer must be made without consideration of money or moneys worth. The Tribunal found that there was a transfer by the assessee-company to one group of shareholders of the companies' properties. It was voluntary in nature and the absence of consideration was evident. In view of this, the Tribunal upheld the order of the Commissioner of Gift-Tax (Appeals) affirming that the transaction was exigible to gift-tax.

Rival submissions

3. At the outset, Mr. Irani, learned counsel for the applicant appearing with Mr. Jasani, urged that the burden of establishing the existence of gift is on the Revenue. According to him, the gift must be a transfer without consideration in money or moneys worth and, therefore, onus is on the Revenue to establish lack of consideration. In support of his submission he relied on the judgment of this court in the case of Commissioner of Gift-tax (Central), Bombay Vs. J.N. Marshall, ; wherein this court held that u/s 3 of the Act, gift-tax can be levied only if there is a gift as defined in the Act. u/s 2(xii) of the Act, one of the essential conditions for a gift is that the transfer must be without consideration in money or moneys worth. The burden of proving that a particular transfer is a gift is upon the Revenue by showing that the transfer was without consideration.

4. Alternatively, Mr. Irani urged that the gift is not taxable so far as the present applicant is concerned because there is no gift u/s 4(1)(a) of the Act because there is no transfer as the family arrangement does not create any new rights but merely recognizes pre-existing rights and that there was consideration as the Kantilal group gave up all claims to the tune of Rs. 80 lakhs receivable by the applicant under the agreement entitled to by it for the sale of FSI. In support of his submission he relied upon the judgment of the Gauhati High Court in the case of Ziauddin Ahmed Vs. Commissioner of Gift-tax, and of this court in the case of Keshub Mahindra and Others Vs. Commissioner of Gift Tax, Bombay City I, .

5. Without prejudice to the above submission, Mr. Irani urged that even if it is assumed that the subject transaction was gift, such gift being exempt u/s 5(1) (xiv) of the Act is not taxable. The provision reads thus :

Gifts made in the course of carrying on a business, profession or vocation, to the extent to which the gift is proved to the satisfaction of the Gift-Tax Officer to

have been made bona fide for the purpose of such business, profession or vocation.

6. According to Mr. Irani, the Tribunal by rejecting this argument has misdirected itself and failed to apply the law laid down by the apex court as well by this court in Commissioner of Income Tax, Andhra Pradesh Vs. Dhanrajgiri Raja Narasingirji, ; F.E. Dinshaw Ltd. Vs. Commissioner of Income Tax, Bombay City, , Commissioner of Income Tax, West Bengal I Vs. Birla Cotton Spinning and Weaving Mills Ltd., and Commissioner of Income Tax, U.P. Vs. Nainital Bank Ltd., .

7. Without prejudice to the aforesaid contentions, Mr. Irani went on to urge that having assessed the Kantilal group to capital gains in respect of the same transaction, the same transaction cannot again be levied with gift tax. In support of his submission he placed reliance on the judgment of the Supreme Court in the case of K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another, .

8. Per contra, Mr. Kamwal, learned counsel appearing for the Revenue, reiterated the submissions which were advanced before the Tribunal and mainly relied upon the findings recorded by the authorities below.

Consideration

9. While hearing the rival submissions, a copy of the arbitration award was placed before us which was later on converted into rule of the court (a decree); wherein the factual genesis of the transactions is to be found in para. 24 thereof, which reads thus :

24. I received another letter dated November 30, 1981, addressed to me by all the parties. Under cover thereof they filed a writing of the same date executed by them. By the said letter the parties requested me to close the reference and to give an award accordingly. By the said writing which is in the form of an agreement of a settlement the parties have, inter alia, agreed that for the reasons mentioned in the said writing and in (consideration of Kantilal and his group being the parties of the second part irrevocably giving to and releasing their claims in the properties described in annexures A and B hereto and or under the said agreement dated 27-10-1980, and/or in the balance price receivable or received there under by the company the company would assign its entire right title and interest in the other properties belonging to the company as mentioned in the said writing dated November 30, 1991, and collectively described in annexure C hereto.) According to this settlement, the properties described in annexure C hereto refer to the said properties described in annexures A and B hereto only for the sake of convenience and are not intended to be assigned and the ownership thereof will continue to be that of the company.

(emphasis italicised in print)

10. Reading of the aforesaid para, and dissection thereof makes it clear that there was an agreement of settlement between the Pannalal group and the Kantilal group; wherein they had, inter alia, agreed that in consideration of the

Kantilal group irrevocably giving up and waiving their property rights in annexures A and B under the agreement dated October 27, 1980, and in the balance price receivable or received there under by the company, the company agreed to assign its entire right, title and interest in the properties belonging to company as mentioned in the writing dated November 30, 1981, collectively described in annexure C annexed thereto. It is, thus, clear that the Kantilal group relinquished and waived their right, title and interest in the property described in annexures A and B and also the consideration which the company was to receive out of the land transaction and in lieu thereof they got properties shown in annexure C free from all liabilities on ownership basis. Nature of consideration is the transfer of property shown in annexure C in favor of the Kantilal group and in consideration thereof the Kantilal group relinquished their rights over the properties shown in annexures A and B. This consideration for the transaction in question can conveniently be spelt out from the arbitration award of the arbitrator. If that be so, the Tribunal was not justified in dismissing submission in this behalf by one line finding that the aspect of consideration is totally lacking in the transaction.

11. In the above view of the matter, for the reasons recorded herein, question No. 2 referred for the opinion of this court will have to be answered in favor of the applicant. The view of the Tribunal on this count cannot be said to be correct view.

12. In the result, question No. 2 is answered in the affirmative, i.e., in favor of the assessee and against the Revenue. In view of answer to question No. 2 in favor of the assessee and against the Revenue the remaining questions need no consideration since they are rendered academic. Reference stands disposed of in terms of this order.