
(2003) 09 KL CK 0004

In the High Court Of Kerala

Case No : IT Reference No. 173 of 1999 25 September 2003

Wg. Cmdr. A.G. Mathews

APPELLANT

Vs

CGT

RESPONDENT

Date of Decision : 25-09-2003

Acts Referred:

Citation : (2004) 134 TAXMAN 236

Hon'ble Judges : J.M. James, J;G. Sivarajan, J

Bench : Full Bench

Advocate : K.P. Dandapani, for the Assessee P.K.R. Menon and K. George, for the Revenue, for the Appellant;

Judgement

G. Sivarajan, J.

The Income Tax Appellate Tribunal, Cochin Bench has referred the following questions of law for decision by (this court u/s 26(3) of the Gift Tax Act (hereinafter referred to as Act) at the instance of the assessee pursuant to the direction issued by this court in the judgment dated 17-11-1998 in O.P. No. 13793 of 1997.

"1. Whether in the facts and circumstances of the case, the Tribunal should have upheld that deemed gift theory was not applicable to the sale of the unquoted shares made on compelling circumstances, which are amply established by the petitioner ?

2. Whether in the facts and circumstances of the case, the Tribunal was wrong in upholding the application of wealth tax valuation in the place of valuation as per the yield method, with regard to the sale of unquoted shares ?"

2. The brief facts necessary for adjudication of the abovesaid questions of law are as follows : The applicant-assessee was holding 14,040 equity shares in Malayala Manorama Co. Ltd., Kottayam. The said shares had a face value of Rs. 10 each. In October, 1985 the assessee sold the said shares to Smt. Rachel

Mammen and Shri Roy Mammen, Bangalore at Rs. 5 per share. The Gift Tax Officer noted that the purchaser are the grand children of Sri. K.M. Mathew, who is the uncle of the assessee. The officer was of the view that the shares had been sold at a price lower than the market value and so the provisions of the Act were attracted. The officer had also noted that in the wealth tax assessment in the case of another shareholder the market value of the shares had been assessed at 44.14 per share, The officer accordingly, proposed to take the market value of the unquoted equity shares by applying the provisions of rule 1D of the Wealth Tax Rules and adopted the value of Rs. 44.14, The market value of 14,040 shares was thus determined at Rs. 6,19,725. As the consideration received by the assessee at Rs. 5 per share was only Rs. 70,200, the balance amount of Rs. 5,49,525 was deemed to have been gifted to the purchasers who were his relatives. The officer had accordingly brought the difference of Rs. 5,49,525 to tax after allowing the exemption provided u/s 5(2) of the Act. The Commissioner (Appeals) in the appeal filed by the assessee did not accept the contention of the assessee that he was badly in need of funds to celebrate the marriage of his son and so he had to dispose of the shares at the price given by the transferees. The Commissioner (Appeals) however accepted the contention of the assessee that the shares should be valued on yield basis following the decision of the Supreme Court in the case of CGT v. Smt. Kusumben D. Mahadevia. (1980) 122 ITR 381 . Being aggrieved by the said order the department filed appeal before the Tribunal. The assessee also filed a cross-objection. The Tribunal allowed the appeal filed by the department and dismissed the cross objection filed by the assessee.

3. The Tribunal had relied on the decision of a Division Bench of this court in CGT v. Mammen Mathew (1986) 158 ITR 466 where it was held that in the absence, of any provision for valuation of unquoted shares in the Gift Tax Rules the provisions of the sister enactment, namely rule 1D of the Wealth Tax Rules has to be applied for determination of the market value of the shares and that the provisions of rule 1D of the Wealth Tax Rules are mandatory. The Tribunal also relied on the decision of the Supreme Court in Bharat Hari Singhania and others Vs. Commissioner of Wealth Tax (Central) and others, where it was held that rule 1D is mandatory and has to be applied. It is in these circumstances the questions of law specified above have been referred to this court for decision.

4. We have heard Sri, K.P. Dandapani, learned counsel for the applicant and Sri. PK.R. Menon, learned senior Central Government standing counsel for Taxes appearing for the respondent. Sri. Dandapani submitted that the assessee had sold the shares in Malayala Manorama Co. Ltd., Kottayam since he was badly in need of money for celebrating the marriage of his son, that there was nobody to purchase the said shares at a higher price at that time and therefore he was forced to sell the said shares to Smt. Rachel Mammen and Sri. Roy Mammen, Bangalore at Rs. 5 per share. The counsel submitted that the two persons mentioned above are not the grand children of Sri. K.M. Mathew as alleged by the officer. He submitted that the said two persons are the grand children of Sri.

K.M. Jacob, the brother of Sri. K.M. Mathew and that the assessee had married the daughter of Sri, K.M. Oommen, another brother of Sr. K.M. Mathew. The counsel submitted that the purchasers are not the relations of the assessee as understood in the taxation laws. He also submitted that the assessing officer had valued the shares at the value fixed in the case of another assessee in the wealth tax assessment by applying rule 1D of the Wealth Tax Rules. The counsel submitted that rule 1D of the Wealth Tax Rules was omitted with effect from 1-4-1989 by the Wealth Tax (Second Amendment) Rules, 1989. The counsel also submitted that though the Commissioner (Appeals) had not accepted the case of the assessee that no gift is involved in the transaction the said authority relying on the decision of the Supreme Court in Smt. Kusumben D. Mahadevias case (supra) which held that the appropriate method for valuation of unquoted shares is the yield method and not the break-up method and the shares were valued by applying the yield method. The counsel also submitted that the assessee had also remitted the gift tax due as per the said valuation Though the counsel had argued for the acceptance of the case that there is no gift involved in the transaction ultimately the counsel submitted that the Tribunal was not justified in setting aside the order of the Commissioner (Appeals). The counsel in support of his contentions relied on the decision of the Supreme Court in CGT v. Executors and Trustees of the Estate of the Late Shri Ambalal Sarabhai, (1988) 170 ITR 144 (SC) and also certain observations in the decision of the Supreme Court in Bharat Hari Singhania's case (supra). The counsel had also relied on the decision of the Bombay High Court in Seth Memant Bhagubhai Magatlal Vs. N. Rama Iyer, Gift-tax Officer and another, .

5. On the other hand, Sri P.K.R. Menon, the senior counsel for the revenue submitted that the questions are squarely covered by the decision of the Division Bench of this court in Mammen Methews case (supra) and the decision of the Supreme Court in Bharat Hari Singhania's case (supra). The senior counsel further submitted that the provisions of rule 10(2) of the Gift Tax Rules provides for valuation of unquoted shares by applying the break up method. He in support of the above relied on a decision of the Madras High Court in Commissioner of Wealth-tax and Others Vs. S. Ram and Others, and another decision of the Supreme Court in Salem Co-operative Central Bank Limited Vs. Commissioner of Income Tax,

6. So far as the first question referred to this court is concerned it must be noted that the same was raised against the finding of the Tribunal that a deemed gift is involved in the transaction of the assessee in transferring the shares of the Malayala Manorama Co. Ltd. in favour of his relations by rejecting the contentions of the assessee that he had sold the shares under compelling circumstances and hence no gift exigible to tax. In this regard, it must be noted that both the assessing officer and the first appellate authority did not accept the contention of the assessee that the shares held by him were sold under pressing circumstances. The Tribunal had taken the view that this is a case of sale of shares to the relatives of the assessee and the consideration is less than the face

value itself and is very much less than the market value of the shares computed in accordance with the Wealth Tax Rules. In view of the concurrent finding of fact entered by the two appellate authorities we do not find any reason to interfere with the said finding. In the above circumstances, the first question referred is answered in the negative, i.e., in favour of the revenue and against the assessee.

7. Coming to the second question it is a substantial question of law regarding the application of the provisions of rule 1D of the Wealth Tax Rules for valuation of unquoted shares of a company in the absence of a similar provision in the Gift Tax Rules. If the provisions of the rule 1D of the Wealth Tax Rules are to be applied for valuation of unquoted shares of a company and since rule 1D of the Wealth Tax Rules is mandatory as held by the Supreme Court in *Bharat Singhania's* case the only method of valuation of shares is the break-up method and there is no scope for application of any other method. In the instant case the Commissioner (Appeals) relying on the decision of the Supreme Court in *Smt. Kusumben D. Mahadevias* case (supra) which held that yield method, directed valuation of the appropriate method valued at the shares of the assessee by applying the yield method. Thus the question for consideration is, for the purpose of the Gift Tax Act, which is the method-break-up method or yield method, i.e., to be adopted for valuation of unquoted shares of the Malayala Manorama Co. Ltd.

8. As already noted, the assessing officer had adopted the break-up method by applying rule 1D of the Wealth Tax Rules and the same was affirmed by the Tribunal, However, the first appellate authority had applied the yield method. The question is as to which is the method of valuation that is to be adopted in the instant case. Admittedly there is no specific provision in the Gift Tax Rules for valuation of unquoted shares of a company. It has been so held by this court in *Mammen Mathews* case (supra) and by the Supreme Court in *Bharat Hari Singhania's* case (supra). A Division Bench of this court in *Mammen Mathews* case (supra) had held that in the absence of a provision in the Gift Tax Rules for valuation of shares the provisions of rule 1D of the Wealth Tax Rules providing for valuation of unquoted shares have to be applied and since the said provisions are held to be mandatory no other method is permissible for valuation of such shares. The Commissioner (Appeals), as already noted, had relied on the decision of the Supreme Court in *Smt. Kusumben D. Mahadevias* case (supra) which held that the appropriate method for valuation of shares is the yield method and not the break-up method. Though the Tribunal had adverted to the said decision the same was not applied as according to the Tribunal, the said decisions were rendered on the basis of concession and therefore it must be confined to the facts of that case only and that ratio cannot be extended to similar cases where such concessions have not been made.

9. We will now consider the decisions relied on by the counsel for the parties. In *Mammen Mathews* case (supra) a Division Bench of this court was considering the question as to whether the provisions of rule 1D can be applied for valuation

of shares for the purpose of gift tax. In that case the assessee, who was a director of Malayala Manorama Company Ltd., gifted 1,940 shares of the face value of Rs. 10 each in that company to one Sri. Jacob Mathew on 1-2-1972. The assessee filed the gift-tax return showing the value of the gifted shares as Rs. 19,400. The assessee contended before the Gift Tax Officer that there were no willing buyers in the market for purchasing those shares since the Central Government had introduced a Bill for diffusion of ownership in newspaper industry which sought to limit the holdings of a director and his relations to 5% of the total shares capital. The Gift Tax Officer observed that there was no valid basis for estimating the value of the shares at their face value and determined the value of the gifted shares as Rs. 73,089 at the rate of Rs. 40.25 per share, that being the value arrived at on the basis of the last balance-sheet. He completed the assessment accordingly. The assessee filed appeal before the Appellate Assistant Commissioner, who allowed the appeal substantially by determining the value of the gifted shares at Rs. 12.50 per shareholding that there was some force in the argument of the assessee that the shares had not been listed on the stock exchange and were not easily saleable. The department took up the matter in appeal before the Tribunal and the Tribunal determined the value of the gifted shares at Rs. 30 per share, taking note of the news reports published in the newspapers and the statement made by the Ministers of the Central Government that steps were being taken to have an enactment passed by Parliament for diffusing the ownership in newspaper, industry, etc. Being aggrieved by the said order the department sought reference of certain questions of law. The said application was dismissed. The department then filed O.P. No. 5580 of 1976 before this court and this court by judgment directed certain questions of law to be referred to this court u/s 26(3) of the Gift Tax Act. This court in reference considered the question whether the appellate Tribunal had acted in accordance with law in fixing the share value at Rs. 30. The Division Bench observed that the Appellate Tribunal seems to have thought that it had the freedom to fix the value of the shares gifted without adhering to any principle or following any procedure. The court observed that the Tribunal had no discretion to fix the shares value without following any procedure prescribed or the well-known principle adopted. The court thereafter referred to the provisions of section 6 of the Gift Tax Act and observed that the value of unquoted shares, has to be estimated by the Gift Tax Officer by finding out what price they would fetch if sold in the open market on the date on which the gift was made. The court then noted that there is no rule framed under the Gift Tax Act prescribing the manner in which the value of gifts is to be estimated or determined but under the sister law pertaining to wealth tax, rules have been framed and for all practical purposes that method would hold good in determining the value of gifts for the purposes of the Gift Tax Act. The Division Bench referred to a decision of this court in COMMISSIONER OF WEALTH-TAX Vs. MAMMAN VARGHESE and OTHERS., rendered in the context of the Wealth Tax Rules and observed that the same would be the position here also once the principle that in the absence of rules made under the Gift Tax Act for determining the value of gifts the procedure

prescribed in the rules under the Wealth Tax Act for that purpose would and should be applied is accepted. The Division Bench also referred to the decision of the Mysore High Court in *Controller of Estate Duty, Mysore Vs. J. Krishna Murthy*, which has taken the view that the adoption of rule 1D of the Wealth Tax Rules, 1957 for valuation for the purpose of estate duty and the decision of the Madhya Pradesh High Court in *Shyamsukh Garg Vs. Controller of Estate Duty*, which has also taken a similar view. The Division Bench had also referred to the decision of the Supreme Court in *Commissioner of Wealth Tax Vs. Mahadeo Jalan and Mahabir Prasad Jalan and Others etc.*, and in *Smt. Kusumben D. Mahadevias case (supra)*. Regarding the determination of the value of unquoted shares, in the former decision rendered in the context of the Wealth Tax Act, the Supreme Court held that the Wealth Tax Officer can on an examination of the balance-sheet, ascertain the profit-earning capacity of the concern and, on the basis of the potential yield, fix the valuation and in the latter case rendered in the context of the provisions of the Gift Tax Act itself the Supreme Court expressed the broad principles which should govern the determination of the value for the purpose of the Gift Tax Act. However, the Division Bench has taken the view that the, only method which can be adopted for the valuation of unquoted shares for the purpose of gift tax is as provided under rule 1D of the Wealth Tax Rules which is mandatory. Here, it must be noted that though the Division Bench has referred to the principles of valuation of unquoted shares laid down by the Supreme Court particularly *Smt. Kusumben D. Mahadevias case (supra)* rendered, in the context of Gift Tax Act itself the Division Bench did not choose to apply the principles laid down therein. No reason are also stated for not following the principles laid down therein.

10. The Supreme Court itself in a later case *Executors & Trustees of the Estate of Late Ambalal Sarabhai (supra)* considered the correct principles to be applied for valuation of unquoted shares for the purpose of gift tax. In that case one Sri. Ambalal Sarabhai held 480 shares in an English Company, M/s. Bakubhai and Ambalal Ltd., London, the share capital of which consisted of 2,000 shares of 10 pound each. On 71-10-1964 under eight deeds of gift., the said Ambalal Sarabhai made gifts of the said 480 shares to certain members of his family. In the proceedings for assessment to gift tax respecting the said gifts, the question of the proper basis for determination of the value of the gifts having arisen, the assessee contended that, as the shares were not quoted in the stock exchange, their value be determined on the average of break-up value indicated by the balance-sheets of the company as on 31-3-1964. The former figure was Rs. 507 and the latter Rs. 333 per share, the average of the two being Rs. 420 per share. The Gift Tax Officer did not accept the contentions of the assessee. He proceeded to value the shares at Rs. 507 per share on the basis of the break-up value yielded by and deducible from the balance sheet as on 31-3-1964. The first appeal filed by the assessee was dismissed. The Tribunal in further appeal valued the shares at Rs. 450 each said to represent the break-up value on the basis of the balance sheet as on 31-3-1963. The Tribunal at the instance of the revenue

referred the question as to whether the Tribunal was justified in accepting the valuation of shares as returned by the assessee by adopting the balance sheet as on 31-3-1963 instead of 31-3-1965. In that case there was no dispute with regard to the method of valuation adopted for the reason that both the assessee and the department had adopted the breakup method for the purpose of value of unquoted shares and the only dispute was with regard to the adoption of the balance-sheet as on 31-3-1963. However, when the matter came up before the Supreme Court the senior counsel appearing for the revenue submitted that the case was squarely covered by the pronouncements of the Supreme Court in Mahadeo Jalans case (supra) and Smt. Kusumben D. Mahadevias case (supra) and that the erroneous view of the High Court as to the principles of valuation should, therefore, not remain uncorrected. The Supreme Court also noted that the senior counsel for the revenue in the light of the aforesaid two pronouncements of the Supreme Court found it difficult to support the principles on which the determination of the value of the shares proceeded before the authorities as well as before the Tribunal and the High Court. The Supreme Court observed that the basis adopted by the High Court is clearly unsustainable in the light of the pronouncements of the Supreme Court in the light of the two decisions mentioned above. The Supreme Court thereafter referred to the principles of valuation laid down in Smt. Kusumben D. Mahadevias case (supra) and held that the view taken by the High Court cannot be said to reflect the position in law correctly. Thus the Supreme Court has followed the principles laid down by the Supreme Court in Smt. Kusumben D. Mahadevias case (supra) in regard to the valuation of unquoted shares for the purpose of gift tax.

11. The Supreme Court in Mahadeo Jalans case (supra) was concerned with the question of valuation of unquoted shares in the context of the Wealth Tax Act. The question considered was as to whether the yield method or the break up method which is the appropriate one for valuation of shares. The Supreme Court considered the question whether the principle of "break up value" adopted by the Tribunal for the purpose of valuation of shares of private companies which are not saleable in the open market is sustainable in law. The Supreme Court considered the question regarding the basis of valuation of shares in private limited companies for the purposes of section 7 of the Wealth Tax Act. The court observed that in valuing shares of a limited company certain factors have to be taken into consideration. After referring to the provisions of section 7 of the Wealth Tax Act and certain decisions rendered by English courts the Supreme Court came to the conclusion that where the shares are of a public limited company which are not quoted on a stock exchange or of a private company, their value is determined by reference to the dividends, if any, reflecting the profit-earning capacity on a reasonable commercial basis. But where they do not, then the amount of yield on that basis will determine the value of the shares. In other words, the profits which the company has been making and should be making will ordinarily determine the value. The dividend should help in ascertaining the profit earning capacity as indicated above. If the results of the

two methods differ, an intermediate figure may have to be computed by adjustment of unreasonable expenses and adopting a reasonable proportion of profits. The Supreme Court also observed that the yield method is generally applicable method while the break up method is one resorted in exceptional circumstances or where the company is ripe for liquidation but nonetheless is one of the methods.

12. The Supreme Court in *Smt. Kusumben D. Mahadevias* case (supra) again considered the question as to which method should be adopted for the valuation of shares of a private limited company which is an investment company and at all material times a going concern-whether the profit-earning method or a combination of the break-up method and the profit-earning method. It was observed that a combination of the two methods, viz., the profit-earning method and the break-up-method, though it may sound acceptable as a compromise formula, cannot be accepted as a valid principle of valuation of shares. The question, it must be noted, arose in the context of valuation of shares of a private company for the purpose of gift tax. The question considered was as to whether the shares of an investment company has to be valued only on the basis of the yield without taking into account the assets owned and reflected in the balance-sheet. The revenue then conceded that the decision in *Mahadeo Jalans* case (supra) did lay down certain principles for valuation of shares in a limited company, but its contention was that these principles were no more than broad-guidelines and they did not eliminate the necessity of finding out the appropriate method of valuation in each case which came before the taxing authority and it was necessary to make a reference so that the proper method for valuation of the shares of *Mafatlal Gagalbhai (P) Ltd.* could be determined by the High Court. The Supreme Court therefore considered the question as to what was decided by this court in *Mahadeo Jalans* case (supra) and whether it laid down what method should be applied for valuation of shares of a private limited company which is an investment company carrying on business as a going concern. The Supreme Court noted that the decision in *Mahadeo Jalans* case (supra) was rendered under the Wealth Tax Act and the question was as to what was the appropriate method for valuation of shares of a private limited company for the purpose of wealth-tax. The Supreme Court thereafter noted the six principles of valuation of shares in a limited company laid down in the said decision. It was further noted that the court following the above principles, negated the applicability of the break-up method for valuation of the shares and upheld that view taken by the High Court that the yield method was the proper method for arriving at the valuation of the shares. The Supreme Court thereafter, observed as follows :

".. . where the shares in a public limited company are not quoted on the stock exchange or the shares are in a private limited company the proper method of valuation to be adopted would be the profit earning method. This method may be applied by taking the dividends as reflecting the profit-earning capacity of the company on a reasonable commercial basis but if it is found that the dividends do not correctly reflect the profit-earning capacity because only a small

proportion of the profits is distributed by way of dividends and a large amount of profits is systematically accumulated in the form of reserves, the dividend method of valuation may be rejected and the valuation may be made by reference to the profits. The profit-earning method takes into account the profits which the company has been making and should be capable of making and the valuation, according to this method is based on the average maintainable profits. Of course, for the purpose of such valuation, the taxing authority is not bound by the figure of profits shown in the profit and loss account because it is possible that the amount of profits may have suffered diminution on account of unreasonable expenditure or the directors having chosen to take away apart of the profits in the form of remuneration rather than dividends. The figure of profits in such a case would have to be adjusted in order to arrive at the real profit-earning capacity of the company. It would, thus, be seen that in the case of a company which is a going concern and whose shares are not quoted on the stock exchange, the profits which the company has been making and should be capable of making or, in other words, the profit-earning capacity of the company would ordinarily determine the value of the shares. That is why in Mahadeo Jalans case (supra) the court quoted with approval the following observations of Williams, J. in *McCathie v. Federal Commissioner of Taxation* (69 Commonwealth Law Reports 1) : ...the real value of shares which a deceased person holds in a company at the date of his death will depend more on the profits which the company has been making and should be capable of making, having regard to the nature of its business, than upon the amounts which the shares would be likely to realise upon a liquidation, and stated in no uncertain terms that : The general principles of valuation in a going concern is the yield on the basis of average maintainable profits, subject to adjustment, etc., which the circumstances of any particular case may call for. The break-up method would not be appropriate for valuation of shares of a company which is a going concern, because as pointed out by the court in Mahadeo Jalans case (supra), among the factors which govern the consideration of the buyer and the seller where the one desires to purchase and the other wishes to sell, the factor or break-up value of a share as on liquidation hardly enters into consideration where the shares are of a going concern. It is only where a company is ripe for winding up or the situation is such that the fluctuations of profits and uncertainty of conditions at the date of valuation prevent any reasonable estimation of the profit-earning capacity of the company, that the valuation by the break-up method would be justified " (p. 45)

The Supreme Court then observed that since the provisions for determining the value of an asset is the same in section 6(1) of the Gift Tax Act as it is the same in section 7(1) of the Wealth Tax Act, the principles of valuation laid down in Mahadeo Jalans case (supra) must apply equally in relation to valuation of shares to be made for the purpose of the Gift Tax Act.

13. The Supreme Court in *Smt. Kusumben D. Mahadevias* case (supra) also noted the contention of the revenue that since there is a vital difference between

section 6(1) of the G.T. Act and section 7(1) of the W.T. Act inasmuch as section 6(1) of the G.T. Act is subject, inter alia, to the provision of sub-section (3) of that section and this latter sub-section provides that where the value of any property cannot be estimated under sub-section (1) because it is not saleable in the open market, the value shall be determined in the prescribed manner and rule 10(2) of the Gift Tax Rules prescribed the manner of valuation of shares in a private limited company where the articles of association contain restrictive provision as to the alienation of shares, by providing that in such a case, the value of the shares "if not ascertainable by reference to the value of the total assets of the company, shall be estimated to be what they would fetch if on the date of gift they could be sold in the open market on the terms of the purchaser being entitled to be registered as holder subject to the articles, but the fact that a special buyer would for his own special reasons give a higher price than the price in the open market shall be disregarded". The Supreme Court noted that the argument of the revenue was that Mafatlal Gagalbhai (P) Ltd. was a private limited company and its articles of association admittedly contained restrictive provision as to the alienation of shares and, therefore, rule 10(2) was applicable and according to that sub-rule, the value of the shares was required to be ascertained by reference to the value of the total assets of the company and it was only if the value was not so ascertainable that it could be determined in any other manner. The break-up method was thus, according to this sub-rule, the primary method to be applied for arriving at the valuation of the shares and in the circumstances the Tribunal was wrong in determining the value of the shares by applying the profit-earning method, at least so far as the valuation under the G.T. Act was concerned. The Supreme Court declined to consider this question for the reason that this question did not arise out of the order of the Tribunal. The Supreme Court further observed that the revenue did not raise this question regarding the application of rule 10(2) of the Gift Tax Rules before the Tribunal nor did the Tribunal consider the said question. The Supreme Court observed that it is well settled that no question can be referred to the High Court unless it arises out of the order of the Tribunal and, as pointed out by the Supreme Court in *Commissioner of Income Tax, Bombay Vs. Scindia Steam Navigation Co. Ltd.*, , a question of law can be said to arise out of the order of the Tribunal only if it is dealt with by the Tribunal or is raised before though not decided by the Tribunal and a question of law not raised before the Tribunal and not dealt with by it in its order cannot be said to arise out of its order, even if on the facts of the case stated in the order the question fairly arises.

14. As already noted, the question that arises for consideration in this case is regarding the method of valuation of shares for the purpose of levy of gift tax and as to whether the yield method adopted by the first appellate authority or (by the Tribunal is the proper method or whether) the breakup value method relying on the provisions of rule 1D of the Wealth Tax Rules adopted by the assessing officer and approved by the Tribunal that should be applied. A Division Bench of this court in *Mammen Mathews* case (*supra*) relying on decisions of the

Mysore and Madhya Pradesh High Courts has taken the view that, in the absence of a provision for valuation of shares in the Gift Tax Rules, rule 1D of the Wealth Tax Rules providing for valuation of unquoted shares would apply and in view of the decision of the Supreme Court in Bharat Hari Singhania's case (supra) the provisions of rule 1D are mandatory in nature and consequently the valuation of unquoted shares for the purpose of gift tax has to be made strictly in accordance with the provisions of rule 1D of the Wealth Tax Rules. Though this court in the said judgment had referred to the two decisions of the Supreme Court in Mahadeo Jalans case (supra) and Smt. Kusumben D. Mahadevias case (supra) the Division Bench did not apply the principles laid down by the Supreme Court in those cases. It is not clear as to why the Division Bench did not apply the principles laid down by the Supreme Court in Smt. Kusumben D. Mahadevias case (supra) which arose under the Gift Tax Act itself. The Supreme Court in Smt. Kusumben D. Mahadevias case (supra) has clearly stated that the proper method for valuation of unquoted shares of a private company is the yield method and not the break up value method. This position has been reiterated by the Supreme Court in Executors & Trustees of the Estate of Late Shri Ambalal Sarabhais case (supra) which was rendered in the context of the provisions of the Gift Tax Act itself. Of course this decision is subsequent to the decision of this court in Mammen Mathews case (supra). Thus the position is settled that in the absence of any rules similar to rule 1D of the Wealth Tax Rules regarding the valuation of unquoted shares of a private company the proper method of valuation of unquoted shares is the yield method. We find that though the assessee had relied on the three decisions of the Supreme Court in Smt. Kusumben D. Mahadevias case (supra), Mahadeo Jalans case (supra) and Executors & Trustees of the Estate of Late Shri Ambalal Sarabhais case (supra) the Tribunal had brushed aside all those decisions and had relied on the decision of this court in Mammen Mathews case (supra) and the decision of the Supreme Court in Bharat Hari Singhania's case (supra) to hold that the valuation of equity shares of Malayal Manorama Co. Ltd.'s case has to be made strictly in accordance with the provisions of rule 1D of the Wealth Tax Rules.

15. In view of what we have stated, according to us, the Commissioner (Appeals) was perfectly justified in holding that the yield method for valuation of the unquoted shares is the Proper method for the Purpose of Gift Tax Act. We note here that the senior counsel for the revenue had advanced an argument based on the provisions of Rule 10(2) of the Gift Tax Rules which was available during the relevant assessment year in question. As observed by the Supreme Court in Smt. Kusumben D. Mahadevias case (supra) the contention based on the provisions of rule 10(2) of the Gift Tax Rules cannot be considered in this reference since the revenue had not raised such a contention before the Tribunal nor did the Tribunal decide the said question. That apart, there is absolutely no material on record to show that the provisions of rule 10(2) has any question in this case. For the reason stated hereinabove we answer application in the present case. Hence we decline to consider the said first question referred in the

negative, i.e., in favour of the revenue and against the assessee. We answer the second question in the affirmative, i.e., in favour of the assessee and against the revenue.