(1989) 06 KL CK 0044

High Court Of Kerala

Case No: Income-tax Reference Case No. 142 of 1984

Commissioner of Gift-tax		APPELLANT
	Vs	
T.M. Luiz Kannamally		RESPONDENT

Date of Decision: June 7, 1989

Acts Referred:

- Gift Tax Act, 1958 - Section 2

Citation: (1989) 78 CTR 36 : (1989) 180 ITR 257

Hon'ble Judges: K.S. Paripoornan, J; K.A. Nayar, J

Bench: Division Bench

Advocate: P.K.R. Menon, for the Appellant;

Judgement

K.A. Nayar, J.

The question that arises in this Income Tax, Reference is whether there is an element of gift involved when the assessee retired from the firms in which he had been a partner. The matter arises out of the gift-tax assessment of the assessee for the assessment year 1973-74. The assessee retired with effect from April 1, 1972, from two firms in which he had been a partner. The Gift-tax Officer was of the view that by retiring from the firms, the assessee had relinquished his rights in the two firms without any consideration for the goodwill. Accordingly, he computed the value of the right forgone by the assessee in the two firms at Rs. 35,000 and Rs. 1,35,000, respectively.

2. On appeal, the Appellate Assistant Commissioner held that there was no voluntary act by the assessee in relinquishing his right or interest in the firms and that there was no gift exigible to tax. The Tribunal, on further appeal by the Gift-tax Officer, confirmed the order of the Appellate Assistant Commissioner. Thereafter, at the instance of the Commissioner of Gift-tax, Trivandrum, the following question of law was referred u/s 26(1) of the Gift-tax Act, 1958, to this court for decision :

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that no element of gift was involved when the assessee retired from the firms in which he had been a partner ?"

3. We heard counsel for the Revenue.

4. Counsel for the Revenue referred to the decision of the Supreme Court in Commissioner of Gift Tax, Gujarat Vs. Chhotalal Mohanlal, and submitted that there is a gift of goodwill involved in the case. In that case, there was a partnership by name Chhotalal Vedilal in which three partners, namely, Chhotalal Mohanlal (the assessee), Gunvantilal Chhotalal and Pravin-chandra Vedilal, held seven annas, four annas and five annas share, respectively, in the firm. The firm was reconstituted by Pravinchandra Vedilal retiring from the firm and taking one Ramniklal Chhotalal as a partner with four annas share. The share of the assessee, Chhotalal Mohanlal, was reduced to four annas and the remaining four annas were given to two minor sons of Chhotalal, admitted to the benefits only of the firm, having 12% and 13% shares. The question was whether the benefit of partnership given to the minors was a gift under the Gift-tax Act, 1958. The Supreme Court held that there is a gift of the goodwill. The relevant portion of the observation is as follows (at p. 127) :

"Once goodwill is taken to be property and with the admission of the two minors to the benefits of partnership in respect of a fixed share, the right to the money value of the goodwill stands transferred, the transaction does constitute a gift under the Act. Since there has been no dispute about valuation of the goodwill as made by the Gift-tax Officer, with the conclusion that there has been a gift in respect of a part of the goodwill, the answer to the question referred has to be in the affirmative, that is, that it constitutes a gift under the Act."

5. The question here is entirely different. There was no transfer of the share of goodwill. The assessee only retired from the firm in which he had been a partner. The contention advanced was that on the retirement of the assessee, from the firms, a gift had arisen in respect of the value of the share thus relinquished. It has been held in the decision in Addl. CIT v. Mohanbhai Pamabhai, (1987) 165 ITR 166 (SC) that, when a partner retired from the firm and received his share of an amount calculated on the value of the net partnership assets including goodwill of the firm, there was no transfer of the interest of the partner in the goodwill. The term "gift" has been defined in Section 2(xii) of the Gift-tax Act, 1958, as under :

" ''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."

"transfer of properly" has been defined in Section 2(xxiv) as under :

""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 a 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. Thus, there must be a transfer by one person to another person and that transfer must be of an existing movable or immovable property made voluntarily without consideration in money or money''s worth.

7. In Addanki Narayanappa and Another Vs. Bhaskara Krishtappa and Others, , the Supreme Court had occasion to consider the nature of a partner''s interest in a partnership firm. It was held therein that during the subsistence of the partnership, no partner can deal with any portion of the partnership property as his own. Nor can he assign his interest in a specific item of the partnership property to any one. His right is to obtain such profits, if any, as fall to his share from time to time. Even when a partner assigns his share to another, the assignee obtains only what is permitted by Section 29(1) of the Partnership Act, namely, the right to receive the share or profit. In the decision reported in Commissioner of Gift-tax, Andhra Pradesh Vs. Chalasani Subbayya, , it was held that on the retirement of a partner from a firm, if what is relinquished by the partner is treated as a share in the future profits, the same is not assessable to gift-tax under the provisions of the Gift-tax Act, 1958, because surrender of future profits cannot be treated as a "gift" as defined in Clause (xii) of Section 2 of the Act. Future profits is not property, because once a person ceases to be a partner, the question of his receiving any profits thereafter does not arise. Similarly, by such surrender, there is no diminution in the value of the property of the retiring partner nor is there any increase in the value of the property of the continuing partner or partners as contemplated by Clause (xxiv) of Section 2. Therefore, if the subject-matter of the gift is the surrender of the retiring partner''s share in the profits of the firm, there is no gift of any property nor is there any transfer within the meaning of Clause (xxiv) of Section 2. To the same effect is the decision reported in Addl. Commissioner of Gift-tax Vs. P. Krishnamoorthy and Others, .

8. When a partner retires from a partnership, there can only be a readjustment of the rights between the retiring partner and the continuing partner in the assets of the partnership and there is no element of transfer. The partnership deed in question has not been made part of the record. The orders of the Gift-tax Officer, the order in appeal of the Assistant Commissioner and of the Tribunal do not disclose any factum of reconstitution. The only question posed is whether there is an element of gift involved when the assessee retired from the firm. After retirement, readjustment will have to be made by the remaining partners.

9. In the light of the above, we hold that the Tribunal was right in concluding that no element of gift was involved when the assessee retired from the firms in which he had been a partner. Therefore, our answer to the question is in the affirmative, i.e., in favour of the assessee and against the Revenue.

10. A copy of this judgment under the seal of the High Court and the signature of the Registrar shall be forwarded to the Income Tax Appellate Tribunal, Cochin Bench.