

(1993) 04 CAL CK 0039

Calcutta High Court

Case No: Matter No. 539 of 1988

BIRESWAR SARKAR

APPELLANT

Vs

GIFT TAX OFFICER and Others

RESPONDENT

Date of Decision: April 7, 1993

Citation: (1997) 139 CTR 138 : (1997) 95 TAXMAN 97

Hon'ble Judges: Ruma Pal, J; Mrs. Ruma Pal, J

Bench: Division Bench

Judgement

MRS. RUMA PAL, J. :

In this writ application, the writ petitioner has challenged the notice issued under s. 16 of the GT Act, 1958 (referred to as "the Act"). By the impugned notice, the GTO has sought to assess the petitioner under the Act in respect of the asst. yr. 1982-83.

2. The respondents had disclosed their reasons recorded for the issuance of the impugned notice on 1st Dec., 1987. In that notice, the GTO has said that by an agreement dt. 27th March, 1982, the petitioner had sold his business which he was carrying on under the name and style of "B. Sarkar Johuri" to a private limited company known as B. Sarkar Johuree Pvt. Ltd. By that agreement, the petitioner was to receive a sum of Rs. 3,29,567.09 being the book value of the petitioners assets from the company. It is further stated that the petitioner was "interested from both sides" and that consequently the sale was made at a consideration less than the market price. According to the GTO, the value of assets over liabilities was reduced by a sum of Rs. 68,20,761. The difference between the actual consideration and the market value being considerable, the petitioner was liable to pay gift-tax in respect of such difference under s. 4(1)(a) of the Act. Additionally, a part of the consideration under the agreement for the sale of the assets by the petitioner to the company, a sum of Rs. 94,567 which was to have been received by the petitioner had not been so received. This was also treated as a deemed gift.

It appears that on 28th Jan., 1983, the petitioner filed a return for the asst. yr. 1982-83 in response to the notice under s. 16(1). In the return the taxable gift was shown as nil.

By a letter dt. 15th Feb., 1988, the GTO wrote to the petitioner stating that the sale had been made at book value disregarding the real market value of the difference of assets over liabilities. It is further stated "it is a fact that you were holding controlling shares of B. Sarkar Johuree Pvt. Ltd. which was formed at the same address with the obvious purpose of acquiring your proprietary business". It was further stated that the petitioner was interested from both sides and that the lower consideration was payable because of the petitioners nexus and control over the company. It was further stated that the difference between the market price, the value of property and consideration for transfer which worked out to Rs. 68,20,761 was a deemed gift under s. 4(1)(a) of the Act. It was further stated in that letter that the sum of Rs. 94,567 out of the agreed consideration money had not been received by the petitioner. Therefore, the petitioner was asked to show cause as to why these two sums should not be treated as gift made by the petitioner to the company. The petitioner filed this writ application on 24th Feb., 1988. Affidavits have been filed. The petitioner has, inter alia, submitted that the GTO had wrongfully assumed jurisdiction inasmuch as the conditions precedent to the exercise of the jurisdiction under s. 16 of the Act were absent. These conditions included (1) a finding that there was a transfer within the meaning of the Act, and (2) that there had been a transfer for inadequate consideration. As far as the first precondition is concerned, it is submitted by the petitioner that there had in fact been no transfer because it was the admitted case that the petitioner was the majority shareholder in the company and by transferring the business of the petitioner to the company the petitioner had in fact transferred it to himself. It is submitted that the concept of gift as envisaged under the Act was the transfer by one person to a third party. The petitioner has relied upon the following decisions in this context : [Gift Tax Officer, "C" Ward Vs. Venesta Foils Ltd., I.C.I. \(India\) Pvt. Ltd. Vs. Gift Tax Officer, "B" Ward and Others](#), and [Gift Tax Officer and Others Vs. ICI \(India\) P. Ltd.](#),

As far as the second precondition is concerned, it is submitted that the GTO had taken into consideration, the market rate for the purpose of determining the value of the assets which were transferred but did not adopt the market rate in respect of the shares which were to be received by the petitioner from the company. It is stated that the GTO could not adopt one standard for the assets transferred and adopt another standard for determining the consideration received. Reliance has been placed on the following decisions in this context : [Commissioner of Gift-tax Vs. Indo Traders and Agencies \(Madras\) P. Ltd.](#), and [Commissioner of Gift-tax Vs. Cawasji Jehangir Co. \(P.\) Ltd.](#),

3. The respondents have contended that the adequacy of consideration is to be determined in the facts and circumstances of the case. It must be assumed that the

market value of the assets had been determined in terms of s. 4(1)(a) of the Act r/w Schedule II to the Act r/w Schedule III, r 18 of the WT Act. It is further submitted at this stage that the Court was only required to consider whether the GTO had prima facie material before him, which material was responsible to seek to reopen or make the assessment. It is emphasised that there was no question of any order of reassessment at this stage nor any final finding. It is then submitted that in the facts of the case s. 4(1)(b) of the Act was applicable as admittedly the petitioner had not received the sum of Rs. 94,567.09 which had been stated to be part of consideration. The Courts attention was drawn to the fact that this case of non-receipt of payment had been specifically made out both in the recorded reasons as well as in the letter dt. 18th Feb., 1988, yet there was no hint by the petitioner in the writ petition that the payment had in fact been received. Reliance was also placed on the fact that in paragraph 5 of the assessment order where it has been specifically stated that the payment of Rs. 94,567.09 had not been received. In dealing with this specific case the writ petitioner has not stated in his reply that the amount of money had been so received.

4. As far as the question of transfer was concerned, it is stated that the cases cited by the petitioner referred to a transfer between a holding company and a wholly owned subsidiary. It is submitted that the principle was not applicable in the facts of this case. It is further stated that at the time when the transfer was effected, the petitioner was not the major shareholder of the company. Reliance has been placed on the memorandum of association of the company which showed that the petitioner had only a one-third shareholding in the company. The respondents have also stated that even if the liabilities as stated by the petitioner had been taken into account, the market value as prima facie arrived at by the GTO would only be diminished by an amount of Rs. 10,00,000 leaving a seizable balance justifying a prima facie conclusion that the consideration was inadequate. A complaint has been made that the grounds sought to be taken by the petitioner at the hearing were not in fact taken in the petition, but had been taken only in the affidavit-in-reply.

5. In my view, the writ petitioner is entitled to succeed. It is well established that the Court in exercise of jurisdiction under Art. 226 can consider whether the authorities had wrongfully decided a jurisdictional fact or had acted in excess of jurisdiction without fulfilment of the preconditions on the basis of which the power was to be exercised.

6. Before proceeding further it is to be noted that the respondents handed over a xerox copy of the document dt. 8th Oct., 1987, addressed by the IAC to the GTO. In that document, the IAC has referred to the agreement and stated that the transfer had been effected by the petitioner to the company of which he was the managing director and the key personnel controlling the whole business.

It is further stated that the petitioner had sold the assets of his going business to the company, where he was substantially interested, at the cost price instead of at

the market price. The IAC also stated that the cash amount of Rs. 94,567.09 had not been actually disbursed. The discrepancy between the market price and the book value and the assets was stated to be Rs. 68,20,761. The letter concludes with the following statement.

"This amount is deemed gift in the hands of Shri Bireswar Sarkar, individual, within the meaning of s. 4 of the GT Act. The GTO is also instructed to take into consideration an amount of Rs. 94,567.09, which has not passed on to the assessee for appropriate treatment under this section. Thus proceedings under s. 16 should be initiated without any further delay after recording the reasons in detail".

It, therefore, appears on the showing of the respondents themselves, that the GTO had abdicated his function under s. 16 of the Act and had acted at the instance or in accordance with the instructions of the IAC. The impugned notice is, therefore, liable to be struck down on this ground alone. Furthermore, it appears that it has been the consistent case of the respondent-authorities at all stages that the petitioner was in fact seeking to benefit himself by making the transfer at book value, because he was substantially interested or had the controlling interest in the transferee. The respondent-authorities certainly did not proceed on the basis that the petitioner was a mere one-third shareholder in the transferee-company. The principles enunciated in the decisions relied upon by the petitioner in this connection, therefore, are fully applicable.

7. As far as the submissions regarding the applicability of the provisions of s. 4(1)(b) is concerned, the petitioner stated categorically before this Court that it was a matter of record that the petitioner had in fact received payment of the entire cash consideration as envisaged under the agreement. The Court accordingly directed the respondent-authorities to ascertain this fact, as the proceedings are being determined in connection with the issue of a writ of certiorari. The respondent-authorities have today produced a statement signed by the AAC, Company Circle II (iv), Mr. S. K. Nandy, where he has said "the said cash sum was paid by the company to the vendor Bireswar Sarkar by 31st March, 1985, in full". A copy of the statement is kept in the records of this case.

In that view of the matter, it cannot be said that any part of the consideration under the agreement had not passed or was not intended to pass within the meaning of s. 4(1)(b) of the Act.

8. As far as the question of the inadequacy of consideration is concerned, no answer could be given by the respondent-authorities as to the adoption of different standards for the purpose of evaluating the value of the assets transferred and for evaluating the consideration received. The only submission was that the matter was at a prima facie stage and that the question could be agitated by the petitioner before the GTO in the assessment proceedings.

In my view, the submission is misconceived, as the question of the adequacy of consideration is the basis upon which the GTO could have assumed jurisdiction in the first place. If the same standard of valuation was adopted, both with regard to the assets transferred and the consideration received, it may have been that the GTO would not have found the consideration to be inadequate, particularly, when the bulk of the interest of the company was being held by the petitioner himself. In other words, what was being transferred by the petitioner to the company was being received back by the petitioner from the company in the form of shares. This aspect of the matter was admittedly not considered by the GTO.

9. For the reasons aforesaid, the writ application is allowed. Rule nisi is made absolute. There will be no order as to costs.

10. All parties are to act on a signed copy of the operative portion of this judgment on the usual undertaking.