Commissioner of Gift-tax Vs. V. Chithra

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Court : Kerala

Decided On : Dec-07-2000

Reported in : [2001]249ITR313(Ker)

Judge : S. Sankarasubban and; A. Lekshmikutty, JJ.

Acts : Gift-tax Act, 1958 - Sections 15(3), 16(1), 17, 17(1) and 26(1)

Appeal No. : Income-tax Reference Nos. 157 and 158 of 1998

Appellant : Commissioner of Gift-tax

Respondent : V. Chithra

Advocate for Def. : B. Radhakrishnan, Adv.

Advocate for Pet/Ap. : P.K.R. Menon and; George K. George, Advs.

Judgement :

S. Sankarasubban, J.

1. This reference is made by the Income-tax Appellate Tribunal, Cochin Bench, at the instance of the Gift-tax Commissioner, Trivandrum. The reference applications are under Section 26(1) of the Gift-tax Act, 1958. The assessment years are 1987-88. These arise out of Reference Applications Nos. 60 and 61 of 1998. The questions of law referred to are as follows :

In R. A. No. 60 of 1998 :

'1. 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 firm in which she was a partner ?'

In R. A. No. 61 of 1998 :

'1. 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 firm in which she was a partner ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was right in cancelling the penalty levied under Section 17(1)(a) of the Gift-tax Act, 1958 ?'

2. The facts which gave rise to the above reference are as follows :

The assessee, V. Chithra, was a partner of the firm, G. G. Hospital, Trivandrum. She retired from the firm during the previous year relevant to the assessment year 1987-88 without receiving any share of goodwill in the firm. The Assessing Officer was of the view that when the assessee-partner retired from the partnership, there was relinquishment of her right to share the goodwill of the firm in favour of the existing partners without any consideration and such relinquishment constituted a gift chargeable to tax. The Assessing Officer accordingly determined the taxable gift and levied the gift-tax thereon. The assessee appealed to the Deputy Commissioner of Gift-tax (Appeals). The Deputy Commissioner cancelled the gift-tax assessment relying on the decision in CGT v. T. M. Luiz Kannamally : [1989]180ITR257(Ker) . The Assessing Officer also levied penalty under Section 17(1)(a) for failure of the assessee to file a return of gift even after issue of notice under Section 16(1) of the Gift-tax Act. The assessee appealed to the Deputy Commissioner against the levy of penalty. Since according to the appellate authority, there was no liability to file a gift-tax return, the penalty imposed was cancelled. The Department preferred an appeal against the order of the Deputy Commissioner cancelling the gift-tax assessment made under Section 15(3) and

the penalty levied under Section 17(1)(a). The Tribunal placing reliance on the decision in T. M. Luiz Kannamally's case : [1989]180ITR257(Ker) held that there was no gift. In the above context, the reference applications were made.

3. Learned counsel for the Department, Sri Raveendranatha Menon, contended that it is a case where a partner retired from a partnership. The goodwill was an asset of the firm. The partner was entitled to a share in the goodwill. But the goodwill was parted with without any consideration. According to him, the remaining partners had an advantage in that their shares increased and, hence, there was a transfer of property as per the Gift-tax Act. He submitted that the decision in T. M. Luiz Kannumally's case : [1989]180ITR257(Ker) has been upheld by the Supreme Court in the decision reported in CGT v. T. M. Louiz : [2000]245ITR831(SC) . But, according to learned counsel, so far as this case is concerned there is some difference in fact. There is no evidence to show that any amount was paid to the retiring partner on her retirement. He further relied on another decision of the Supreme Court reported in E. T. Pntil and Sons v. CGT (2001] 247 ITR 588.

4. Sri Thottathil B. Radhakrishnan, appearing for the assessec, contended that it has been categorically held by the Supreme Court that when a partner retires it is not necessary that goodwill should also be transferred to the existing partners and that there was no gift involved with regard to the goodwill concerned, and on the facts of the case and the proposition of law laid down in T. M. Louiz's case : [2000]245ITR831(SC) applies squarely. He further, submits that the decision in B. T. Patil and Softs' case [2001] 247 ITR 588 is not applicable. In T. M. Louiz's case : [2000]245ITR831(SC) , it was held by the Supreme Court as follows (headnote) :

'When a partner retires from a partnership, the partnership continues. The assets and the goodwill of the firm continue to remain the assets and the goodwill of the firm. All that the retiring partner gets is the value of his share in the partnership assets less its liabilities. In such circumstances, even assuming that the retiring partner received less than what was his due, it cannot be held that the difference was something that he had transferred to the continuing partners within the meaning of 'transfer of property' for the purpose of the Gift-tax Act, or that there

was a gift liable to gift-tax.'

5. The facts in that case was that, the assessee was a partner in two firms. The Gift-tax Officer assessed him to gift-tax on the basis that, upon such retirement, there was a gift because the assessee had surrendered his rights in the firms. The assessee appealed and the Appellate Assistant Commissioner held that there was no voluntary act by the assessee and that he had only relinquished his right and interest in the firms, so that there was no gift. Before the Tribunal, it was contended by the Revenue that the amounts taken by the assessee from the firms for his shares therein was less than the market value thereof, since the goodwill of the firm had not been taken into account. There had, therefore, been a relinquishment of his shares, which was a gift. The Tribunal took the view that on retirement, the retiring partner was only entitled to get the value of hisshare in the partnership assets less liabilities. It was, therefore, merely an adjustment of rights between the retiring partner and the continuing partners in the assets of the partnership and there was no element of transfer of interest by the retiring partner to the continuing partners. Before the Supreme Court, its attention was drawn to the decision in CGT v. Chhota-lal Mohanlal : [1987]166ITR124(SC) . Thereafter, the Supreme Court observed that the definition of gift makes it clear that there has to be a transfer by one person to another of movable or immovable property ; such transfer has to be voluntary and without consideration in money or money's worth. When the assessee retired from the two firms, he received the value of his shares therein and the argument was that what he had received was less than the market value of his shares since the goodwill of the firms had not been taken into account. It is in the above context, the Supreme Court had made the observations which had been made above. Thus, the Supreme Court confirmed the decision in CGT v. T. M. Luiz Kannamally : [1989]180ITR257(Ker) .

6. Sri P. K. Raveendranatha Menon contended that the facts of the case reveal that the assessee in T. M. Louiz's case : [2000]245ITR831(SC) received the value of his shares and it was in that context the Supreme Court held that there was no gift. Hence, according to him, in this case, there is nothing to show that any amount was paid and so there is a gift. According to us, the statement of facts do not reflect that no amount was received by the assessee with regard to the value

of the shares in the firm. The assessment order as well as the statement of facts show that the only question raised was whether for the purpose of goodwill any separate consideration should have been paid by the assessee for the purpose of relin-quishment of goodwill. The facts do not show that the retiring partner did not receive any amount for the value of the shares. Hence, we are of the view that facts of this case are covered by the decision of the Supreme Court in T. M. Louiz's case : [2000]245ITR831(SC) . So far as the decision in B. T. Patil and Sons' case [2001] 247 ITR 588 is concerned, that was a case where during the subsistence of a partnership, an asset of the partnership becomes the asset of any partner or partners thereof, then there is a transfer of that asset by the partnership to the individual partner or partners. The Supreme Court held that, when there is a dissolution of the partnership or a partner retires and obtains in lieu of his interest in the firm an asset of the firm, no transfer is involved. But the position is very different when, during the subsistence of a partnership, an asset of the partnership becomes the asset of only one of the partners thereof ; there is, in such a case, a transfer of that asset by the partnership to the individual partner. In that case, the assessee was a partnership firm engaged in the activity of excavating tunnels, it had five partners. During the assessment year under consideration, it transferred certain items of machinery to each of its fivepartners and debited their accounts with the consideration charged therefor. The aggregate of such consideration came to Rs. 1,26,035. This apparently, was the written down value of the machinery in the assessee'sbooks. About three months later, the five partners floated another partnership and brought in the said machinery as their capital contributionthereto, at the value of Rs. 9,48,100. Then, the new partnership firm soldthe machinery to another concern for the price of Rs. 10,76,220. On thesefacts, the Gift-tax Officer came to the conclusion that the assessee hadmade a gift of the machinery to its five partners and the considerationtherefor was much less than the market value as evidenced by the sale ofmachinery to the third party for the sum of Rs. 10,75,220. In the appeal itwas upheld. Then the matter was taken to the Supreme Court. TheSupreme Court held that there was a gift and the appeal was dismissed.

7. The facts of the present case are entirely different from B. T. Patil andSons' case [2001] 247 ITR 588 . In the above view of the matter, weanswer the

questions of law referred in the affirmative and in favour ofthe assessee.