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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX REFERENCE NO. 55 OF 2000

Shri Nusli N. Wadia

... Applicant

vs.

The Commissioner of Income Tax

Central II, Bombay

... Respondent

.....

Mr. Madhur Agarwal a/w. Mr. Atul Jasani for the Applicant.

Mr. Suresh Kumar for the Respondent.

.....

CORAM : M.S.SANKLECHA

& A.K. MENON JJ.

RESERVED ON : 1st MARCH, 2017

PRONOUNCED ON : 10th MARCH, 2017

JUDGMENT (PER A.K. MENON, J.)

1. This Reference under Section 256(1) of the Income Tax Act, 1961 (the Act) by the Income Tax Appellate Tribunal (the Tribunal) seeks our opinion on the following question of law : -

“(i) Whether on the facts and circumstances of the case, the Tribunal was right in holding that the life interest held by the assessee in Neville Wadia Trust No. 2 was an asset coming within the purview of Sec. 49(1)(ii) as it was acquired on the release executed by the previous life interest holder which amounted to a gift and therefore, the cost of the acquisition of asset would be deemed to be the cost of the original settlor ?”

2. This Reference relates to the Assessment Year 1984-85. The brief facts leading to the present Reference as indicated in the statement of case are as under :

(a) By an indenture dated 30th January, 1947, Sir Nusserwanjee Nowrosjee Wadia (Sir Ness Wadia) created an irrevocable trust for the benefit of his son Neville Ness Wadia (Neville Wadia) and his children by settling 1001 fully paid shares of Bombay Dyeing and Manufacturing Co. on trustees of Neville Ness Trust Fund No. 2 (the Trust). The indenture of lease provided that Neville Wadia (son of the settlor) would have life interest in respect of the dividends, interest and income of the settlor for his life. After the death of said Neville Ness Wadia, the property is to be divided into two equal shares and held by another Trust.

(b) On 30th March, 1957, Mr. Neville Wadia relinquished his life interest in the Trust and life interest in the property belonging to the Trust. This on the ground that it did not amount towards transfer. The aforesaid issue was challenged in appeal before the authorities under the Act and finally referred to this Court by the Tribunal. This Court in the above Reference at the instance of the respondent – Revenue in ***Commissioner of Income Tax Vs. Neville Ness Wadia, [90 ITR 155]*** held that surrendering of life interest by the assessee would not amount to transfer of property to his children so as to attract the provisions of Section 16(3)

(a)(iii) of the Indian Income Tax Act, 1922.

(c) During the previous year relevant to assessment year 1984-85 the respondent assessee sold his life interest in the income from the property of the Trust under an Agreement dated 19th March, 1984 to M/s. Kapadia Trading Co. Ltd. and Anr. for consideration of Rs. 21.70 lakhs. The respondent assessee took the stand that the amounts received on transfer of life interest to M/s. Kapadia Trading Co. Pvt. Ltd. would not give rise to any capital gains as the cost of acquisition of life interest in the shares / securities held by the respondent assessee was Nil. Thus, no capital gains could be taxed upon the respondent assessee. In support, reliance was placed upon the decision of the Apex Court in ***Commissioner of Income Tax vs. B.C. Shrinivas Shetty, [128 ITR 294]***.

(d) The Tribunal held that the Settlement Deed by Neville Wadia in favour of Shri Nusli Wadia amounted to a Gift therefore, covered by Section 49(1)(ii) of the Act and concluded that the respondent assessee had become the “owner” of the property under a gift. The cost of property to the previous owner was to be taken as cost of acquisition for determining the capital gains. Consequently, the cost of acquisition to the original owner was to be taken as the cost for arriving at the capital gains tax, if any, payable by the respondent assessee. Consequently, the impugned order of the Tribunal restored the issue to the file of the Assessing Officer to correctly compute the capital gains payable in

accordance with law.

3. Mr. Agarwal, learned Counsel appearing for the applicant assessee in support made the following submissions.

(a) Section 49(1)(ii) of the Act provides the method of determining the cost of acquisition of the capital asset received under a Gift or a Will. While computing the capital gains tax payable on the sale of the capital asset, the cost of acquisition of such asset in the hands of the previous owner of the property would be considered. The life interest in the property of the trust had been sold by the applicant assessee in the subject assessment year, but the life interest was not acquired under a gift and therefore the occasion to apply Section 49(1)(ii) of the Act will not arise. Therefore, the cost of acquisition of the asset by the previous owner of the property received as gift was not relevant.

(b) Relinquishment of life interest by the father of the applicant assessee in the property of the Trust is not a transfer of property from father to son and this has been so held by our Court in Neville N. Wadia (supra).

(c) The normal meaning of “Gift” under the Transfer of Property Act contemplates a transfer to a donee. In the present facts, there is no transfer as held by our Court in Neville Wadia (supra). Thus, it is admittedly not a gift under Section 49(1)(ii) of the Act.

(d) The definition of a “Gift” under the Gift Tax Act will not be applicable to proceedings under the Income Tax Act. In Gift Tax definition of word “Gift” also includes deemed gift where a consideration paid is lower than the consideration payable and the balance is considered to be a deemed gift. The concept of deemed gift is not available under the Income Tax Act, 1961. In support, reliance is placed upon the decision of the Supreme Court in *Khoday Distilleries Ltd vs. Commissioner of Income Tax & Anr [307 ITR 312]*.

(e) Even if the definition of “Gift” as provided under the Gift Tax Act is applied, the sine qua non for the same is for transfer from one person to another of any existing movable or immovable property. In this case, there is no transfer by one person to another. Neville Wadia merely relinquished his life interest in the property. Thus, the occasion to apply the cost to the previous owner of the life interest, in this case, the father, would not arise.

(f) In any event, the cost of acquisition to the father i.e. Neville Wadia of the life interest in the property owned by the Trust was Nil. The grandfather i.e. Ness Wadia who made the Deed of Settlement dated 30th January, 1947 did not himself have any life interest in the property at the time of making the settlement and giving a life interest to Neville Wadia. Therefore, the life interest in the property owned by the Trust was not an existing property in the hands of the settlor of the trust but created for the first time in the hands of Neville Wadia. Thus, it was not an existing

property. In support, reliance was placed upon the decision of the Apex Court in *Khoday Distilleries Ltd.* (supra) wherein it has been held that allotment of rights shares would not constitute transfer as there was no existing property at the time of allotment of the shares. Further, the Court held that there was no element of gift as there was no transfer of property as defined in the Gift Tax Act or even under the Transfer of Property Act. Thus, there was no cost of acquisition of life interest in the hands of his settlor as it was not in existence prior to the creation of the life interest in the hands of the settlor's son i.e. Neville Wadia.

(g) It is submitted that the life interest of Neville Wadia was not “gifted” to the applicant assessee as held by this Court in *Neville N. Wadia* (supra), because there was no “transfer”. The sine qua non for a gift under the Transfer of Property Act as well as the Gift Tax Act being a transfer from one person to another.

(h) In any event, the cost of the life interest in the hands of the Neville Wadia (i.e. father of the assessee) as well as in the hands of the settlor is Nil. Therefore, the decision in the case of *B. C. Shrinivas Shetty* (supra) would apply, as it is not possible to compute / envisage the cost of life interest to which no cost can be attributed would result in the failing of charging section and no capital gains tax would be payable.

4. Mr. Agarwal, learned Counsel on behalf of the applicant-assessee relied

upon the Judgment of this Court in the case of *Neville N. Wadia* (supra) in support of his contention that there was no transfer upon Neville N. Wadia relinquishing his life interests. A Gift would necessarily involve transfer between two people one the donor and the other the donee. The donor would gift a property to the donee who would accept the gift and acceptance is the relevant factor to be considered in the present case.

5. In the present case he submitted that there is no transfer from one person to the other and by virtue of the operation of Trust Deed read with the deed of release, Neville N Wadia while executing the deed of release dated 30th March, 1957 had merely released and discharged the trustees of the Trust Fund. Mr. Agarwal submitted that the expression 'Gift' was not defined in the Act. He also invited our attention to the definition of Gift under the Transfer of Property Act, 1882 which defines Gift in Section 122 of the Act as follows :

“Gift” is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.”

6. Mr. Agarwal submitted that although “Gift” was defined in the Gift Tax Act, the said definition could not be used in the present case since the assessee has not played any active part in receiving the benefits of the release of life interest by Neville N. Wadia. Mr. Agarwal relied upon the decision of this Court in *Neville Wadia* (supra) in which after consideration of the various submissions, the Court had occasion to consider the very trust deed forming subject matter of

the present reference. It considered the fact that during 1988-89 by a deed of release dated 30th March, 1957 Neville Wadia (supra) accelerated the respective life estates to succeed him being his daughter and son. Accordingly he released his interest in the Neville Ness Trust Fund No.2 along with interest and dividends.

7. Mr. Suresh Kumar on behalf of the Revenue submitted that where life interest is followed by another life interest, the transfer by holder of prior life interests extinguishes his interest, the release deed merely transferred the assessee's interest in favour of his minor children, who were owners of the successors life interests. Mr. Kumar further submitted that acceleration of the life interest in favour of the children, one of whom is the assessee amounted to a Gift or in any event a deemed Gift under Section 4(1)(c) of the Gift Tax Act.

“4(1)(c) where there is a release, discharge, surrender, forfeiture or abandonment of any debt, contract or other actionable claim or of any interest in property by any person, the value of the release, discharge, surrender, forfeiture or abandonment, to the extent to which it has not been found to the satisfaction of the Gift-tax Officer to have been bonafide, shall be deemed to be a gift made by the person responsible for the release, discharge, surrender, forfeiture or abandonment...”

8. Faced with this, Mr. Agarwal drew our attention to the decision of this Court in ***Commissioner of Gift Tax, Bombay City- I vs. Mrs. Jer Mavis Lubimoff [(1977)90 VOL 114]*** wherein the Court had occasion to consider meaning of the expression Gift. In the case of Lubimoff (supra) it was contended on behalf of the Revenue that a deed of release or surrender or

relinquishment is a transaction entered into by the respondent Lubimoff with the intent to diminish, directly or indirectly, the value of the property and to increase the value of the property of her daughter Mrs Elizabeth Anne Guhl and that it may not amount to 'transfer of property' within the meaning of Section 2(xxiv)(d) of the Gift Tax Act, 1958. In that case this Court also considered the fact that the expression '*transaction entered into*' used in clause (d) of Section 2(xxiv) of the Gift Tax Act had come up for consideration before the Supreme Court in the case of ***Goli Eswariah's case [(1970) 76 ITR 675]*** wherein the Supreme Court took a view that the words "transaction entered into" contemplated in Section 2(xxiv)(d) of the Gift Tax Act cannot apply to a unilateral act. The act must be one to which two or more persons are parties.

9. The Court found that in the case of Lubimoff (supra) also the deed of release or relinquishment or surrender was executed by Mrs. Jer Mavis Lubimoff alone and nobody else was a party, much less the daughter. Such a unilateral document was not a "transfer of property" within the meaning of Section 2(xxiv) of the Gift Tax Act 1958 and not a gift within the meaning of Section 2(xii) of the said Act.

10. The Court also considered contention of the Revenue that the transaction was a Gift under the provision of Section 4(1)(c) of the Gift Tax Act and after considering the same observed that the answer to such a question would depend as to the whether Gift Tax Officer was satisfied that the deed of release had been

found not to be bonafide. In that case, the Tribunal had found it was impossible to come to such a conclusion that the deed of release was not executed bonafide, a finding which the Court held could not have been challenged in a reference under the Act before the High Court since a reference was restricted to determining questions of law arising from the orders of the Tribunal.

11. Faced with this position Mr. Suresh Kumar submitted that execution of the release deed amounted to transfer of property by the father of the assessee who accelerated the vesting of the life interest by executing deed of release. Mr. Suresh Kumar, submitted in the alternative that the relinquishment of life interest amounted to a transfer and that the question referred by the Tribunal be answered in the affirmative and the cost of acquisition of the capital asset should be computed as the cost to the original Settlor. He relied upon the order of the CIT (Appeals) dated 30th November, 1988 which dealt with the Wealth Tax returns filed by the Assessee till the year 1983-84 in which the value of his life interest was disclosed as Rs.7,39,830/- as on 01st January, 1964. Relying on this Mr. Suresh Kumar submitted that this amount must be taken to be the cost of acquisition for the purpose of determining the value of the capital asset constituting the life interest and transferred in favour of the assessee. He relied upon the provision of Section 2(xii) of the Gift Tax Act and submitted that the release in favour of the assessee was a deemed gift under the provisions of section 4(1)(d) of the Gift Tax Act. Mr. Suresh Kumar submitted in the alternative that the transfer in the present case would be covered by Section 4(1)(d) and / or 4(1)

(e) of the Gift Tax Act.

12. We drew the attention of Mr. Suresh Kumar to the fact that clause 4(1)(c) & (d) of the Gift Tax Act contemplated the Assessing Officer coming to the finding that the release was not bonafide and asked him whether this test of lack of bonafide was satisfied in the case at hand. He fairly conceded that the Assessment Order did not proceed on the basis that the release was not bonafide. We find that the issues stand fairly covered by the decision of Neville Wadia (supra) and we find no reason to take a different view. In our view the concept of a gift clearly demands of a voluntary, conscious and positive act by one person transferring property and without any consideration therefor.

13. Considering the controversy at hand we have examined the various definitions of the expression "gift" as set out below;

(a) "Gift" is defined under Section 2(xii) of the Gift Tax Act 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 moneys worth and includes the transfer or conversion of any property referred to viz. Sect. 4, deemed to be gift under that section".

(b) the Transfer of Property Act, 1882 which defines Gift in Section 122 of the Act as follows :-

"Gift" is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the

donor, to another, called the donee, and accepted by or on behalf of the donee."

(c) Black's Law Dictionary defines "gift" as :-

"The voluntary transfer of property to another without compensation."

(d) The plain dictionary meaning of 'Gift' as given in the Oxford Dictionary is:-

"A thing given willingly to someone without payment."

14. Having considered the various definitions of the expression "Gift" as above and the judicial pronouncements, we are of the view that the relinquishment/surrender in the instant case does not constitute a Gift in the absence of a transfer by Neville Wadia to the assessee nor does it come under Section 4(1)(c), (d) or (e) of the Gift Tax Act.

15. We are unable to agree with the submissions of the Revenue for more than one reason. Firstly, Neville Wadia the releasor was not absolutely entitled to the property nor has he caused the same to be vested in himself jointly with any other person. He has also not caused any appropriation to be made from and within the said property. Moreover, the effect of clause 4(1)(d) of the Gift Tax Act will be deemed to be gift made in favour of the other person by the person who caused the property to be so vested upon appropriation and the Tribunal was not correct in concluding that the assessee had acquired a capital asset by way of gift. The Tribunal's decision to restore the matter to the file of the Assessing Officer is not justifiable. The decision of the Tribunal seems to have been influenced by deeming

provision in the definition of a Gift under the Gift Tax Act. In Neville Wadia (Supra), the revenue contended that the operative words in the release of deed constituted transfer of life interest by the assessee in favour of his daughter and son. The contention was negated by this Court. This Court held that whatever came to the daughter and son of the assessee in that case (the son being the assessee in the present reference) was a result of provisions made in their favour as beneficiaries under the original deed of settlement dated 30th January, 1947 and that by use of the words in the operative clause did not create any interest in favour of the daughter and the son of the assessee and the operative portion of the deed gave Neville Wadia complete release and discharged the trustees from all obligations against them and it was impossible to construe the deed to hold that it was deed of transfer of the life estate of the assessee in favour of his daughter and son. The Court found that the Revenue's contention was entirely unsustainable having regard to the language of the deed.

16. In this case the person who caused appropriation by executing the release is Neville Wadia and it is not the case of the Revenue that Neville Wadia has been held liable to be taxed in relation to the release in favour of his children. As far as clause 4(1)(d) of the Gift Tax Act is concerned the same has no application at all. At best 4(1)(c) of the Gift Tax Act would be of some relevance and we find no reason, given the decision of our Court in Neville Wadia (supra), to hold that there has been a "transfer" or "gift" in favour of the present assessee of any Capital asset, even assuming that the definition of "Gift" under the Gift Tax Act

can be pressed into service by the Revenue.

17. For the aforesaid reasons we answer the question raised for our opinion in the negative i.e. against the Revenue and in favour of the assessee.

18. Reference disposed of in the above terms. There will be no order as to costs.

(A.K. MENON,J.)

(M. S. SANKLECHA,J.)