**BOMBAY HIGH COURT**

Commissioner of Income-tax

Vs.

Late Sir Homi Mehta

I.T.R. No. 12 of 1955

(Chagla, C.J. and Tendolkar, J.)

22.09.1955

**JUDGMENT**

**Chagla, C.J.**

1. The question that arises on this reference is whether the assessee made any profit or gain by a transaction the effect of which was to transfer shares of 20 joint stock companies to a limited company called Homi Mehta and Sons Ltd. Sir Homi Mehta admittedly dealt in shares both ready and forward, and at the material date he. jointly with his sons, held shares in 26 companies including 20 companies with which we areconcerned on this reference, and the cost price of these shares was Rs. 30,45,017/-.
The assessee floated a private limited company with a capital of Rs. 60,00,000/-, and to this company he transferred several businesses in which he had a share and interest and also shares of 26 joint stock companies and the interest of Sir Homi Mehta in various businesses was valued at Rs. 28,08,281-11-0, the value of the shares of 26 joint stock companies was Rs. 40,97,000/- being their market value at the date of the transfer aggregating to RS. 69,05,281-11-0. It appears that Sir Homi Mehta had an overdraft account with a Bank and he had to pay to the Bank a sum of Rs. 9,05,281-11-0. The newly formed company agreed to take over this liability paid discharge it, and, therefore the total after deducting this sum of Rs. 9,05,281-11-0 came to Rs. 60,00,000/-. This amount was paid, as it were, to Sir Homi Mehta, by allotting to him 6000 fully paid up shares of this company of the face, value of Rs. 1000/- each. Sir Homi Mehta did not take all these 6000 shares to himself. He took 5600 shares and at his direction the remaining 400 shares were divided between his four sons, each getting a 100 shares.

2. The contention of the department was that Sir Homi Mehta sold shares of these 26 joint stock companies to this limited company for Rs. 40,97,000/-, that these shares cost him Rs. 30,45,017/- i.e., The result was that he made a profit of the difference between Rs. 40,97,000/- and Rs. 30,45,017/- i.e., roughly between Rs. 10 lacs and Rs. 11 lacs, and this amount was liable to tax.

3. When the matter came before the Tribunal it took the view that only shares of 20 companies were the stock-in-trade of Sir Homi Mehta and therefore the only question that fell to be considered was the alleged profit made by Sir Homi Mehta on the transfer of these shares to the private limited company. On this question before the Tribunal the President and the Accountant Member differed. The President took the view that the amount was Income within the meaning of the Act and liable to tax. The Accountant Member took a different view. The matter was therefore referred to the Judicial Member and the Judicial Member agreed with the Accountant Member and the Commissioner of Income-tax has now come on this reference.

4. It is a trite saying that in income-tax matters one must look at the real nature of the transaction. Whatever legal or technical form a transaction may take, the Court must try and determine what the real transaction was and not the form which the transaction took. It is equally true to say that a transaction for the purposes of income-tax must be looked at from a commercial point of view. In dealing with commercial men in income-tax matters we must try and understand what is the real commercial result of a particular action taken by a commercial man. Equally so, in trying to determine whether a certain transaction resulted in profits, we must come to a conclusion that the transaction resulted in real profits, profits which from the commercial point of view meant a gain to the person who entered into the transaction, not profits from any narrow, technical or legalistic point of view.

5. If we approach this matter from that point of view, the case really does not present; very serious difficulties. We will now concern ourselves only with the shares of these 20 joint stock companies, ignoring for the moment the other items which were transferred by Sir Homi Mehta to the limited company. Sir Homi Mehta owned these shares jointly with his sons. The result of the formation of this private limited company and the so-called sale of these shares to the limited company was that these very shares instead of being held by Sir Homi Mehta and his sons jointly in their individual capacity were held by these very persons constituted into a limited company. We are quite conscious of the distinction which has been constantly emphasised by the Advocate General in this reference between an individual as an entity and a limited company as an entity, and there can be no doubt that in law Sir Homi Mehta and his sons were very different entities from Sir Homi Mehta and Sons Ltd. But what the Advocate General is doing is looking at the matter from a legal aspect, but in truth and in substance the only result of this particular transaction was that Sir Homi Mehta and his sons held these very shares in a different way from the way they held before the transaction was completed. They adopted a different mode, the mode of the formation of the limited company with all its advantages, in order to hold these shares and to deal with these shares and to make profit out of these shares.

6. Let us look at it from a different point of view. Can it be said that in forming this limited company and transferring these shares to it the assessee was undertaking any business activities ? Was this transaction a part of his ordinary business ? It has been found as a fact that the shares of

these 20 joint stock companies were the stock-in-trade of Sir Homi Mehta. Therefore Sir Homi Mehta was a businessman with regard to these shares and he bought and sold the shares of this script. Can it be said that, although these shares were his stock-in-trade, Sir Homi Mehta was dealing with these shares in the ordinary course of business as a businessman when he transferred these shares to the private limited company? Obviously, the answer must be in the negative. The important test of a business activity must always be that an activity is undertaken with the object of making profit. The object may not be realised but a businessman ordinarily and normally enters into a business transaction or undertakes a business activity with the object of making profit. Here again if that test is applied, the department must fail, because it cannot be said that when Sir Homi Mehta formed this limited company and transferred these shares valuing them at Rs. 40 lacs which had cost him Rs. 30 lacs his object in forming the company was to realise the profit of Rs. 10 lacs on these shares. The result of the transaction was that Sir Homi Mehta was neither the richer nor the poorer by the transaction. He was exactly in the same position as he was before the company was formed; the shares were not sold, monies were not realised, the shares remained where they were and on paper in the agreement relating to the so-called sale the valuation of the shares was put at Rs. 40 lacs which was the market value as against the cost price of Rs. 30 lacs.

7. The Advocate General has taken us through the terms of the agreement by which Sir Homi sold these shares to the private limited company and he has emphasised the fact that it is a clear agreement of sale and purchase, that the vendor is Sir Homi Mehta, that the vendee is the limited company, that apart from other things sold to the vendee, these shares were sold at about 40 lacs, and as these shares are the stock-in-trade of Sir Homi Mehta and as there is the sale of this stock-in-trade, and the sale realised about Rs. 10 lacs more than the cost price, there cannot be any doubt that these Rs. 10 lacs constituted the profit or gain of Sir Homi Mehta which is liable to tax. Now, in the first place, we must not go merely by the nomenclature used in the agreement. The mere description of a transaction as a sale does not necessarily make it a sale in substance or in reality. But even assuming that the agreement embodies a real sale between Sir Homi Mehta and the limited company, the significant fact remains, and we shall presently point out how great is the significance of that fact, that the sale is by the vendor to himself. As we have pointed out, although it is Sir Homi Mehta and his sons as individuals who are selling these shares, they are selling these shares to themselves constituted as a different legal entity and taking the form of a limited company. It is well established both in English Courts and in our own Courts that there can be no profit subject to tax when there is a sale by a vendor to himself. A vendor cannot make profit out of himself, and, therefore, the transaction relied upon by the department is not a transaction which was capable of resulting in any profits. In the first place, it is not a sale, it is merely a transfer of shares by Sir Homi Mehta to the limited company and in the second place the transfer is solely for the purpose of bringing about a readjustment of their position as the holder of these shares. Instead of holding these shares and doing business in these shares as individuals with all the consequential liabilities, the readjustment is brought about by which Sir Homi Mehta holds these shares as a shareholder of the limited company along with his sons.

8. There are two important aspects of this transaction which must be borne in mind especially in view of some of the decisions on which the Advocate General relied, to which we shall presently refer. In this transaction no third person has any interest or is involved. It is a transfer in which both as vendor and vendee only the assessees and his sons are interested. The second aspect is that the shares transferred to the assessee represent all the shares which were transferred or sold by the assessee to the limited company. Therefore, this is not a case where shares or stocks constituting the stock-in-trade of the assessee were converted into different snares. Therefore the proportionate value of the shares of the new company which were transferred to the assessee was represented by the value of the shares which the assessee transferred to the limited company.
Only in name the assessee held a different script of shares from the script that he held before the transfer took place. Conceivably we may have a transaction where an assessee may get shares of a company which is carrying on a different business and the activity of that company may have no bearing upon the value of the shares transferred.
But in this case, as we have just stated, the proportionate value of the shares of Rs. 60 lacs which the assessee obtained from the limited company represented the value of the shares transferred by him and the profits or gains of the assessee would depend, in the same way as before the transfer, upon the profits earned on these very shares which were transferred to the newly formed company.

9. Turning to the decisions on which the Advocate General relied, the first is the case reported in *'Californian Copper Syndicate Ltd. v. Harris[1]',* and the Advocate General has strongly relied on this case contending that the facts of this case are almost identical with the facts before us and the decision of the English Court should be applied by us to the present reference. In this case a company was formed for the purpose 'inter alia' of acquiring and re-selling of a mining property, and after acquiring and working various profits it resold the whole property to a second company receiving payment in fully paid up shares of the latter company, and what was held was that the difference between the purchase price and the value of the shares for which the property was exchanged was a profit assessable to income-tax. The first company was not in a position to work the mines and therefore its mining interest was sold to the second company which had a larger capital, and the value of the shares which were transferred to the first company would really depend upon the working of the mines by the second company and the profit made by the second company upon the working of those mines. Therefore, in that respect alone there is a striking difference between the facts of that case and the case before us; and Clerk, L.J. points out in his judgment that the question that has to be determined is whether the gain that has been made is a mere enhancement of value by realizing a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making; and according to the learned Judge it is only, in the latter case that the gain is liable to tax; and as we have already pointed out on the facts of this case it is impossible to suggest that what Sir Homi Mehta did was in an operation of business in carrying out a scheme for profit-making. The Advocate General has relied on the passage in the judgment of Lord Trayner at page 168 :

"No more, in my opinion, does it affect the liability for the tax that the appellants left their profit in the hands of the company they sold to and took the company's shares as their voucher".

According to the Advocate General Sir Homi Mehta left his profit of Rs. 10 lacs with the new company and took the company's shares and, therefore this fact should not affect the liability of Sir Homi Mehta to the payment of tax. But in the case under consideration the new company was not identical with the company which sold its interest, and the shares which the assessee company received from the new company did not represent all the assets transferred by the assessee to the new company. As we have just pointed out, the value of these shares would depend upon the working of the mines by the new company.

10. The second case is the one reported in *'Royal Ins. Co. Ltd. v. Stephen[2]',*

[1] (1905) 5 Tax Cas 159 [2](1928) 14 Tax Cas 22

This is a clear case where the assessee company received different shares from the shares which it originally held. The assessee company which was an insurance company was compelled to accept new railway stocks in lieu of the stocks which it already held, and the new stock had a definite market value on the date of exchange and this value was less than the original value of the stock of the company and the company claimed the difference as a permissible deduction, and this deduction was allowed by the High Court, and what was held was that the surrender of the old stocks enabled the result of the company's holding of those investments to be definitely ascertained and was equivalent to a realization. But if we are right in our view that Sir Homi Mehta in substance did not receive any new shares at all, and what he received represented the same scares which he had transferred to the company, then this decision has no application to the facts of this case. Further the new stock in this case had a definite market value which could be ascertained and the loss or profit could be realized in relation to the old stock held by the insurance company. In the present case it cannot be suggested that the shares of the new company transferred to Sir Homi Mehta had any market value which could be compared with the value of the shares transferred to the company; and Rowlatt, J. at page 27 points out that what the assessee company has now got are stocks and securities of an entirely new body which stocks and shares give it an interest in a different undertaking - an interest in an entirety of an undertaking of which the shares have disappeared represented an interest only in a very small part. It can surely not be said that by acquiring the shares of the new company Sir Homi Mehta got an interest in an entirely different undertaking. The undertaking of the new company was the same as the undertaking which Sir Homi Mehta was himself carrying on as an individual. Rowlatt, J. also points out that with regard to the old shares which the company held there was an end of the old suspense and there was a new starting point with regard to the substituted stocks. Whatever suspense Sir Homi Mehta had with regard to the shares he held and which he

transferred to the company continued unabated and there was no new starting point with regard to the shares of the company which he started.

11. The decision in *'Westminster Bank Ltd. v. Osler[3]',* is also a case dealing with substitution of new shares for old shares. In this case the Westminster Bank which had purchased national war bonds for certain value exchanged them for a conversion loan, and on the basis of this conversion it was held that the Bank had made a certain profit which was liable to tax and the House of Lords held that there had been a realization, for, as soon as new securities were taken in place of the investment in the original war bonds, a new venture was begun in relation to the new holding. Therefore the ratio of this judgment is that there was a new venture with regard to the new holding, a holding which was entirely different from the original holding. Again it is impossible to say that there was a new venture with regard to the shares of the private limited company which were transferred to Sir Homi Mehta.

12. In *'Craddock v. Zevo Finance Co. Ltd[4].',* the assessee company which was an investment dealing company was formed to take over the more speculative investments of another investment company. The investments were purchased by the assessee company at the price at which they stood in the books of the old company,

[3]1933-1 ITR 65 [4](1944) 27 Tax Cas 267

being their cost price to that company, and the consideration that was paid by the assessee company was the undertaking to discharge the liability in respect of the old company's debentures and interest thereon and by the allotment of its authorized capital with the shares credited as fully paid, to the shareholders of the old company, and the question that had to be decided in this case was what was the value of the investments purchased by the assessee company and the Court held that the Crown had failed to establish that the value of the investments was less than the nominal value of the consideration for which the assessee company had received them, viz., the liability to discharge the debentures and interest thereon and the allotment of its share capital as fully paid. It is difficult to understand what bearing this case has to the question that we have to decide because the two companies were not identical and the second company was specially formed to take over the speculative investments of the first company and to carry on that business, and really as pointed out the only question was as to how these investments should be valued at the market rate prevailing in the Stock Exchange or the value put in the agreement itself, and the learned Judges refused to countenance the idea that the price qouted at the Stock Exchange necessarily represents the true value or the real value of the shares.

13. Another decision of the House of Lords *'Gold Coast Selection Trust v. Humphrey[5]',* was cited for the proposition that in order to value an asset it is not necessary that the asset should be immediately realised, and it is urged that although the shares of the new company which were transferred to Sir Homi Mehta might not have been immediately realizable they had still a value and the value was the value put upon it under the agreement. That proposition cannot be

disputed, but as pointed out by Viscount Simon in the judgment at page 26 the Court must be satisfied that the assessee has received a, new valuable asset and even though the asset may not be in the shape of money and even though it may not be immediately realisable it can be valued and the difference between the value of this new asset parted with may be computed for the purpose of ascertaining the gain of the asset, but the very basis of the judgment is that the assessee received a new and valuable asset. In the case before us, in our opinion, Sir Homi Mehta did not receive any new and valuable asset.

14. According to the Advocate General the decision of the Supreme Court in 'Kikabhai's case does not present any insurmountable difficulty in his way. That is reported in *'Kikabhai Premchand v. Commissioner of Income-tax (Central) Bombay*[6]'That was an appeal from a decision of this Court. Sir Kikabhai who was a dealer in silver and shares withdrew certain amount of silver and shares from the stock-in-trade and made a trust in favour of himself, his wife, and children, and We held that the silver and shares ought to be valued at the market price at the date of the withdrawal and if the market price was higher than the cost price the assesses was liable to pay tax on it. The Supreme Court did not accept our view of the law as correct and held that Sir Kikabhai was not liable to tax. At page 510 the learned Judges of the Supreme Court point out :

> "We are of the opinion that the appellant was light in entering the cost value of the silver and shares at the date of the withdrawal, because it was not a business transaction and by that act the business made no profit or gain, nor did it sustain a loss, and the appellant derived no income from it. He may have stored up a future

[5]1949-17 ITR Sup. 19

[6]AIR 1953 SC 509

> advantage for himself, but as the transactions were not business ones and as he derived no immediate pecuniary gain, the State cannot tax them, for under the Income-tax Act the State has no power to tax a potential future advantage. All it can tax is income and gains made in the relevant accounting year".

Therefore the two points emphasized by the Supreme Court with respect, are that the transaction of Sir Kikabhai was not a business transaction and he did not derive any immediate pecuniary gain from that transaction. Both these circumstances are present in this case. As we have already pointed out the transaction of Sir Homi Mehta is not a business transaction and he has derived no immediate pecuniary gain from this transaction. On the same page again the learned Judges say :

> "It is well recognized that in revenue cases regard must be had to the substance of the transaction rather than to its mere form. In the present case disregarding technicalities it is impossible to get away from the fact that the business is owned and run by the assessee himself.

In such circumstances we are of opinion that it is wholly unreal and artificial to separate the

business from its owners and treat them as if they were separate entities trading with each other and then by means of a fictional sale introduce a fictional profit which in turn and in fact is nonexistent". In 'Kikabhai's case' (F) Sir Kikabhai wanted to make a trust in which not only he himself was interested but also his wife and children. In the case before us the two entities are entirely identical, and, to use the language of the Supreme Court, it is entirely unreal and artificial to treat these two identical entities as doing business with each other and by means of a fictional sale producing a fair profit which the income-tax department seeks to tax.

15. Finally, there is a very strong decision of the Privy Council reported in *'Doughty v. Commissioner of Taxes*[7]*',* where two partners sold a partnership business to a limited company in which they became the only shareholders. The sale was of their entire assets, including goodwill, the consideration being fully paid shares, and an agreement by the Company to discharge all the liabilities. The nominal value of the shares was more than the sum to the credit of the capital account of the partnership in its last balance sheet. The Commissioner of Taxes treated the increase in value so shown as a profit on the sale of the stock-in-trade and assessed the appellant to tax. The Privy Council set aside the assessment on two grounds :

> (1) If the transaction was to be treated as a sale, there was no separate sale of the stock, and no valuation of it as an item forming part of the aggregate sold, and
> (2) the transaction was a mere readjustment of the business position of the partners, resulting in no profit; a mere book-keeping entry could not be taken as conclusive evidence of a profit. Although the vendor was a different entity from the vendee, the first being a partnership and the second being a limited company, even so, the Privy Council looked upon the transaction as a mere readjustment of the business position of the partners.

At page 332 the Privy Council points out that as the vendors were the takers of the shares

[7](1927) AC 327

they would gain nothing, because in one sense the vendors were selling to themselves and in place of the partnership assets they were getting the shares of the limited company which represented those very partnership assets. At page 336 their Lordships observe :

> "The two partners made no money by the mere process of having their stock in trade valued at a high rate when they transferred to a company consisting of their two selves".

Sir Homi Mehta made no profit by valuing these shares at Rs. 40 lacs which was the market rate when those shares were not transferred to any third party but were transferred to himself in the shape of a limited company. It may be pertinent to inquire whether if Sir Homi Mehta instead of valuing the shares at Rs. 40 lacs had valued them at Rs. 20 lacs could it have been said that he sold, these shares to the company at a loss and, therefore, he was entitled to claim the loss as a permissible deduction ? The answer that the Advocate General gave to this querry was that in

such a case the Income-tax Department would be entitled to look to the market value of these shares. We fail to understand why. If Sir Homi Mehta was the owner of these shares and was entitled to sell them, it was open to Sir Homi Mehta to sell this property at any price he liked. If the transaction was a 'bona fide transaction - and in this case there is no suggestion that it was not a 'bona fide' transaction - then the vendor was entitled to charge a lower price or a higher price from the vendee. But it is clear that in such a case Sir Homi Mehta would not suffer any loss merely by reason of valuing the shares at a lower value. Equally he makes no profit by valuing them at a higher rate. It makes not the slightest difference to the position whether Sir Homi Mehta got 6000 shares of the face value of Rs. 1,000/- each amounting to Rs. 60,00,000/- or he got 40,000 shares of the face value of Rs. 1,000/- each amounting to Rs. 40,00,000/-. This is nothing more than a mere book entry, to use the language of the Privy Council. The value put upon the shares of the new company in no way increases or decreases the real value of what Sir Homi Mehta got, and what he got was the very shares which he purported to transfer to the limited company but held through a limited company and not through himself as an individual.

16. Ultimately the result must depend upon the view that we take as to whether Sir Homi Mehta made any profit or gain in a commercial sense by transferring these shares to the newly formed limited company. In our opinion he did not make any profit or gain, and, therefore, the mere fact that the shares which he transferred had a market value at the date of the transfer higher than the cost price of the shares did not make Sir Homi Mehta liable to pay tax on the difference.

17. We, therefore, answer the question submitted to us in the negative. The Commissioner to pay the costs.

Answer in the negative.