

BOMBAY HIGH COURT

Commissioner of Income-Tax

Vs.

New Digvijaysinghji Tin Factory

I.T. Ref. No. 14 of 1958

(S.T. Desai and K.T. Desai, JJ.)

03.10.1958

JUDGMENT

S.T. Desai, J.

1. In this reference made at the instance of the Commissioner of Income-tax, Ahmedabad, everything has been said that could possibly have been said on behalf of the Revenue. The assessee is a registered firm of two partners Vithaldas Dhanjibhai and his son Harjivandas Vithaldas carrying on business at Jamnagar in Saurashtra. The relevant assessment year is 1952-53, the accounting year being S Y. 2007 ending on 30th October 1951. A writing was executed on 2nd February 1946 by Vithaldas, the father, in which he declared his intention in writing in order to allay the fears of his son that he might remarry. He stated in that writing that out of his 1/2 share in the profits he would give 1/4th share to the wife of his son and another 1/4th share to Manu, his grand-son, meaning thereby that he would keep to himself only 1/2 of his 8 annas share, in the profits of the partnership. The account, of the partners at the end of S.Y. 2003 showed this. To the credit of the two partners stood the sums 1 of Rs. 8,83,070/-. These sums represented their share of the capital and their accumulation of profits upto the end of S.Y. 2003. On Aso Vad 30, S.Y. 2003 (12th November 1947) entries were passed in the firm's books debiting the account of Vithaldas with a sum of Rs. 8,83,070/- by making corresponding credit entries as we shall immediately state. The whole amount was debited to the account of Vithaldas and on the credit side one them of Rs. 2,25,000/- was then entered in his name. It represented the capital amount which was to continue to the credit of Vithaldas so that really Vithaldas was parting with the sum of Rs. 8,83,070 , minus Rs. 2,25,000/-. The other credit entries are :

Rs. 1,00,000/- credited to Narendrakumar Harjivandas (Minor) (son of Harjivandas)

Rs. 25,000/- credited to Manjula Harjivandas (Minor) (daughter of Harjivandas)

Rs. 25,000/- credited to Pushpa Harjivandas (Minor) (another daughter of Harjivandas)

Rs. 58,070/- credited to Harjivandas Vithaldas (trust a/c)

Rs. 2,25,000/- credited to Mansukhlal Harjivandas (Minor) (Another son of Harjivandas)

Rs. 2,25,000/- credited to the account of Lilavati, daughter-in-law of Vithaldas.

2. Now, one of the principal questions, which we have to decide on this reference is whether a completed and legally valid gift of these amounts was made by Vithaldas in favor of his daughter-in-law and his grand-children. The case for the revenue is that mere book entries cannot result in a gift or a trust. It is an elementary proposition and cannot be disputed by anybody but in this case we have to see whether there are any other facts which go to show that these gifts were legally valid and binding, as has been concluded by the Tribunal. As we shall presently point out, there is in this case other material which has been considered by the Tribunal. On 15th April 1948 Vithaldas executed another writing on stamp paper in which he expressed his intention not to marry again and confirmed the transfers which had been made in the firm's books at the end of S.Y. 2003. There was yet another document executed by Vithaldas on 17th April 1948. That writing which is on stamp paper has been strongly relied on by the assessee in this case and it will be convenient to refer to the same at this stage. It is in Gujerati language and is addressed to Lilavati, the daughter-in-law. It refers to the various gifts which had been made by Vithaldas in favor of his daughter-in-law and his grand-children. The writing as translated is as under :

"Stamp No. 372, Year 1947-48 Printed Block- Nawanagar State. Documentary Stamp ten rupees. Book No. 626 Ve Le (Purchaser) Vithaldas Danjibhai

Resident Nagar.

By Mohan, Dated 10-4-1948

Chan. L.D. Vithaldas Gaubhai.

Nawanagar Stamp Vendor.

Jamnagar, Dated 17-4-1948.

(TO) A. Sau. Lilavati (Jog) giver in writing Jamnagarwala Vithaldas Dhanjibhai (To say) that you are my daughter-in-law and you are equal to my daughter and according to written agreement with Bhai Harjivan of 15-4-1948 and for family peace and for the benefit of you and your children have given gifts out of my property and profits at the end of S.Y. 2003 Rs. 2,25,000/- to you, Rs. 2,25,000/- to Chi. Mansukh, Rs. 1,00,000/- to Chi. Narendra and to Chi. Manju and Pushpa each Rs. 25,000/- and which in the books of our firm have been debited to my account and have been credited to the account of each of you. Some conversation having taken place between us today in that matter once again assure you that there is absolutely no heart-ache in my mind about that giving gifts nor any doubt and I have given all those gifts with pure intelligence and I do not want back even a pie out of it and that to me is equal to cow's beef. Each of you has complete right on those gifts and I had absolutely no right of which be rest assured. Over and above that I am so much satisfied with your Khandani (respectability) and family service that I have also a fond wish that even after my death too my share in the firm be available to you and the children therefore you will not keep in your mind any misgiving of any sort.

I give this writing in the presence of our Mehtaji Jayantilal for your personal satisfaction and give

all of you my blessings. That is all.

Daskat : Sd/- Jayantilal

Dated 17-4-1948

Sd./- Vithaldas Dhanji by his own hand.

(To)

Vadid Pujya Murabhai Sasaraji (Father-in-law)

Vithaldas Seth (Jog).

Your above mentioned gifts are agreeable to me and to me on behalf of my children and give you blessings of mine and my children to you and assure you that I will not falter in serving and nursing you just like your daughter in your old age. Jamnagar : Dated 17-4-1948.

Daskat Jayantilal.

Sd. Lilavati Jagjivandas by her own hand."

3. It will be seen that in this writing Vithaldas reaffirms the gifts. He also states that entries were made in the books of account debiting the amounts to his account and giving credit to the various donees. The reason for the gift is also stated in the writing. He swears solemnly and says that it was not his intention to try to get back a pie out of all he had already gifted to the donees. He also states in the writing that the donees have full title and every right to the gifts made in their favour. The writing as already mentioned is addressed to the daughter-in-law Lilavati. Then at the foot of that writing there is an endorsement made by Lilavati in which she says that she has accepted the gifts on behalf of herself and her children. It is essential to observe at this stage that the genuineness of none of these gifts nor of the entries to which we have referred has been challenged by the Department and we have to examine this case on the footing that the transaction was genuine and bona fide. It may also be mentioned that this writing and the entries were made at a time when there was no income-tax law in Saurashtra though that is a factor which has bearing only on the question of the genuineness or otherwise of the gifts. The donees, after the gifts were made, maintained separate books of account in which the amounts gifts to them were debited to the firm and interest earned was credited. The donees have been assessed every year since 1949-50 to 1955-56 on the interest earned by them on the amount of these gifts, which, as a result of the agreement evidenced by the writing and the book entries was the result of a tripartite transaction between the two partners and the donees.

4. Now, let us see what was the position in the matter of the assessment of the firm itself. In the assessment year 1949-50 deduction was claimed by the firm in respect of interest paid on the amount of these gifts and that was allowed by the Department. In respect of the next assessment year 1950-51, the Income-tax Officer disallowed the amount of interest claimed as a deduction but in appeal the Appellate Assistant Commissioner allowed the deduction and the contention that was raised before the Appellate Assistant Commissioner was mainly on the question of

validity of the gifts and not that the gifts were not genuine. The Appellate Assistant Commissioner held that the gifts had been duly accepted by Lilavati on her own behalf and on behalf of her children. He also held that the documents were all executed prior to the introduction of income-tax in Saurashtra. The department accepted that position also for the subsequent year 1951-52. So that in the first year, the Department did not take any objection to this deduction; in the second year the objection that it took was about the validity of the gifts which was turned down and in the third year it did not take any objection. However for the assessment year 1952-53 when the assessee firm claimed a deduction in respect of interest amounting to Rs. 15,947/- an objection was raised in computing the profits of the assessee under Section 10. The Department carried the matter in appeal to the Tribunal against the orders which were made against it, mainly on the question of validity of the gifts and in that appeal it raised two contentions. One contention was that in the account books of the firm, the amount shown to the credit of the donees was not strictly in the proportion set out in the writing dated 2nd February 1946 and the other contention was that there was no sufficient cash balance with the assessee firm on Aso Vad 30, S.Y. 2003 which could have enabled the donor to make valid and effective gifts by delivery thereof to the donees. In substance, the suggestion was that they were only book entries in the account books of the firm. The Tribunal negatived both the contentions. The Tribunal found that all the gifts had been accepted by Lilavati, the daughter-in-law of Vithaldas, on behalf of herself and on behalf of her minor children and the firm had accepted the transfer by making suitable entries in its books of account. The Tribunal considered the tripartite nature of the transaction contended for by the assessee. It also took into consideration the facts that the donees had maintained separate books of account showing the firm as their debtor and had filed returns and had been assessed for tax on the amount of interest earned by them. It also found that the donees had withdrawn part of the amounts standing to their credit and had built immoveable properties from the income received from the assessee firm.

5. There was another contention of the assessee in the matter of the assessment of the firm for the relevant year. The assessee firm was a partner in another partnership firm of Messrs. Halar Salt and Chemical Works in which it was represented by Harjivandas Vithaldas. Harjivandas representing the assessee firm had a 20 per cent, share in the business of the Halar Salt and Chemical Works. There were four other partners in that business. An agreement was executed on 20th April 1948 in which it is stated by Harjivandas that as it was not possible for him to attend to the business of the Salt and Chemical Works in which he was a partner, he had employed Bachubbai and Balkrishna to supervise the general management of that firm and to attend to the correspondence of that firm on his behalf and they were to be paid remuneration at the rate of 42-1/2 per cent and 7-1/2 per cent, respectively out of the 20 per cent, share of Harjivandas in the partnership firm of Halar Salt and Chemical Works. That agreement states that the remuneration of the two employees was to be paid out of the profits made by the parent firm and in case that firm made a loss the share of the loss was to be carried forward to the next year and the remuneration was to be paid to the two employees only out of profits. In the relevant assessment year, the amount of remuneration of the two employees worked out at Rs. 24,706/- and Rs.

4360/- respectively. After disallowing this remuneration, the assessable income of the assessee firm from the parent firm was computed at Rs. 70,832/-. The Income-tax Officer took the view that, this was not a permissible deduction but was tantamount to an appropriation of profits as in its opinion it was not necessary for Harjivandas to employ any outsider to represent him in the parent firm. In appeal, the Appellate Assistant Commissioner took the contrary view. He reached the conclusion that it was expedient from the commercial point of view for Harjivandas to employ those two persons to look after his interest. He also found that they were not in any way related to him and that the whole arrangement was genuine. According to him, it was an expenditure wholly laid out for the purpose of earning an income and as such it was an allowable deduction in computing the real income of the assessee firm. The Tribunal also took the same view. On both the questions, the Commissioner of Income-tax has come before us on this reference.

6. The two questions which we are called upon to answer are :

"(1) Whether, in computing its income under Section 10, the assessee firm is entitled to claim deduction under Section 10(2)(iii) of Rs. 15,947/- on account of interest paid on moneys transferred by Vithaldas to Narendrakumar, Lilavati, Mansukhal, Mantjula and Pusbpa ?

(2) Whether the amounts of Rs. 24,706/- and Rs. 4,360/- are admissible deductions under Section 10(2)(xv) against the share of income falling to its lot from the firm of Messrs. Halar Salt and Chemical Works ?"

7. It has been argued by Mr. Joshi learned counsel for the Revenue that mere entries in the books of account of the assessee firm are insufficient to constitute a valid gift. On principle we agree that one cannot create rights and liabilities simply and solely by making book entries. A good deal of the argument urged before us really went to question the genuineness of the gifts; but, as we have already observed, that is not the question before us. The question is of the validity of the transactions of gift and not their genuineness.

8. We have here entries made with the knowledge and consent of the two partners where by a large part of the moneys which stood to the credit of one of the partners are debited to his account with such consent and credited to the account of the donees with the intention of making them the creditors of the firm. Had the matter rested at that, different considerations might have arisen but such is not the position. The writing, executed by Vithaldas, to which we have already made reference and particularly the document of 17th April 1948 - once accepted as genuine clinch the whole matter. The donees accepted the transaction of gift, the firm accepted the transaction and not only paid interest on the amounts accepted as due to the donees but also allowed the donees to withdraw moneys from time to time. In case of any gift of such a nature, the Court has to satisfy itself that there is substitution of some other obligation for the original one and that there is the animus novandi. There is in our opinion ample material which satisfies the legal requirements of a completed and valid gift. The rights of the donees were defined and

ascertained; they became creditors of the firm and received interest as such and withdrew part of the moneys accepted and agreed as due to them by the firm as a result of what was a tripartite arrangement. Once you accept the genuineness of the facts relating to the transaction, there is little scope in the facts and circumstances of this case for suggesting that what was done was inchoate or incomplete or invalid in law.

9. Before we proceed to consider another argument of Mr. Joshi, we may observe that two elements were stressed by Mr. Joshi. It was said that when the entries were made in the books of account of the assessee firm, there was no sufficient cash in hand and therefore there could not in law be delivery of the moneys to the donees. The ingredient and question of delivery has its importance in case of gift but in the context of the transaction before us, actual physical delivery is not the sine qua non of the matter. Delivery can be symbolical. This court had occasion to deal with a similar question in *Chimanbhai Lalbhai v. Commissioner of Income Tax (Central) Bombay*¹, and in view of what this Court there decided, it is not necessary to dwell any more on the subject.

10. It was next argued by Mr. Joshi that if we look at the question as formulated, we have to determine whether the requirements of Section 10(2)(iii) are satisfied. The suggestion

¹(1958) 34 ITR 259

was that there was nothing on the record to show that the amounts shown as due to the donees in the books of account of the assessee were "capital borrowed for the purpose of the business" of the assessee. Now, we do not think Mr. Joshi is entitled to raise this contention on this reference. Even so, we have fully heard him on this point. Let us see what happened before the Tribunal. The order of the Tribunal shows that an attempt was made to contend before it that the moneys had not been borrowed for the purpose to the business and therefore did not fall to be allowed under Section 10(2)(iii). This is what the Tribunal has stated in repelling that contention :

"As regards Section 10(2)(iii) the Department does not seem to have challenged that the money had been borrowed for the purpose of the business but the disallowance was made on the short ground that it was an interest payments to a partner. In view of our finding herein above on the first point, this objection of the department no longer survives."

We are in agreement with the view taken by the Tribunal. In surveying the facts, we have already mentioned that in the assessment year 1949-50, the deduction for interest paid was allowed to the assessee firm. In 1950-51 it was disallowed by the Income-tax Officer but on appeal to the Appellate Assistant" Commissioner, the assessee was successful and the interest paid on those amounts were *****lowed in the assessment of the firm. It was held that the gifts had been accepted by the daughter-in-law on her own behalf of her minor children and that the instruments relating to the gifts executed on 2nd February 1946, 15th April 1946 and 17th April 1948 were all executed prior to the introduction of the Income-tax Act in Saurashtra. The Department did not carry the matter any further in respect of the assessment for that year. In respect of the

subsequent assessment year 1951-52 also no objection was taken to the deduction being claimed. It was only for the assessment year 1952-53 which is the subject-matter of this reference that an objection was taken. No objection however was taken by the Income-tax Officer on the ground that the sums shown to the credit of the donees did not amount to "capital borrowed for the purpose of the business" of the assessee; nor does it appear that any such contention was raised before the Appellate Assistant Commissioner and when such attempt was made before the Tribunal, it was bound to be discountenanced, Therefore, the present argument must fail.

11. To turn to the second question which arises on this Reference. In our survey of facts we have already referred to the circumstances which give rise to this question. Here also it may be observed that the genuineness of the payments to the two persons Bachubhai and Balkrishna has not been doubted by the Department, the sole question being whether these payments were allowable deductions. The Tribunal has dealt this contention in the following manner :

"The only other contention is in respect of the deduction of Rs. 24,707/- and Rs. 4,360/- paid to Bachubhai and Balkrishna respectively out of the share of the assessee standing in the name of Harjivandas from Messrs. Halar Salt and Chemical Works. Harjivandas's share was 20 per cent and as he was unable to give any personal attention to this business, an agreement dated 20-4-1948 was entered into with Bachubhai and Balkrishna to remunerate them for the work done on behalf of the assessee at the rate of 42-1/2 per cent and 7-1/2 per cent, respectively, i.e., these two between them were to receive 50 per cent, of the share of Harjivandas. According to the Department this arrangement is tantamount to an appropriation of profits. There is no force in this contention. These two persons are not in any way related to the partners of the assessee firm and it is not denied that they had rendered services. We agree with the A.A.C. that the agreement was a genuine agreement and the impugned sums are admissible deductions."

Learned counsel for the Department has argued that the order of the Tribunal gives no reasoning. We are unable to agree that such is the position. What the Tribunal has done is to state its reasons very briefly in view of the opinion formed by it that there was no force in the contention. Mr. Joshi has drawn our attention to the agreement and argued that it was incumbent on Harjivandas to attend to the business of Halar Salt and Chemical Works. The argument proceeded that under Section 12 of the Partnership Act, it was the duty of Harjivandas to attend personally to the management and affairs of the partnership firm. The argument was that if it was his duty to attend personally to the management and affairs of the partnership firm, he had no right to appoint any representatives and even if he did so and the other partners permitted him to do so he could not claim, as legitimate expenses what he paid them. The short question that we have to consider is whether in a case where it is incumbent on a partner to attend to the management and affairs of the partnership business and he finds he is unable or disabled to do so and if the other partners permit him to have some other person to discharge his duty by the firm or so to say deputise for him, can he or can he not say that the remuneration paid to that person is a legitimate

expenditure. Can it be said in such a case that the agreed payments he may *bona fide* make to such person are no more than appropriation of profits. We see no difficulty in reaching the conclusion that in such a case the payments that would be made would be legitimate deductions under Section 10. Only recently in *Ratilal Daptari v. Commissioner of Income Tax, Bombay City II*², we had occasion to consider a somewhat similar matter and in *Shantikumar v. Commissioner of Income Tax, Bombay City*³, somewhat similar consideration arose before this Court, the question here is not of wiredrawn technicalities or any refined distinction but what is the real income of the partner. The matter has to be approached bearing in mind the commercial aspect of the same. Therefore, in our opinion, the Tribunal was right in the conclusion reached by it that these two sums were legitimate deductions.

12. It was lastly urged by Mr. Josh; that in the question as formulated reference is only made to Section 10(2)(xv) and what we have to decide is the question whether the deductions are permissible under Section 10(2)(xv). It is not necessary to deal with this argument in any detail. It is open to the assessee before us to rely also on any other provision in Section 10. Moreover, there is nothing in the judgment of the Tribunal that its decision was under Section 10(2)(xv). In view of what we have observed it is necessary to reformulate the second question which should be as under :

"Whether on the facts and in the circumstances of the case the amounts of Rs. 2,41,706/- and Rs. 4,360/- are admissible deductions against the share of income falling to its lot from the firm of Messrs. Halar Salt and Chemical Works ?"

² I.T. Ref. No. 9 of 1958

³ 1955-27 ITR 69 : AIR 1955 Bom 234

13. Our answer to the first question is in the affirmative.

14. Our answer to the second question as reformulated is in the affirmative.

15. Commissioner to pay the costs.

Answer accordingly.