

**C.K. Krishnankutty Nair, Olesha Ayurveda Vaidyasala Vs. Commissioner of Gift-tax**

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**Court** : Kerala

**Decided On** : Jul-18-1973

**Reported in** : [1977]110ITR541(Ker)

**Judge** : P. Govindan Nair, Actg. C.J. and George Vadakkal, J.

**Acts** : [Gift Tax Act, 1958](#) - Sections 5(1)

**Appeal No.** : Income-tax Reference No. 144 of 1971

**Appellant** : C.K. Krishnankutty Nair, Olesha Ayurveda Vaidyasala

**Respondent** : Commissioner of Gift-tax

**Advocate for Def.** : P.A. Francis and; P.K. Ravindranatha Menon, Advs.

**Advocate for Pet/Ap.** : C.T. Peter; T.C. Karunakaran; V.M. Kurian;

**Judgement** :

George Vadakkal, J.

1. The question whether Section 5(1)(xiv) of the Gift-tax Act, 1958 (for short 'the Act'), will be attracted when a sole proprietor converts his business into a partnership concern is being raised once again before this court in this case. The principles are by now well-settled by the decisions of the Supreme Court and of this court. In Commissioner of Gift-tax v. Dr. George Kuruvilla : [1970]77ITR749(Ker) it was held that it would be enough to show that the gift was made on grounds of commercial expediency and in order to directly or indirectly facilitate the carrying on of the business, profession or vocation, and that it is not necessary to prove that any benefit actually accrued to the business or that the gift was made with a view to earn profits for the business. The object of better ordering of the business of the assessee by itself was, in this case, considered to be sufficient for claiming exemption under the section. In a subsequent case, Commissioner of Gift-tax v. P. Gheevarghese : [1968]68ITR132(Ker) construing the phrase 'for the purpose of such business, profession or vocation' in Section 5(1)(xiv) of the Act it was held that that expression is wider in ambit than the expression 'for the purpose, of earning profits', and, therefore, will include measures for the preservation of the business and for the protection of its assets and property. Ensuring continuity of the business and prevention of the extinction of the business by death of the sole proprietor were also held to be factors which will attract the provision.

2. The above-said decisions of this court were considered by the Supreme Court in

appeals preferred by the revenue. The Supreme Court in Commissioner of Gift-tax v. Dr. George Kuruvilla : [1970]77ITR746(SC) held that there was no evidence on record to prove that the gift was ' in the course of carrying on the business ' of the donor and ' for the purpose of the business '. The Supreme Court did not, in that case, decide the correctness of the test of ' commercial expediency ' expounded by this court. In the other case, Commissioner of Gift-tax v. P. Gheevarghese : [1972]83ITR403(SC) the Supreme Court said :

' Therefore, on the plain meaning of the word, ' purpose ', as employed in Clause (xiv), the object, plan or design must have connection or relationship with the business. To put it differently, the object in making the gift or the design or intention behind it should be related to the business .....According to a recent decision of this court in Civil Appeals Nos. 1351 to 1353, 1897 and 1241 of 1968 (Commissioner of Income-tax v. Birla Cotton Spinning & Weaving Mills Ltd. : [1971]82ITR166(SC) ) the expression 'for the purpose of the business' is essentially wider than the expression ' for the purpose of earning profits'. It covers not only the running of the business or its administration but also measures for the preservation of the business, protection of its assets and property. It may legitimately comprehend many other acts incidental to the carrying on of the business. Another test that has often been taken into consideration is whether the expenditure was necessitated or justified by commercial expediency.'

3. On the facts of that case it was held that the real intention of the assessee apparently was to take his daughters into the firm with the object of conferring benefit on them for the natural reason that the father wanted to look to the advancement of his daughters. That the assessee retained complete control over the running of the partnership business and that he did not need any help from his daughters, particularly when there was no evidence that he was in a weak state of health, his age being below 50 years, and the fact that there was nothing to show that the daughters had any specialised knowledge or business experience so as to be able to assist in the development or management of the business, were noticed and pointed out by the court in this connection. It was further pointed out that there was no cogent material to come to the conclusion that the gift of Rs. 25,000 to each of the daughters by the assessee was ' in the course of carrying on the business ' of the assessee and was ' for the purpose of the business '.

4. Subsequent to the decision of the Supreme Court this court had again occasion to consider the question in two cases, Commissioner of Gift-tax v. Narayani Amma [1972] KLT 9 (Ker) and Smt. Muttu Ammal v. Commissioner of Gift-tax (ITR No. 43 of 1970). In the former case, it was held, following an earlier decision of this court in Commissioner of Gift-tax v. Narasimhan Potti [1972] 83 ITR 296 that the burden to make out the grounds for claiming the exemption is on the assessee, and that this burden will not be discharged by the mere production of the partnership deed or by the bare statements in the partnership deed that the object was to ensure continuity of the business. It was also pointed out that there should be some integral connection or relation between the making of the gift and the carrying on of the business. In the latter case, I.T.R. No. 43 of 1970 (Smt. Muttu Ammal v. Commissioner of Gift-tax), it was held that the mere existence of natural relationship between the donor and the donee, and the intention that the business should continue is not sufficient to hold that the gift was ' in the course of carrying on of the business '. The question whether the gift was ' for the purpose of the business ' was not considered in this case, since the two requirements were held to be cumulative. In another case also this court had

occasion to consider the scope of Section 5(1)(xiv), viz., in Commissioner of Gift-tax v. Ganapathy Moothan : [1972]84ITR758(Ker) . It was held that the section will not be attracted merely because the property is used for the purpose for which it was used by the donor, or merely because the object is to run the business on a more efficient basis by all the partners engaging in the business.

5. From the decisions referred to above, the following principles can be deduced :

(1) Section 5(1)(xiv) will be attracted only if both the conditions, viz., that the gift should have been made ' in the course of carrying on the business, profession or vocation ' and that it should have been made ' bona fide for the purpose of such business, profession or vocation ' are satisfied.

(2) Further, there should be an integral or real connection between the making of the gift and the carrying on of the business, profession or vocation.

(3) The gift should also have been bona fide for the purpose of such business, profession or vocation. In other words, the gift should have been made in good faith, truly and really for the purpose of the business, profession or vocation. The assessee will have to establish that the gift was necessary and justified, taking into account all the varied circumstances and facts (including not only) commercial expediency.

(4) The burden of establishing grounds for claiming exemption is upon the assessee ; and this burden is not discharged by the bare statement in the partnership deed and the mere production of it.

6. In the light of these principles we will examine the case in hand. The short facts are as follows : M/s. Olesha Ayurveda Vaidyasala was owned by one K. Narayana Pillai. There was a main vaidyasala, at Olesha with 6 branches at various other places. On August 17, 1962, he converted this business into a partnership concern, the partners being himself, his wife, his two sons and five daughters, each of them having a 1/9th share in it. A partnership deed was subsequently executed on March 28, 1963. Narayana Pillai died on January 14, 1965. The Gift-tax Officer determined the value of the gift at Rs. 85,830. In so valuing he included Rs. 30,000 being the sum total of each gifts by Narayana Pillai to his two sons, and four daughters (Rs. 5,000 to each) made on August 16, 1962, the day previous to the formation of the partnership, and Rs. 55,830 being the value of the 7/9ths share of the goodwill, calculated at 3 times the average annual profit of Rs. 23,927 made during the five years immediately preceding the formation of the partnership. The exemption claimed under Section 5(1)(xiv) of the Act was not allowed by the Gift-tax Officer. The Appellate Assistant Commissioner confirmed the order of assessment. On further appeal the Tribunal held that since the two sons had gained experience in the business as employees exemption under Section 5(1)(xiv) was available so far as the transfers in their favour are concerned. To that extent the appeal was allowed. At the instance of the assessee, the Tribunal referred the following question :

' Whether, on the facts and in the circumstances of the case, the gift of the goodwill of the business in favour of the daughters of the donor is exempt from taxation under Section 5(1)(xiv) of the Gift-tax Act '

7. The goodwill of a business by itself is property capable of being gifted cannot be disputed. In Commissioner of Gift-tax v, Ganapathy Moothan : [1972]84ITR758(Ker)

already referred to, Mathew J., relying on the decision of the Supreme Court in Rustom Cavasjee Cooper v. Union of India : [1970]3SCR530 , said as follows :

' Goodwill by itself is property because it had a value of its own apart from the other assets of the firm. When the same business was carried on by the partnership, it had the advantage of the goodwill which the assessee had before he entered into the partnership. Entering into partnership would constitute a transfer by virtue of the provisions of Section 2(xxiv)(b) ; in other words, when the assessee entered into the partnership to carry on the same business there was a transfer of the goodwill; and there is no reason to hold why the transfer did not amount to a gift. '

8. Annexure ' A ' is the partnership deed. Though it is stated in the preamble that the partnership was formed with the intention that ' the business should thrive with the co-operation and support of the proposed partners ' there is no evidence at all as to how the daughters could be of any help to achieve that object. Further, under Clause 6 when a partner retires (which he can by giving 3 months' notice, as per Clause. 4) such partner will be entitled to a fair value of the share calculated on the basis of the capital standing to his or her credit, the share of undistributed profits and losses and the fraction of the goodwill arrived at in terms of Clause 6(c). Besides, under the terms of the partnership deed, the 1st partner, Narayana Pillai, continued to have complete and overall control of the business. In any case, so far as the gifts in favour of the daughters are concerned there is absolutely no material to come to the conclusion that these gifts were necessary and justified in order to carry on the business, or that they were made truly and really for the purpose of the business.

9. Our answer to the question is in the negative, i.e., in favour of the revenue and against the assessee. The assessee will pay the costs of this reference including advocate's fee Rs. 250.

10. A copy of this judgment shall be sent under the seal of this court and the signature of the Registrar to the Appellate Tribunal.

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