Before R. N. Mittal & M. M. Punchhi, JJ.

KEWAL KRISHAN KUTHIALA,—*Applicant.*

versus

THE COMMISSIONER OF GIFT-TAX, JULLUNDUR,—*Respondent.*

G.T. Reference No. 1 of 1977.

March 20, 1984.

Gift Tax Act (XVII of 1958)—Sections 1(2), 2(xii) & (xviii), 3 & 5—Individual making a gift of movable property in the State of Jammu and Kashmir—Such individual a citizen of India but ordinarily residing in territories other than that State—Gift tax—Whether could be levied—Section 3 & 5—Whether to be read together—Axis on which such a tax revoles—Stated.

Held, that the provisions of the Gift Tax Act, 1958 have not been extended to the State of Jammu and Kashmir and as such is an Act which is not applicable to that State. Section 3 of the Act does not stand emperically alone. It is conditioned, as it is subject to the other provisions contained in the Act. When read in the light of the definition of the word 'gift' in section 2 (xii), the charge created under section 3 relates to the transfer by one person to another of any existing movable or immovable property. Though 'gift' in a sense is the tax base, the tax is primarily leviable on the donor, the person who makes the taxable gift in question for the purpose and the word 'person' as defined in section 2(xviii) is patently very wide. Gift tax is not a tax on land and buildings but it is a levy on a particular use which is transmission of title by gift. The Taxable event is the particular use of property by transmission of title by gift. So to say that the taxable event was the property gifted and that by itself was the taxable incident is not correct. Sequally placement of the gifted property *per se whether* "within or without India" is also alien to the concept of section 3 if read in plain terms, and also whether it is movable or immovable. But section 3 being conditioned to other provisions contained in the Act compulsorily needs to be read in conjunction with the other provisions and thus inevitably section 5 comes to the fore with the aid of which the taxable event becomes crystalized. Section 3 says there shall be charge on tax in respect of the gifts and section 5 says gift-tax shall not be charged under this Act in respect of certain gifts. Thus, obviously even on adopting the traditional pragmatic approach in construing the provisions of the Gift Tax Act, section 3 and 5 under legislative mandate have to be read together. Section 5(1)(i) & (ii)(a) says that gift-tax shall not be charged under the Act in respect of the gifts made by any person of immovable property situate outside the territories to which this Act extends as also of movable property situate outside the said territories unless the person being an individual, is a citizen of Indian and is ordinarily resident in the said territories. When this Act does not extend to the State of Jammu and Kashmir,

the relevant provisions can easily be substitutedly paraphrased to convey the legal statement that gift-tax shall not be charged under the Act in respect of the gift made by any person of movable property placed in the State of Jammu and Kashmir if that person being an individual, is a citizen of India and is ordinarily resident in the State of Jammu and Kashmir. Thus, if a person who is an individual, is a citizen of India and is ordinarily a resident in the State of Jammu and Kashmir, gift-tax is not to be charged from him in respect of the gifts made by him of movable property in the State of Jammu and Kashmir. But if that person being an individual and citizen of India is ordinarily a resident in the territories other than Jammu and Kashmir that is, the remaining India, to which the Act extends, then he is certainly liable to pay tax on the conjoint reading of sections 3 and 5 of the Act. There are no means of escape for him.

(Paras 5 & 6).

G.T. Reference made by the Income tax Appellate Tribunal Amritsar referring the following question to this Hon'ble High Court for its opinion arising out of G.T.A. No. 1(*ASR*) 1975-76. *Assessment year* 1973-74:—

"Whether, on the facts and in the circumstances of the case, **the Tribunal has rightly held the gift of Rs. 20,000 made** in the State of Jammu and Kashmir, liable to Gift tax in **the hands of the assessee?"**

B. S. Gupta, Advocate with S. K. Mittal, Advocate, *for the Petitioner.*

Ashok Bhan Sr. Advocate with A. K. Mittal, Advocate, *for the Respondent.*

JUDGMENT

M. M. Punchhi, J.

(1) The Income Tax Appellate Tribunal, Amritsar. has referred to us the following question of law for our opinion:—

"Whether on the facts and in the circumstances of the case, the Tribunal has rightly held the gift of Rs. 20,000 made in the State of Jammu and Kashmir, liable to Gift tax in the hands of the assessee?"

(2) The relevant facts which surface the question are these : The assessee Shri Kewal Krishan Kuthiala bears the status of an

individual and is resident of Hoshiarpur. He field a return of gift on 29th February, 1973, declaring the taxable gift at Rs. 15,000. A revised return was filed on 18th October, 1973, declaring the taxable gift as nil. The assessee earlier had sold land situate in Jammu and Kashmir and credited the sale proceeds thereof in his account maintained with Laxmi Commercial Bank, Jammu. Out of those deposits the assessee gifted an amount of Rs. 20,000 to his daughter, namely, Miss Kum Kum Kuthiala, by means of a cheque which was credited in her account in the same Bank. The gift concededly had been made in the State of Jammu and Kashmir. In these circumstances, the assessee claimed that the gift was exempt. In support thereof he relied upon the certificate issued by the Jammu and Kashmir Government that the assessee was a subject of that State.

(3) The Gift Tax Officer, however did not allow exemption. In his view section 5(1)(ii) of the Gift Tax Act did not permit the assessee to have the gift as exempt. The assessees appeal however was allowed by the Appellate Assistant Commissioner who took the view that no charge under section 3 of the Act was created, inasmuch as, the subject matter of the gift was not situated within the taxable territories as defined in Sub-section (2) of Section 1. As a sequel thereto, it was held that unless charge was created, it was futile to make scrutiny of the exemption under Section 5(1)(ii) of the Act. In this view of the matter the assessment was set aside. The Revenue took the matter in appeal before the Tribunal.

The view of the Appellate Assistant Commissioner was upset and that of the Gift Tax Officer restored. The Tribunal observed—"the exemption in respect of the movable property situated in Jammu and Kashmir, is not absolute or unqualified, but it is subject to certain conditions. If the movable property outside India is owned by an individual who is both a citizen and at the same time 'ordinarily resident' in India, than the gift-tax will be chargeable". Mr. K. K. Kuthiala, the assessee, than approached the Tribunal to refer the afore-mentioned question of law to this Court.

(4) Learned counsel for the assessee urged that the Appellate Assistant Commissioner has correctly approached the subject by giving paramountcy to section 3 of the Act, whereas the Tribunal has without any sound reasoning given that status to section 5(1)(ii) of the Act. He maintained that section 3 was the charging section,

and unless the gift squarely fell within that section the other provisions of the Act could not be activated. Basis for the argument was twinfold. Firstly, it was contended that the Gift Tax Act, 1958 was a legislative measure enacted by the parliament under entry 97 of List I of Schedule VII to the Constitution, that is, under its residuary powers and as such the said Act could not apply to the State of Jammu and Kashmir under Article 370 of the Constitution. Secondly, it was contended that the Act otherwise had not been extended to the State of Jammu and Kashmir under section 1(2) of the Act. On applicability of either principle it was asserted that the subject of legislation under the Constitution stood curtailed. And further, in any case, under the legislative measure, gift being the tax base, the question of any exemption arising under Section 5 cannot crop up on the facts and circumstances as of the case. Reliance was placed on *Second Gift Tax Officer, Mangalore* v. *D. H. Nazareth*, (1) in which it was held that the Gift Tax Act had been enacted under the residuary power of the Parliament. Reliance was also placed on *P. C. Oswal* v. *S. P. Mehta, Wealth Tax Officer*, (2) in which the Jammu and Kashmir High Court has taken the view that the Wealth Tax Act 1957 had been enacted under the residuary powers of the Parliament but not in relation to Jammu and Kashmir, because the residuary power of legislation, unlike other States in India, belongs to the Jammu and Kashmir State Legislature and not the Union Parliament. In that case the said Act in so far as it purported to be applicable to the Jammu and Kashmir was held *ultra vires* the Constitution of India, as applicable to the said State. On the same parity of reasoning it was asserted that the Gift Tax Act was also *ultra vires*. Learned counsel for the Revenue, on the other hand, challenged the submissions of the learned counsel of the assessee from all possible angles.

(5) It is beyond doubt that the Gift Tax Act has been enacted by the Parliament under its residuary powers of legislation under Entry 97 List I of Schedule VII. It is also beyond doubt that it extends under section 1(2) to whole of India except the State of Jammu and Kashmir. In this situation it is futile to go into the question whether the Act as such could or could not be enacted for the State of Jammu and Kashmir. The fact remains that it has not been tended to the State of Jammu and Kashmir and as such

(1) (1976) 67 I.T.R. 713.
(2) (1983) 142 I.T.R. 574.

is an Act which is not applicable to that State. The point to be seen is on what axis does the tax revolves and does it revolve on an incident happening in a territory which falls out of the purview of the Act.

Section 3, the charging section, reads as follows:—

> "3. *Charge of gift-tax.*—Subject to the other provisions contained in this Act there shall be charge for every assessment year commencing on and from the 1st day of April, 1958, a tax (here-in-after referred to as gift-tax) in respect of the gifts, if any, made by a person during the previous year (other than gifts made before the 1st day of April, 1957), at the rate or rates specified in the Schedule."

This section, as is plain, does not stand emperically alone. It is conditioned, as it is subject to the other provisions contained in the Act. The use of the words 'subject to" has reference to effectuating the intention of the law, which is "conditional upon". See in this connection *K. R. C. S. Balakrishna Chetty & Sons & Co.* v. *The State of Madras,* (3) in which a provision of the Madras General Sales Tax Act, 1939, came to be construed and it was held that the words "subject to "meant" conditional upon". Section 3 is thus conditioned upon the other provisions contained in the Act. In addition thereto the definition of the word "gift" in section 2(xii) is that it means the transfer by one person to another of any existing movable or immovable property made voluntarily and without consideration in money or money's worth, and includes the transfer or conversion of any property referred to in section 4, deemed to be a gift under that section. Read in the light of that definition the charge created under section 3 relates to the transfer by one person to another of any existing movable or immovable property. Though "Gift' in a sense is the tax base the tax is primarily leviable on the donor, the person who makes the taxable gift in question for the purpose. And the word "person" as defined in section 2(xviii) is patently very wide. It is held by the Supreme

(3) (1961)(II) S.C.R. 736.

Court in *D. H. Nazareth's case* (supra) that Gift-tax is not a tax on lands and buildings as such but is a levy upon a particular use, which is transmission of title by gift. So it is not difficult to discern from the scheme of the Act and as thus spelled out by the Supreme Court, that the taxable event is the particular use of property by transmission of the title by gift. So to say that the taxable event was the property gifted and that by itself was the taxable incident is not correct. Sequally placement of the gifted property *per se* whether "within or without India" is also alien to the concept of section 3 if read in plain terms, and also whether it is movable or immovable. But as said before section 3 being conditioned to other provisions contanied in the Act compulsorily needs to be read in conjunction with the other provisions and thus inevitably section 5 comes to the force with the aid of which the taxable event becomes crystalized. Section 3 says there shall be charge on tax in respect of the gifts, and section 5 says gift-tax shall not be charged under this Act in respect of certain gifts. Thus obviously even on adopting the traditional pragmatic approach in construcing the provision of the Gift-tax Act, sections 3 and 5 under legislative mandate have to be read together.

S.6. *Exemption in respect of certain gifts Section* 5(1)(*i*) & (*ii*):—

5(1) Gift-tax shall not be charged under this Act in respect of gifts made by any person—

"(i) of immovable property situate outside the territories, to which this Act extends ;

(ii) of movable property situate outside the said territories unless the person—

(a) being an individual, is a citizen of India and is ordinarily resident in the said territories, or

(b) not being an individual, is resident in the said territories, during the previous year in which the gift is made."

(6) Plainly section 5(1)(i) & (ii)(a) says that gift-tax shall not be charged under the Act in respect of the gifts made by any person of immovable property situate outside the territories to which this Act extends as also of movable property situate outside the said terrritories unless the person being an individual,is a citizen of India and is ordinarily resident in the said territories. When this Act does not extend to the State of Jammu and Kashmir, the relevant provisions can easily be substitutedly paraphrased to convey the legal statement that gift-tax shall not be charged under the Act in respect of the gifts made by any person of movable property placed in the State of Jammu and Kashmir if that person being an individual, is a citizen of India and is ordinarily resident in the State of Jammu and Kashmir. Thus, if a person who is an individual, is a citizen of India and is ordinarly a resident in the State of Jammu and Kashmir, gift-tax is not to be charged from him in respect of the gifts made by him of movable property in the State of Jammu and Kashmir. But if that person being an individual and citizen of India is ordinarily a resident in the territories other than Jammu and Kashmir that is, the remaining India to which the Act extends, then he is certainly liable to pay tax on the conjoint reading of Sections 3 and 5 of the Act. There are no means of escape for him. In the instant case, the assessee concededly is a resident of Hoshiarpur and had submitted himself to the jurisdiction of income-tax officer Hoshiarpur as a resident and ordinarily resident in that territory. He was thus clearly within the grip of the tax net. Placement of the corpus of the gift in the State of Jammu and Kashmir, in his case, was thus of no avail. Equally so was the certificate issued by Jammu and Kashmir Government that he was subject of Jammu and Kashmir State.

(7) Thus on the view above taken we have no hesitation to answer the question afore-posed in the affirmative, that is against the assessee and in favour of the Revenue. There shall, however, be no order as to costs.

R. N. Mittal, J—I agree.

N.K.S.