7 SCOB [2016] HCD 148

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 14059 OF 2012

Asoke Das Gupta
-------Petitioner.

Versus

Ministry of Finance and others
---------Respondents.

Ms. Nazmus Saliheen, Advocate,
------- For the Petitioner.

Mr. Saikat Basu, A.A.G.
----For the Respondents

Heard on: The 20.11.2013, 14.11.2013
And Judgment on 25.11. 2013.

Present:
Justice A.F.M Abdur Rahman
And
Justice Kashefa Hussain

Gift Tax Act, 1990
Section 4(ja)
And
Income Tax Ordinance, 1984
Section 53M:
The intention of the legislators when the Gift Tax Act, 1990 was enacted was to exempt certain persons from tax if the gift was made to the persons stated in Section 4(ja) of the Gift Tax Act, 1990. Moreover, we have also found that the impugned Section 53M of ITO was only inserted in the Finance Act 2010, while the Gift Tax Act, which was enacted in 1990, is an earlier law and is still very much a provision of law, since no amendment or changes to the law have been brought to till present. Therefore the provisions the Gift Tax Act, 1990 shall prevail over any insertion that might have been brought into the ITO 1984 and there can be no room for any presumptions or assumptions that tax must be paid by all in case of any gift which might be made to any person irrespective of his or her relationship with the donee of the gift and to presume such a thing is a serious misinterpretation of the law and is a misinterpretation of the intention of the legislators and shall result in serious miscarriage of justice. ... (Para-15)

Income Tax Ordinance, 1984
Section 48(2):
There cannot be any doubt left that tax may be imposed only on 'income'.
... (Para-21)

Income can arise out of a transferor of any capital asset only if any profit or gain has accrued to the transferor of the asset. And therefore it is only logical to conclude that if no "profit" or 'gain' has accrued to the transferor there can be no "income" and if there is no "income" there can be no question of the transferor being subject to tax.
... (Para-23)

Income Tax Ordinance, 1984
Section 53M Explanation 1:
This section in our opinion is against the whole spirit of the Ordinance. Because none of the terms mentioned here including gift are transfers for consideration and none of these modes of transfer contemplate income of any kind, in whatever form on the part of the transferor. The transferor or donor in performing his act of transfer does not receive anything in return and therefore these modes of transfer being transfers by way of gift, bequest etc. can under no circumstances be the source of "income" of any kind.
... (Para- 27)

Gift Tax Act, 1990
Section 4
And
Income Tax Ordinance, 1984
Section 53M:
Section 53M Explanation 1 is contrary to the rest of the provisions of the ITO, 1984, being against the sprit and intent of the Ordinance and also contrary to the Section 4 of Gift Tax Act, 1990. Therefore the impugned collection of advance tax against transfer of shares to the daughter of the petitioner is unlawful and without lawful authority.
... (Para-29)

Judgment

Kashefa Hussain, J:

1. This Rule Nisi was issued calling upon the respondents to show cause as to why Section 53M of the Income Tax Ordinance, 1984 (hereinafter called ITO 1984) shall not be declared contrary to section 4(ja) of the Gift Tax Act, 1990 and shall have no legal effect and (B) why the collection of advance tax of Tk.63,69,350 against transfer of 51,30,000 shares of One Bank Limited of Tk.10 each to the petitioner's daughter shall not be declared without lawful authority and shall be refunded against the petitioner's TIN number 142-100-0038 and/or such other or further order or orders passed as to this Court may seem fit and proper.

2. The facts in short relevant for the purpose of the case are that the petitioner Mr. Asoke Das Gupta being Hindu by religion is a reputed businessman and regular income tax payee holding Tin Number 142-100-0038 and is a sponsor shareholder and Vice-Chairman of One Bank Limited, a Public Limited Company listed with the Stock Exchange. The Respondent No.1 is the Ministry of Finance, Represented by its Secretary, the Respondent No.2 is the Chairman, the National Board of Revenue. The Respondent No.3 is the Member (Income Tax), National Board of Revenue, the Respondent No.4 is the First Secretary, Income Tax Regulation and Budget, National Board of Revenue, the Respondent No.5 is the 2nd Secretary, Income Tax Regulation and Budget, National Board of Revenue. The Respondent No.6 is the Commissioner of Tax, Large Taxpayer Unit (LTU). The Respondent No.7 is the Deputy Commissioner of Tax, (LTU) and they are engaged in the collection of National Revenue and monitoring and the Respondent No.8 is the Dhaka Stock Exchange hereafter called DSE, represented by its Chief Executive Officer (CEO) and is engaged in monitoring stock trading and collection of tax arising out of the stock trading.

3. The petitioner being a sponsor shareholder and Vice-Chairman of One Bank Limited, a listed company listed with the Respondent No.8, Dhaka Stock Exchange. The petitioner holding TIN No.142-100-0038/LTU/Dhaka is a sponsor shareholder and Vice-Chairman of

One Bank Limited. The petitioner gifted and thereupon transferred 51,30,000 shares of One Bank Limited of Taka 10 each to his daughter Anannya Das Gupta by way of gift out of his own shares. Since the process of transfer is carried out through off market settlement it requires prior approval from the Respondent No.8 Dhaka Stock Exchange (hereinafter called DSE). Therefore the petitioner applied to the Respondent No.8 to approve the transfer and further advised to pay an advance income tax as per Section 53M of the Income Tax Ordinance, 1984. The petitioner acting upon such advice deposited an Advance Income Tax at (AIT) of an amount of Tk.63,69,350 through three pay orders to the Respondent No.8 DSE on 09.05.2012, 15.05.2012 and 21.05.2012 respectively.

4. The petitioner asserted in the Writ Petition that he has not derived any income out of this transfer by way of gift to his daughter and the petitioner alleges that section 53M of the Ordinance is contrary to Section 4(ja) of the Gift Tax Act, 1990 and he also states that in the Demanded of Justice Notice to the respondent he claimed refund of Tk.63,69,350 from the respondents, but he has still got no response against that notice. The petitioner in his application states that he is aggrieved by such contrary provision of section 53M of the Ordinance, which empowers the Respondent No.8 to collect advance income tax against the transfer of shares by the sponsor shareholder by way of gift. The petitioner also states that Section 53M of the Ordinance is contrary to Section 4(ja) of the Act and shall have no legal effect. He states that Section 4(ja) of Gift Tax Act clearly makes any transfer to wife, son, daughter, father, mother, original sister and brother by way of gift tax free and therefore this provision shall be applicable for every transfer by way of gift. The petitioner states that since Section 4(ja) of Gift Tax Act, 1990 is the governing law for tax against gift, consequently Section 53M of the Ordinance being contrary to Section 4(ja) of the Act of 1990 shall have no legal effect. He also states that the Gift Tax Act being the governing law for gift tax therefore the Income Tax Ordinance shall not be applicable for any transfer by way of gift.

5. That notice of the writ petition filed by the petitioner was duly served upon the Respondent pursuant to which the learned Deputy Attorney General Mr. Rashed Jhangir along with Mr. Saikat Basu representing the respondents filed Affidavit-in-Opposition on the Respondent's behalf. In the affidavit-in-opposition it is stated inter alia, that there is no ambiguity in Section 53M of the Income Tax Ordinance, 1984 and the said Section 53M clearly states that tax shall be collected at the rate of 5% if and when a sponsor shareholder transfers securities. In the Respondents in the Affidavit-in-opposition refers to the explanation given in Section 53M ITO, 1984 which reads thus;

> " Collection of tax from transfer of securities or mutual fund units by sponsor shareholders of a company etc.-
>
> The Securities and Exchange Commission or Stock Exchange, as the case may be, at the time of transfer or declaration of transfer or according consent to transfer of securities or mutual fund units of a sponsor shareholder or director or placement holder of a company or sponsor or placement holder of a mutual fund listed with a Stock Exchange shall collect tax at the rate of five per cent on the difference between transfer value and cost of acquisition of the securities or mutual fund units.
>
> Explanation. – For the purpose of this section ---
>
> (1) 'transfer' includes transfer under a gift, bequest, will or an irrevocable trust;

> (2) 'transfer value' of a security or a mutual fund unit shall be deemed to be the closing price of securities or mutual fund units prevailing on the day of consent accorded by the Securities and Exchange Commission or the Stock Exchange, as the case may be, or where such securities or mutual fund units were not traded on the day such consent was accorded, the closing price of the day when such securities or mutual fund units were last traded. "

6. The Respondents in their Affidavit-in-opposition on this explanation given in Section 53M and upon such reliance go onto state that the transfer is taxable at source by the designated authority. That it is stated in the Affidavit-in-opposition that the petitioner may be correct in so far that a gift from a father to a daughter is exempt under Section 4(ja) of the Gift Tax Act, 1990. However the respondents further persuade that this exemption under Section 4(ja) of Gift Tax Act, 1990 that this does not automatically exclude the transfer from the imposition of Income Tax under the ITO, 1984. The Respondents also state that exemption under Section 4(ja) of the Gift Tax Act, 1990 is irrelevant and immaterial for the purpose of income tax where transfer by way of gift entails the imposition of Income Tax according to the provisions of Section 53M of the Income Tax Ordinance, 1984 and the Respondent further insist that this being the law of the land should be abided by all citizens.

7. Ms. M. Nazmus Saliheen the learned Advocate appeared on behalf of the petitioner while Mr. Shaikat Basu, the learned Assistant Attorney General appeared on behalf of the Respondents resist the Rule.

8. M. Nazmus Saliheen, the Learned Advocate appearing on behalf of the petitioner took us through the impugned order inter alia, other documents/papers and materials available on record. She argued that Section 53M of the Income Tax Ordinance is contrary to Section 4(ja) of the Gift Tax Act, 1990 and therefore the two Sections are in conflict and contrary to each other. She argued that the said Section 4(ja) of Gift Tax Act, 1990 is the governing law for any transfer by way of gift and the said Section clearly exempts any transfer to wife, son, daughter, father, mother, original sister and brother from the provision of tax and therefore Section 53M of the Ordinance being contrary to Section 4(ja) of the Gift Tax Act, 1990 shall have no legal effect and bears no relevance in the petitioner's case. She also draws our attention to Section 48(2) of the Ordinance which reads as under:-

> " Any sum deducted or collected, or paid by way of advance payment, in accordance of this chapter, shall, for the purpose of computing the income of an assessee, be deemed to be the income received and be treated as payment of tax in due time, by the assessee "

9. The learned Advocate by inferring to this particular section argues that from a plain reading of the above Section, it is clear that any sum that may be deducted or collected by way of advance payment shall be only collected for the purpose of computing " income " of any assessee and do not make provision for computing anything else otherwise than income and to only those payments may shall treated as tax. The learned Advocate persuaded that Chapter VII of the Ordinance therefore, makes provision only to compute the income of the assessee for an assessment year. In the instant case she argues that the petitioner by transferring the shares to his daughter by way of gift did not earn anything, rather on the contrary he reduced his assets up to the gifted amount. Therefore, since no income was at all derived from the instant transfer there can be no question of calculating any tax arising out of such gift. She also submits that the action of the respondents in imposing tax upon a gift

which he has made to his daughter is violative of the petitioner's fundamental rights conferred to him under Articles 27 and 31 of the Constitution of Bangladesh.

10. Mr. Saikat Basu, the learned Assistant Attorney General appearing on behalf of the respondents makes his arguments that though it is correct that the gift from a father to a daughter is exempt from Gift Tax under the provision of section 4(ja) of the Gift Act, 1990, however this does not automatically exclude this transfer from the imposition of Income Tax under the Income Tax Ordinance, 1991. He also submits that the provision for exemption under Section 4(ja) of Gift Act, 1990 is irrelevant and immaterial for the purpose of income tax where transfer by way of gift of securities invites the imposition of Income Tax according to Section 53M of the Income Tax Ordinance, 1984.

11. We have heard the learned Advocates of both sides and perused the documents and other materials available on record. We have also read the impugned section, that is Section 53M of the ITO, 1984 and Section 4(ja) of Gift Tax Act, 1990. Section 4(ja) of Gift Tax Act, 1990 reads as under -

> "dj¡l¡-৪ঃ কতিপয় দানের ক্ষেত্রে অব্যাহিত।- 1) ‡ejAvZa ক্ষেত্রসমূহে কোন ব্যক্তির কৃত দানের উপর এই আইনের অধীনে কোন দানকর আরোপযোগ্য হইবে না , যথা-
> (জ) দান যদি পুত্র, কন্যা, পিতা, মাতা, স্বামী, সহোদর ভাই অথবা সহোদর বোনকে করা হয়।"

12. The petitioner has impugned the whole of Section 53M of the ITO as being contrary to Section 4(ja) of ITO, 1984. But upon a close scrutiny of the relevant section we find that explanation I of Section 53M is actually the relevant portion which requires our attention. Section 53M of the ITO is itself relatively a new provision of the statute since it was only inserted in the Ordinance by Finance Act, 2010, whereas Section (4(ja) of Gift Tax Act, 1990 was brought in to force in 1990 and is a settled provision of law since then. From this we come to understand that before the insertion of Section 53M for our purposes Section 53M explanation (1) the question of paying tax for making a gift to certain persons, those exempted under Section 4(ja) of Gift Tax Act, 1990 shall be the governing law.

13. From a plain reading of Section 53M of the Ordinance it follows that the whole of Section 53M is not contrary to Section 4(ja) of Gift Tax Act, 1990. The rationale behind this view of ours is that the first portion of the impugned Section and likewise explanation (2) of the said section is not in conflict with Section 4(ja) of Gift Tax Act, 1990. We hold this view because upon scanning the whole section we have been able to distinguish that save for explanation (1), the rest of Section 53M do not come into conflict with Section 4(ja) of Gift Tax Act. The rest of other parts of Section 53M refers to transfer, but does not mention the type or kind of transfer. Transfer can be of different modes it may be by way of sale, mortgage or any transfer for consideration and we have no conflict with those modes of transfers. With regard to that we can say that the other portions of Section 53M are a little vague in that if does not explain the mode of transfer. But since it does not directly mention the term "Gift" or bring it within its purview we can leave if at that. But Section 53 Explanation 1 directly brings 'gift' within the scope of income tax.

14. Section 53M Explanation 1 reads

> Explanation. – For the purpose of this section ---
> (1) 'transfer' includes transfer under a gift, bequest, will or an irrevocable trust;

15. Now, for our purposes we cannot accept this provision as a part of law. In the first place, this provision is in direct conflict with Section 4(ja) of Gift Tax Act, 1990. Section

4(ja) of Gift Tax Act, 1990 unequivocally states that son, daughter, father, mother, husband or sister shall be exempted from the tax by way of gift. The provisions of Gift Tax Act, 1990 shall prevail over the provisions ITO, 1984 so far as any transfer by way of 'Gifts' are concerned since the Gift Tax Act, 1990 was particularly enacted by the legislators for the purpose of gift. We can therefore understand from the unambiguous language used therein, that the intention of the legislators when the Gift Tax Act, 1990 was enacted was to exempt certain persons from tax if the gift was made to the persons stated mentioned in Section 4(ja) of the Gift Tax Act, 1990. Moreover, we have also found that the impugned Section 53M of ITO was only inserted in the Finance Act 2010, while the Gift Tax Act, which was enacted in 1990, is an earlier law and is still very much a provision of law, since no amendment or changes to the law have been brought to till present. Therefore the provisions the Gift Tax Act, 1990 shall prevail over any insertion that might have been brought into the ITO 1984 and there can be no room for any presumptions or assumptions that tax must be paid by all in case of any gift which might be made to any person irrespective of his or her relationship with the donee of the gift and to presume such a thing is a serious misinterpretation of the law and is a misinterpretation of the intention of the legislators and shall result in serious miscarriage of justice.

16. Upon a close reading of the Income Tax Ordinance and especially Section 48(2) of the Ordinance, we are in agreement with the petitioner in that, Section 53M(1) actually is in conflict with the scheme and object of the Ordinance. The Ordinance is Income Tax Ordinance. Let us draw our attention to the word 'Income'. The word 'Income' comes across us all through the Ordinance particularly for the purposes of tax. We have tried to detect and interpret the meaning of Income which is very much relevant for our purposes. Income in the Oxford Dictionary is defined as "money received, especially or a regular basis for work or through investments".

17. Macmillan's Dictionary defines income thus:-
"money that someone gets from working or form investing money".

18. From the above we can assume that the term income must presuppose a consideration and does contemplate a consideration received by the person receiving the income in whatever form it may be.

19. Now let us closely read Chapter VII Section 48(2) of the ITO 1984 to which the petitioner had drawn our attention to and which we have inserted above. Section 48(2) of the Ordinance provides an overall explanation as to the source of collectability or deductibility of taxes. We have already quoted Section 48(2) of ITO, 1984 elsewhere in this judgment.

20. The words used in Section 48(2) as we have seen are quite unambiguous and leaves no scope for any presumptions on our part. The said section clearly sets out the intention of the Ordinance that any sum that may be deducted; or 'collected' shall be only for the purpose of computing the 'income' of the assessee and only those shall be treated as payment of tax. Therefore from the language of Section 48(2) it is crystal clear that tax has been contemplated in the scheme of the Ordinance only as far as 'income' is concerned. We earlier defined income in the meaning of referring to some dictionaries and which we do not feel necessary to repeat. The mode of income however may be of different varieties and genres. But an "income" has to be received to fall under the provisions of the Ordinance and thereupon be subject to be tax.

21. Section 48(2) gives an overall explanation as to the source of collectability or deductibility of taxes and that source we repeat is 'income'. Therefore upon reading the different Heads under chapter VII and the rest of the provision there cannot be any doubt left that tax may be imposed only on 'income'; whatever head it might come under is however a different question and which have been quite exhaustively been dealt with in different provisions of chapter VII.

22. The petitioner has also cited a case in her support being the case of Commissioner of Taxes -Vs- Ahsanul Haque reported in 60 DLR (HCD) 2008 where in para 12 of the Judgment 'income' has been defined as :-

> " Any profits and/or gains that accrue from transfer of a capital asset shall be deemed to be income and classified and computed under the head, " Capital gains " under section 20 of the Ordinance."

23. This view also comes to aid and support of our assertion that income can arise out of a transferor of any capital asset only if any profit or gain has accrued to the transferor of the asset. And therefore it is only logical to conclude that if no "profit" or 'gain' has accrued to the transferor there can be no "income" and if there is no "income" there can be no question of the transferor being subject to tax.

24. Now let us try to ascertain the meaning of the word "gift". According to Oxford Dictionary 'gift' means "a thing given willingly to someone without payment" Accordingly to Macmillan's Dictionary, gift means 'some thing that you give to someone as a present'. Therefore, it cannot be more clear and unambiguous that the word 'gift' does not entail or presuppose any consideration of any kind and therefore a gift is a transfer without any consideration received. Gift is a transfer belonging to a different genre and a gift is not given in exchange for anything and therefore the question of income here is irrelevant and the two words 'Income' and "Gift" read along with their respective meanings cannot be connected or brought together.

25. Transfer of any property, object or anything else can be of different kinds for example, transfer can be by way of sale, lease etc. which are transfers for consideration as opposed to gift which is without any consideration.

26. Section 53M Explanation 1 reads :-

> "'transfer' includes transfer under a gift, bequest, will or an irrevocable trust."

27. This section in our opinion is against the whole spirit of the Ordinance. Because none of the terms mentioned here including gift are transfers for consideration and none of these modes of transfer contemplate income of any kind, in whatever form on the part of the transferor. The transferor or donor in performing his act of transfer does not receive anything in return and therefore these modes of transfer being transfers by way of gift, bequest etc. can under no circumstances be the source of "income" of any kind.

28. Upon a reading and comparison of the two sections i.e. section 53M of ITO, 1984 and the Gift Tax Act, 1990, it is our view that for the purpose of the case we are addressing, at present, only the Explanation 1 of Section 53M of ITO, 1984 which was inserted through Finance Act, 2010 is contrary to Section 4(ja) of the Gift Tax Act, 1990 and actually Section 53M Explanation 1 is also in conflict with the rest of the Income Tax Ordinance and particularly Section 48(2) of the Ordinance. The Respondents seem to have failed to

understand that for the purpose of gift the Gift Tax Act, 1990 is the governing law and not the ITO, 1984. The ITO 1984 is out side the purview of any sort of "gift" since tax as we emphasized above may be imposed only upon income as envisaged in Section 48(2) of the Ordinance. However, after reading the entire Section 53M of the Ordinance we disagree with the petitioners in so far as that she has alleged that the entire Section 53M is contrary to the Gift Tax Act, 1990. Our finding is that Section 53M Explanation 1 is only contrary to the Gift Tax Act, 1990 and the said Explanation 1 of Section 53M is also in conflict with the other provisions of the ITO, 1984 inter alia Section 48(2) of the Ordinance. However we are not concerned with the rest of the Section 53M which is not in conflict in our case since they do not contain or contemplate any provision relating to transfer by way of 'gift'.

29. The ratio decidendi of this case is that Section 53M Explanation 1 is contrary to the rest of the provisions of the ITO, 1984, being against the sprit and intent of the Ordinance and also contrary to the Section 4 of Gift Tax Act, 1990. Therefore the impugned collection of advance tax against transfer of shares to the daughter of the petitioner is unlawful and without lawful authority.

30. Under the foregoing facts and circumstances and upon consideration of all the laws and considering the materials placed before us we find merit in the Rule.

31. In the Result, the Rule is made absolute in modified form and therefore Section 53M Explanation (1) of the Income Tax Ordinance, 1984 is declared contrary to Section 4(ja) of the Gift Tax Act, 1990 and is also declared contrary to provisions of Income Tax Ordinance, 1984 and the collection of advance tax of Tk.63,69,350 against transfer of 51,30,000 shares of One Bank Limited of Tk.10 each to the petitioner's daughter is hereby declared without lawful authority and the Respondents are directed to refund the advance tax paid by the petitioner against the petitioner's TIN number 142-100-0038.

32. However, there shall be no order as to costs.