

CHOY JOE KONG

A

v.

THE COMMISSIONER OF ESTATE AND GIFT DUTIES

[SUPREME COURT, Kermode, J. 24 November 1983]

B

Civil Jurisdiction

Gift Duty—4 annual purported gifts of \$4,000 each by way of forgiveness—total \$16,000—gifts confirmed in one deed—Commissioner bound to treat gifts as one of \$16,000. Date of gift is date perfected.

C

F. G. Keil for Appellant

M. J. Scott for Respondent

Appeal by way of case stated against Gift Duty levied on appellant pursuant to the Estate and Gift Duties Act (Cap. 203) in respect of four purported gifts each of \$4,000 by way of "forgiveness of part of debt" owing to him by his two sons. \$4,000 was the maximum amount that could be given away without attracting Gift Duty. The gifts were alleged to have been made on 6, 7, 11 and 18 July in years 1977 to 1980 both years inclusive. In respect of the first gift the appellant completed a gift duty statement in the form referred to s.46 of the Act. The Commissioner of Estate and Gift Duties enquired how the debt was forgiven, and asking if there was a document that it be forwarded for inspection. Appellant's accountants replied that there was no document; the debt had been forgiven by journal entry in appellant's books. On receiving the second statement in July 1978 the Commissioner wrote pointing out that forgiveness by journal entry such gift, whereby no property had been transferred to the donee did not amount to a disposition of property.

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E

The Court held that a debt can only be released either for consideration or by deed.

F

With the 1979 and 1980 Gift Duty Statements the appellant furnished a written unwitnessed statement but after further correspondence, finally a formal deed of Gift release was on 20 March 1981 executed by appellant confirming the four gifts and formally releasing the four amounts of \$4,000, totalling \$16,000. The Commissioner treated the deed as creating one gift of \$16,000.

G

The Court found that the deed perfected 4 separate gifts totalling \$16,000. The four gifts would be treated as one gift for the assessment of gift duty. The questions submitted for the court were—

- A “ (i) Whether the respondent has correctly assessed the appellant the sum shown in Exhibit 14.
 (ii) Whether the respondent was correct in regarding himself as bound to consider ‘gifts’ prior to 20 March 1981 as imperfect.”

B *Held:* The deed was in proper form and effective to complete or perfect the four annual gifts. The date of the gifts is the date the gifts were perfected.

The answers to the questions were—

- (i) Yes
 (ii) Yes

C Cases Referred to:

Gould v. Commissioner of Stamp Duties (1934) A.C. 69.
Strong v. Bird (1874) 18 Eq. 315.
Foakes v. Beer (1884) 9 App. cas. 605.

KERMODE, Mr Justice

D

Judgment

This appeal by way of case stated was heard at the same time as Civil Appeal No. 8 of 1983 (Reported p. 23 post) because one issue was common to both.

Both cases involved alleged gifts which the Commissioner contends were not perfected at the time the respective appellants allege the gifts were made.

E Judgment in the other appeal was delivered before this judgment and in it the relevant authorities were discussed. There was judgment in that appeal for the appellant as a result of the negative answers to the two questions posed for the opinion of this Court.

F The appellant in the instant case purported to make four gifts by way of “forgiveness of part of debt” owing to him by his two sons. Each purported gift was for \$4,000 the maximum amount that can be given away in any one year without attracting gift duty.

The gifts were alleged to have been made on the 6th, 7th, 11th and 18th days of July in the years 1977 to 1980 both years inclusive.

G In respect of each annual ‘gift’ the appellant completed and filed a Gift Duty Statement in the form referred to in section 46 of the Estate and Gift Duties Act.

On receipt of the first statement the Commissioner wrote to the appellant enquiring as to how the debt was forgiven and asking if there was a document that it be forwarded for inspection.

H The appellant’s accountants, Messrs. Wilberfoss and Aidney replied that apart from the Gift Duty Statement that there was no document but that the debt was forgiven by way of journal entry in the appellant’s books.

When the Commissioner received the second statement in July 1978 he later wrote to the appellant pointing out that forgiveness of a debt by way of journal entry is an incomplete and invalid gift.

The Commissioner apparently had in mind the case of *Gould v. Commissioner of Stamp Duties* (1934) A.C. 69 a New Zealand case which went to the Privy Council. It was held in that case that mere entry in the books of account whereby no property had been transferred to the donee did not amount to a disposition of property. A

The Commissioner also pointed out that completion of a Gift Duty Statement in itself was not sufficient and that it must be accompanied by a deed or some other instrument. B

Adams in "Law of Estate and Gift Duties" in New Zealand 3rd Ed. (1956) at page 278 states:

"The filing of a gift statement does not in any way create estoppel. It is still open to the intended donor or to the Crown to aver that the intended gift has not been constituted."

A debt can only be released either for consideration or by a deed. (*Foakes v. Beer* (1884) 9 App. cas., 605). C

With the 1979 and 1980 Gift Statements, the appellant's accountants attached with each statement a signed but unwitnessed statement by the appellant in the following form:

"I, Choy Joe Kong hereby gift the sum of \$4,000 in partial settlement of a mortgage given to Chris and Francis Choy by me". D

He dated and signed each statement.

The Commissioner was still not satisfied and he pointed out that the documents were not deeds.

There then ensued correspondence between the appellant's solicitors and the Commissioner. E

Finally a formal deed of Gift Release and Confirmation dated the 20th March, 1981, was executed by the appellant in which he confirmed the four annual gifts by way of partial forgiveness of the debt due under mortgage No. 14311 by the donees and formally releasing the four amounts of \$4,000 each totalling \$16,000.

The Commissioner treated the deed as creating one gift of \$16,000 made on the 20th March, 1981, and assessed the appellant for gift duty accordingly. F

I do not consider the Commissioner was strictly correct in his view that the appellant made one gift of \$16,000 but that is immaterial. The deed perfected four separate gift of \$4,000 which when aggregated totalled \$16,000. The four gifts would be treated as one gift for assessment of gift duty.

Sir George Jessel M. R. in *Strong v. Bird* (1874) 18 Eq. 315 said: G

"First of all, it is said, and said quite accurately, that the mere saying, by a creditor to a debtor, I forgive you the debt, will not operate as a release at law. It is what the law calls 'nudum pactum', a promise made without an actual consideration passing, and which consequently cannot be supported as a contract. It is not a release, because it is not under seal. Therefore the mere circumstances of saying, 'I will forgive you', will not do.... The gift is not perfect until what has been generally called a change of the property at law has taken place." H

Unlike the documents in the Civil Appeal No. 8 of 1983 which did not complete or perfect the proposed gifts, the deed in the instant case is in proper form and effective to complete or perfect the four annual gifts.

- A** The date of the gifts is the date the gifts were perfected in this case the 20th March 1981.

The questions for this Court are:

- (i) Whether the respondent has correctly assessed the appellant the sum shown in Exhibit 14.
 - (ii) Whether the respondent was correct in regarding himself as bound to consider 'gifts' prior to 20th March 1981 as imperfect.
- B**

The answers to these questions are:

- (i) Yes.
- (ii) Yes.

- C** *Appeal dismissed.*