

(1973) 03 MP CK 0003

In the Madhya Pradesh High Court

Case No : Miscellaneous Civil Case No's. 181 of 1965 and 468 of 1971

Balkishan Muchhal

APPELLANT

Vs

Controller of Estate Duty

RESPONDENT

Date of Decision : 09-03-1973

Acts Referred:

Estate Duty Act, 1953 — Section 10

Citation : (1974) ILR (MP) 376 : (1974) 94 ITR 243 : (1973) JLJ 604 : (1973) 18 MPLJ 484

Hon'ble Judges : P.K. Tare, C.J;S.M.N. Raina, J;G.P. Singh, J

Bench : Full Bench

Advocate : K.A. Chitale, for the Appellant; P.S. Khirwadkar, for the Respondent

Judgement

Singh, J.

This judgment will govern the disposal of Miscellaneous Civil Case No. 181 of 1965 and Miscellaneous Civil Case No. 468 of 1971. These are two references u/s 64 of the Estate Duty Act, 1953, relating to the assessment of estate duty on the estate of one Smt. Ayodhyabai Muchhal who died on September 10, 1957.

The deceased was a partner in the firm of M/s. Laxmichand Muchhal holding one-fifth share in the firm. In the books of the firm a sum of Rs. 36,501 was debited in the account, of the deceased and credited in the account of a trust known as "Muchhal Trust" on November 2, 1952. The accountable person claimed that this amount represented a gift for public charitable purposes and as it was made beyond six months prior to the date of death, it could not be included in the estate of the deceased u/s 9 of the Act. The Assistant Controller held that the gift was not complete and he accordingly added the amount in computing the value of the deceased's interest in the firm. In appeal the Central Board of Direct Taxes took the view that even if there was a complete gift, the amount should be deemed to pass on the death of the deceased u/s 10 of the Act.

The deceased was also a partner in another firm, M/s. Muchhal & Co., in which

she had one-fourth share. This firm owed a sum of Rs. 2,03,731 to three relatives of the deceased. It was, however, found that these relatives had received a gift of Rs. 50,000 each (i.e. a total amount of Rs. 1,50,000) from the deceased. The Assistant Controller held that the liability of the firm should be abated to the extent of Rs. 1,50,000, and that, consequently, the deceased's one-fourth share of the liability should be abated to the extent of Rs. 37,500. This amount was, therefore, added by the Assistant Controller in computing the value of the share of the deceased in the firm. In appeal the Board held that Section 46(1) of the Act was not applicable for the reason that the gifts to the three relatives were made not by the firm but by the deceased whereas the loans from these relatives had been taken by the firm and not by the deceased. The Board, however, held that the gifts to the relatives fell u/s 10 of the Act as the amounts gifted were utilised for the firm in which the deceased was a partner and, as such, the donor, i.e., the deceased, was not entirely excluded from the possession and enjoyment of the gifted property. The Board, therefore, upheld the addition of Rs. 37,500 u/s 10 of the Act.

On an application made by the accountable person, the following questions of law were referred by the Board in Miscellaneous Civil Case No. 181 of 1965 for the opinion of the High Court:

"(1) Whether, on the facts and in the circumstances of the case, the sum of Rs. 36,501 credited in the name of Muchhal Trust was rightly included in the principal value of the estate of the deceased ?

(2) Whether, on the facts and in the circumstances of the case, the sum of Rs. 37,500 representing the value of gifts made by the deceased to three of her relatives was rightly included in the principal value of the estate of the deceased ?"

When the reference. Miscellaneous Civil Case No. 181 of 1965, came up for hearing before the High Court (Dixit C.J. and Pandey J.) it was found that the statement of the case submitted by the Board was not complete and the High Court by order passed on March 31, 1968, directed the Board " to send a further statement of the case giving the material facts and circumstances bearing on the points whether there was any gifts of the amounts of Rs. 36,501 and Rs. 37,500 by the deceased; whether, if there was any gift, the donee bona fide assumed possession and enjoyment of the property to the exclusion of the donor immediately upon the gifts; and whether thenceforward the donees retained the possession and enjoyment of the property to the exclusion of the donor; and on the manner and nature of the retention and utilisation of these two amounts by the firm in which the deceased was a partner."

The further statement of the case as required by the High Court was submitted by the Board on July 25, 1968. As regards the item of Rs. 36,501, the facts stated are that apart from the entries in the books of the firm on November 2, 1956, there was no contemporaneous evidence of the gift made in favour of the

Muchhal Trust. The entries were not signed by the deceased and there was no letter from her authorising the firm to make the entries. There was no physical delivery of the cash and there could be no such delivery as the cash balance on November 2, 1956, was only Rs. 15,671. It was only after the death of Smt. Ayodhyabai that entries in respect of interest and cash withdrawals were made in the account of the trust in the account books of the firm and possession and enjoyment of the sum of Rs. 36,501 by the trust in the lifetime of the deceased was not established.

As regards the other item, the facts stated by the Board are that entries were made on October 30, 1951, in the account of the deceased in the books of the firm, M/s. Laxmichand Muchhal, debiting her account by a sum of Rs. six lakhs and crediting a sum of Rs. 50,000 to the account of each of the following twelve relations of the deceased :

Jamnabai, wife of Balkishan

daughters-in-law of the deceased

Kamlabai, wife of Harikishan

Kamlabai, wife of Ram Kumar

Ramnivas s/o Balkishan

grandsons of the deceased

Rajendrakumar s/o Balkishan

Krishankumar s/o Harikishan

Lakshmikumar s/b Harikishan

Ashokkumar s/o Ramkumar

Mahindrakumar s/o Ramkumar

Krishnabai

grand-daughters of the deceased

Sarlabai

Nirmalabai

The entries were made in pursuance of gifts of Rs. 50,000 made by the deceased to each of these twelve relations. The gifts were accepted in the Income Tax assessment of the deceased. A firm of the name of M/s, Muchhal & Co. was formed with effect from April 5, 1954, in which the deceased was a partner having one-fourth share. Other partners in this firm were three daughters-in-law of the deceased and wife of the grandson, Ramnivas. After the formation of this firm the amount of Rs. 50,000 which was gifted to the grand-daughters, Krishnabai, Sarlabai and Nirmalabai, including interest credited to their accounts,

was transferred from the firm, M/s. Laxmichand Muchhal, to the new firm, M/s. Muchhal & Co. The transfer entries were made on October 22, 1954. During the period from October 30, 1951, to October 22, 1954, the three ladies had not withdrawn any amount from the firm, M/s. Laxmichand Muchhal and only interest was credited to their accounts. Even after the transfer of the accounts to the new firm the three ladies did not withdraw any cash upto the date of the death of Smt. Ayodhyabai. The amounts gifted to the remaining nine relations also remained invested with either the firm, M/s. Laxmichand Muchhal, or M/s. Muchhal & Co. even after the death of Smt. Ayodhyabai or within two years before her death.

In the opinion of the Board as the sums gifted throughout remained invested in and were utilised by the two firms for the purpose of their business, the donor who was a partner in both these firms also enjoyed the property gifted by employing it in her business and by earning more profits. On this reasoning the Board, as already stated, held that the gifted property was not retained by the donees to the entire exclusion of the donor and, therefore, was liable to duty u/s 10 of the Act. As the Controller of Estate Duty had only included a sum of Rs. 37,500, to the principal value of the estate u/s 46(1), the inclusion was upheld u/s 10.

On receipt of the order of the Board upholding the addition of Rs. 37,500, u/s 10 of the Act and not u/s 46(1), the Assistant Controller realised that if Section 10 applied the whole of the amounts gifted should have been included. He, therefore, initiated proceedings u/s 59 of the Act and made a revised assessment. In this revised assessment additional amounts of Rs. 5,62,500 and Rs. 4,800 were brought to tax. In appeal, the Zonal Appellate Controller upheld the order of the Assistant Controller except to the extent of Rs. 50,000, which was found to have been withdrawn on November 12, 1954, and deposited with a concern in which the deceased was not a partner. The accountable person then went up in appeal to the Appellate Tribunal. The Tribunal, differing with the opinion of the Assistant Controller and the Zonal Appellate Controller, was of the view that the amounts were gifted shorn of the rights of the partnership to use the same in partnership business and, therefore, the donees assumed bona fide possession of the property gifted and continued to hold the same to the exclusion of the donor and Section 10 of the Act was not attracted. On an application made by the Controller of Estate Duty, the Tribunal has referred in Miscellaneous Civil Case No. 468 of 1971 for opinion of the High Court the following questions of law :

"(I) Whether, on the facts and circumstances of the case, the Tribunal was justified in holding that the provisions of Section 10 are not attracted by the facts of the case and in excluding the amounts of Rs. 5,12,500 and Rs. 4,800 from the principal value of the estate ?

(2) Whether the Tribunal is justified in holding that by making the transfer entries in respect of the gifts the deceased has passed over to the donees all the

rights shorn of the right which belonged to the partnership and as such the provisions of Section 10 of the Estate Duty Act are not applicable ?"

The facts stated and found by the Tribunal in Miscellaneous Civil Case No. 468 of 1971 are that the deceased made gift of Rs. six lakhs (Rs. 50,000 each) to the twelve relations whose names have been mentioned above. Another gift of a sum of Rs. 6,000 was made in favour of one Gangabai. The gifts were made not by handing over cash but by making transfer entries in the books of the firm, M/s. Laxmichand Muchhal, out of deposits which the deceased had in that firm of which she was a partner. Except to the extent of Rs. 50,000, which was withdrawn on November 12, 1954, and deposited in a concern in which the deceased had no interest, the amounts gifted remained invested either in the firm, M/s. Lakshmichand Muchhal or M/s. Muchhal & Co. and the deceased was a partner in both these firms. The department did not dispute that the gifts were real and valid. Out of these gifts, Rs. 37,500 and Rs. 1,200 were brought to tax in the initial assessment itself u/s 46(1) which addition was upheld by the Board u/s 10. In the reassessment, therefore, after excluding the amount of Rs. 50,000, which was withdrawn on November 12, 1954, the question was whether Rs. 5,12,500 (out of the amount of Rs. six lakhs gifted to the relations mentioned in paragraph five) and Rs. 4,800 (out of Rs. 6,000, gifted to Gangabai) should be included u/s 10 of the Act as property passing on the death of Smt. Ayodhyabai. The Tribunal's conclusion, as already stated, was that " the deceased had passed over to the donees all the rights shorn of the right which belonged to the partnership and the donees assumed bona fide possession of the same and continued to hold such property thereafter to the entire exclusion of the donor and also of benefits to the donor. "

It will be convenient first to dispose of question No. (1) in Miscellaneous Civil Case No. 181 of 1965. The learned counsel for the accountable person has conceded that on the facts stated by the Board in that reference it is not possible to hold that the gift of Rs. 36,501 to the Muchhal Trust by the deceased has been established. The question, therefore, must be answered in the affirmative.

Question No. (2) in Misc. Civil Case No. 181 of 1965 and Questions Nos. (1) and (2) in Misc. Civil Case No. 468 of 1971 relate to the applicability of Section 10 of the Act to the gifts of Rs. 50,000 made by the deceased to each of her twelve relations. Although these references arise out of orders passed by different authorities (due to change of law in the matter of appellate authorities between assessment and reassessment) the material facts stated by the two authorities are the same. To briefly recapitulate the facts, the deceased had a deposit account in the firm, M/s. Laxmichand Muchhal, of which she was a partner. As a result of gifts made by the deceased, debit entries of rupees six lakhs were made in this account and credit entries of Rs. 50,000 were made in the accounts of each of the twelve donees in the books of the firm. No cash was paid to the donees. It seems, interest was credited to the accounts of the donees but there were no withdrawals. In respect of most of the donees the accounts were later

transferred to another firm, M/s. Muchhal & Co., in which also the deceased was a partner. Here also no cash was paid or withdrawn and the transfer was made by book entries. The reality and validity of the gifts have not been disputed. The money standing in the deposit account of the deceased was utilised by the firm in its business and even after the gifts the moneys transferred to the donees' accounts remained so utilised. After the accounts were transferred to the other firm the moneys standing to the credit of the donees were utilised in this firm for its business. The donees were not partners in M/s. Laxmichand Muchhal. But three of the donees (three daughters-in-law) were partners in the firm of M/s. Muchhal & Co. along with the deceased. A similar gift of Rs. 6,000 was in favour of one Gangabai which is also embraced within questions Nos. (I) and (2) in Misc. Civil Case No. 468 of 1971. It is on these facts that the applicability of Section 10 of the Act has to be determined.

Section 10 of the Act enacts that " property taken under any gift, whenever made, shall be deemed to pass on the donor's death to the extent the bona fide possession and enjoyment of it was not immediately assumed by the donee and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise ". The object of the section is to prevent evasion of duty by colourable gifts and semi-testamentary dispositions and to avoid the inconvenience of inquiry whether a gift is genuine or colourable where the conduct of the parties is prima facie inconsistent with the gift. The prima facie view is made by the legislature conclusive :

" The validity of the transaction is left untouched, for it concerns the parties alone. But they are not to embarrass the public treasury by equivocal acts " : Issacs J. in *Lang v. Webb* [1912] 13 C.L.R. 503, 514.

As construed by the Supreme Court in *George Da Costa Vs. Controller of Estate Duty* in Mysore, Bangalore, , before a gift can be taken out of the provisions of this section two conditions must be satisfied : " (1) the donee must bona fide have assumed possession and enjoyment of the property which is the subject-matter of the gift to the exclusion of the donor immediately upon the gift, and (2) the donee must have retained such possession and enjoyment of the property to the entire exclusion of the donor or of any benefit to him by contract or otherwise." It was further held in that case that the word " otherwise *" in the second part of the section must be construed ejusdem generis and must be interpreted to mean " some kind of legal obligation or some transaction enforceable at law or in equity which, though not in the form of a contract, may confer a benefit on the donor ". It was also held that the words " by contract or otherwise " in the second part of the section only qualified the word " benefit " and they did not control the words " to the entire exclusion of the donor ". Therefore, if the donor remained in possession and enjoyment of the subject-matter of the gift even without any legal right, the gift will not be excluded from the operation of the section.

In determining the question of application of the section to a particular case, it

has first to be ascertained as to what is the subject-matter of the gift, for the requirement for non-liability that the possession and enjoyment should be assumed immediately by the donee and retained to the exclusion of the donor has to be satisfied in relation to what is truly given. Possession and enjoyment which the donee must assume must necessarily vary according to the nature of the property. Copyright cannot be possessed and enjoyed in the same manner as a bottle of champagne. As observed by Barton J. in *Horsfall v. Commissioner of Taxes* 24 C.L.R. 422 in the context of a similarly worded Victorian Statute :

" The section extends not only to interests in remainder or reversion but to incorporeal property such as choses-in-action as well as corporeal property. I do not think that the word " immediate " is intended to apply to the time of the acquisition of mere physical possession. In the words of the Chief Justice in the same case, *Lang v. Webb*, possession as used in Section 143(b) means such a change of ostensible dominion as can be made having regard to the nature of the particular property and that must vary according as the property is corporeal or incorporeal."

Further, the question whether the donor has been completely excluded is also a question depending upon what is truly given under the gift. If the donor retains and excludes from the gift certain rights and interests, possession and enjoyment by the donor of such rights and interests does not amount to non-exclusion of the donor of what is given under the gift of which possession and enjoyment is assumed by the donee. The distinction is adverted to in a number of cases and was re-stated by Lord Simonds in *Clifford John Chick v. Commissioner of Stamp Duties* [1958] A.C. 435; [1958] 2 All E.R. 623: [1959] 37 ITR 89 ; 3 E.D.C. 915, 925 (P.C.), in the following words:

" It must often be a matter of fine distinction what is the subject-matter of a gift. If as in *Munro's* case, the gift is of a property shorn of certain of the rights which appertain to complete ownership, the donor cannot, merely because he remains in possession and enjoyment of those rights, be said within the meaning of the section not to be excluded from possession and enjoyment of that which he has given."

Then, it must also be remembered that Section 10, though designed to meet devices of tax evasion, has the effect of taxing even genuine gifts which do not fulfil the conditions of non-liability laid down in the section and hence there is no scope for any liberal construction of the section. The rule of construction applicable to such a provision is indicated in *H.R. Munro v. Commissioner of Stamp Duties* [1934] A.C. 61 : [1933] All E.R. 185: 188 2 E.D.C. 462 where in dealing with a similarly worded section of a New South Wales Statute, the Privy Council said:

" It is not always sufficiently appreciated that it is for the taxing authority to bring each case within the taxing Act, and that the subject ought not to be taxed upon refinements or otherwise than by clear words. "

What then is the nature of the property that was transferred to the donees by the deceased under the gifts in question ? The gifts were made from the deposit account of the deceased which she had in the firm. Messrs, Laxmichand Muchhal by transfer entries. It is, therefore, necessary to examine first the nature of property which a depositor has in the deposit. In common language it is usual to speak that a depositor owns money in deposit and this may be substantially true in the economic sense, but in strict legal sense such a statement is wholly untrue. When a person deposits money in a bank, firm or with any other person, the property in the money passes to the depositee and what the depositor owns thereafter is a debt which is also known as obligation, chose-in-action or actionable claim. The right in rem which the depositor has in his money is replaced by a right in personam against the depositee. The reason is that in the case of money possession and property go together ; with every change in possession property in money passes from one person to another. Money, therefore, cannot ordinarily be followed and even in the exceptional cases, which the common law recognised, it could be followed only so long as the relation of creditor and debtor had not superseded the right in rem. The legal principles bearing on this point are well brought out in the speech of Viscount Haldane L.C. in *Sinclair v. Brougham* [1914] A.C. 398: [1914] All E.R. 622 where he said :

"The difficulty of establishing a title in rem in this case arises from the apparent difficulty of following money. In most cases money cannot be followed. When sovereigns or bank notes are paid over as currency, so far as the payer is concerned, they cease ipso facto to be the subjects of specific title as chattels. If a sovereign or bank note be offered in payment it is, under ordinary circumstances, no part of the duty of the person receiving it to inquire into title. The reason of this is that chattels of such a kind form part of what the law recognises as currency, and treats as passing from hand to hand in point, not merely of possession, but of property. It would cause great inconvenience to commerce if in this class of chattel an exception were not made to the general requirement of the law as to title.

But the exception is not extended beyond the limits which necessity imposes. If money in a bag is stolen, and can be identified in the form in which it was stolen, it can be recovered in specie. Even if it has been expended by the person who has wrongfully taken it in purchasing some particular asset, that asset, if capable of being earmarked as purchased with the money, can be claimed by the true owner of the money. This is a principle not merely of equity, but of the common law. It is explained in the judgment of Lord Ellenborough C.J., in *Taylor v. Plumer* [1815] 3 M. & S. 562, who pointed out that there was no reason why the doctrine that money could not be followed should apply to circumstances in which a broker had wrongfully invested money of his principal in purchasing securities into which it could be traced. The reason of this is plain. The broker could not in these circumstances set up against his principal the rule which applies to what has been paid over as currency, that ordinarily transfer of possession is transfer of property. So long as the money which the principal has

handed to his agent to be applied specifically, and not on a debtor and creditor account, can be traced into what has been procured with it, the principal can waive his right of action for damages for tort, and, affirming the proceeding of the broker, claim that his money is invested in a specific thing, which is his. But Lord Ellenborough C.J. laid down, as a limit to this proposition, that if the money had become incapable of being traced, as, for instance, when it had been paid into the broker's general account with his banker, the principal had no remedy excepting to prove as a creditor for money had and received. The explanation was, of course, that a relation of debtor and creditor had arisen between the banker and his client, the broker, which precluded the notion of following the money.

That seems to be, so far as the doctrine of the common law is concerned, the limit to which the exception to the rule about currency was carried; whether the case be that of a thief or of a fraudulent broker, or of money paid under mistake of fact, you can, even at law, follow, but only so long as the relation of debtor and creditor had not superseded the right in rem."

The debt, obligation or actionable claim, which the depositor holds after the deposit is itself a proprietary right. It is incorporeal property which is owned, possessed and enjoyed by the depositor and is capable of being transferred. Another aspect that is to be taken notice of is that a deposit is something more than a mere loan of money. In contrast to a loan payable on demand a deposit does not impose an immediate obligation on the depositee to seek out the depositor and repay him. The obligation to repay arises only after a demand is made by the depositor. The idea is to give financial accommodation to the depositee without immediate worry of repayment: *Ram Janki Devi and Another Vs. Juggilal Kamlapat*, .

In this background it has to be seen what was transferred to the donees under the gifts in question. The nature of property held and possessed by the deceased in the deposit account was an actionable claim without any immediate obligation on the firm to make repayment. The deceased was in enjoyment of this property by getting the interest credited to her account. By the gifts in question it is this property, i.e., the actionable claim, which was transferred to the donees.

Then comes the question whether possession and enjoyment of the subject-matter of the gifts was immediately assumed by the donees and thenceforward retained to the entire exclusion of the donor. The subject-matter of the gifts in each case was actionable claim as distinct from money and immediate possession and enjoyment of this incorporeal property was taken by the donees, as the deposit account of the deceased in the firm was debited and simultaneously credit entries were made in the accounts of the donees. Interest accruing thereafter was also entered in their accounts and not in the account of the deceased. There was thus a complete change of ostensible dominion over the subject-matter of gifts as could be made having regard to the nature of the property, and the donees assumed possession and enjoyment of the property to

the same extent as it was possessed and enjoyed by the donor prior to the gifts. After the aforesaid entries in the books of account of the firm, the deceased ceased to have any interest in or possession over the actionable claim transferred under the gifts and possession and enjoyment of the donees was thenceforward retained to the entire exclusion of the deceased. As regards the firm, i.e., the deposittee, it was never in possession of the actionable claim either before or after the gifts and thus the possession and enjoyment of the donees of the property gifted was to the exclusion of both the deceased and the firm in which she was a partner. The transfer of accounts of the donees from one firm to another had also no effect on the possession and enjoyment of the donees of the property gifted as it only had the effect of substituting a new firm as debtor in place of the old firm. The deceased also received no benefit by contract or otherwise in the subject-matter of gifts, nor did she receive any benefit that may be said to be referable to the gifts. The right which, the partnership firm had of the use of the money which was deposited with it by the deceased flowed from the contract of deposit and not from the gifts or any transaction collateral to the gifts. Therefore, it is not possible to say that the possession and enjoyment of the property gifted was not retained by the donees to the entire exclusion of any benefit to the deceased or the firm in which she was a partner by contract or otherwise. In this view of the matter, all the gifts in question qualify for exemption from the operation of Section 10 of the Act.

The conclusion reached by me is supported by the decisions of the Madras and Allahabad High. Courts. In *Controller of Estate Duty Vs. C.R. Ramachandra Gounder*, , the deceased was a member of a firm in which he had a loan account. He asked the firm to transfer from his loan account with it a sum of Rs. one lakh to the credit of his five sons in equal shares of Rs. 20,000 by opening separate accounts in their individual names in the firm's books. The money was not withdrawn by the donees. On these facts, it was held by the Madras High Court that the subject-matter of gifts was not money but actionable claim, possession and enjoyment of which was assumed by the donees to the exclusion of the donor and Section 10 of the Act was not attracted. The Madras High Court has reaffirmed this line of reasoning in two subsequent cases, viz., *Controller of Estate Duty Vs. N.R. Ramarathanam and Others*, and *Godavari Bai Vs. Controller of Estate Duty*, . The same view has been adopted by the Allahabad High Court in *Behari Lal Matanhelia Vs. Controller of Estate Duty*, . I am in respectful agreement with this line of reasoning.

My conclusion, however, is in conflict with the views expressed by the Gujarat and Delhi High Courts. In *Shantaben S. Kapadia Vs. Controller of Estate Duty*, Gujarat, , a sum of Rs. 60,000 was debited in the account of the firm of which the deceased was a partner and credited to the account of the brother of the deceased. Without advertting to the distinction between money, and actionable claim, it was held that, as the amount remained with the partnership of which the deceased was a partner, the deceased as one of the partners remained in possession and enjoyment of the property gifted, viz., the amount of Rs. 60,000,

and hence there was no exclusion of the donor from possession and enjoyment. This case was followed by the same High Court in *Controller of Estate Duty, Gujarat Vs. Chandravadan Amratlal Bhatt*, . In these cases no distinction is drawn between gift of money and gift of actionable claim. The Delhi High Court in *Controller of Estate Duty Vs. Prahlad Rai*, had to consider a similar question. In that case gifts were made by the deceased to his four minor grand-daughters of a sum of Rs. 6,250 each by making transfer entries in books of account of a firm of which the deceased was a partner. In the opinion of the learned judges although the gift was of an actionable claim the donees should have taken steps to realise the money to assume possession and enjoyment of the property gifted to the exclusion of the donor. With great respect, this line of reasoning blurs the distinction between actionable claim and money in specie and assumes that actionable claim can be possessed and enjoyed only by converting the claim into money. In my opinion, actionable claim arising out of a deposit may also be possessed and enjoyed by continuing the deposit and by allowing interest to accumulate and, indeed, that is the most common mode of enjoyment when cash is not immediately needed. For these reasons and other reasons already indicated, I respectfully dissent from the view taken by the Gujarat and Delhi High Courts.

Learned counsel for the department argued that we must look to the substance of the matter and in substance the gift was of money and not of actionable claim. It is true that in applying Section 10 of the Act one has to see not the mere form of words but what is in substance given under the gift. But, substance, in this context, means the real nature and character of the subject-matter of the gift under the law and not what a common man may think about it. The doctrine of substance of the matter in the application of fiscal legislation in the way the learned counsel wants us to adopt has long been refuted : *Inland Revenue Commissioners v. Duke of Westminster* [1936] A.C. 1 ; [1935] All E.R. 250: 19 T.C. 490 . In the words of Lord Wright, " the true nature of the legal obligation " arising out of a genuine transaction " and nothing else is " the substance"". If it were open to discard the true legal character of the subject-matter of the gift and to adopt the common man's point of view, need for the " fine distinction " to which Lord Simonds refers in the passage already quoted from *Chick's* case will hardly ever arise.

Learned counsel for the accountable person urged as an alternative argument that, as the donees were not partners in the partnership firm, the exclusion of the donor was complete even though money was allowed to remain in deposit with the partnership firm of which the donor was a partner. Support for this argument was taken from the case of *Controller of Estate Duty Vs. Jai Gopal Mehra*, decided by the High Court of Punjab and Haryana. In that case the deceased had made gifts of cash of Rs. 20,000 each to one of his sons and four daughters-in-law and the amounts gifted were invested by the donees in a firm in which the donor was a partner but the donees were not partners. It was held by the High Court that even after the investment of the money in the partnership

the donor remained completely excluded. On the view that I have taken of the facts of the instant case, it is not necessary to consider the validity of the alternative argument urged by the learned counsel.

Another alternative argument submitted by the learned, counsel was that, even if we regard the gift as gift of money, the gift was shorn of the rights of the partnership to use the money under the contract of deposit. It is unnecessary to consider this argument also, for, in my opinion, the gift was not of money but of actionable claim in which the partnership firm had no rights.

As a result of the above discussion, I answer the questions referred to us as follows:

Misc. Civil Case No. 181 of 1965:

(1) The sum of Rs. 36,501 credited in the name of Muchhal Trust was rightly included in the principal value of the estate of the deceased.

(2) The sum of Rs. 37,500 representing one fifth of the value of gifts made by the deceased to three of her relatives could not be included in the principal value of the estate of the deceased.

Misc. Civil Case No. 468 of 1971 :

(1) The Tribunal was justified in holding that the provisions of Section 10 of the Act are not attracted by the facts of the case and in excluding Rs. 5,12,500 and Rs. 4,800 from the principal value of the estate,

(2) The subject-matter of the gifts was actionable claim and not money and the possession and enjoyment of the subject-matter of gifts was assumed and retained by the donees to the exclusion of the deceased or of any benefit to her by contract or otherwise. The partnership firm had no rights in the actionable claim and, therefore, the question of the gift being shorn of the rights of the partnership does not arise.

There shall be no order as to costs in both the cases.

Raina, J.

I have carefully perused the judgment proposed by my learned brother Singh J. With great respect I must say that I am unable to agree with him in respect of some of his conclusions.

The facts of the case have been fully set out in the proposed judgment. It is, therefore, not necessary for me to re-state them. The questions referred to us by the Tribunal u/s 64 of the Estate Duty Act, 1953 (hereinafter referred to as "the Act") are as follows :

In M.C.C. No. 181 of 1965 :

" (i) Whether, on the facts and in the circumstances of the case, the sum of Rs.

36,501 credited in the name of "Muchhal Trust" was rightly included in the principal value of the estate of the deceased ?

(ii) Whether, on the facts and in the circumstances of the case, the sum of Rs. 37,500 representing the value of the gifts made by the deceased to three of her relatives was rightly included in the principal value of the estate of the deceased ? "

In M.C.C. No. 468 of 1971 :

(i) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the provisions of Section 10 are not attracted by the facts of the case and in excluding the amounts of Rs. 5,12,500 and Rs. 4,800 from the principal value of the estate?

(ii) Whether the Tribunal is justified in holding that by making the transfer entries in respect of the gifts the deceased had passed over to the donees all the rights shorn of the right which belonged to the partnership and as such the provisions of Section 10 of the Estate Duty Act are not applicable ?"

So far as the question No. 1 in Misc. Civil Case No. 181 of 1965 is concerned, Shri K.A. Chitale, learned counsel for the accountable person, conceded that on the facts stated by the Tribunal it is not possible to hold that the gift of Rs. 36,501 to the Muchhal Trust by the deceased had been established. I, therefore, agree with my learned brother that the question must be answered in the affirmative.

Question No. 2 in Misc. Civil Case No. 181 of 1965 and Questions Nos. 1 and 2 in Misc. Civil Case No. 468 of 1971,

These questions relate to the applicability of Section 10 of the Act to the gifts of Rs. 50,000 made by the deceased to each of his 12 relations. The deceased had a deposit account in the firm, M/s. Laxmichand Muchhal of which he was a partner. As a result of gift made by the deceased debit entries of Rs. 6,00,000 (six lakhs) were made in his account and credit entries of Rs. 50,000 were made in the accounts of each of the 12 donees in the books of the firm. No cash was paid to the donees. It appears that the interest was credited to the account of the donees but there were no withdrawals. In respect of some of the donees the accounts were later transferred to another firm, M/s. Muchhal & Co. in which also the deceased was a partner. But no cash was paid or withdrawn and the transfer was made by book entries.

The validity of these gifts has not been disputed. It is also not disputed that the money standing in deposit account of the deceased was utilised by the firm in its business and it continued to be so utilised even after the gifts. After these accounts were transferred to the other firm the moneys standing to the credit of the donees were utilised in this firm for its business. The donees were not partners in M/s. Laxmichand Muchhal but three of the donees (3 daughters-in-law) were partners in the firm, M/s. Muchhal and Co. along with the deceased. It

is on these facts that the applicability of Section 10 of the Act has to be determined. Section 10 of the Act is reproduced below for facility of reference:

" Property taken under any gift, whenever made, shall be deemed to pass on the donor's death to the extent that bona fide possession and enjoyment of it was not immediately assumed by the donee and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise:....."

(The provisos are not reproduced as they are not attracted in this case.)

As pointed out by my learned brother, Singh J., in paragraph 10 of the judgment, the object of Section 10 is to prevent evasion of duty by colourable gifts which on the surface appear to be perfectly valid and are brought about with the object of evading estate duty. Although taxing statutes are to be construed strictly in favour of the subject, provisions enacted to prevent tax evasion must be given a liberal construction to effectuate the purpose of suppressing tax evasion: vide comments at pages 10 and 409 of Principles of Statutory Interpretation by Singh J. The construction of statutes to prevent evasion has been dealt with in detail in Chapter 6 of Maxwell on the Interpretation of Statutes, twelfth edition, by P. St. J. Langam, at page 137. The following extracts from the English decisions referred to therein are pertinent:

"... there is no doubt that" the office of the judge is, to make such construction as will suppress the mischief, and advance the remedy, and to suppress all evasions for the continuance of the mischief". To carry out effectually the object of a statute, it must be so construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that which it has prohibited or enjoined, quando aliquid prohibetur, prohibetur ut omne per quod devenitur ad illud. "

In *Inland Revenue Commissioners v. Jamieson*[1964] A.C. 1445 it was held that:

"Where the court has to consider a provision expressly designed to prevent tax evasion, which uses unnecessarily wide language to achieve its purpose, that language will be given effect to even though the section is thereby made to apply to cases which it was probably never intended to catch." : Vide Maxwell on the Interpretation of Statutes, at page 141.

In this connection it would be pertinent to refer to the following observations of their Lordships of the Supreme Court in *Shanti Prasad Jain Vs. The Director of Enforcement*, in paragraph 47 regarding construction of statutory provision in connection with evasion of the enactment containing the said provision while dealing with a case under the Foreign Exchange Regulation Act:

" To hold that the prohibition under the Act does not extend to acts done outside India by residents of India must inevitably lead to large-scale evasion of the Act resulting in its object being defeated, A construction which leads to such a result must be avoided. The expression " resident in India" is clearly used in the sense resident of India."

As pointed out by their Lordships of the Supreme Court in *George Da Costa v. Controller of Estate Duty* the crux of Section 10 of the Act lies in two parts:

" (i) The donee must bonafide have assumed possession and enjoyment of the property, which is the subject-matter of the gift, to the exclusion of the donor, immediately upon the gift; and

(ii) The donee must have retained such possession and enjoyment of the property to the entire exclusion of the donor or of any benefit to him by contract or otherwise."

Their Lordships held that both the aforesaid conditions are cumulative and unless each of these conditions is satisfied, the property would be liable to estate duty u/s 10 of the Act.

The main point for consideration in this case, therefore, is whether both the aforesaid conditions are fulfilled in this case. Though the principles enunciated by their Lordships of the Privy Council in *H.R. Munro v. Commissioner of Stamp Duties* and *Clifford John Chick v. Commissioner of Stamp Duties* in regard to estate duty payable u/s 102(2-A) of the Stamp Duties Act which is in pan materia with Section 10 of the Act, have been adopted by the Supreme Court as well as by other courts in India in regard to the interpretation of Section 10 of the Act, the actual application of these principles to a particular set of facts presents some difficulty and has given rise to divergent views by various High Courts in India particularly in regard to gifts by debit and credit entries as in this case.

In *Controller of Estate Duty v. C.R. Ramachandra Gounder*, the deceased who was a member of a firm in which he had a loan account had asked the firm to transfer from his account a sum of Rs. 1 lakh and credit it equally to the accounts of his five sons by opening separate accounts in their individual names in the firm's books. In these circumstances, it was held that the subject-matter of the gift being not money but an actionable claim, the donor was completely excluded from it and hence Section 10 of the Estate Duty Act was not applicable to the same. The Madras High Court has reaffirmed the view taken in this case in two subsequent cases, namely. *Controller of Estate Duty v. N.R. Ramarathanam* and *Godavari Bai v. Controller of Estate Duty*, The same view has been adopted by the Allahabad High Court in *Beharilal Matanhelia v. Controller of Estate Duty*. This view has found favour with my learned brother.

The Gujarat and Delhi High Courts have, however, expressed a contrary view. In *Smt. Shantaben S. Kapadia v. Controller of Estate Duty* in the books of account of a partnership firm in which the deceased was a partner a sum of Rs. 60,000 was debited, and credited to the account of his brother and the credit continued in the account of the firm till the date of his death. Subsequent to the making of the transfer, the deceased made a declaration of gift and also acknowledged on behalf of the firm that the amount was kept by the brother with the firm without interest. It was held by the Gujarat High Court that the amount of the gift having

been kept with the firm in which the deceased was a partner till his death, he was in possession and enjoyment of the property gifted by the deceased and hence the amount of the gift was to be included in the estate of the deceased by reason of Section 10 of the Act. It is no doubt true that the fact that the subject-matter of a gift in such a case is an actionable claim and not money was not taken notice of. This decision was followed by the same High Court in *Controller of Estate Duty v. Chandravadan Amratlal Bhatt*. In this case too distinction between a gift of money and a gift of actionable claim does not seem to have been taken into consideration in this connection.

In *Controller of Estate Duty v. Prahlad Rai* a Full Bench of the Delhi High Court had to consider a case of this nature. The deceased, a partner in the firm who had a capital to the extent of Rs. 1,29,006 standing to his credit in the firm's accounts, gave a sum of Rs. 6,250 each to his four grand-daughters by making appropriate transfer entries in the books of accounts of the firm in 1954. It was held in this case that although the subject-matter of the gifts was actionable claim but since there was nothing on record to show that the firm had a pre-existing right to the use of the money gifted by the deceased to the donees and that such right continued till the death of the deceased or that the donees were disabled by some other reason from realising the payment of the amounts, the nature of the property gifted was not such that the donees should be deemed to have assumed possession and enjoyment thereof to the entire exclusion of the donor and thenceforward retained it, and, therefore, the corpus of the gifts was liable to estate duty u/s 10 of the Act.

Unfortunately, there is no decision of the Privy Council or the Supreme Court in respect of a gift of this nature. At least none was brought to our notice,

I agree with my learned brother, Singh J., that a gift of this nature is in substance a gift of an actionable claim and the applicability of Section 10 needs to be examined treating the subject-matter of the gift as an actionable claim and not sum of money gifted. My learned brother has dealt with this matter at length and I entirely agree with his legal analysis of the nature of such gifts. The question, however, is whether in a case like this it can be said that bona fide possession and enjoyment of the gift was immediately assumed by the donee to the entire exclusion of the donor within the meaning of Section 10 of the Act.

It is true, that an actionable claim is in the nature of incorporeal property. But we must clearly recognize the distinction between ownership in incorporeal property and the possession thereof. Ownership in its wide sense is the relation in which a person stands to a right vested in him. It must be clearly distinguished from possession thereof. The possession of a right is the de facto relation of continuing exercise and enjoyment as opposed to the de jure relation of ownership. The use of the expression "assumed possession and enjoyment of the property" clearly indicates that mere vesting of the property in the donee would not suffice for the purpose of section 10 of the Act. It must be established by the accountable person that the donee had immediately upon the gift begun to enjoy the subject-

matter of the gift and such enjoyment was to the exclusion of the donor. To "enjoy", according to Webster's New World Dictionary, second college edition, page 464, means "to have the use or benefit of" and the word "enjoyment" is to be construed accordingly. In *Corpus Juris Secundum*, volume 30, page 708, the word "enjoyment" has been described as a term meaning the exercise of a right, possession, use and occupation. In *Words and Phrases*, permanent edition, volume 14-A, at page 290, the following comments regarding the word "enjoyment" are pertinent:

"The words "enjoyment" and "enjoy", as used in statutes relating to estate and gift taxes, are not terms of art, but connote substantial present economic benefit rather than technical vesting of title or estate."

An actionable claim is what is known in English law as "chose-in-action" as distinguished from a "chose-in-possession." I may here refer to the following observation in *Salmond on Jurisprudence*, eleventh edition, page 489 :

"In its origin a chose-in-possession was any thing or right which was accompanied by possession ; while a chose-in-action was any thing or right of which the claimant had no possession but which he must obtain, if need be, by way of an action at law."

Thus, an enjoyment of a chose-in-action must necessarily mean the enjoyment of the subject-matter of the chose-in-action by obtaining possession thereof by action at law or otherwise. A completely passive attitude on the part of the donee cannot be construed as possession and enjoyment. In my view, if the donee simply remains quiet after a gift of this nature and takes no steps to acquire possession of the subject-matter of the chose-in-action, he cannot be said to have assumed immediate possession and enjoyment thereof. Even if it is assumed that by allowing the money to remain with the firm the enjoyment consists in earning interest thereon, such enjoyment cannot be said to be an enjoyment to the exclusion of the donor because the donor being a partner in the firm continues to derive benefit from the money in deposit with the firm as such partner. If the money cannot be withdrawn at all being subject to the superior rights of partnership in the money the position might be different but where there is no impediment to the withdrawal of the money by the donee, the donee cannot be said to have assumed the enjoyment of the subject-matter of the gift to the exclusion of the donor within the meaning of Section 10 of the Act.

This line of approach is supported -by the Full Bench decision of the Delhi High Court in *Controller of Estate Duty v. Prahlad Rai*. The following observations at page 328 are pertinent :

"But Section 10 is applicable to the gifts not only of immovable and movable property but also to gifts of actionable claims. For, the possession and enjoyment of the gifted property by the donee to the entire exclusion of the donor is always expected to the extent possible according to the nature of the gifted property in the case of actionable claims also, The donees can take steps to convert their

claims to the money gifted into money in possession. Had it been shown in the present case that the gifts made were subject to the pre-existing rights of the partnership to their use and further that such rights of the partnership to the use of the money continued till the death of the donor, then it would have been arguable that the possession and enjoyment of the gifted property was taken by the donees to the extent it was possible in keeping with the nature of the gifted property and that the fact that the donor was not entirely excluded from the gifted property was not due to any inaction on the part of the donees but was due to the fact that the gifts themselves were subject to the pre-existing rights of the partnership to the use of the money so gifted, and that these rights of the partnership continued till the death of the donor. "

In the instant case there is nothing to show that the donees did anything to enjoy the subject-matter of the actionable claim to the exclusion of the donor. There is nothing to show that there was any impediment to their realising the subject-matter of the actionable claim from the firm by demand or an action at law. In fact they did not even care to withdraw the interest that was credited to their accounts. They thus allowed the donor to continue to derive full benefit from the money which was the subject matter of the actionable claim as partner of the firm. In these circumstances, I am of the view that the corpus of the gift must be deemed to have passed on the death of the donor u/s 10 of the Act and was as such liable to estate duty. I may here point out that a contrary view would create an anomaly. It cannot be doubted that if the donor had withdrawn the amounts in question from his account with the firm and had gifted the said amounts to the donees who in turn had deposited the same with the firm, Section 10 of the Act would be clearly applicable in view of the principles laid down in *Clifford John Chick v. Commissioner of Stamp Duties*. I need not dilate on this aspect of the matter because this was not disputed even by the learned counsel for the accountable person. The position in substance is not different from the one obtaining in the case of a gift by transfer entries, where the donee does not choose to withdraw the amount immediately after the gift even though there is no impediment. I do not think that it would be proper to treat the case of gift by transfer entries differently so as to provide ample scope for evasion of stamp duty by resorting to such gifts by transfer entries. As already pointed out above, the provisions in taxing statutes relating to evasion of duty must be liberally construed so as to effectuate the purpose thereof.

As a result of the above discussion, I would answer the questions referred to us as follows :

Misc. Civil Case No. 181 of 1965 :

(1) The sum of Rs. 36,501 credited in the name of "Muchhal Trust" was tightly included in the principal value of the estate of the deceased.

(2) The sum of Rs. 37,500 representing 1/5 of the value of gifts made by the deceased to 3 of her relations must be included in the principal value of the

estate of the deceased.

Misc. Civil Case No. 468 of 1971:

(1) The Tribunal was in error in holding that the provisions of Section 10 of the Act are not attracted by the facts of the case and in excluding Rs. 5,12,500 and Rs. 4,800 from the principal value of the estate.

(2) Since there is nothing to show that the rights of the partnership to the use of the money so gifted were such as to disentitle the donees to withdraw the amounts in question from the firm after the gifts, the provisions of Section 10 of the Act are applicable.

Tare, C.J.

The facts of the case have been elaborately stated by my learned brother, Singh J., in his order. It is not necessary to state them in detail except to recapitulate the barely relevant facts. My learned brother, Raina J., in his separate order has, however, disagreed with the view expressed by Singh J., on three questions referred to this court by the Tribunal u/s 64 of the Estate Duty Act, 1953. As regards the first question referred to us for opinion, both the learned judges have agreed.

At the outset, I may record my opinion with reference to question No. 1 involved in Misc. Civil Case No. 181 of 1965, by stating that I agree with the answer given by them to the effect that the sum of Rs. 36,501 credited in the name of Muchhal Trust was rightly included in the principal value of the estate of the deceased. However, as differences have arisen among my learned colleagues with respect to the other three questions, it is necessary to resolve the conflict in a separate order.

The deceased, Smt. Ayodhyabai Muchhal, who died on September 10, 1957, was a partner in the firm of Messrs. Laxmichand Muchhal & Co., holding 1/5th share in the firm. She was also a partner in another firm of Messrs. Muchhal and Co., in which she had 1/4th share. This firm owed a sum of Rs. 2,03,731 to three relatives of the deceased. The deceased had gifted Rs. 50,000 each to the three relatives and in addition Rs. 50,000 each to nine other relatives. The relationship is mentioned by my learned brother, Singh J., in paragraph 5 of his order. It was held by the Assistant Controller of Estate Duty that the amounts of Rs. 5,12,500 and Rs. 4,800 were liable to estate duty as Section 46(1) of the Estate Duty Act, 1953, was applicable to these gifts to twelve relatives. In appeal, the Central Board of Revenue held that Section 46(1) of the Act was not applicable for the reason that the gifts to the three relations were made not by the firm but by the deceased; whereas the loans from these relatives had been taken by the firm and not by the deceased. However, the Board expressed the view that the gifts to the relatives fell u/s 10 of the Estate Duty Act, 1953, and, therefore, they were liable to be included in the assets of the deceased for the purposes of imposition of estate duty.

In this connection the law as stated by my learned brothers in their separate orders is on the basis of the view expressed in *Lang v. Webb* and as enunciated by their Lordships of the Supreme Court in *George Da Costa v. Controller of Estate Duty*. It may be relevant to reproduce the pronouncement of their Lordships of the Supreme Court in the said case. Their Lordships have laid down that before a gift can be taken out of the provisions of Section 10 of the Estate Duty Act, 1953, two conditions must be satisfied. The first condition is that the donee must bona fide have assumed possession and enjoyment of the property which is the subject-matter of the gift to the exclusion of the donor immediately upon the gift and, secondly, the donee must have retained such possession "and enjoyment of the property to the entire exclusion of the donor or of any benefit to him by contract or otherwise. My learned brothers have also referred to other cases in their separate orders and as regards this position of the law they are agreed that the test would be as laid down by their Lordships of the Supreme Court in the said case. There is no difference of opinion among them on the said aspect. Therefore, I do not think it necessary to consider all the cases referred to in the separate orders of my learned brothers. Suffice it to say that the tests would be as laid down by their Lordships in the said cases.

In the present case there were book entries about transfer of the gifted amounts made in the account books of the firm in favour of the donees and also there were entries about interest payable to the donees. As was found by the taxing authorities two of the donees had withdrawn an amount of Rs. 25,000 each and had invested it in another firm in which the deceased Ayodhyabai was not a partner. Therefore, the taxing authorities thought that this amount of Rs. 50,000 was liable to be excluded. The Central Board of Revenue, however, excluded an amount of Rs. 1,00,000 from the assets of the deceased. This would be one of the relevant factors for consideration whether the donor was excluded from possession.

Another relevant factor would be the fact that these gifts were accepted not only by the Income Tax department, but also by the taxing authorities under the Estate Duty Act as genuine and valid gifts. Thus, the genuineness of the gifts not being challenged by the department, the question would arise whether the donors were in exclusive possession immediately after the gift and up to the time of death of Smt. Ayodhyabai, If exclusion of the donors be established, Section 10 of the Estate Duty Act, 1953, can evidently not be attracted, as was the view expressed by the Tribunal.

In this connection, I might observe that it is necessary for the donee to establish the fact that he was in exclusive possession of the gifted amount to the exclusion of the donor and he continued to be in such possession till the demise of the donor. So far as two of the donees are concerned, that fact would be established by the very fact that they had withdrawn the amounts of gifts and had invested them in another firm in which the donor had no interest whatsoever. This fact would establish exclusive possession of the donee, and exclusion of the donor

from possession or from any benefit whatsoever.

The further question is whether the same finding can be recorded in respect of the other donees, who did not withdraw any amount of gift or who did not even withdraw interest during the lifetime of the donor. In this connection I might observe that mere inaction on the part of the donee will not amount to the donor continuing in possession. But an inference has to be drawn from the totality of the circumstances. Firstly, I may observe that, more or less, the same consideration is applicable to all the donees except that two of the donees withdrew the amounts of the gift and invested them in some other firm in which the donor had no interest. That would be a clear indication of the exclusion of the donor from possession. But, in my opinion, it would be self-contradictory and rather anomalous to hold that the other donees did not assume immediate possession to the exclusion of the donor and did not continue in such possession till the demise of the donor.

Another aspect that persuades me to come to this conclusion is that these gifts were the subject-matter of taxation before the Income Tax authorities and the Income Tax department accepted these gifts as genuine and valid. Although the facts stated by the Tribunal are not clear on this aspect, there can be no doubt that if the Income Tax authorities accepted these gifts as genuine and valid, the interest accruing on the gifts was bound to be taken into consideration for the purpose of taxation against such of the donees who might be liable to pay Income Tax. It is not on record whether the Income Tax authorities actually took such amounts of interest into consideration for the purpose of taxing the donees. It would be a matter of surmise or conjecture. But the very fact that these gifts were the subject-matter of consideration before the Income Tax authorities would be another factor in support of the conclusion that the donees entered into possession to the exclusion of the donor and continued in such possession till the demise of the donor. If I may say so with due respect to my learned brother, Raina J., he, while considering the question of exclusion of the donor, has altogether ignored this aspect. I may observe that there cannot be double taxation. Say, for instance, the Income Tax authorities accepted these gifts as genuine and valid and in the case of donees liable to pay Income Tax, they included the amount of interest for the purpose of levying the Income Tax, the authorities under the Estate Duty Act cannot insist on levying the estate duty on the assumption that the donor continued to be in possession and that the donees never entered into possession to the exclusion of the donor. If that were allowed to be done, it will clearly result in double taxation unauthorisedly and in contravention of the provisions of article 265 of the Constitution of India. Thus, if the contention of the authorities under the Estate Duty Act were to be accepted, it might imply that the Income Tax authorities would claim to tax the donees to Income Tax on the assumption that the gifts were genuine and valid and the authorities under the Estate Duty Act, 1953, would be permitted to levy estate duty by including the said amount of gifts in the assets of the deceased which would also include the accumulated interest on such gifts. This evidently cannot

be the position under the law and article 265 of the Constitution of India would certainly prohibit such an interpretation, as it would be a tax not by the authority of law. For this reason I agree with my learned brother, Singh J., in the answers to be given to the other three questions referred to us for opinion.

To conclude, agreeing with my learned brother, Singh J., I would answer the question No. 2, in Misc. Civil Case No. 181 of 1965, by stating that the sum of Rs. 37,500, representing one-fifth of the value of gifts made by the deceased to three of her relatives, could not be included in the principal value of the estate of the deceased. As regards Misc. Civil Case No. 468 of 1971, agreeing with my learned brother, Singh J., I would answer the two questions as follows:

(1) The Tribunal was justified in holding that the provisions of Section 10 of the Act were not attracted by the facts of the case and in excluding the amounts of Rs. 5,12,500 and Rs. 4,800 from the principal value of the estate.

(2) The subject-matter of the gifts was actionable claim and not money and the possession and enjoyment of the subject-matter of gifts was assumed and retained by the donees to the exclusion of the deceased or of any benefit to her by contract or otherwise. The partnership firm had no rights in the actionable claim and, therefore, the question of the gift being shorn of the rights of the partnership does not arise.

Let the reference be returned to the Tribunal for modifying its final order in accordance with the opinion given by us above. There shall be no order as to costs in both the cases in view of the divided success of the department and the accountable persons.

BY THE COURT

In accordance with the majority judgments, the questions referred in this case are answered as follows :

(1) The sum of Rs. 36,501 credited in the name of Muchhal Trust was rightly included in the principal value of the estate of the deceased.

(2) The sum of Rs. 37,500 representing one-fifth of the value of the gifts made by the deceased to three of her relatives could not be included in the principal value of the estate of the deceased.

There shall be no order as to costs.