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**(1971) 12 AP CK 0020**

**In the Andhra Pradesh High Court**

**Case No : Case Referred No. 49 of 1970**

Commissioner of Gift-tax

APPELLANT

Vs

G. Ethirajulu

RESPONDENT

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**Date of Decision :** 03-12-1971

**Acts Referred:**

Gift Tax Act, 1958 — Section 5(1)

**Citation :** (1974) 93 ITR 366

**Hon'ble Judges :** Chinnappa Reddy, J;A.D.V. Reddy, J

**Bench :** Division Bench

**Advocate :** P. Ramarao, for the Appellant; C. Obulapathi Chowdary and T. Rangaiah, for the Respondent

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## **Judgement**

Chinnappa Reddy, J.—This is a reference u/s 26(3) of the Gift-tax Act, 1958, The assessee, G. Ethirajulu, was a partner of an unregistered firm, Kasetty Rangappa and Sons, for several years. By December 15, 1956, all the other partners of the firm retired and he became the sole proprietor of the business which he carried on as such till March 31, 1957. On April 1, 1957, he converted the business from a proprietary business into a partnership business, with himself and three other persons as partners. His share in the partnership business was 6/16ths while that of the other three partners was 4/16ths, 4/16ths and 2/16ths, respectively. Admittedly, the entire capital of the business was contributed by the assessee alone, the other partners being mere working partners. The Gift-tax Officer was of the view that the conversion of the proprietary business into a partnership business resulted in a gift of a 10/16ths share in all the assets (including goodwill) of the business to the other partners. A contention raised by the assessee that under the terms of the partnership the other partners had no right to a share in the assets was not accepted by the Gift-tax Officer as there was no such restrictive clause in the partnership deed. Another contention that the goodwill of the business should not be valued and included in the assets in assessing the value of the gift was not also accepted. The Gift-tax Officer assessed the value of the gift at Rs. 1,00,000 and levied gift-tax on that amount.

The Appellate Assistant Commissioner confirmed the order of the Gift-tax Officer. On further appeal to the Tribunal, the latter while holding that there was a gift and that the goodwill of the business should also be included in the assets for valuing the gift, held that the gift was exempt from tax by reason of Section 5(1)(xiv) of the Gift-tax Act as according to the Tribunal the gift was made bona fide "in the course of carrying on a business" and "for the purpose of such business". The Tribunal, therefore, allowed the appeal and set aside the orders of the Gift-tax Officer and the Appellate Assistant Commissioner. At the instance of the Commissioner of Gift-tax, the Tribunal has referred the following question to us :

"Whether, on the facts and in the circumstances of the case, the gift was exempt u/s 5(1)(xiv) of the Gift-tax Act, 1958 ?"

2. Section 5(1)(xiv) of the Gift-tax Act is as follows :

"Gift-tax shall not be charged under this Act in respect of gifts made by any person in the course of carrying on a business, profession or vocation, to the extent to which the gift is proved to the satisfaction of the Gift-tax Officer to have been made bona fide for the purpose of such business, profession or vocation."

3. It is apparent that the gift must satisfy two conditions before an assessee can claim the benefit of the exemption. They are : (1) it must be made in the course of carrying on a business, and, (2) it must be made bona fide for the purpose of such business. In the present case, the gift could perhaps be said to have been made bona fide for the purpose of the business since the Tribunal found that the assessee admitted the three others as partners with a view to facilitate the carrying on of the business and to earn more profits. But could it be said that the gift was made "in the course of carrying on a business"? The expression "in the course of carrying on a business" must naturally mean something different from the expression "for the purpose of the business". We think that it means that the gift must be made as an incident of the business activity of the assessee and not independently of it. It cannot mean the transfer of the very business or a part of it, even if such transfer is to facilitate the business. There is an even more formidable obstacle in the way of the assessee.

4. It appears to be essential, in order to claim the benefit of section 5(1)(xiv), that the business should continue to be that of the same person who made the gift. If, as a result of the gift, the business changes hands we do not see how the person making the gift can claim the benefit of Section 5(1)(xiv).

5. Perhaps, this is another face of the same idea that we have expressed in the previous paragraph. In the present case the business ceased to belong exclusively to the assessee and became the property of a partnership. Clearly it is not the same person and the gift was not "in the course of the carrying on of the business".

6. The Tribunal relied on a decision of the Kerala High Court in COMMISSIONER

OF GIFT-TAX, KERALA Vs. P. GHEEVARGHESE, TRAVANCORE TIMBERS and PRODUCTS., In that case the finding was that the gift was for the purpose of the business and that was thought by the learned judges to be sufficient to attract Section 5(1)(xiv). They did not consider the aspects to which we have referred. We respectfully dissent from their view. The learned counsel for the assessee, Sri C. Obulapathi Chowdary, relied on the decision of the Supreme Court in Commissioner of Gift Tax, Kerala Vs. George Kuruvilla, . The decision appears to us to be wholly irrelevant. A gift made to a son out of love and affection was held to be not a gift which attracted Section 5(1)(xiv). We are unable to see how the decision can be of any possible assistance to the assessee.

7. The question referred to us is answered in favour of the department and against the assessee.

8. The assessee will pay the costs of the reference which we fix at Rs. 250.