

(1995) 02 MAD CK 0081

In the Madras High Court

Case No : Tax Case No. 64 of 1982 (Reference No. 34 of 1982)

Controller of Estate Duty

APPELLANT

Vs

K. Govindarajulu

RESPONDENT

Date of Decision : 23-02-1995

Acts Referred:

Gift Tax Act, 1958 — Section 4, 5
Income Tax Act, 1961 — Section 28

Citation : (1995) 216 ITR 309

Hon'ble Judges : S.M. Ali Mohamed, J; Mishra, J

Bench : Division Bench

Advocate : Deokinandan, for the Appellant; K.M.L. Majele, for the Respondent

Judgement

Mishra J.

1. On the demise of one, K. Kunchithapatham, on October 5, 1974, who, it is alleged, had gifted a little over 24 acres of wet land in a village in

Karaikkal, a quarter of the Union Territory of Pondicherry, the Controller of Estate Duty has sought for a reference u/s 64(1) of the Estate Duty

Act, 1953 (hereinafter referred to as "the Act"), and, accordingly, the Tribunal at Madras has referred to this court the following questions :

(1) Whether, on the facts and in the circumstances of the case, the Appellate Tribunal, while agreeing with the view that section 10 of the Estate

Duty Act would be applicable to this case, was justified in concluding that section 33(1)(o) would apply in respect of the gift included u/s 10 of the

Estate Duty Act ?

(2) Whether the Appellate Tribunal was justified in applying the provisions of section 33(1)(o) of the Estate Duty Act in respect of the gifts made

by the deceased on April 4, 1963, prior to the insertion of clause (o) to section

33(1) of the Estate Duty Act with effect from April 1, 1965, by the Finance Act, 1965, the deceased having died on October 5, 1974 ?

2. The gift, it is alleged, was made on April 4, 1963, by Kunchithapatham to his son, Govindarajulu. Kunchithapatham died on October 5, 1974.

The Assistant Controller, who assessed the duty, held that Kunchithapatham continued to be in possession and enjoyment of the land gifted and

thus the property passed on his death under the said gift. He, accordingly, invoked section 10 of the Act and brought to tax the value of the said

property. Before the Appellate Controller, there was some dispute about the extent of the land covered by the gift, but the main contention was

that in case section 10 of the Act was attracted, since it was a gift by the father to his son, section 33(1)(o) of the Act was applicable. The

Appellate Controller found that even though there was a formal transfer of the land as early as April, 1963, Kunchithapatham continued to be in

possession and enjoyment of the property right up to the date of his death and thus section 10 of the Act was attracted. The Appellate Controller

held, however, that the gift was one made beyond a period of five years as contemplated u/s 33(1)(o) of the Act and thus not chargeable to duty.

The Revenue preferred an appeal before the Tribunal. It contended before the Tribunal that section 10 is an overriding provision and there was no

scope for applying section 33(1)(o) in a case to which section 10 was attracted. The Tribunal has held :

... On the facts and circumstances, section 10 would be applicable, but by virtue of section 33(1)(o) such gifts are exempt. . . .

The section presumes that even though the property passes they are entitled to exemption if the conditions prescribed are satisfied. In this view, we

hold that section 10 cannot have an overriding effect and in fact section 33 takes out of the principal value of the estate those items covered by

section 33. In view of this, we uphold the order of the Appellate Controller and dismiss the Departmental appeal.

3. Learned counsel for the Revenue has taken us through the various provisions of the Act and shown to us that under the scheme of the Act, a

property passing on the death is chargeable to duty and section 10 creates a presumption that gifts whenever made where the donor is not entirely

excluded or irrespective of the expressions in the deed if the donee had not

immediately assumed bona fide possession and enjoyment of the property and retained the same to the entire exclusion of the donor or of any benefit to him by contract or otherwise, the property passed on the donor's death only. He has drawn our attention in particular to the second proviso inserted by Act 10 of 1965, with effect from April 1, 1965, as respects any gift made to his spouse, son, daughter, brother or sister and contended that since this proviso excludes a house or part thereof taken under any gift, the legislative intendment is clear that section 33 is not attracted to a gift covered by section 10 of the Act. Learned counsel for the assessee has contested the above contention mainly on the ground that the incident of passing on the donor's death has to be understood to the extent specified against each of the clauses in sub-section (1) of section 33 of the Act and the exemption of a property taken under any gift made by the deceased to the spouse, son, daughter, brother or sister, beyond a period of five years before his death has to be applied to the cases of gifts beyond a period of five years before the death of the deceased.

4. Section 2(16) of the Act contains the definition of "property passing on the death" to include property passing either immediately on the death or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation. Section 5 of the Act speaks of the levy of estate duty in the case of every person dying after the commencement of the Act save as expressly provided elsewhere in the Act, levied and paid upon the principal value of all property settled or not settled, including agricultural land specified in the First Schedule to the Act, which passes on the death of such person. Section 8 of the Act says, "property taken as a gift made in contemplation of death shall be deemed to pass on the donor's death". Section 9 speaks of a property taken under a disposition made by the deceased purporting to operate as an immediate gift inter vivos whether by way of transfer, delivery, declaration of trust, settlement upon persons in succession, or otherwise, and says that such disposition which shall not have been bona fide made two years or more before the death of the deceased, shall be deemed to pass on the death except as indicated in the proviso therein if made for public charitable purpose for which the period shall be six months and as provided under sub-section (2) thereof, gifts made in consideration of marriage, subject to a

maximum of rupees ten thousand in value and gifts which are proved to the satisfaction of the Controller to have been part of the normal expenditure of the deceased, subject to a maximum of rupees ten thousand in value, are excluded. Section 10 of the Act comes following the said two provisions under sections 8 and 9 of the Act as regards gifts and states as follows :

10. 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 :

Provided that the property shall not be deemed to pass by reason only that it was not, as from the date of the gift, exclusively retained as aforesaid, if, by means of the surrender of the reserved benefit or otherwise, it is subsequently, enjoyed to the entire exclusion of the donor or of any benefit to him for at least two years before the death :

Provided further that a house or part thereof taken under any gift made to the spouse, son, daughter, brother or sister, shall not be deemed to pass on the donor's death by reason only of the residence therein of the donor except where a right of residence therein is reserved or secured directly or indirectly to the donor under the relevant disposition or under any collateral disposition.

5. The question as to the extent that bona fide possession and enjoyment of the property taken under any gift 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 has to be decided on

proof that the donee or any person accountable for estate duty may produce and no presumption is available as in the case of a property taken as

a gift made in contemplation of death or under a disposition made by the deceased purporting to operate as an immediate gift inter vivos within two

years or more before the death of the deceased or in the case of gifts made for public charitable purposes, six months or more as contemplated

under sections 8 and 9 of the Act, if the gift is shown to have been acted upon and the donee is found to have assumed possession and retained the

same to the entire exclusion of the donor or of any benefit to him by contract or

otherwise. The first proviso has a major role in the determination of the extent of the bona fide possession and enjoyment of the property gifted and it must guide the scrutiny of evidence that the donee or the accountable person may produce to show that the deceased had completely parted with the possession and enjoyment of the property.

6. The second proviso to section 10 is clear, in that, it speaks of the gift of a house or part thereof, to the spouse, son, daughter, brother or sister.

Those who constitute a family and live together are expected to live in a house together and if there is a gift of such a house or part thereof to the

spouse, son, daughter, brother or sister, it is indeed difficult to find or imagine the extent of the bona fide possession and enjoyment of the donee

vis-a-vis that of the donor if the donee is the spouse, son, daughter, brother or sister of the donor. On determination that the donee had not

assumed possession and enjoyment of the property taken under the gift and retained the same in his possession to the entire exclusion of the donor

or of any benefit to him by contract or otherwise, the property shall be one satisfying the definition of a property passing on the death of the donor;

to such a property, the Act (Estate Duty Act) shall be attracted except in the case of a house property. Merely, however, because the property

shall be deemed to pass on the donor's death and accordingly, shall seemingly be a property of a person upon which the estate duty can be levied,

it cannot be said that in all circumstances, the duty shall be realised and the donee or the accountable person shall be liable to pay the duty. Section

33 of the Act says,

33. (1) To the extent specified against each of the clauses in this sub-section, no estate duty shall be payable in respect of property of any of the

following kinds belonging to the deceased which passes on his death -

(a) to (n)....

(o) property taken under any gift made by the deceased to his spouse, son, daughter, brother or sister, beyond a period of five years before his

death :

Provided that the property is either chargeable to gift-tax under the Gift-tax Act, 1958, or is not chargeable u/s 5 of that Act, for any assessment

year commencing after the 31st day of March, 1964.

7. Confined to clause (o), section 33(1) provides as follows :

No estate duty shall be payable in respect of property belonging to the deceased which passes on his death, taken under any gift made by the

deceased to the spouse, son, daughter, brother or sister, beyond a period of five years before his death :

Provided that the property is either chargeable to gift-tax under the Gift-tax Act, 1958, or is not chargeable u/s 5 of that Act, for any assessment

year commencing after the 31st day of March, 1964.

8. Even if a property taken under any gift made by the deceased to the spouse, son, daughter, brother or sister, is one which passed on his death

to the donee, no estate duty shall be payable for it, if it is a property taken under a gift by the deceased to the spouse, son, daughter, brother or

sister beyond a period of five years before his death, It is enough without adverting to the proviso that the property is either chargeable to gift-tax

under the Gift-tax Act, 1958, or is not chargeable u/s 5 of that Act, for any assessment year commencing after the 31st day of March, 1964, to

hold that section 10 has only assured that in the case of a gift of a property if it is found 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 of

otherwise and it is not a house property or a part thereof gifted to the spouse, son, daughter, brother or sister, it has to be held that such property

passed on the donor's death only but if it is a property taken under a gift by the deceased to the spouse, son, daughter brother or sister beyond a

period of five years before his death, no estate duty shall be payable for it.

9. The Tribunal, in our opinion, has taken the correct view of the law in this behalf.

10. The second question, however, hinges upon the application of the proviso to a property taken under any gift made by the deceased to the

spouse, son, daughter, brother or sister, beyond a period of five years before his death. The words in the proviso are ""provided that the property is

either chargeable to gift-tax under the Gift-tax Act, 1958, or is not chargeable u/s 5 of that Act, for any assessment year commencing after the 31st

day of March, 1964."" A plain reading of this suggests that if a property is taken under a gift made by the deceased to the spouse, son, daughter,

brother or sister and is chargeable to gift-tax under the Gift-tax Act, 1958, and is covered by a gift made beyond a period of five years before the

death of the donee, no estate duty shall be payable in respect of such property and no estate duty shall be payable in respect of the property taken

under any gift made by the deceased to the spouse, son, daughter, brother or sister beyond a period of five years before his death even if it is not

chargeable u/s 5 of the Gift-tax Act, 1958, for any assessment year commencing after the 31st day of March, 1964.

11. A gift is made chargeable to tax under the Gift-tax Act, 1958, and section 4 thereof has extended it to transfers otherwise than for adequate

consideration or in case the consideration has not passed or is not intended to pass either in full or in part from the transferee to the transferor, and

some other forms of transfer to some or the full extent. Section 5 provides, however, the list of the properties which are gifted or the situations

under which any property is gifted to which property or situation, the gift-tax shall not be charged. This list contains gifts under a will section 5(1)

(x); in contemplation of death section 5; for the education of children, to the extent to which the gifts are proved to the satisfaction of the Assessing

Officer as being reasonable having regard to the circumstances of the case section 5(1)(xii); being an employer, to any employee by way of bonus,

gratuity or pension or to the dependents of a deceased employee.... section 5(1)(xii) and included as an item of exemption, a gift by a person to his

spouse, subject to a maximum of rupees fifty thousand in value in the aggregate in one or more previous years, the expression ""spouse"" in this

clause, where there are more wives than one, meaning all the wives together, in section 5(1)(viii) as introduced by the Finance Act, 1964, with

effect from April 1, 1964, until omitted by the Finance Act, 1986, with effect from April 1, 1987. The significance of the date on March 31, 1964,

thus is obvious. While a gift to a son, daughter, brother or sister was chargeable to gift-tax during the period from April 1, 1964, to April 1, 1987,

a gift to the spouse to a maximum of fifty thousand rupees in value in the aggregate in one or more previous years, was not chargeable to the said

tax u/s 5(1)(viii) for any assessment year commencing after March 1, 1964, until the repeal of the said provision u/s 5(1)(viii) by the Finance Act,

1986, with effect from April 1, 1987. The proviso has been introduced to take care of the situation that no one could say, in the case of the gift to

the spouse, that it was not chargeable to gift-tax and, therefore, the estate duty should be realised.

12. Learned counsel for the Revenue has drawn our attention to the proviso to section 4(1)(a) of the Wealth-tax Act in which the clause ""for any

assessment year commencing after March 31, 1964, but before April 1, 1972"" occurs. He has submitted on the said basis that as held by the

Supreme Court in Commissioner of Wealth Tax Vs. Smt. Hashmatunnisa Begum, and this court in T. C. No. 1189 of 1981, judgment dated

November 10, 1994 (K.V. Iyer Vs. Commissioner of Income Tax, , we should hold that the exemption as contemplated u/s 33(1)(o) of the

(Estate Duty) Act shall be available for any assessment year commencing after March 31, 1964, only and not in respect of gifts which are on any

assessment year before the assessment year commencing on April 1, 1964. We are unable, however, to accept such a contention. The Supreme

Court in Commissioner of Wealth Tax Vs. Smt. Hashmatunnisa Begum, , has observed (at page 103) :

The controversy surrounds the question whether the expression for any assessment year commencing after 31st day of March, 1964", occurring

in the proviso should be read with the first part and as referring to the eligibility of the gifts for exemption with reference to the point of time at

which the gifts were made or whether that expression does not condition the identity of the eligible gifts but only signifies the starting point for the

exemption from wealth-tax. The assessee contends that the date of the gift is immaterial and as long as the transfer is chargeable to gift-tax or is

exempt u/s 5 - whatever may be the year in which the gift was made - the exemption from gift-tax must commence "for any assessment year

commencing after 31st day of March, 1964".

13. The Supreme Court, upon that, has said,

Having regard to the purpose for which the proviso was enacted and to the expression "is chargeable" in conjunction with the provisions of the

Gift-tax Act, 1958, the expression "for any assessment year commencing after the 31st day of March, 1964," occurring in the proviso indicates

that the transfer of assets must be chargeable to gift-tax under the provisions of the Gift-tax Act for any assessment year commencing after the 31st

day of March, 1964, or, where the transfer is not chargeable u/s 5 of that Act,

then for any assessment year commencing after the 31st day of March, 1964, the proviso would apply. The reason for our coming to this conclusion is that the proviso was really dealing with the effect of the assessment to wealth-tax and what is being dealt with in the proviso is that certain transfers which would, subsequent to the proviso coming into effect, be eliminated from the provision of the substantive part of the section. It is true that the location of the expression for any assessment year commencing after the 31st day of March, 1964", is not quite appropriate. The punctuation mark is also suggestive of a contrary conclusion but, having regard to the provisions of the Gift-tax Act, 1958, and having regard to the purposes for which the proviso came into effect, we are of the opinion that the proviso really exempted transfer of assets which were chargeable for any assessment year commencing after the 31st day of March, 1964, or where the transfer was not chargeable u/s 5 of the Act for any assessment year commencing after the 31st day of March, 1954.

This construction is in consonance with the later amendment made, though that is not a relevant factor.

14. In T. C. No. 1189 of 1981 (K.V. Iyer Vs. Commissioner of Income Tax,), we, constituting the Bench of the court, have recorded, ""we

prefer this approach"". That, however, does not in any manner lead us to any different view than the one we have already taken in respect of section

33(1)(o) of the Act. We are unable to fix the assessment year commencing after the 31st day of March, 1964, to the execution of the gift for this

will postpone by five years the exemption contemplated u/s 33(1)(o) after the 31st day of March, 1964. Exemption in such a situation can be

claimed only if the death takes place after March 31, 1969, and not before that. The commencement date of clause (o) of sub-section (1) of

section 33 of the Act is April 1, 1965. This provision is introduced in the Act by the amendment Act of 1965. If the interpretation put forward by

the Revenue is accepted the proviso shall be inoperative for the said period of five years commencing from March 31, 1964, and there shall be no

exemption available to the donee if the property passed on to him on the death of the donor during the said period. It is obvious, the property

taken under any gift beyond a period of five years must mean beyond a period of five years prior to the death of the deceased and that period may

be prior to April 1, 1965, the date with effect from which this provision is introduced in the Act. In the instant case, the gift is of the year 1963 and it is obviously beyond five years of the death which took place in the year 1974. The Tribunal, in our view, has committed no error in this behalf.

15. Both the questions referred to us are answered accordingly. No costs.