

**(1976) 06 MAD CK 0006**

**In the Madras High Court**

**Case No :** Tax Case No. 395 of 1970 (Reference No. 126 of 1970)

Controller of Estate Duty

APPELLANT

Vs

S.A. Rahman Beevi

RESPONDENT

**Date of Decision :** 16-06-1976

**Acts Referred:**

Estate Duty Act, 1953 — Section 10, 9

**Citation :** (1978) 111 ITR 422

**Hon'ble Judges :** Sethuraman, J;Ismail, J

**Bench :** Division Bench

**Advocate :** J. Jayaraman and Nalini Chidambaram, for the Appellant; K.C. Rajappa, for the Respondent

## Judgement

Ismail, J.—The following two questions of law have been referred to this court for its opinion u/s 64(1) of the Estate Duty Act, 1953, by the

Income Tax Appellate Tribunal, Madras Bench, at the instance of the Controller of Estate Duty, Madras:

(1) Whether, on the facts arid in the circumstances of the case, the Appellate Tribunal was right in law in holding that the additions amounting to

Rs. 28,000 could not be sustained on the ground that the provisions of sections 9 and 10 of the Estate Duty Act were not applicable ?

(2) Whether, on the materials on record, the Appellate Tribunal was right in holding that there was no goodwill at all for the retail business carried

on by the firm A. M, Saliah and Company and accordingly deleting an addition of Rs. 23,374 ?

2. One A. M. Saliah, who died on March 9, 1966, was one of the three partners in a firm called A. M. Saliah and Company, carrying on retail

business in the purchase and sale of textiles at Mayuram. The firm was

reconstituted on April 1, 1964, by which the number of partners was increased from 3 to 8. Two of the partners who became partners by the reconstitution, were Smt. Farita Bivi and Abdul Rasheed. The accounts of these persons in the partnership firm were credited with the following amounts on the respective dates as under :

Rs.

1-10-1963 Farita Bivi Credit 7,500

1-10-1963 Abdul Rasheed Credit 7,500

1- 4-1964 Farita Bivi Credit 7,500

1- 4-1964 Abdul Rasheed Credit 5,500

3. The total of these four amounts was Rs. 28,000. These amounts were credited to these two persons in the partnership accounts by debiting A.

M. Saliah in his capital account. After the death of Mr. Saliah on March 9, 1966, when the question of the assessment to the Estate Duty arose,

the department took the view that the sum of Rs. 28,000 formed part of the property passing on death and, therefore, assessable and it is this that

is covered by the first question extracted already.

4. As we pointed out already, the partnership was carrying on retail business in the purchase and sale of textiles and the Asst. Controller of Estate

Duty as well, as the Appellate Controller of Estate Duty took the view that the said business had a goodwill and while the former assessed the

value of the goodwill at Rs. 35,060, the latter reduced the value of the goodwill while holding that the business had a goodwill and the value of the

goodwill also formed part of the property passing on death. On appeal by the accountable person to the Income Tax Appellate Tribunal, Madras

Bench, the Bench held that neither the sum of Rs. 28,000 covered by the first question nor the sum of Rs. 23,374 being the reduced value of the

goodwill as held by the Appellate Controller would constitute property passing on death and, therefore, were not liable to be included for the

purpose of Estate Duty. It is, thereafter, at the instance of the Controller of Estate Duty, Madras, the present reference has been made to this

court. We shall first deal with the first question and also indicate the reasons which prevailed upon the Assistant Controller and the Appellate

Controller for including the sum in the estate and the Tribunal for excluding it.

The Assistant Controller took the view that the said amounts were made a gift of to the two persons concerned merely by adjustment entries made in the accounts and, therefore, the donor had not parted with the possession nor the donees had obtained exclusive possession of the subject-matter of the gift and, consequently, u/s 10 of the Estate Duty Act, the amounts were liable to be included in the estate. As a matter of fact, it would appear from one part of the order of the Assistant Controller that he ignored the gift on the ground that there was no delivery of possession at all and, therefore, the amounts continued to remain as part of the estate of the deceased donor. With regard to the entries made on October 1, 1963, they were more than two years prior to the date of death of the deceased, viz., March 9, 1966, and, therefore, the same would not be covered by Section 9 of the Act, though with regard to the entries made on April 1, 1964, it was pointed out by the Assistant Controller, that the same being within two years from the date of the death of the donor they would be covered by Section 9. None the less, the entire amounts were held to be liable to be included on the ground they were hit by Section 10 of the Act.

5. As far as the Appellate Controller is concerned, he pointed out that it was a doubtful question whether a valid gift of money can be made by means of transfer entries in the accounts and, at any rate, the matter was not free from doubt. Notwithstanding this, he took the view that the gift of Rs. 13,000 made on April 1, 1964, would, without having to wait for a decision of the above issue be drawn into the net u/s 9 as it is within two years before the death of the donor and the gift of Rs. 15,000 made on October 1, 1963, even if it was considered valid gift and, therefore, not affected by Section 9, it would still be drawn into the vortex of dutiability as they cannot escape the mischief of Section 10, because in his view the amounts continued to be invested in the firm in which the donor was a partner thereby giving the latter a beneficial control over it. It is in view of this stand taken by these two officials, they held that the entire sum of Rs. 28,000 was liable to be included in the estate. However, the Tribunal took a different view. According to the Tribunal, the transfers from the account of the deceased to the respective donees had to be treated as gifts through an "actionable claim" defined by Section 3 of the Transfer of Property

Act, and once it was held that the subject-matter of the gifts were the actionable claims of the total value of Rs. 28,000 it followed that the donor was completely excluded from them. The Tribunal drew support from a decision of this court in *E. S. Hajee Abdul Kareem and Son Vs. Commissioner of Income Tax, Madras*, and the later decision of this court which was subsequently reported in *Controller of Estate Duty Vs. C.R. Ramachandra Gounder*, . It is against the background of these conflicting views taken by the lower authorities that we have to consider the first question referred to us.

6. We are clearly of the opinion that the first question has to be answered in the affirmative and in favour of the accountable person in view of the provisions contained in Section 9 of the Estate Duty Act, 1953, as well as two decisions of the Supreme Court which are directly in point, with reference to Section 10 of the Act.

7. Section 9(1) of the Estate Duty Act, 1953, so far as it is relevant for the purposes of this case, states as follows :

9. (1) 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, which shall not have been bona fide made one year or more before the death of the deceased shall be deemed to pass on the death.

8. It is pertinent to point out in this connection that the section as originally enacted contained the words ""two years"" after the words ""bonafide made"". However, by Section 69 of the Finance Act, 1965, which section came into force on 1st April, 1965, the words ""one year"" were substituted for the words ""two years"". However, later, by Section 38 of the Finance Act, 1966, the words ""two years"" were again substituted for the words ""one year"" with effect from 1st April, 1966. In this case, the deceased donor having died on March 9, 1966, the Section 9 that will apply to this case will be with the words ""one year"" and not with the words ""two years"". This has been overlooked by all the authorities below and that is the reason why they made a distinction between the entries made on October 1, 1963, and the entries made on April 1, 1964, by stating that the former gift will fall outside the mischief of Section 9 while the latter gift will come within the scope of Section 9. Once it is realised that

Section 9 is applicable to the present case with the words ""one year"", both the gifts, viz., the gift made on October 1, 1963, as well as the gift

made on April 1, 1964, will fall outside the scope of Section 9 and, therefore, the Controller of Estate Duty cannot rely upon Section 9 for the

purpose of including the sum of Rs. 13,000 in the estate for the purpose of liability of estate duty. Consequently, Section 9 is not of any assistance

whatever to support the contention of the Controller of Estate Duty, Madras.

9. This leaves out the question of the applicability of Section 10. Section 10 without the provisos, states as follows :

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.

10. With reference to this section, as we pointed out already, there are two decisions of the Supreme Court which are directly in point. The first

decision is the decision in Controller of Estate Duty, Madras Vs. C.R. Ramachandra Gounder, which itself was an appeal from the decision of this

court in Controller of Estate Duty Vs. C.R. Ramachandra Gounder, , which we referred to already and to which the Tribunal itself has made a

reference. In that case, one Ramajah Gounder was a partner in the firm called, N. Desai Gounder and Company, Coimbatore. He had an account

with the firm, N. Desai Gounder and Company, and on March 31, 1953, he requested the firm by a letter to transfer from his account five sums of

Rs. 20,500 each with effect from 1st April, 1953, to the credit of his five sons in the firm's books. He also wrote to the five sons informing them of

the transfer. The sons did not withdraw any amount from their accounts in the firm and the amounts remained invested with the firm for which

interest at 7 1/2 per cent, was paid to them. It is against the background of these facts the contention of the department was that the said sum of

Rs. 1,00,000 gifted by the deceased to his sons in 1953 was liable to estate duty as property deemed to pass on the death of the deceased u/s 10

of the Act. The contention was based on the allegation that even after the gift the donor continued to be a partner of the firm and, therefore, as

such he had the benefit of the money in the partnership and consequently

Section 10 applied. The Supreme Court negated the contention and held that the amounts transferred to the sons by adjustment of entries should not be included in the estate of the deceased.

11. The second decision is Commissioner of Income Tax and Controller of Estate Duty, Madras Vs. N.R. Ramarathnam and Others, . This is also

on an appeal from a decision of this court in Controller of Estate Duty Vs. N.R. Ramarathanam and Others, . In that case also one N. S.

Ramaswami Iyer was a partner in the firm of M/s. Ennessor and Co., the other partners of the firm being his three sons and daughter. The firm was

engaged in money-lending and financing business. At the end of the accounting year 1952-53 the current account of the deceased showed a credit

balance of Rs. 78,098.65. On March 31, 1953, the deceased transferred by adjustment entries a sum of Rs. 52,042.73 to the accounts of his

daughter and three sons. The balance in the account of the deceased was reduced to Rs. 26,055-15-2. Again, on March 31, 1956, the account of

the deceased in the firm showed a credit balance of Rs. 1,15,304-11-9. On April 1, 1956, the deceased transferred Rs. 77,881-11-8 again by

adjustment entries to his daughter and three sons. Thus, the two transfers on March 31, 1953, and April 1, 1956, amounted to Rs. 1,29,924. The

amounts thus transferred by the deceased to his daughter and sons continued to remain ,in the partnership business subsequent to the transfer till

the death of the deceased and were utilised in the firm's money-lending business. It is against the background of these facts it was contended on

behalf of the department that Section 10 of the Estate Duty Act covered the case because the deceased had not parted with possession or the

benefit of the use of the money and, therefore, the amount should be included in the estate. The Supreme Court negated this contention.

Therefore, we are of the view that these two decisions of the Supreme Court are directly in point and, according to these two decisions, it must be

held that the amount of Rs. 28,000 transferred by adjustment entries by the deceased, A. M. Saliah, to the two, persons referred to above would

not be said to constitute property passing on death or deemed to pass on death, so as to be included in the estate of the deceased. Hence, we

answer the first question in the affirmative and in favour of the accountable person.

12. As far as the second question is concerned, as we pointed out already, it dealt with the value of the goodwill of the business. The Assistant

Controller proceeded on the basis that every business has got a goodwill and, therefore, this business also must have a goodwill. The Appellate

Controller who dealt with the appeal took into account the various factors which will constitute goodwill and held that in the present case the

business of the deceased had a goodwill and arrived at the value of the goodwill. However, on the second appeal preferred by the accountable

person, the Tribunal took a different view. In paragraph 5 of the order, the Tribunal pointed out: ""We have to take into account the nature and

circumstances of each case. In this case the nature of the business is retail trade in articles which a customer can buy from any similar shop and it is

not as if there is any trade-mark and any manufacturing process peculiar to the business. Considering the facts and circumstances of the case, we

are of the opinion that there was no goodwill for the business at the time of the death."" It was not disputed before us that the question has to be

considered with reference to the nature and circumstances of each case. Equally, it is not disputed before us that the firm was dealing in retail

purchase and sale of textiles and itself was not manufacturing any goods, nor had a trade mark of its own. Under these circumstances, the Tribunal

was fully justified in stating that the firm was dealing in goods which a customer can get from any similar shop and, therefore, there was nothing

special or peculiar which may be said to constitute or create goodwill for the business of the firm in question. The learned counsel for the Controller

of Estate Duty urged that the Appellate Controller has taken into account the long-standing nature of the business, its profitability as well as its

location. Undoubtedly, the location of a business is a very important circumstance, even though not a decisive circumstance, for the purpose of

arriving at the existence as well as the value of goodwill. But, the mere fact that the firm was carrying on business in a place in Mayuram without

anything more, cannot be said to be a circumstance conclusively in favour of holding that the business was having a goodwill. In fairness to the

learned counsel for the Controller of Estate Duty, we must point out that he did not support the theory of the Assistant Controller that every

business has got a goodwill. Under these circumstances, it is clear that whether a particular business has a goodwill or not has to be decided with

reference to the facts and circumstances relevant and available in respect of that business and once the Tribunal has, after taking into account the relevant facts and circumstances, come to the conclusion that the business of the firm in the present case did not have a goodwill, it cannot be contended that any question of law, would arise out of such conclusion of the Tribunal. Under these circumstances, we answer the second question also in the affirmative and in favour of the accountable person. The accountable person is entitled to her costs in this reference from the Controller of Estate Duty, Madras, and counsel's fee is fixed at Rs. 500.