
(1993) 12 RAJ CK 0007
In the Rajasthan High Court
Case No : ED Reference No. 128 of 1981

Controller of Estate Duty

APPELLANT

Vs

Sireh Mal Ji Nawalkha

RESPONDENT

Date of Decision : 09-12-1993

Acts Referred:

Estate Duty Act, 1953 — Section 2(15), 5, 9, 9(1)

Citation : (1994) 75 TAXMAN 169

Hon'ble Judges : V.K. Singhal, J;N.C. Kochhar, J

Bench : Division Bench

Advocate : G.S. Bapna, for the Appellant; B.S. Yadav and N.M. Ranka, for the Respondent

Judgement

V.K. Singhal, J.—The liability of the accountable person under the Estate Duty Act, 1953 ("the Act") is to be determined on the basis of the following question of law referred by the Tribunal for our opinion:

Whether, on the facts and in the circumstance of the case, the Tribunal is justified in holding that nothing on account of any share of the deceased in the goodwill of the firm Nawalkha Gems and Vineet Trading Corporation can be included in the principal value?

During the course of assessment proceedings the Assistant Controller found that the accountable person had not disclosed the value of good- will passed on the death of the deceased from Vineet Trading Corporation and Nawalkha Gems. Smt. Lata Nawalkha (deceased) was a partner in the firm Nawalkha Gems having 25 per cent share and she died on 11-1-1978 within two years of the dissolution of the firm, i.e., on 18-3-1977, The provisions of section 9 of the Act were applied, and the share of the goodwill was subject to estate duty. The deceased Smt. Lata Nawalkha was a partner in the firm Vineet Trading Corporation having 50 per cent share and became partner on 23-11-1976 and retired on Diwali 1977. The firm Vineet Trading Corporation was dissolved on 29-3-1977.

2. Section 9(1) provides that the 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 two years or more before the death of the deceased shall be deemed to pass on the death.

3. The question that death took place within two years of the retirement from the firm is not in dispute. On the retirement unless otherwise provided which has not been brought to the notice of the court there may be passing of the goodwill to the legal heir. The Tribunal relying on the decision of the Bombay High Court in the case of Urmila Vs. Controller of Estate Duty, Bombay, came to the conclusion that there was no gift at the time of retirement of the deceased and that all the assets of the firm including the goodwill rights, benefits and privileges together with all its liabilities were taken over by the continuing partners and that the continuing partners undertook the liability to discharge all the debts and obligations of the firm. The Tribunal, thus, found that it was not a one side affair where the rights in any asset were given up by the deceased. Since the share of the liability was taken by the continuing partners, no giving-up of the rights was there. In respect of firm Vineet Trading Corporation it was found by the Assistant Controller that the firm was dissolved and shares and liabilities were equally divided and nothing was left over and, therefore, there was no question of invoking the provisions of section 9.

4. In the case of Smt. Urmila (supra) it was held by the Bombay High Court that the share of the deceased in the goodwill of the firm was includible in the value of the estate u/s 5 of the Estate Duty Act. However, in respect of the firm where there was simultaneous taking over the rights and obligations and the benefit secured by each group was supported by consideration, namely, giving up of its claim, being relieved of the liabilities, it was held that there was no gift of the share in the good will and the provisions contained in section 9 regarding gifts made within a certain period before death were not attracted. From the facts of this case it would be evident that the assessee's case stands on a different footing. There was no simultaneous taking over the rights and obligations or the benefits could be said to be supported by consideration of giving up the claims. There was a goodwill which is not in dispute and it passed on to certain persons which could be by way of gift and under the Act it has been contemplated as a deed of gift. So far as the deceased is concerned, she was entitled to the goodwill which has to be valued as on the date of death taking into consideration the fact of disposition of the said property, namely, the goodwill being passed on to other persons within a period of two years from the date of death. It has not been found by the Tribunal that the deceased was under obligation to make the payment of such liability which could be adjusted or could be considered to have passed on the donee. In the case of Khushal Khemgar Shah and Others Vs. Khorshed Banu Dadiba Boatwalla and Another, the Supreme Court held as under:

... The goodwill of a firm is an asset. In interpreting the deed of partnership, the

court will insist upon some indication that the right to a share in the assets is, by virtue of the agreement, that the surviving partners are entitled to carry on the business on the death of the partner to be extinguished. In the absence of a provision expressly made or clearly implied, the normal rule that the share of a partner in the assets devolves upon his legal representatives will apply to the goodwill as well as to other assets. (p. 1149)

In the case of *S.C. Cambatta and Co. Private Ltd. Vs. Commissioner of Excess Profits Tax, Bombay*, the Supreme Court observed as under:

It will thus be seen that the goodwill of a business depends upon a variety of circumstances or a combination of them. The location, the service, the standing of the business, the honesty of those who run it, and the lack of competition and many other factors go individually or together to make up the goodwill, though locality always place a considerable point. Shift the locality, and the goodwill may be lost. At the same time, locality is not everything. The power to attract custom depends on one or more of the other factors as well. In the case of a theatre or restaurant, that is catered how the service is run and what the competition is, contribute also to the goodwill. (p. 505)

In the case of *Commissioner of Gift Tax, Gujarat Vs. Chhotalal Mohanlal*, the Supreme Court has considered even in a case where there was reduction of share of the partners that it amounted to a gift. In the case of *Controller of Estate Duty, Gujarat-I, Ahmedabad Vs. Smt. Mrudula Nareshchandra*, the Supreme Court has held that the partner has a marketable interest in all assets of the firm including that goodwill and the said interest is the property within the meaning of section 2(15) of the Act and that goodwill of the firm is also an asset in which the deceased had share on his death and his interest does not vanish or extinguish but passes on to the surviving partners. In respect of *Vineet Trading Corporation* the Assistant Controller found that a new firm in such a name and style was constituted and, therefore, the observations of the Tribunal that the partners have equally divided their shares and liabilities and nothing was left out is contrary to the evidence on record.

5. Whenever in a firm running business is continued or taken over by adding partners or reducing the number of partners or changing the profit sharing ratio, there remain always assets and liabilities in that firm. The liability of a firm with the assets cannot be considered to be a case of no gift or consideration. It is the goodwill in the firm which normally exists in a profit making concern. The firm besides the assets and liabilities has goodwill also. If after dissolution no business is carried on and the assets and liabilities are divided by the partners inter se, then it could be considered that nothing remains but where after the dissolution and re-constitution the business of the firm in the same name is re-started the goodwill cannot be said to have become of no value. The approach of the Tribunal that the firm has the assets and liabilities which is a valid consideration is not the correct approach so far as the firm *Nawalkha Gem* is concerned. Similarly, the observations of the Tribunal that since the shares and

liabilities were equally divided nothing was left in the firm Vineet Trading Corporation cannot be said to be the correct approach in view of the law laid down by the Apex Court and this Court. In view of the above discussion the only thing to be seen is as to whether the disposal by way of gift could be considered as bona fide or not. Since no finding has been given by the Tribunal, the matter is sent back to the Tribunal for giving decision on the question as to whether the said gifts could be considered to be bona fide or not. Accordingly, it is answered that the Tribunal was not justified in holding that nothing on account of any share of the deceased in the goodwill of the firm Nawalkha Gems and Vineet Trading Corporation can be included in the principal value. The reference is answered in favour of the revenue and against the assessee subject to the observations made above.