

(1981) 03 MAD CK 0030
In the Madras High Court
Case No : Tax Case No. 342 of 1976

Controller of Estate Duty, Tamil Nadu

APPELLANT

Vs

S.T.B. Ameen Khaleeli

RESPONDENT

Date of Decision : 12-03-1981

Acts Referred:

Estate Duty Act, 1953 — Section 44, 46, 46(1), 46(2)

Citation : (1983) 143 ITR 679

Hon'ble Judges : V. Ramaswami-II, J; N.V. Balasubramanian, J

Bench : Division Bench

Advocate : J. Jayaraman, for the Appellant; S.V. Subramaniam, for the Respondent

Judgement

Balasubrahmanyam, J.—This is a case stated by the Income Tax Appellate Tribunal Madras, under s. 64(1) of the E.D. Act, 1953, on the

following question of law :

1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the provisions of section 46(1)(b) would not

apply to the facts of the case to uphold the disallowance of Rs. 30,000 and consequently to the disallowance of Rs. 50,000 u/s 46(2) of the Estate

Duty Act ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the provisions of section 46(1)(b) read with

section 16 would apply and that, therefore, the disallowance of Rs. 30,000 and Rs. 50,000 made by the Assistance Controller could not be

sustained ?

2. The facts giving rise to this reference may be shortly stated. One Ammen Khaleeli, hereinafter referred to as the deceased, died on June 5, 1970.

On August 29, 1963, the deceased made a gift of vacant site of the extent of 4 grounds and 30 sq. ft. in Nungambakkam, Madras City, to his son,

Afsur. The son construed a building on the plot. The construction was begun in 1963 and completed in 1964. The building was a residential

building. The son was unable to obtain a suitable tenant to occupy the house. At the same time, the deceased having disposed of his residential

properties, also wanted to have a house of live within the same locality. In these circumstances, the son let out the building to the deceased with

effect from February 1, 1965. Subsequently, in January 1966, the deceased himself purchased the entire property land and building together, from

his son for a sum of Rs. 2 lakhs which was equivalent to the market value of the property as on that date. Subsequently to the purchase of the

property, the deceased took a loan from his son of Rs. 70,000 on April 1969, and another loan of Rs. 10,000 on March 13, 1970. In course of

time, the deceased made repayments amounting to Rs. 50,000 to his son. Just before his death, the deceased owed Rs. 30,000 to his son as

respects the loan obtained by him earlier. There was no interest on these loan and the principal amount which was outstanding at that time was Rs.

30,000.

3. In the assessment to estate duty following the death of the deceased, the house property which the deceased had purchased from his son was

included as part of the dutiable estate. Its principal value as on the date of his death was determined at Rs. 2,91,200. This property along with

other properties and assets of the deceased, both movable and immovable, was included in the dutiable estate. As for the debts and liabilities

which had to be deducted in order to arrive at the "net" value of the estate, which alone was properly chargeable to estate duty, the question arose

whether the debt which the deceased had to pay to his son in the sum of Rs. 30,000 could come in for allowance as a deduction under s. 44 of the

E.D. Act, 1953. There was no dispute as to the bona fide character of this debt, because the debt was for full consideration and had been utilised

by the deceased for certain investments of his own in a business. However, the Asst. Controller invoked the provisions of s. 46(1)(b) of the Act

and disallowed the entirety of the debt owed by the deceased to his son as on date his death, on the ground that the borrowings effected by the

deceased from the son of the total extent of Rs. 80,000 had to be abated under s. 46(1)(b) of the Act since the vacant land which the deceased had gifted to the son on March 29, 1963, must be considered as being property which had been part of resources of the son at some time or other and the son had lend the money to the father subsequently. Having decided that Rs. 30,000 should be abated in the computation of the debts to be deducted for arriving at the net value of the deceased's estate, the Asst. Controller proceeded to apply the provisions of s. 46(2) of the Act as respects the amount of Rs. 50,000 which had been repaid by the deceased was money applied by the deceased towards the satisfaction or discharge of a debt which fell within the mischief of s. 46(1)(b) of the Act and hence the repayments too, in accordance with s. 46(2), must be included in the dutiable estate. In this way while the value of the property which the deceased had purchased from his son was included in the dutiable estate, the entire borrowings effected by the deceased from his son was disallowed partly under s. 46(1)(b) of the Act and partly under s. 46(2) of the Act.

4. Against the assessment done in this manner, the accountable person appealed to the Appellate Controller of Estate Duty. The Appellate Controller found that there was no intention on the part of the deceased at the time when he gave a gift of the vacant land in Nugambakkam to his son that the latter should at some time in the future grant him loans without interest. The Appellate Controller also paid regard to the conduct of the parties which according to him did not lead to the inference that the transaction of gift in 1963 was in any way related to borrowings effected by the deceased subsequently in 1969 and 1970. The Appellate Controller pointed out that after obtaining from the deceased a gift of the house site, the son built a superstructure thereon paying for the cost of construction entirely from out of his own independent funds. The Appellate Controller also took note of the fact that the reason why the deceased first became a tenant of the son's building and later obtained a sale of locality and there was no other suitable house available for him for that purpose. As for the son, according to the Appellate Controller, he too was looking for a proper tenant and failing to get some third party for that purpose, he let out the house to his father. Another peculiar circumstances which

according to the Appellate Controller was present in this case was that the property gifted by the deceased was subsequently purchased for

consideration by the deceased along with the superstructure standing thereon. In the Appellate Controller's opinion, this feature militated against

the application of the provisions of s. 46(1)(b) of the Act. On the basis that s. 46(1)(b) was wrongly applied to the borrowings, the Appellate

Controller followed up that finding by holding that the prepayment of Rs. 50,000 by the deceased to his son within a period of two years before his

death was also not properly brought into the charge under s. 46(2) of the Act.

5. The Asst. Controller thereupon filed an appeal before the Tribunal. The Tribunal, on a consideration of the facts and circumstances bearing on

the case, held that the disallowance of the debt to the extent of Rs. 30,000 under s. 46(1)(b) of the Act was not justified. They found that there

was no nexus between the property which was gifted by the deceased to his son, namely, the vacant site and the borrowings obtained by the

deceased from his son subsequently. The Tribunal remarked that the gift of a house site made by the deceased to the son was intended to enable

the son to raise a house of his own on the land. The Tribunal took more of the fact that it was only after the building was raised and the son was

unable to obtain a suitable tenant and the deceased himself was in search of a good residential house for rent that the built up property was let out

to the deceased and it was for the same reason that subsequently the deceased purchased the property from his son. The Tribunal accordingly

found that while the gift of land was made by the deceased to the son in order to enable the latter to construct a house thereon the borrowing

obtained by the deceased from his son was obviously for certain investment made by the deceased himself elsewhere. The Tribunal further pointed

out that it was only subsequent to the sale by the son of the built up property that the deceased, in turn, obtained loans from his son, and even those

loans had been discharged to a substantial extent before the deceased's death. It was on a consideration of all these facts that the Tribunal came to

the conclusion that s. 46(1)(b) of the Act had no application to the case. On the basis of this finding, the Tribunal made a consequential determination

that even the repayment of Rs. 50,000 by the deceased to his son cannot be brought to charge under the provisions of s. 46(2) of the Act. In the

result, the Tribunal upheld the order of the Appellate Controller.

6. In this reference made by the Tribunal at the instance of the Controller of Estate Duty his learned counsel, Mr. Jayaraman, submitted that the

provisions of s. 46(1)(b) of the Act should not have been ruled out, but ought to have been properly applied by the Tribunal in the present case.

He cited in support a decision of a Bench of this court in A. Kandaswami Pillai (deceased) (by legal representative) and Ahmed Haji Mohammed

Vs. Controller of Estate Duty, . In the course of the argument, another Bench decision of this court reported in Mrs. Ratnakumari Kumbhat Vs.

Controller of Estate Duty, , was also cited. But before we proceed to refer in detail to the rulings in those cases it would be convenient to refer to

the terms of s. 46(1) of the Act and the setting in which that provision is found enacted. If we look at the broad scheme of the Act, it will be

noticed that the charge to estate duty is on the principal value of the deceased's estate which passes or is deemed to pass on his death. The

conception of principal value is not the gross value of the estate but the gross value less certain deductions towards debts and liabilities of the

deceased, and certain expenses such as funeral expenses and the like. The charge really, therefore, is only on the net estate of the deceased. The

provision which allows for the deduction of debts is to be found in s. 44(a) of the Act. It provides that allowance shall be made for debts and

encumbrances but no allowance shall be made for debts incurred by a deceased unless such debts were incurred bona fide for full consideration in

money or money's worth wholly for the deceased's own use and benefit and take effect out of his interest. The limitation laid down in s. 44 by

Parliament is a simple one, namely, that bona fide debts incurred for full consideration by the deceased shall alone be deducted. The statute,

however, imposes certain further limitation on the deductibility even of bona fide debts for full consideration. Those limitation are set out in s. 46(1)

(a) and (b) of the Act. The restrictions or limitation on the allowability even of bona fide debts go by the name of "abatement". We think if

convenient at this stage to reproduce s. 46(1) of the Act. It runs as follows.

Further limitations. - (1) Any allowance which, but for this provisions, would be made u/s 44 for a debt incurred by the deceased as mentioned in

clause (a) of that section, or for an incumbrance created by a disposition made

by the deceased as therein mentioned, shall be subject to

abatement to an extent proportionate to the value of any of the consideration given therefore which consisted of -

(a) property derived from the deceased; or

(b) Consideration not being such property as aforesaid, but given by any person who was at any time entitled to, or amongst whose resources

there was at any time included, any property derived from the deceased.

7. There is a proviso which figures in s. 46(1) after the words above quoted. The proviso is in the followings terms :

Provided that if, where the whole or a part of the consideration given consisted of such consideration as is mentioned in clause (b) of this sub-

section, it is proved to the satisfaction of the Controller that the value of the consideration given, or of that part thereof, as the case may be,

exceeded that which could have been rendered available by application of all the property derived from the deceased, other than such (if any) of

that property as is included in the consideration given or as to which the like facts are proved in relation to the giving of the consideration as are

mentioned in the proviso to sub-section (1) of section 16 in relation to the purchase or provision of an annuity or other interest, no abatement shall

be made in respect of the excess.

8. In the present reference, it is not the case of either side that the borrowings effected by the deceased from his son can properly be brought in

and "abated" under s. 46(1)(a) of the Act. Nevertheless, a construction of this particular clause too cannot be avoided in understanding the scope

of the limitation imposed by the statute on the deductibility of bona fide debts. Broadly stated, the idea behind both clauses in s. 46(1) is based on

the apprehension of the Legislature that the requirement under s. 44 of the Act that a debt must be for full consideration and must be incurred bona

fide could be easily defeated by the deceased by making an unconditional gift to the would-be creditor and then borrowing the amount of the value

of the gift from the donee, with the diminution in the deceased's purchasing powers. In other words, the policy behind the provision is to

counteract or render nugatory any attempt at avoidance or evasion of estate duty in this manner. In *A. Kandaswami Pillai (deceased) (by legal*

representative) and Ahmed Haji Mohammed Vs. Controller of Estate Duty, ,

Veeraswami J., as he then was, speaking for a Division Bench,

Summed up the policy behind this part of the statute as well as the effect of the provision of s. 46(1) of the Act in the following terms (p. 569) :

9. We must confess that, at first sight, we feel some difficulty in appreciating the real scope of section 46(1). This is because while the policy of the

provision is obvious, viz., to avoid evasion of estate duty, the section seems to oversteps that mark, and in its abundant caution, appears to do

injustice by the disallowing even debts not intended to escape tax.

10. Similar sentiments were expressed in a Scottish case [McDougal's Trustees v. IRC [1952] 31 ATC 153 reproduced as Appendix at p. 698

(infra)] on the comparable provisions of s. 31(1) of the United Kingdom Finance Act 1839. Describing that provision as a strange section, Lord

Mackay characterised it as an affront to common sense which involved even the Inland Revenue in confusion.

11. The idea behind s. 46(1)(a) is that where the debt incurred by the deceased although for full consideration, must yet be disallowed if the

consideration for the debt is property derived from the deceased. The section provides that to the extent of the property the debt to allowed shall

be abated. This is provision in s. 46(1)(a). In A. Kandaswami Pillai (deceased) (by legal representative) and Ahmed Haji Mohammed Vs.

Controller of Estate Duty, , there were two cases in one and the same reference, which the learned judges had to decide in terms of s. 46(1) of the

Act. In the first of the cases, an argument was addressed before the court that for the application of s. 46(1)(a) there must be an intention in the

mind of the deceased, even at the time when he parted with the property, that he should at some time subsequent thereto borrow money from the

person to whom he had gifted the property. In other words, the argument was that part from what the section required, namely, that the property

derived from the deceased, must be consideration for this debt there must be further element of intention. Repelling the contention, Veeraswami J.,

who spoke for the court, observed thus (p. 569) :

Debt, to come within the ambit of section 46(1)(a) should be a debt which satisfied section 44(a). That means it must be a debt bona fide, for full

consideration : and such consideration in money or money's worth should be for the deceased's own use and benefit. If for such a debt

consideration constitutes property derived from the deceased to the extent of such consideration, allowance of the debt will not be made. In other

words, there should be a nexus between a debt which falls u/s 44(a) and the consideration, which must consist of property derived from the deceased.

we are unable to spell out any further element necessary for the application of section 46(1)(a), in the form of the intention, as contended for.

12. The above passage, with respect, brings out the essence of the provision in s. 46(1)(a). We would only observe that when the learned judge

spoke about the nexus as a basic element in s. 46(1)(a) he was referring to the express provisions in that clause which made property derived from

the deceased as the consideration for the debt. In this sense, nexus might even be regarded as an understatement of the relationship between the

debt on the one hand and property derived from the deceased on the other. For, under s. 46(1)(a) the one is the very consideration for the other.

13. In the same decision the learned judges also had to consider another fact-situation which called for the construction and application of s. 46(1)

(b) of the Act. The relevant facts were these : The deceased had two sons. He gave to each of them Rs. 70,000 each on July 31, 1952. These

amounts were withdrawn by the deceased from a firm in Bombay with whom he had credit and in which his sons were partners along with

certain third parties. The subject matter of the two gifts, of Rs. 70,000 each, was subsequently invested by the donees in another firm in Madras

in which they alone were partners. The deceased died on November 20, 1957, but before his death the deceased had continuously operated on his

account with the Bombay firm and by the time of his death his liability to that firm was cleared by his sons in the sum of Rs. 1,29,068. The question

was whether this liability which the deceased had created against himself by overdrawing on his account with the Bombay firm and which was

subsequently discharged by the sons to whom the deceased had earlier gifted moneys could be brought in for purposes of abatement under s.

46(1) of the Act. The estate duty authorities had applied to these transactions the provisions of s. 46(1)(a) of the Act. When the matter came before

this court in a reference, the learned judges, however, were of the view that the appropriate provision to be applied to the transaction was s. 46(1)

(b) of the Act. The argument which was addressed before the court by the accountable person in that case against the application of s. 46(1)(b)

was that the borrowings by the deceased from the Bombay firm was a direct borrowing and there was no interposition of third parties between the

deceased the person from whom he had borrowed and hence s. 46(1)(b) would not be attracted. This was the only argument addressed against

the applicability of that provision. This contention, however, was rejected by the court. The reason stated was that when the sons of the deceased

received a gift of Rs. 1,40,000 and when they subsequently discharged the father's debt due to the firm, they brought into application the

provisions of s. 46(1)(b) of the Act.

14. The difference between the provisions of s. 46(1)(a) and s. 46(1)(b) may be broadly stated as the difference between a direct nexus and a

nexus which is somewhat less direct. In cases to which clause (a) applies, the debt is to be abated because the consideration for the debt incurred

by the deceased happens to be directly and undistinguishably property derived from the deceased. In the case provided for by s. 46(1)(b),

however, the consideration is not directly any property derived by the creditor from the deceased. The debt to be abated under this clause is one

which person who was at some time entitled to, or amongst whose resources there was at some time included, any property derived from the

deceased. In the present case, the contention of Mr. Jayaraman, learned counsel for the Controller of Estate Duty, was that the person from whom

the deceased obtained the loan, namely, his son, Afsur, was the person to whom the deceased had earlier given the gift of the vacant land in 1963.

Learned counsel was quite aware of the considerable time lag between the gift in 1963 and the loans taken in 1969 and 1970. He also granted that

there was no direct relation between the gifted between the gifted property on the one hand and the debt on the other, each of which could be

regarded as providing a mutual consideration for the other. Yet since the gift of the vacant site by the deceased to his son can be regarded as

property derived from the deceased and since that property was held by the son at least from the date of the gift, namely, August 29, 1963, up to

the date of sale by him after raising a superstructure over it, namely, in January 1966, learned counsel for the Department urged that this property

derived from the deceased must be held as part of the resources of the person from whom the debt was incurred by the deceased, rendering it

necessary to abate the debt to that extent under s. 46(1)(b) of the Act.

15. This submission of learned counsel for the Revenue is based solely on the enacting part of s. 46(1)(b) of the Act. It does not take note of the

important provisions contained in the proviso to that sub-clause a proviso which has to be read in terms of s 16(1) enacted in a different context.

While the enacting part of s. 46(1)(b) addresses itself to the abatement of debts, the proviso lays down an opposite principle. The proviso says

that where the property derived from the deceased and held by the creditor as part of his resources is in excess of the debt obtained by the

deceased from the creditor, then the abatement shall not be made in respect of the excess of the property over the debt. The proviso, however,

lays down a further extension to the rule of abatement, and that is to effect that in calculating the excess of the property over the consideration of

the debt, account must be taken of all the property which could have been rendered available by the application of all the property derived by the

creditor from the deceased. However, this reckoning of the aggregate amount of property derived by the creditor from the deceased must exclude

the items by way of exceptions. One is the very property which had been derived from the deceased but which had not facilitated or enabled the

creditor to advance the loan or which did not possess any relation whatever to such loan. There is thus a nice balancing of the connection between

the debt advancement by the creditor remaining at one time or another as part of his resources. This balancing of considerations has been brought

in the proviso to s. 46(1)(b) by reference to the proviso to s. 16(1) of the Act.

16. The provisions of s. 46(1)(b) either alone or in association with the proviso to s. 16(1) do not make for easy reading or understanding. But an

attempt was made and, with respect, a very successful one by a Bench of this court in *Mrs. Ratnakumari Kumbhat Vs. Controller of Estate Duty*, .

Although the facts in that case had greater reference to s. 46(1)(b) of the Act than to s. 46(1)(b), the discussion inevitably covered the whole

section, including the proviso to s. 46(1)(b). Incidentally, the judgment of the Bench in that case was rendered by my learned brother, Ramaswami

J. By a quick of law reporting, his name does not appear in the reported

judgment as the learned judge who had spoken for the court. My learned brother, in the course of his discussion, referred to the earlier judgment of this court in A. Kandaswami Pillai (deceased) (by legal representative) and Ahmed Haji Mohammed Vs. Controller of Estate Duty, . He then proceeded to sum up the provisions of s. 46(1)(b) in the following terms in juxtaposition to s. 46(1)(b) (p. 582 of 101 ITR) :

17. This sub-section deals with a case where neither in whole nor in part the consideration was property derived from the deceased. Clause (b) assumes and proceeds on the basis that clause (a) is not applicable. In other words, that portion of the consideration which would be covered by clause (a) would not come under clause (b).... The proviso to clause (b) also makes this position abundantly clear. Under the proviso, for finding out whether the value of the whole or that part of consideration falling under clause (b) exceeded that which could have been rendered available by application of all the property derived from the deceased, the property which is included in the consideration given shall be excluded. Property which is included in the consideration given is the one that is dealt in clause (a). Thus, clause (b) deals with cases where the consideration was not the property derived but give by a person who was entitled to or amongst whose resources there was any property derived from the deceased.

18. My learned brother also supported his construction of the section with a citation from Halsbury's Laws of England, 3rd Edn., Vol. 15 at p. 82.

19. As observed, in the passage from my learned brother's judgment above quoted. clause (b) of s. 46(1) deals with a situation which is not covered by clause (a). It is no, however, to be supported that for s. 46(1)(b) to apply, the person who derives the property from the deceases should not also be the person who has advanced money to deceased. In other words, there is no scope for the argument that under s. 46(1)(b) of the Act it is only a third party who has interposed himself between the deceased and the creditor who is referred to as the person having properties derived from the deceased. As we had earlier mentioned an argument of this sort was advanced before this court in A. Kandaswami Pillai

(deceased) (by legal representative) and Ahmed Haji Mohammed Vs. Controller of Estate Duty, , and was repelled. In the Scottish case of

McDoughal's Trustees in v. IRC [1952] 31 ATC 153 a deceased purchased some

landed property in the name and for the benefit of the City of Edinburgh as representing the citizens. He also arranged with the counsel of the City Edinburgh to borrow almost an amount equivalent to the purchase price of the property with the stipulation that the amount borrowed together with the interest shall not be repayable so long as he lived but can be recovered only from his estate after his death. To this transaction the comparable provisions of s. 31 of the United Kingdom Finance Act, 1939, were applied by the Commissioner of Inland Revenue. The assessment was questioned by the accountable person. In the court of Session of Scotland, out of three of the learned judges who heard the case, Lord Mackay, in a monetary opinion, expressed the view that clause (b) had application only in cases where a third party comes in, for the words of the section are apt to refer only to a person other than the deceased's creditor, who has among his resources, property derived from the deceased. According to Lord Mackay it is only when we find in such a third party a resource either by way of gift or by way of inheritance derived from the deceased debtor that the provisions of clause (b) can be attracted. According to the learned judge, since in that case there was no such third party and since the gift was to the City of Edinburgh and the borrowing from the deceased was again for the City Edinburgh, the provisions of clause (b) cannot be applied. The other two judges of the Court of Session Lord Thomson and Lord Patrick, however, differed from Lord Mackay. They held that since the lender of the money was entitled to property derived from the deceased as part of his resources, clause (b) applied. Lord Patrick who agreed with Lord Thomson went into the construction of clause (b) both in its enacting part and in its proviso. A passage from Lord Patrick's judgment has been reproduced by my learned brother in the judgment in *Mrs. Ratnakumari Kumbhat Vs. Controller of Estate Duty*, in extenso and it is, therefore, unnecessary to quote the passage once again in this judgment. The principle derived from Lord Patrick's observation has been summarised in the judgment of my learned brother at p. 587 in the following terms :

It, may also be noticed at this stage that it is the view of learned judges in *McDougal's Trustees* case [1952] 31 ATax Cas 153 and also text book writers that in respect of cases falling under clause (b) no abatement shall

be made if it were shown that the disposition under which the property was derived was not made with reference to or with a view to enabling or facilitating the provision of the consideration for the debt. In other words, the loan transaction must have been in the contemplation of the parties at the time of making the gift. This view has been expressed in view of the proviso to clause (b).

20. My learned brother has made the further observation that the view expressed in McDougal's Trustees' case [1952] 31 ATC 512 did not find favour with the earlier Bench of this court which decided A. Kandaswami Pillai (deceased) (by legal representative) and Ahmed Haji Mohammed Vs. Controller of Estate Duty, , although the learned judges in that case had expressed the view that there must be a nexus between the incurring of the debt and the gift.

21. By way of explanation it may be stated that in A. Kandaswami Pillai v. CED, this court did not have to decide any particular argument addressed on the basis of the proviso to s. 46(1)(b) of the Act. Secondly the decision of the Scottish Court in McDougal's Trustees v. IRC had not been brought to their notice. Thirdly, the learned judge's observation to the effect that there must be a nexus between a debt which falls under s. 44(a) and the consideration which must consist of property derived from the deceased was particularly addressed with reference to the provisions of s. 46(1)(a) of the Act. In this sense, therefore, it could not be said that the expression of views in A. Kandaswami Pillai (deceased) (by legal representative) and Ahmed Haji Mohammed Vs. Controller of Estate Duty, , is in any way inconsistent with the view expressed in McDougal's Trustees v. IRC [1952] 31 ATC 153 or the construction placed on s. 46(1)(b) of the Act in Mrs. Ratnakumari Kumbhat Vs. Controller of Estate Duty, , for that matter.

22. Before us, however, the attempt of Mr. Jayaraman for the Revenue was to say that the view expressed by the learned judges of this court in A. Kandaswami Pillai (deceased) (by legal representative) and Ahmed Haji Mohammed Vs. Controller of Estate Duty, , with reference to s. 46(1)(a) must also be applied to an interpretation of s. 46(1)(b). It may be recalled that what the learned judges observed in A. Kandaswami Pillai v. CED, about s. 46(1)(a) was to reaper the argument that only where there is an

intention on the part of the donee at the time of the making the gift to get back the property comprised therein at a liability in the form of a liability, that s. 46(1)(a) would apply. It is in that connection that they had observed that it is enough that there is nexus between the property derived from the assessee and the debt advanced to the assessee as consideration therefore and it was not necessary that there should be intention on the deceased's part to borrow from the donee any money even at time of making the gift. The same view had not been expressed by the learned judges with reference to s. 46(1)(b). Nevertheless, the argument of learned counsel for the Revenue that the same principle must also apply for the interpretation of s. 46(1)(b) cannot be rejected out of hand as not calling for examination. We have earlier referred to the expression provision in the enacting part of s. 46(1)(b) as requiring no more than that the person who advances the debt to the deceased had as part of his resources any property derived from the deceased at some time or other. We think it necessary to mention that the proviso s. 46(1) expressly refers only to clause (b) and stops with that, if clause (b) which the proviso refers to applies only to cases other than those which fall under clause (a), then it is quite easy to see that the reference in the proviso to s. 46(1)(b) excludes the provisions of clause (a) altogether, by sheer non-mention of one of two classes forming a dichotomous classification. In other words the proviso is a proviso not to s. 46(1)(a) but only to s. 46(1)(b). Thus, the observations of this court in *A. Kandaswami Pillai (deceased) (by legal representative) and Ahmed Haji Mohammed Vs. Controller of Estate Duty*, made with reference to the construction of s. 46(1)(a), cannot be applied without any modification to s. 46(1)(b) considering that s. 46(1)(a) is not in any way influenced by any proviso whereas s. 46(1)(b) has to reckon with the proviso. Quite apart from this aspect of the drafting and the resultant structure of s. 46(1) of the Act, we may observe that when the Legislature directed that notice must be taken of the fact that the creditor has some property derived from the deceased as part of his resources, then the wide language of the enacting part of s. 46(1)(b) was not intended to be applied as it is without qualification. This would be seen from the fact that literally understood any and every property which at some time or other had been derived from the deceased would have

the effect of abating the debt to some extent or other. The words in s. 46(1)(b) are "any person who was at any time entitled to "or" amongst whose resources there was at any time included, any property derived from the deceased". Ordinarily understood, the expression at any time by mean, however long before and, however long after. An unrestricted meaning if given to this phrase "at any time" may even refer to the property derived from the deceased by way of inheritance or testamentary succession. It is obvious, however, that it must only refer to the derivation of property prior to the advance of the debt. This is because at the time at any rate when the property becomes part of the creditor's resources, there may be some nexus between part of the creditor resources, there must be some nexus between the resources and the consideration for the debt. But where the property, irrespective of any distance of time, becomes part of the resources of the creditor of the deceased, that nexus cannot be established merely because of the subsequent relation between the deceased and the creditor. Apart from this aspect, the expression "resources" itself indicates a particular fund or feeder source and it is from that fund that the debts should have been advanced. "Resource" means that which supplied some deficiency or some want. "Resource" does not merely refer to the source of finance, without any antecedence. This also shows that there must be a precedence of the property first and the advance of loan to the deceased subsequently.

23. Quite apart from the aforesaid consideration which flow as a matter of construction from the enacting part of s. 46(1)(b), the proviso to the section also introduces factors, which reduces the rigor of the rule relating to abatement of debts. In this sense the proviso must really be read as a measures of relief from abatement of debt. Diamond in his 14th Edn. of Death Duties, summarising the effect of the provisions of s. 31(1)(b) of the United Kingdom Finance Act, 1939, observed that provision for relief is made to the extent to which it exceeds the amount available by the application of all the property derived from the deceased other than, (1) property included in the consideration, i.e., falling within clause (a), and (2) property which can be proved to have been derived from the deceased under a disposition not made with reference to, or with a view of enabling or facilitating the transaction, or with a view to recouping the cost. To the extent of excess, deduction of the debt could be allowed. The

same view was expressed in McDougal's Trustee's case [1952] 31 ATC 1538 and Mrs. Ratnakumari Kumbhat Vs. Controller of Estate Duty, .

24. The statement of the legal position in Dymond fits with what we find in the proviso to s. 46(1)(b) which has to be read with the proviso to s.

16(1)(b) of our E.D. Act. Broadly speaking, s. 46(1)(b) aggregates all the properties derived from the deceased forming part of his resources, and

compares their aggregate value with the money borrowed by the deceased from the owner of those properties. If the deceased's borrowing

exceeds the aggregate of the resources made available by the deceased to the lender, then to the extent of that excess there shall not be any

abatement. In other word, the excess of the deceased's debt over the value of the properties of the creditor which are traceable to the deceased

shall be allowed as deductible debts. In this sense, there will be an abatement of the abatement. But in arriving at the "excess" of the deceased's

debts over the creditor's properties, two classes of properties must stand out. In the first place, the proviso to s. 46(1)(b) itself lays down that the

very property, if any, which is derived by the creditor from the deceased which forms the consideration for the money lent by the creditor to the

deceased, must be left out of account. This class of property stands excluded because, if there is a direct link between the loan to the deceased

and the property gifted by the deceased to the creditor, as one being the consideration for the other, the abatement would have to be done under

s. 46(1)(a) and not under s. 46(1)(b). The second class of properties which will have to be excluded in reckoning the excess of the creditor's

resources (derived from the deceased) over the debt owed by the deceased must be ascertained by reference to the proviso to s. 16(1), which

stands incorporation, in a manner of speaking, in the proviso to s. 46(1)(b). On a combined reading of the two proviso, the following properties

cannot be taken into account in ascertaining the deceased's debts over the resources which, at some time or other, the creditor holds which are

traceable to the deceased :(1) property which was not given by the deceased to the creditor with a view to "enable" the loan to be given to the

deceased; (ii) property which was not given by the deceased to the creditor with a view to "facilitating" the loan to be granted to the deceased; and

(iii) property which was not given by the deceased to the creditor with a view to "recouping" by the creditor of the cost of the loan advanced by

the creditor to the deceased.

25. The question in this case is whether there should be an abatement of the debt of Rs. 30,000 under s. 46(1)(b) or whether under the proviso to

s. 46(1)(b) there should be an abatement of the abatement of the debt. We may first rule out any contention based on the debt owed by the

deceased to his son being direct consideration for the gift of the vacant site by the deceased to his son. The gift was in march, 1963, and although

the then value of the 4 grounds and 30 sq. feet so gifted is not on record, there is not question of the gifted property forming an impetus or

consideration for the subsequent loan by the son to the deceased amounting in all to Rs. 80,000. The estate duty authorities themselves do to

regard the gift of vacant site as providing the consideration for the loan. This is shown by the fact that the Asst. Controller did not invoke s. 46(1)

(a) for abating the debt, he only relied on s. 46(1)(b).

26. It cannot also be said that the gift by the deceased of the vacant site to the son in 1963 facilitated or enabled the son to advance money to his

father six or seven years hence in 1969 and 1970 in the total sum of Rs. 80,000. Apart from the considerable time-lag in between there is yet

another reason why the gifted property could not have facilitated or enabled the loans to be made by son. While the loans were effected by the son

to the deceased in April, 1969, and March, 1970, the property itself had been sold for full consideration by the son to the deceased more than

three years prior thereto, in January, 1966. It would, therefore, be impossible to hold that the property gifted would have been gifted with a view

to enable or to facilitate the subsequent loans. Nor could it be said that the property was in any way intended or utilised for recoupment of the loan

or any part thereof. On the contrary, the facts show that out of the total borrowings of Rs. 80,000 the deceased had been in a position to repay

Rs. 50,000 during his lifetime out of his other resources and, therefore, this property having left hands of the son, the donee, even prior to the

deceased obtaining the loans, the property could not have once in even for recoupment of the loans. The property did not exists in the hands of the

son by the time the loans themselves were effected and, therefore, he could to look to the properties for recoupment. It is not shown that the sale

proceeds of the house were kept by the son or meant by the son to any extent

as some kind of a cover for the loan. Apart from all these consideration, it could not be stated that there is otherwise by any stretch of language or imagination any "nexus" between the loans borrowed in the years 1969 and 1970 and the gift of the vacant land effected in 1963 when all the subsequent transaction between the parties with reference to the subject-matter of the gift was as was described by the Appellate Controller purely at arm's length, in the first instance as landlord and tenant and later as vendor and purchaser. It has been found both by the Appellate Controller and the Tribunal that the deceased took the tenancy of the building at a rent, and it was let out to him at a time when the son was on the look out for a suitable tenant. This shows that the tenancy was a bona fide one. Again, the record shows that a sum of Rs. 2 lakhs for which the property was sold by the son to the deceased represented just the market value of the property as on the date of sale. Having regard to all these considerations, we are satisfied that the Tribunal was right in holding that there was no nexus either direct or indirect whatever between the original gift and the subsequent borrowings.

27. The Appellate Controller had given an additional reasons as to by the provisions of s. 46(1)(b) cannot be applied to the present case, a reason which cannot be derived from s. 46(1)(b) but from the scheme of the estate duty statute. He pointed out that the very property which was gifted by the deceased in favour of his son whose presence is relied upon for the purpose of applying the provisions relating to abatement was subsequently held with by the son in such away that it had become part of the property passing on the deceased's death upon which duty has been directly levied in the assessment. We had earlier referred to this fact while analysing the assessment. The subject-matter of the gift, namely, the land and the superstructure built thereon having become the property of the deceased by reason of the purchase effected by him in January, 1966, remained till his death as part of his estate. On that account the property was brought to assessment on its principal value estimated at Rs. 2 lakhs odd. Thus, when the property itself has been brought to charge, the disallowance of the borrowings purely on the basis that the original gift might have same subject-matter. According to the Appellate Controller this is not the result which is to the view expressed by Green, in his Death Duties (7th Edn.).

This learned writer refers to a revenue practice in vogue in the United Kingdom in the following terms (see p. 524 of the text) :

Where, in case (a) the consideration for the debt consisted to any extent of property derived from the deceased which is itself subject to duty on his death, the debt is in practice allowed pro tanto.

28. In our view the practice of the united Kingdom Estate Duty Officer to which Green had referred is in consonance with the policy of s. 46(1)(b)

of our E.D. Act. While the provision is intended to neutralise tax avoidance schemes, it is not intended at all to obtain for the Revenue a double tax.

29. Learned counsel for the Department submitted that the proviso to s. 46(1)(b) must be understood as laying down on more than a rule as to

burden of proof. He explained that if there should be any cutting down of the abatement under s. 46(1)(b) on account of any consideration which

could be invoked by reference to the proviso to s. 16(1) of the Act, then the onus is entirely on the accountable person to prove those facts to the

satisfaction of the Controller. Learned counsel particularly relied on the words ""it is proved to the satisfaction of the Controller"", occurring in the

proviso to s. 46(1)(a) as well as the proviso to s. 16(1) of the Act. According to learned counsel, the accountable person in the present case had

failed to discharge this onus.

30. We would not like to understand the proviso to s. 46(1)(b) as merely enouncing a rule of evidence. On the contrary we hold that the proviso

has to be read as part and parcel, or the summum bonum of the entire object of Parliament contained in s. 46(1)(b) as respects the extent of the

abatement of the debt and the extent of the cutting down of the abatement, both put together. It is true that some kind of emphasis has, perhaps to

be made on the words ""it is proved to the satisfaction of the Controller"". But we can easily overemphasize the importance of these words and hold

that what the proviso enacts is only a rule of evidence laying down a rebuttable presumption.

31. Section 46(1)(b) no doubt lays down the onus, but it lays down much more. Even on the question as to where the onus lies in cases covered

by s. 46(1)(b) the position does not seem to be the one which has been urged by the Department's learned counsel, in *Monie Ardeshir Baria and*

Piloo F. Antia, Executrices of The Estate of Ardeshir D. Baria and Others Vs.

Controller of Estate Duty, Bombay, , which was a case arising under s. 46(1)(b) of the Act, it was observed (p. 270) :

... the onus of seeking abatement u/s 46 of the said Act is on the Revenue and if it is found that the source is not clearly shown, the Revenue must be deemed to have failed to discharge this onus, with the result that no abatement could be claimed in respect of this amount.

32. A similar view was expressed by Lord Mackay in *McDogal's Trustees v. IRC* [1952] 21 ATC 153 when he said with reference to a

particular facts of the case before the Court of Session that the Commissioner of Inland Revenue had not even discharged the onus with which

rests upon them. The editor of the 14th Edn. of *Dymond's Death Duties*, while expressing the view that the onus would be on the accountable

person, however, has referred to the difficulties that might be caused by a rigorous application of this rule. He observed (pp. 429, 430) :

If it can be shown that when the deceased made the disposition of the property he never contemplated that it would or might be used to facilitate etc.,

the provision of the interest, it is immaterial that, at some later date, it had such an effect or was consciously so used; by task the deceased may

kept his ideas to himself it may clearly be difficult to establish this, though it may assist if it can be shown that the disposition was made for some

other specific purpose. If the disposition and the provisions of the interest were contemporaneous, or at all nearly so, this difficulty may usually

prove in super above, even if there was ostensibly another reason for the disposition; on the other hand, where there is an interval of years between

the two transactions, and the circumstances do not suggest that the later of them was in mind at the time of the earlier, it may frequently prove easier

to satisfy the Commissioners.

33. While we have endeavored to touch upon the aspect of onus, we must hasten to observe what is pertinent to the disposal of the present case,

namely, that at the present stage, with all the evidence that could be made available having already been made available during the assessment and

during the appeal, the question hardly arises as one of application of the rules as to burden of proof. When we are called upon to express our

opinion as to the correctness of the decision in law of the Tribunal, the question of onus of proof recedes into the background and all we have to

address our minds to is to find out if, on the facts found by the Tribunal, their determination in the point of law is correct or not. We have earlier

referred to the grounds on which the Tribunal had come to the conclusion that there was no nexus whatever between the disposition of the

property by the deceased in favour of his son in 1963, and the borrowing effected by the deceased from his son after an interval of six seven years.

The house site was certainly not of the resources from which the deceased's son could have advanced the loan to his father. It was not one of the

properties available to him which the son could look to for the recoupment of the loan. There was no other kind of relation which could be

established between the outstanding debt of Rs. 30,000 and the gift of the house site 7 years earlier.

34. We accordingly answer both the questions in the affirmative and against the Revenue. The accountable persons will have their costs of this

reference. Counsel's fee Rs. 500.