

(1976) 03 PAT CK 0011
In the Patna High Court
Case No : Tax Case No. 166 of 1971

Mahabir Prasad Poddar

APPELLANT

Vs

Controller of Estate Duty

RESPONDENT

Date of Decision : 04-03-1976

Acts Referred:

Estate Duty Act, 1953 — Section 10

Citation : (1976) 104 ITR 612 : (1976) 9 PLJR 220

Hon'ble Judges : S.N.P. Singh, C.J.; S.K. Jha, J

Bench : Division Bench

Advocate : N.P. Agrawal and Bishwanath Agrawal, for the Appellant; B.P. Rajgarhia, Senior Standing Counsel and S.K. Sharan, Junior Counsel, for the Respondent

Judgement

S.K. Jha, J.—A statement of the case u/s 64(1) of the Estate Duty Act, 1953 (hereinafter referred to as "the Act"), has been submitted by the Income Tax Appellate Tribunal, Patna Bench, and the following two questions of law have been referred for the opinion of this court :

"(1) Whether, on the facts and in the circumstances of the case the sum of Rs. 80,000 was liable to estate duty as property deemed to pass on the death of the deceased u/s 10 of the Estate Duty Act, 1953 ?

(2) Whether, on the facts and in the circumstances of the case, the business of M/s. Mahabir Prasad Gopi Krishna has any goodwill ?"

2. The facts relevant for the disposal of this case are not in controversy. The estate duty proceedings are in respect of the estate of the deceased, Debi Prasad Poddar, who died on the 6th of December, 1964. The accountable person is one of his sons, Mahabir Prasad Poddar, at whose instance this reference has been made. The deceased had two sons, Mahabir Prasad and Gopi Krishna. He was the proprietor of the proprietary firm doing business under the name and style of M/s, Mahabir Prasad Gopi Krishna. On the 23rd of May, 1959, the deceased made a

cash gift of Rs. 25,000 to each of the two sons. The two donees deposited the gifted amounts in their bank accounts. Thereafter, on the 26th of May, 1959, Gopi Krishna withdrew Rs. 25,000 from his bank and invested the same in the proprietary firm of the deceased. So did the other son, Mahabir Prasad, on the 30th of May, 1959. The proprietary firm continued till the 30th of September, 1959, and with effect from October, 1959, it was converted into a partnership firm with the deceased and his two sons as partners. During the continuance of the partnership, the deceased made the following further gifts of Rs. 15,000 each to his two sons :

Date Mahabir Prasad Gopi Krishna

10-10-60 5,000 5,000

16-8-61 5,000 5,000

1-10-62 5,000

5,000

Total 15,000

15,000

3. The aforesaid amount of Rs. 30,000 gifted to the two sons was invested by the donees in the partnership firm on October 10, 1960, August 16, 1961, and October 1, 1962, that is, on the very dates on which the donees received the gifted amounts. The Assistant Controller of Estate Duty included the total sum of Rs. 80,000 as aforesaid in the value of the estate of the deceased by virtue of Section 10 of the Act. The accountable person having preferred an appeal, the Appellate Controller affirmed the decision of the Assistant Controller. On a second appeal having been preferred by the accountable person before the Appellate Tribunal, the Tribunal held that since the gifted amounts had been invested in the books of account of the partnership firm in which the donor was a partner till his death, the donees did not retain to the exclusion of the donor such gifted amounts which were, therefore, liable to be included in the estate of the deceased. Copies of the orders passed by the Assistant Controller, the Appellate Controller and the Tribunal have been marked annexures "A", "B", and "C", respectively, and form parts of the statement of the case. On these facts the first question has been referred to this court for our opinion.

4. The facts relevant for the purpose of the second question are these. On the date of the death of the deceased, as already stated above, he was a partner of the firm along with his two sons. The business was carried on in Marufganj, which is an important business locality of Patna. The Assistant Controller of Estate Duty estimated the value of the goodwill of the business at. Rs. 26,000. On first appeal the Appellate Controller reduced the value of the goodwill to Rs. 15,000. Before the Tribunal it was contended by the accountable person that the business carried on by the partnership firm was only in kirana goods and since

the business involved no distinguishable features and dealt with in standard articles, which one could get from anywhere, there could not be any goodwill attached to such a business. The Tribunal held that the partnership firm not only carried on business in kirana goods but was also the selling agent and stockist for R. S. Hindustan Lever Ltd. and Western India Match Co. Ltd. and since the location, service, standing of the business and the honesty of those who ran it all went to constitute the goodwill there must be goodwill attached to the business. The value of the goodwill was, however, estimated by the Tribunal at Rs. 10,000 only in which the deceased had one-third share and his share in the value of the goodwill alone was included in the estate of the deceased.

5. To deal with the second question first, I do not find any infirmity in the Tribunal's appellate order holding that the partnership firm had a goodwill which could be valued. The contention of the accountable person was that the nature of the business carried on by the partnership firm, which dealt only in kirana goods, was such that it should not be held to have any goodwill at all. The Tribunal relying upon a decision of the Supreme Court in the case of S.C. Cambatta and Co. Private Ltd. Vs. Commissioner of Excess Profits Tax, Bombay, held that the goodwill of a business depended upon a variety of circumstances or a combination of them. The location, the service, the standing of the business, the honesty of those who ran it, the lack of competition and many other factors went individually or together to make up the goodwill though locality always played a considerable part. But locality is not everything. The power to attract customers depends on one or more of the other factors as well. Applying the aforesaid test, the Tribunal recorded a finding of fact that the partnership firm was not carrying on kirana business only but was also the selling agent and stockist for R. S. Hindustan Lever Ltd. and Western India Match Co. Ltd. The location, the service, the standing of the business and the honesty of those who ran it were also taken notice of by the Tribunal. It cannot, therefore, be said that the Tribunal committed any error in law in holding that on the facts and in the circumstances of the case the business of M/s. Mahabir Prasad Gopi Krishna had a goodwill. Learned counsel for the accountable person urged that, in any event, assuming that the firm had a goodwill, the share of the deceased in the value of such a goodwill should have been held to have been not exigible to estate duty. This point had never been canvassed before any of the authorities below. Even in the application for reference filed by the accountable person the only point taken is that on the facts and in the circumstances of the case the business of M/s. Mahabir Prasad Gopi Krishna had no goodwill. To negative the stand of the accountable person, the Tribunal has taken due consideration of all the relevant factors constituting a goodwill and has come to a conclusion on a question of fact. The decision of the Tribunal is patently right. Reliance was placed on behalf of the accountable person on two decisions, one of the Punjab and Haryana High Court in the case of Controller of Estate Duty Vs. Shri Ved Parkash Jain, and the other of the Gujarat High Court in the case of Mrudula Nareshchandra Vs. Controller Estate of Duty, for the purpose of contending that goodwill of a

partnership is not such an asset as could be said to have passed on the death of the deceased for the purpose of estate duty. Assuming such a point could be taken at this stage, these cases do not come to the aid of the accountable person. In the case of Ved Parkash Jain, the Punjab and Haryana High Court held that during the subsistence of the partnership no partner can deal with any part of its property as his own nor can he assign his interest in a specific item of the partnership property to anyone. His only right is to obtain such profits, if any, as fall to, his share from time to time and, in case a partner assigns his share to another, then the assignees would get only the right to receive the share of the profits of the assignor. In that case the firm was continued after the death of the partner, who had assigned his share, and it was, therefore, held that no specific share in the goodwill passed on to his heirs as he did not own any specific share in the goodwill of the firm. It was further held that u/s 5 of the Estate Duty Act duty is leviable only upon the principal value of property which passes on his death and goodwill has no value in a going concern of partnership. In the case of Smt. Mrudula Nareshchandra it was held that in a case where it is specifically stipulated between the partners of a firm that on the death of any of the partners the partnership shall not stand dissolved and that the heirs of the deceased partner shall have no right whatsoever to claim any share in the goodwill of the firm, the benefit arising to the other partners on the cesser of interest in the goodwill, on the death of one of the partners, cannot be measured in terms of Section 40, and, therefore, such benefit is not liable to estate duty u/s 7 of the Act. In the instant case there is nothing in the statement of the case which would go to show that there was any stipulation amongst the partners of the firm that on the death of one of them the partnership shall not stand dissolved. Nor is there anything to show that the partnership is still continuing. In such circumstances it is not possible to enter into such academic discussion or to reframe the question as was suggested by the learned counsel for the accountable person. The second question, therefore, must be answered in favour of the revenue and against the accountable person and it must be held that on the facts and in the circumstances of the case the business of M/s. Mahabir Prasad Gopi Krishna had a goodwill.

6. Coming to the first question then, one thing is perfectly clear that the gifts in question have been made, as appears from the materials on record, of cash absolutely to the two donees. I have already stated above that after the gifts were made in cash to the two sons, the donees in their return subsequently invested the amounts by depositing in their accounts the sums so gifted. These are the basic facts on the basis of which it has to be judged whether the gifts are liable to estate duty under the provisions of Section 10 of the Act. Section 10 of the Act reads 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."

7. While construing the true scope and purport of the deeming clause, the Supreme Court in the case of *George Da Costa Vs. Controller of Estate Duty* in Mysore, Bangalore, laid down the principle to be applied to cases which may be sought to be covered by the provisions of the deeming clause u/s 10. In the case of *George Da Costa* the Supreme Court has laid down that the crux of section 10 of the Act lies in two parts: (i) the donee must bona fide have assumed possession and enjoyment of the property which is the subject-matter of the gift to the exclusion of the donor, immediately upon the gift, and (ii) the donee must have retained such possession and enjoyment of the property to the entire exclusion of the donor or of any benefit to him by contract or otherwise. Both these conditions are cumulative. Unless each of these conditions is satisfied the property would be liable to estate duty u/s 10 of the Act. The second part of Section 10 has two limbs ; the deceased must be entirely excluded, (i) from the property, and (ii) from any benefit by contract or otherwise. The words "by contract or otherwise" in the second limb of the section will not control the words "to the entire exclusion of the donor" in the first limb. The first limb may be infringed if the donor occupies or enjoys the property or its income, even though he has no right to do so which he could legally enforce against the donee. In other words, in order to attract the section, it is not necessary that the possession of the donor of the gift must be referable to some contractual or other arrangement enforceable in law or in equity; even if the donor is content to rely upon the mere filial affection of his sons with a view to enable him to continue to reside in the house which he had given to them, it could not be said that he was entirely excluded from possession and enjoyment within the meaning of the first limb of the section, and, therefore, the property will be deemed to have passed on the death of the donor and will be subject to levy of estate duty. The general principles in construing the provisions of Section 10 of the Act are to my mind by now well-settled. In construing liability under the provisions it is necessary to examine exactly what was the property taken under the gift. If it is found that the deceased instead of reserving an interest in the property given has retained and excluded from the gift some beneficial interest, the interest which he has retained is not a reservation in relation to the interest which he has given; it is simply something which was not included in the gift-The principle is that what a donor keeps back is no gift at all. It is merely the

application of this principle to the facts of different types of cases which has resulted in the two leading decisions on the subject, one of the Judicial Committee of the Privy Council in the case of H.R. Munro v. Commissioner of Stamp Duties [1934] AC 61 : 2 EDC 462 (PC) and the other that of the House of Lords(?) in the case of Clifford John Chick v. Commissioner of Stamp Duties [1959] 37 ITR 89 : [1958] AC 435 : 3 EDC 915 (PC). Both Munro's case and Chick's case have been approved and the principles enunciated therein have been followed by our Supreme Court as well as all the High Courts in the country. Munro's case lays down the proposition that if what was comprised in the gift was the property, shorn of the right which belonged to the partnership, then to that extent it cannot be said that the right reserved to the partnership was in any way gifted. And what was the subject-matter of gift did pass exclusively and was retained thenceforward by the donee. In such circumstances the property taken under the gift was held not deemed to have passed on the donor's death. Chick's case, on the other hand, lays down the proposition that where the question is whether the donor has been entirely excluded from the subject-matter of the gift, that is the single fact to be determined, and, if he has not been so excluded, the eye need look no further to see whether his non-exclusion has been advantageous or otherwise to the donee. In that case, while it was not disputed that the son had assumed bona fide possession and enjoyment immediately upon the gift to the entire exclusion of the father, he had not, on the facts, thenceforth retained it to the father's entire exclusion. It was, therefore, held in Chick's case that the property would be deemed to have passed on the death of the donor. These principles have been followed in all the cases cited at the Bar either in support of the case of the accountable person or that of the revenue. Learned counsel for the accountable person placed reliance on Munro's case and on the cases of Controller of Estate Duty Vs. S. Aswathanarayana Setty and Another, a judgment of the Mysore High Court which was approved by the Supreme Court in the case of Controller of Estate Duty, Madras Vs. C.R. Ramachandra Gounder, , Commissioner of Income Tax and Controller of Estate Duty, Madras Vs. N.R. Ramarathnam and Others, , Controller of Estate Duty Vs. Thanwar Dass, , Balkishan Muchhal Vs. Controller of Estate Duty, and Sakarlal Chunilal and Others Vs. Controller of Estate Duty, Gujarat, . The learned senior standing counsel for the department placed reliance on the cases of George Da Costa Vs. Controller of Estate Duty in Mysore, Bangalore, dealt with above, Controller of Estate Duty Vs. N.K. Sanghi, , Radhabai Ramchand Vs. Controller Of Estate Duty, Madras, and Addanki Narayanappa and Another Vs. Bhaskara Krishtappa and Others, . I shall presently show that there is no conflict in these decisions. On the facts of each particular case what has been decided is that if the gift has been made shorn of certain rights belonging to the partnership then that part which is excluded from the gift is no gift at all and what was gifted to the donee shorn of such right was exclusively held as owner and retained by him. In such cases the property gifted is not deemed to have passed on the donor's death. In the other line of cases, on the facts found, the donees were held to have been given under the deed of gift the absolute property without any

reservation or interest in the property, without being shorn of any right which belonged to the partnership. In such cases the inevitable conclusion was that if the donee had not assumed bona fide possession and retained the property to the entire exclusion of the donor, the property would be deemed to have passed under the provisions of Section 10 of the Act.

8. Before dealing with the catena of decisions cited at the Bar, I think it is worthwhile to enunciate the principle of law regarding the nature of interest of a partner in a partnership property on account of which when a share in the partnership property is transferred by gift or by adjustment of book entries it has to be held that where such a share is gifted it is subject to the rights of the partnership and shorn of certain rights not belonging to the donor exclusively. The law in this connection has been settled by the Supreme Court in the case of Addanki Narayanappa. The law in this regard is that provisions of the Partnership Act, 1932, make it clear that whatever may be the character of the property which is brought in by the partners when the partnership is formed or which may be acquired in the course of the business of the partnership it becomes the property of the firm and what a partner is entitled to is his share of profits, if any, according to the partnership from the realisation of this property and upon dissolution of the partnership to a share in the money representing the value of the property. Since a firm has no legal existence, the partnership property is vested in all the partners and in that sense every partner has an interest in the property of the partnership. During the subsistence of the partnership, no partner can deal with any portion of the property as his own. Nor can he assign his interest in a specific item of the partnership property to any one. The whole concept of partnership is to embark upon a joint venture and for that purpose to bring in as capital money or even property including immovable property. Once that is done whatever is brought in would cease to be the exclusive property of the person who brought it in. It would be merely the trading asset of the partnership in which all the partners would have interest in proportion to their share in the joint venture of the business of partnership. The person who brought it in would, therefore, not be able to claim or exercise any exclusive right over any property which he has brought in, much less over any other partnership property. It is true that even during the subsistence of the partnership a partner may assign his share to another. In that case what the assignee would get would be only that which is permitted by Section 29(1) of the Partnership Act, that is, the right to receive the share of profits of the assignor and accept the account of profits agreed to by the partners.

9. We have to judge the case law cited at the Bar keeping in mind the nature of the interest that a partner has got in the partnership property as enunciated in the foregoing paragraph.

10. In *Controller of Estate Duty Vs. S. Aswathanarayana Setty and Another*, the Mysore High Court was dealing with a case in which the deceased donor was partner in the firm along with others under a partnership agreement. The

deceased had a half share in the said business. The capital standing to the credit of the deceased in the books of the firm as on June 30, 1954, was Rs. 1,07,148. On June 30, 1954, this amount was divided into three parts of four annas, two annas, and two annas, respectively, and two shares of two annas each in the capital were transferred by the deceased donor to the accounts of his two sons and the shares so transferred to the accounts of the donees were credited to the accounts of the donees who were brought in as partners on July 1, 1954, and a fresh partnership deed was duly drawn up. On these facts Hegde J. (as he then was), speaking for the court, held that:

"In the instant case, gifts made were shares in an existing firm. The firm in question continued to be in existence even after the gifts, till the date of the death of the deceased, Subbiah....All the partners of the firm including the deceased were in management of the firm as partners. In these circumstances, the possession that the donees could have taken in pursuance of the gifts mentioned earlier is only a legal possession. It was not possible for any one of the partners to take physical possession of any portion of the assets of the firm. It is established that the property gifted was in the management of the donees. On the facts of the case, it cannot be said that, after the gifts, the donees did not retain the property gifted to the entire exclusion of the donor or that the donor had any benefit either by contract or otherwise in the property gifted."

11. It was, therefore, held that Section 10 of the Act was not attracted. In the case of C.R. Ramachandra Gounder the Supreme Court was again dealing with the case of gifts made by the deceased, who was a partner in the firm. A sum of Rs. 1,00,000 which was the subject-matter of gift was transferred by crediting the amount in each of the son's accounts with the firm which thenceforward became liable to the sons for payment of that amount and the interest thereon ; the possession which the donor could give was the legal possession which the circumstances and the nature of the property would admit and this the donor had given. In the case of N.R. Ramarathnan the Supreme Court was dealing with gifts made by the deceased to his three sons and a daughter who were already partners in a firm which carried on money-lending business. The transfers were made by adjustment entries in the books of the firm against the balance to the credit of the donor in the firm and the amounts continued to remain with the firm and were utilised in the business and the deceased continued to be a partner of the firm till his death. The Supreme Court held that what was gifted was subject to the rights of the partnership and the subject-matter of the gift was retained exclusively by the donees to the entire exclusion of the donor. So also in the case of Thanwar Dass, the gift was made by adjustment entries in the books of account of a firm in which the donor was a partner and the money so gifted was not withdrawn by the donee but was allowed to remain with the firm. In Balkishan Muchhal the deceased had a deposit account in a firm of which she was a partner. She made certain gifts from this deposit account. As a result debit entries were made in her account and credit entries were made in the accounts of the donees. No cash was paid to the donees. In such circumstances Section 10

of the Act was held not to be attracted. The case of Sakarlal Chunilal of the Gujarat High Court is very much against the accountable person. In that case where the gifts were made by debiting the amounts in the books of the partnership of which the donor was a partner it was held that Section 10 would not be attracted. But where the gifts were made by cash which were later ploughed back by the donees into the partnership business it was held that Section 10 of the Act would be attracted.

12. The cases relied upon by the learned senior standing counsel for the department have applied the same principle for coming to the conclusion that the subject-matter of the gifts would fall within the purview of Section 10 of the Act. In the case of N.K. Sanghi the Rajasthan High Court was dealing with an amount gifted by the deceased to his sons which was ploughed back into the partnership business of the donor and the donees. On such facts it was held that the donees could not be said to enjoy the possession of the property during the continuance of the partnership to the entire exclusion of the donor. The donor in one sense or the other had dominion over the property and the property was utilised both for the benefit of the donor and the donees. In the case of Radhabhai Ramchand the Madras High Court was similarly dealing with a case of gift of cash which was afterwards invested in the partnership firm of which the donor was a partner. It could not, therefore, be said that the donor had been excluded from all benefit from the gifted property because the property of a firm vests in all its partners and possession by the firm is possession by all the partners and each of them. In these cases, therefore, evidently applying the principle of law as enunciated by the Supreme Court in *Addanki Narayanappa v. Bhaskara Krishnappa* it was held that Section 10 of the Act was attracted.

13. It will thus be seen that keeping in view the nature of interest of a partner in a partnership property and determining exactly what was the property taken under the gift, it was found in the group of cases earlier mentioned that what was transferred by way of gift was property shorn of the right which belonged to the partnership since the right which the partnership had in the property gifted was reserved, retained and excluded from the gift. On the contrary, the latter group of cases were cases in which the gifts had been made of cash absolutely which was later invested by the donees in a firm in which the deceased donor was also a partner. In such circumstances, it has been rightly held that it could not be said that the donees retained the possession of the gifted property to the exclusion of the donor.

14. Applying these well-established principles, there can be no manner of doubt that the Tribunal was perfectly justified in coming to the conclusion that the bona fide possession and enjoyment of the property gifted was not assumed by the sons and thenceforward retained by them to the entire exclusion of the deceased. In the present case the amounts gifted were in cash. There was no transfer by adjustment in the book entries of the partnership firm. Indeed, in so far as the amount of Rs. 50,000 is concerned it was gifted at a time when there

was no partnership firm at all and even when the gifts of Rs. 30,000 in favour of the two sons were made on various dates when the firm was in existence it was not by adjustment in the book entries of the partnership firm, but by cash which was ploughed back by the donees to their accounts in the firm. On these facts and in such circumstances, in my view, Section 10 will be attracted. The answer to the first question, therefore, must also be in the affirmative, in favour of the revenue and against the accountable person and I must hold that, on the facts and in the circumstances of the case, the sum of Rs. 80,000 was liable to estate duty as property deemed to pass on the death of the deceased u/s 10 of the Estate Duty Act, 1953.

15. Both the questions are thus answered in favour of the revenue and against the accountable person. In the circumstances, however, I shall make no order as to costs.

S.N.P. Singh, C.J.

16. I agree.