

(1968) 09 GUJ CK 0016
In the Gujarat High Court
Case No : Estate Duty Reference No. 1 of 1965

Shantaben S. Kapadia

APPELLANT

Vs

Controller of Estate Duty, Gujarat

RESPONDENT

Date of Decision : 20-09-1968

Acts Referred:

Estate Duty Act, 1953 — Section 10

Transfer of Property Act, 1882 — Section 123, 131

Citation : (1969) 73 ITR 171

Hon'ble Judges : P.N. Bhagwati, J;B.J. Divan, J

Bench : Division Bench

Advocate : K.H. Kaji, for the Appellant; J.M. Thakore, for the Respondent

Judgement

Divan, J.—In this reference u/s 64(1) of the Estate Duty Act, 1953 (hereinafter referred to as the Act), the following question has been

referred to us by the Central Board of Direct Taxes :

Whether, on the facts and in the circumstances of the case, the sum of Rs. 60,000, standing to the credit of the account of the deceased's brother,

in the firm of M/s. Shantilal C. Kapadia, was correctly included in the principal value of the estate of the deceased.

2. This reference arises out of the assessment for estate duty of the estate of Shantilal C. Kapadia, who died on February 20, 1957. On the death

of the deceased, his widow, who is the applicant in this reference, filed a statement of account in the prescribed form, showing the principal value

of the estate passing on the death of the deceased at Rs. 1,39,199. The Assistant Controller determined the principal value of the estate at Rs.

2,14,340 and, in arriving at the principal value, he added, inter alia, a sum of Rs. 60,000, which had not been shown in the statement of account

furnished by the applicant (hereinafter referred to as the accountable person), and it is in connection with this amount of Rs. 60,000 that this

reference has been made. The deceased and two other persons related to him were partners of the firm of Shantilal C. Kapadia, Cambay. On

18th October, 1962, in the books of account of the partnership firm, a sum of Rs, 60,000 was debited to the account of the deceased and

credited to the account of Subhashchandra, brother of the deceased. At the time of this transfer no cash was paid to Subhashchandra but from

October 18, 1952, till the date of the death of the deceased the amount stood credited in the books of the firm in the account of Subhashchandra.

The firm did not allow any interest either on the capital invested by each of the partners of the firm or on this amount of Rs. 60,000 standing to the

credit of Subhaschandra. On August 29, 1953, the deceased made a declaration of gift in respect of the amount of Rs. 60,000 on a stamp-paper

of Rs. 3. Subsequently, i.e., on June 20, 1955, in a book belonging to Subhaschandra, the deceased acknowledged on behalf of the firm that a

sum of Rs. 60,000 was kept by Subhaschandra with the partnership on ""Anamat"" account and without interest. It was contended before the

Assistant Controller that the deceased had gifted the sum of Rs. 60,000 to Subhashchandra more than two years prior to the date of his death and

that, therefore, the amount could not be included in the principal value of the estate of the deceased. The Assistant Controller held that the

conditions laid down in section 123 of the Transfer of Property Act for making a gift of movable property were not complied with in this case and

that even if there was a valid gift, the amount was includible in the principal value of the estate of the deceased under the provisions of section 10 of

the Act. Thereafter there was an appeal to the Central Board of Revenue and the Board held that the credit balance of the deceased in the account

books of the firm was an actionable claim and as there was no execution of an instrument in writing with the transfer of the sum of Rs. 60,000 from

the account of the deceased to the account of Subhashchandra was made, the procedure laid down in section 130 of the Transfer of Property Act

had not been complied with and hence the transfer was defective in law. The Central Board also came to the conclusion in the alternative that even

if it was to be assumed that there was a valid gift, the amount would have to be considered as property deemed to pass under the provisions of

section 10 of the Act. Thereafter, at the instance of the accountable person, the above question has been referred to this court.

3. In the view that we are taking regarding the applicability of section 10 of the Act to the facts of the present case, it is not necessary for us to

decide whether in fact there was a valid gift or not. We wish to make it clear at this stage that we are not deciding the question whether the credit

balance of the deceased in the books of account of the firm was an actionable claim or whether the gift by way of entries in the books of account

amounted to a valid gift in the eye of the law; but we are proceeding on the assumption that there was a valid gift in favour of Subhaschandra, the

brother of the deceased.

4. u/s 10 of the Act, 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.

5. It was pointed out by the Supreme Court in *George Da Costa v. Controller of Estate Duty*, at page 500 :

The intention of the legislature in enacting section 10 of the Act was to exclude from liability to estate duty certain categories of gifts. A gift of

immovable property u/s 10 will, however, be dutiable unless the donee assumes immediately exclusive and bona fide possession and enjoyment of

the subject-matter of the gift, and there is no beneficial interest reserved to the donor by contract or otherwise. The section must be grammatically

construed as follows : "property taken under any gift, whenever made, of which property bona fide possession and enjoyment shall not have been

assumed by the donee immediately upon the gift, and of which property bona fide possession and enjoyment shall not have been thenceforward

retained by the donee to the entire exclusion of the donor from such possession and enjoyment, or of any benefit to him, by contract or otherwise".

The crux of the section lies in two parts : (1) 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 (2) 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. As a matter of construction we are of opinion that 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.

6. So far as the question of exclusion of the donor is concerned, it is clear that according to the Supreme Court that part of the section has two limbs : the donor must be excluded (i) from the property, and (ii) from any benefit, by contract or otherwise. The words "or otherwise" have been interpreted in this decision of the Supreme Court as ejusdem generis with a contractual obligation. It was held as a matter of construction in that case that 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. 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.

7. In the instant case, the facts are that after October 18, 1952, the amount stood to the credit of the donee, Subhashchandra, the brother of the deceased, and it remained with the partnership firm of which the donor was a partner till his death; and the amount remained with the partnership firm till the death of the deceased on February 20, 1957. The question then arises on these facts as to whether there was any exclusion of the donor from possession and enjoyment of the sum of Rs. 60,000, which on the assumption that we have set out in the beginning of this judgment, is assumed to have been validly gifted by the deceased to Subhashchandra, the donee.

8. In *Narayanappa v. Bhaskara Krishnappa*, the Supreme Court has explained, with reference to the provisions of the Partnership Act, the nature of the interest of a partner in partnership property during the subsistence of the partnership. It has been pointed out that whatever may be the character of the property, which is brought in by the partner when the partnership is formed or which may be acquired in the course of 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, accruing to the partnership from the realization of this property and upon dissolution of the partnership to a share in the money representing the value of the property. Since the firm

has no legal existence, the partnership property will vest in all the partners and in that sense each partner has an interest in the property of the

partnership and 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 anyone. The Supreme Court further pointed out as follows :

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 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. He would not be able to exercise his right even to the extent of his share in the business

of the partnership.... 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), that is to say, the right to receive the share of profits of the assignor and

accept the account of profits agreed to by the partners.

9. Thus, so far as any property which is an asset of the partnership property is concerned, the partnership property vests in all the partners and in

that sense every partner is interested in the property of the partnership. The effect of showing the amount Rs. 60,000 to the credit of

Subhashchandra, the donee in the books of account of the partnership firm, was to show that the donee was a creditor of the partnership firm and

the firm was indebted to Subhashchandra but the amount of Rs. 60,000 came to the partnership firm for the purposes of its business like any other

asset of the firm; and, therefore, under the general law applicable to partnership property, every partner of the partnership firm in question had an

interest in this asset along with the other assets of the partnership firm.

10. A question similar to the question before us came up before the Judicial Committee of the Privy Council in Clifford John Chick v.

Commissioner of Stamp Duties Section 109 of the New South Wales Stamp

Duties Act, with which their Lordships of the Privy Council had to deal with, was in terms identical with section 10 of our Estate Duty Act, 1953, and also provided for the inclusion of certain gifts in the estate of the donor, as is being done by the provisions of section 10 of our Act. In that case what happened was that in 1934, a father transferred by way of gift to one of his sons a pastoral property, the gift being made without reservation or qualification or condition. In 1935, some 17 months after the gift, the father, the donee son and another son entered into an agreement to carry on in partnership the business of graziers and stock dealers. The agreement provided, inter alia, that the father should be the manager of the business and that his decision should be final and conclusive in connection with all matters relating to its conduct; that the capital of the business should consist of the livestock and plant then owned by the respective partners; that the business should be conducted on the respective holding of the partners and such holdings should be used for the purpose of the partnership only; that all lands held by any of the partner at the date of the agreement should remain the sole property of such partner and should not on any consideration be taken into account as or deemed to be an asset of the partnership, and any such partners should have the sole and free right to deal with it as he might think fit. Each of the three partners owned a property, that of the donee son being that which had been given to him by his father in 1934, and each partner brought into the partnership livestock and plant, and their three properties were thenceforth used for the depasturing of the partnership stock. That continued up to the death of the father in 1952. On these facts it was held by the Privy Council that the value of the property given to the son in 1934 was to be included in computing the value of the father's estate for the purpose of death duty. Viscount Simonds, who delivered the judgment of the Judicial Committee, observed :

The simple question is whether the donor has been excluded from the subject-matter of the gift, a pastoral property known as "Mia Mia," and the clear answer is that he has not.

11. In Clifford's case, the Privy Council approved of the decision in Lang v. Webb, which was decided as far back as 1912. In that case a testatrix gave certain blocks of land to her sons and on the same day took lease

from them of the same land and Isaacs J. observed :

The lease, however, gave to the donor possession and enjoyment of the land itself, which is a simple negation of exclusion, and brings the case

within the statutory liability. It was argued that as the rent was full value, the lessee's possession and occupation were not a benefit. The argument

is unimportant because the lease, at whatsoever rent, prevents the entire exclusion of the donor.

Thus, this question of exclusion of the donor has to be approached from the simple point of fact and the question to be determined in such cases is

whether in fact complete exclusion of the donor from the possession and enjoyment of the gifted property has been carried out or not. If he is not

excluded the eye need look no further to see whether his non-exclusion has been advantageous or otherwise to the donee. In Clifford's case it was

held that, under the partnership agreement, the father as one of the partners was in possession and enjoyment of the property so long as the

partnership subsisted and it was found as a matter of fact that the partnership subsisted till the date of his death; and it was on these facts that the

entire value of the whole property which was gifted to the donor's son in 1934 was held includible in the estate of the father.

12. These decision of the Privy Council was followed by the Supreme Court in George Da Costa's case, and it was observed by Ramaswami J. at

page 503 of the report :

It appears from all these cases that the first limb of the section may be infringed if the donor occupies or enjoys the property or its income, even

though he has no right to do which he could legally enforce against the donee.

13. In the case before the Supreme Court, the deceased had purchased a house in the joint names of himself and his wife in 1940. They made a

gift of the house to their sons in October, 1954. The document recited that the donees had accepted the gift and that they had been put in

possession. The deceased died on September 30, 1959. The Controller included the value of that house in the principal value of the estate that

passed on the deceased's death, u/s 10 of the Act. The Board found that, though the deceased had gifted the house four years before his death, he

still continued to stay in the house till his death as the head of the family and was also looking after the affairs of the house; and, further, that the

property was purchased entirely out of the funds of the deceased, and, though the property stood in the joint names of the deceased and his wife,

the wife was merely a name-lender and the entire property belonged to the deceased; and it was held that the value of the property was correctly

included in the estate of the deceased as property deemed to pass on his death u/s 10.

14. Mr. Kaji, on behalf of the accountable person, contended that there are certain observations of this court in Commissioner of Income Tax v.

Jayantilal Amratlal which go to show that is the real nature of a loan and what happens when a loan is given by one person to another. In this

connection, Mr. Kaji contended that after the amount of Rs. 60,000 was gifted by the deceased to his brother, Subhashchandra, the donee had

advanced the amount of Rs. 60,000 by way of a loan and this amount was kept as a deposit by the partnership firm. The observations relied upon

by Mr. Kaji are at page 229 of the report and are as follows :

A loan, by the very nature of it, cannot be said to amount to an exercise of dominion or control over its subject-matter. It is repayable and is given

on conditions as to the time of repayment and interest, if any. By taking a loan, a settlor does not exercise over its subject-matter power or

dominion which, but for the trust or the settlement, he would have been able to exercise.

15. In that case, the Division Bench of this court was dealing with proviso (1) to section 16(1) (c) of the Indian Income Tax Act, 1922; and the

proviso in question was as follows :

Provided that for the purposes of this clause a settlement, disposition or transfer shall be deemed to be recoverable if it contains any provision for

the retransfer directly or indirectly of the income or assets to the settlor, disponent or transferor, or in any way gives the settlor, disponent transfer or

transferor, a right to reassume power directly or indirectly over the income or assets.

16. In that case, by a deed of settlement, the assessee created a trust, whereby he settled on trust certain shares. Under one of the clauses of the

trust deed, it was open to the trustees to give a loan from the trust fund to the settlor himself; and it was contended that this power to advance a

loan to the settlor meant that under this clause the settlor had reserved to

himself a right to reassume power directly or indirectly over the income or assets of the trust fund. It was in this context of reassumption of power over the trust fund that the observations quoted above were made by the Division Bench at Page 229 of the report.

17. Reassumption of power under proviso (1) to section 16(1) (c) was explained by the Supreme Court when this decision was taken in appeal

against and the decision of the Supreme Court is reported as Commissioner of Income Tax v. Jayantilal Amratlal At page 10 of the report, the

Supreme Court observed that the words, "reassume power" indicate the correct meaning of proviso (1) to section 16(1) (c); and the latter part of

the proviso contemplates that the settlor should be able, by virtue of something contained in the trust deed, to take back the power he had over the

assets or income produced through the execution of the trust deed.

18. In the light of this interpretation of the words of proviso (1) to section 16(1) (c), is clear that the observations relied upon by Mr. Kaji from the

judgment of this High Court in Commissioner of Income Tax v. Jayantilal Amratlal were made in order to explain the transaction of a loan in the

context of reassumption of power and it was, therefore, pointed out that when a loan was to be advanced by the trustees under the deed of trust,

there was no reassumption of power in the sense of reassumption of dominion or control. The wording of the section with which we have to deal in

the instant case, viz., "entire exclusion of the donor from the possession or enjoyment of the gifted property", is different from the words of the

section with which the Division Bench had to deal in Commissioner of Income Tax v. Jayantilal Amratlal and, therefore, the observation made at

page 229 of that report in connection with a loan cannot help the assessee in this case.

19. It is clear that after the gift was made by the deceased to Subhashchandra, on the very day the amount was kept as a deposit with the

partnership firm and this amount remained with the firm of which the deceased was a partner till his death. Therefore, as one of the partners of the

firm, the deceased was in possession and enjoyment of the property gifted by the deceased to Subhashchandra, and it is not in dispute before us

that the partnership subsisted during the lifetime of the deceased. Therefore, from the date of the gift till the date of his death, there was exclusion of

the donor from possession and enjoyment of the property which was gifted, viz., the amount of Rs. 60,000.

20. Under these circumstances, it is clear that the amount of Rs. 60,000 was includible in the principal value of the estate of the deceased and was

correctly included in such value by the authorities concerned.

21. We, therefore, answer question referred to us in the affirmative. The accountable person will pay the costs of this reference to the Controller.