IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved On 02.11.2018	Judgment Pronounced On 14.12.2018

CORAM:

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Tax Case (Appeal) No.1600 of 2008

Shri Narendra Kumar Sakaria,
16, Kesava Iyer Street,
Chennai-600 003. .. Appellant

-vs-

Assistant Commissioner of Income Tax,
Circle XI, Chennai. .. Respondent

Tax Case (Appeal) filed under Section 260A of the Income Tax Act, 1961 against the order of the Income-tax Appellate Tribunal Bench 'B' Chennai, dated 29.02.2008, in I.T.A.No.1942/Mds/2007 for the assessment year 2004-05.

For Appellant : Mr.T.Pramod Kumar Chopda

For Respondent : Mrs.R.Hemalatha,
Senior Standing Counsel

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JUDGMENT

T.S.Sivagnanam, J.

This appeal, filed by the assessee under Section 260A of the Income-tax Act, 1961 ("the Act" for brevity), is directed against the order passed by the Income-tax Appellate Tribunal Bench 'B' Chennai, ("the Tribunal" for brevity) dated 29.02.2008, in I.T.A.No.1942/Mds/2007 for the assessment year 2004-05.

2. The above appeal was admitted, on 04.11.2008, on the following substantial questions of law:-

> "(i) Whether on the facts and circumstances of the case and having regard to the provisions of Section 68 whether the appellant had discharged his initial burden in respect of gift/loan received by the appellant?
>
> (ii) Whether on the facts and circumstances of the case the Appellate Tribunal is right in law in holding that the additional evidence provided before the Commissioner of Income Tax (A) cannot be taken cognizance of to prove the credit worthiness of the donor/creditor, instead of remanding the matter to the Assessing Officer for consideration of the additional evidence."

3. The appellant/assessee is the proprietor of Madras Steels and Tubes having branches in several places in the country. The assessee filed return of income for the assessment year 2004–2005, on 30.10.2004, admitting an income of Rs.35,25,380/-. The assessee's case was selected for scrutiny during which, the Assessing Officer treated the gift and loan received from the assessee's nephew of Rs.90,00,000/- as unexplained credits under Section 68 of the Act and added the same to the total income. Aggrieved by the same, the assessee preferred appeal before the Commissioner of Income Tax (Appeals)-IV Chennai ("the CIT(A)" for brevity).

4. The assessee's case before the CIT(A) was that, he received a gift from his nephew, who was a resident of United States of America, and the gift was treated as a capital receipt and credited to the capital account of the assessee, the gift was received through banking channels from an NRO Account with Global Trust Bank of the donor at Secunderabad and the gift deed was also placed before the Assessing Officer. It is a further case of the assessee that the Assessing Officer opined that the donor did not have adequate creditworthiness by referring to his wage slips and omitted to consider the income earned by the donor functioning as a consultant of a company at UAE.

5. It is a further case of the assessee that he had discharged the onus of the source of the gift by furnishing the details of the donor, the mode of receipt, the confirmation by way of a gift deed and copy of the bank account of the donor. Thus, it was contended that the addition made by the Assessing Officer was merely based on suspicion, surmises and conjectures.

6. The learned counsel for the assessee referred to various decisions in support of his contentions. The CIT(A) allowed the assessee's appeal on the ground that the genuineness of the transaction not being doubted and all three conditions having been satisfied, there is no reason to make an addition in respect of a gift by merely citing human probability and based on suspicion. The CIT(A) also referred to certain decisions to support his conclusion. The Revenue filed appeal before the Tribunal among other things contending that the claim of the assessee that he worked as a consultant for a company in UAE is a new theory and was not raised before the Assessing Officer, nor any evidence was produced and therefore, the finding of the CIT(A) is against Rule 46A of the Income Tax Rules, 1962 (hereinafter referred to as “the Rules”).

7. Further, it was contended that the nature of employment, salary income certificate from the authorities concerned were not produced by the assessee or by the donor and even though the donor is identified, the capacity of the donor and the genuineness of the transactions were not established.

8. Further, the assessee when directed by the Assessing Officer to produce the source of funds for huge financial transactions made by Sushil Kumar Jain besides Rs.90,00,000/- and gift to Meena Sakaria of 99,989 USD, the assessee remained silent. Thus, it was contended that the addition made under Section 68 of the Act was based on material and not on conjectures and surmises.

9. Further, by referring to the decision of the High Court of Calcutta in the case of ***CIT vs. Precision Finance Ltd., (1994) 121 CTR 0020,*** it was contended that mere payment by account payee cheque is not sacrosanct and surrounding circumstances like relationship of the parties, occasion for making the gift have to be seen.

10. The Tribunal allowed the appeal filed by the Revenue holding that no particulars were produced regarding the assessee's nephew's

income; the letter produced by assessee purported to be written by the company in UAE stating that the company has given him 2 lakhs USD was not produced before the Assessing Officer; no enquiry was made by the CIT(A) when the assessee claimed that the donor was earning a sum of 2 lakhs USD, which is nearly double the amount of his salary from Citi Bank, USA for 4 years and this aspect was not investigated.

11. Further, the Tribunal held that the amount of gift and loan was transferred out of the NRO account of the donor at Global Trust Bank, Secunderabad and the credit of this sum into the bank was through telegraphic transfer and the source of transfer was not established as to how it was relatable to the donor. The communication sent by Assessing Officer to the donor was unanswered. The donor is closely related to the assessee, as he is his nephew. The Tribunal relying on the decisions of the Hon'ble Supreme Court in ***CIT vs. P.Mohanakala, (2007) 291 ITR 278 (SC)*** and ***Sumati Dayal vs. CIT, (1995) 125 CTR 0124 (SC)*** held that there is lack of probability that the nephew of the assessee, who is a salaried person, would grant a gift to his uncle, who is having business spread over several cities in India of an amount which beyond his known source of income. Thus, the Tribunal held that the alleged gift is liable to be quashed not only on account of lack of human

probability but, also on account of un-proved creditworthiness of the donor. Aggrieved by such order, the assesses is before us.

12. Mr.T.Pramod Kumar Chopda, learned counsel appearing for the assessee reiterated the factual aspects referred above, has drawn the attention of this Court to the assessment order of the assessee's wife, which was completed under Section 143(3) of the Act for the assessment year 2004 -2005, by order dated 28.12.2006 wherein, the gift was not disputed.

13. It is further submitted that the remittance made will show the genuineness of the transaction and the factual aspects were not considered by the Tribunal, though it pointed out that the matter certainly requires investigation. The decision, which was relied on by the Tribunal especially the case of ***P.Mohanakala,*** (supra), is not applicable to the facts of the case, because in the said case, the identity of the donor was in doubt.

14. With regard to the contentions advanced by the Revenue that the CIT(A) contravened Section 46 by referring to an alleged income of the donor, which was not placed before Assessing Officer, the learned

counsel relied on sub-Rule 4 of Rule 46A of the Rules and submitted that, if sufficient cause is shown for not producing the document before the Assessing Officer, the same can be produced before the CIT(A).

15. Referring to the order passed by the Tribunal in I.T.A. No.1745/Mds/2011, which arose out of an order imposing penalty on the assessee, it is submitted that the appeal filed by assessee was allowed and the Tribunal has pointed out that, if the Assessing Officer did not believe the donor's capacity, it was up to the Assessing Officer to consider the issue in the hands of the donor and the same could not have been considered in the hands of the assessee.

16. In support of the contentions advanced, the learned counsel referred to the decision of the Hon'ble Supreme Court in ***CIT, Ernakulam vs. P.K.Noorjahan, 1999 237 ITR 570 SC;*** the decisions of the High Court of Gujarat in ***Deputy Commissioner Of... vs. Rohini Builders, 2002 256 ITR 360 Guj;*** and ***Murlidhar Lahorimal vs. Commissioner of Income-Tax, 2006 280 ITR 512 (Guj);*** and the decision of the Division Bench of this Court in ***Commissioner of Income-tax vs. Subbu Shashank, [2010] 327 ITR 577 (Madras).***

17. Mrs.R.Hemalatha, learned Senior Standing Counsel for the Revenue sought to sustain the order passed by the Tribunal and pointed out that the Assessing Officer has considered the entire case and pointed out the conditions to be satisfied for invoking Section 68 of the Act and this order was erroneously reversed by the CIT(A) and rightly restored by the Tribunal. Further by referring to Rule 46A of the Rules, it is submitted that the CIT(A) ought not to have relied on documents produced by the assessee before him, which were not produced before the Assessing Officer. Thus, it is submitted that considering the totality of circumstances, the case of the assessee is liable to be rejected.

18. Heard the learned counsels for the parties and carefully perused the materials placed on record.

19. The first aspect of the matter, which we propose to consider is whether the CIT(A) was justified in accepting the documents, which were not produced before the Assessing Officer. Rule 46A of the Rules provides for an opportunity to the assessee to produce documents. However, there are conditions, which are required to be fulfilled, before the Appellate Authority accepts such documents. Firstly, the burden of

proof is on the assessee to show sufficient cause for not having been able to produce the documents before the Assessing Officer. Upon the CIT(A) being satisfied that the assessee for bona fide reasons could not produce document, then the Assessing Officer has to be given an opportunity to submit his report. This report is referred as the remand report from the Assessing Officer. This procedure has not been adhered to by the CIT(A) in the case on hand. Thus, on this ground, we would be well justified in confirming the order of the Tribunal thereby, interfering with the order passed by the CIT(A). The Assessing Officer addressed the donor and this communication remained unanswered either by the donor or by the assessee. The reliance placed on the order passed by the Tribunal in the appeal arising out of the penalty proceedings could have no impact on the present proceedings arising out of the regular assessment. Therefore, the assessee cannot fall back on the said order of the Tribunal.

20. The learned counsel for the appellant relied on the decisions in the case of ***Murlidhar Lahorimal*** (supra) and ***Rohini Builders,*** (supra) to explain the phraseology of Section 68, which was rendered after referring to the decision of the Apex Court in ***P.K.Noorjahan*** (supra). In the said decision, it was pointed out that the unsatisfactoriness of the

explanation does not and need not automatically result in deeming amount credited in the books as the income of the assessee.

21. In the case on hand, we have seen that the Assessing Officer as well as the Tribunal have analysed the materials available, then examined as regards the probabilities of a nephew, a salaried person in United States, extending a gift to his uncle in India, who has extensive business throughout the country with several branches would probablise the theory of gift.

22. Furthermore, the assessee did not place any material before the CIT(A) as to why the alleged additional income earned by the donor by doing consultancy work for a company in UAE was not produced by him before the Assessing Officer. The pre-requisite for accepting a new document at the first appellate stage is that the assesee should show sufficient cause. This is lacking in the instant case. Had the assessee produced the document before the Assessing Officer in all probabilities, an investigation would have been conducted. Considering the income of the donor, a salaried person in United States, the Assessing Officer rightly concluded that the probability of a salaried nephew giving a gift to his uncle, who is an affluent business man is hard to believe. In

cases, such as the present one preponderance of probability play a vital role. Thus, the theory of gift was not established by the assessee. The so called transfer through an NRO account was also self-serving because, the amount was transferred through telegraphic transfer and the source of transfer was not established as to how it was relatable to the donor. In such circumstances, the Tribunal was well justified in reversing the order passed by the CIT(A).

23. For all the above reasons, the appeal fails and is dismissed and the substantial questions of law are answered against the assessee. No costs.

(T.S.S., J.) (V.B.S., J.)
.12.2018

Index : Yes/No
Internet : Yes/No

pns/abr

To

The Income-tax Appellate Tribunal Bench 'B' Chennai.

T.S.Sivagnanam, J.
and
V.Bhavani Subbaroyan, J.

pns/abr

Pre-delivery Judgment
made in
T.C.(A) No.1600 of 2008

14.12.2018