

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/TAX APPEAL NO. 1537 of 2007****With****R/TAX APPEAL NO. 1696 of 2007****With****R/TAX APPEAL NO. 543 of 2008****With****R/TAX APPEAL NO. 544 of 2008****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE AKIL KURESHI****and****HONOURABLE MR.JUSTICE B.N. KARIA**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

THE COMMISSIONER OF INCOME TAXCENTRAL - II**Versus****MUKESH M SHETH****Appearance:****MRS MAUNA M BHATT(174) for the PETITIONER(s) No. 1****MR.B.S.SOPARKAR, ADVOCATE for MRS SWATI SOPARKAR(870) for the RESPONDENT(s) No. 1****CORAM: HONOURABLE MR.JUSTICE AKIL KURESHI****and****HONOURABLE MR.JUSTICE B.N. KARIA****Date : 13/06/2018****COMMON ORAL JUDGMENT****(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)****1. These appeals arise out of common judgment of**

the Income Tax Appellate Tribunal. They have been heard together and are being disposed of by this common judgment.

2. We may record facts separately in each appeal.

Tax Appeal No.1537 of 2007

3. This appeal is filed by the Revenue against the respondent assessee, an individual-Mukesh M. Sheth. The assessee had filed the return of income for the assessment year 2001-02. In such return, the assessee had shown to have received a gift of Rs.1.50 crores from one Bipinchandra Kantilal Bhagat, an NRI based at UAE. The return was accepted under section 143(1) of the Income Tax Act, 1961 ('the Act' for short) without scrutiny. The assessee was subjected to search operation by the Income Tax department. The Assessing Officer passed block assessment order for the block period between 01.04.1996 to 12.09.2002. Main issue discussed by the Assessing Officer in such order was the on-money received by the assessee through sale of land. Assessing Officer also examined whether this undisclosed income was routed into the assessee's bank accounts through

gifts which were non-genuine. In the block order of assessment dated 30.09.2004, the Assessing Officer made detailed observations with respect to these two issues. We would take note of the contents of this order at a later stage. For the present, it would be sufficient to note that in such order, he had held that the undisclosed income through sale of land was already taxed in the hands of the partnership firm of whom the assessee was the partner and therefore it was not necessary to tax the assessee separately. He also held some of the gifts to be genuine and the rest as non-genuine.

4. After this block assessment order was passed, the Assessing Officer issued notice under section 147 of the Act, reopening of the assessment of the assessee for the same assessment year. Sole ground in the reasons recorded was of the non-genuineness of the gifts received by the assessee from the said foreign source. The assessee contested the reassessment proceedings on the various grounds; principal being that the issue is already examined during the block assessment proceedings and cannot be reexamined now when the Assessing Officer in the

block assessment held the gift to be genuine. In the present assessment order, any attempt on the part of the Assessing Officer to take a different view would amount to change of opinion and lastly, in any case, the gifts were genuine. The assessee had established the genuineness of the transaction, identity and creditworthiness of the donor.

5. The Assessing Officer rejected the contentions and in the order of reassessment held that the gift was not genuine and taxed the same under section 68 of the Act. Commissioner of Income Tax (Appeals) reversed the view of the Assessing Officer both on the ground of the validity of the reassessment proceedings as well as on merits. The Revenue carried the matter in appeal before the Tribunal. The Tribunal rejected the appeal confirming the view of the Commissioner of Income Tax (Appeals). Thereupon, the Revenue has filed the present Tax Appeal, in which, at the time of admission, following questions of law were framed:

"A. Whether the Appellate Tribunal is right in law and on facts in deleting addition of Rs.1,50,00,000/- made u/s.68 of the I.T. Act being the disallowance of claim of gift?"

B. Whether the Appellate Tribunal was right in law and on facts in holding that proceedings u/s.148 are bad in law?"

Tax Appeal No.1696 of 2007

6. This appeal also involves the same assessee Mukesh M. Sheth and concerns his return for the assessment year 2000-01, in which also, he had declared having received gift of Rs.50 lakhs from the same NRI Bipinchandra K. Bhagat. This return was also initially accepted under section 143(1) of the Act. After the block assessment order in his case, notice of reopening was issued. The Assessing Officer taxed the said sum of Rs.50 lakhs under section 68 of the Act holding the gift to be non-genuine. Like in the earlier case, the Commissioner of Income Tax (Appeals) and the Tribunal reversed the view of the Assessing Officer. Hence this appeal, in which, following substantial questions of law were framed:

"A. Whether the Appellate Tribunal was right in law and on facts in deleting addition of Rs.50,00,000/- made u/s.68 of the I.T. Act being the disallowance of claim of gift?

B. Whether the Appellate Tribunal was right in law and on facts in holding that proceedings u/s.148 are bad in law?"

Tax Appeal No.543 of 2008

7. This appeal is filed by the Revenue against the assessee Atul D. Sheth. For the assessment year 2000-01, in the return filed, the assessee had shown to have received a gift of Rs.50 lakhs from his mother-in-law Bhartiben Kotak. The return was accepted under section 143(1) of the Act. This assessee was also subjected to search operations leading to the Assessing Officer framing block assessment, in which, like in the previous cases, he examined the question of on-money receipts which would have been routed to his accounts through gifts. After the block assessment order was passed, notice of reopening of assessment came to be issued giving rise to the reassessment order in which, the Assessing Officer made addition of the gift amount under section 68 of the Act holding the gift to be non-genuine. Like in the previous cases, here also the Commissioner of Income Tax (Appeals) and the Tribunal reversed the order of the Assessing Officer. In the Tax Appeal filed by the department, following questions were framed:

"A. Whether the Appellate Tribunal was right in law and on facts in deleting addition of

Rs.50,00,000=00 made u/s.68 of the I.T.Act being the disallowance of claim of gift?

B. Whether the Appellate Tribunal was right in law and on facts in holding that proceedings under Section 148 are bad in law?"

Tax Appeal No.544 of 2008

8. This appeal filed by the Revenue concerns the assessee Atul D. Sheth for the assessment year 2001-02, during which, he had disclosed having received gift of Rs.2.10 crores approximately from his mother-in-law. These proceedings also followed the same pattern as in the previous case giving rise to the present appeal. In the Tax Appeal, following questions were framed:

"A. Whether the Appellate Tribunal was right in law and on facts in deleting addition of Rs.2,10,75,000=00 made u/s.68 of the I.T.Act being the disallowance of claim of gift?

B. Whether the Appellate Tribunal was right in law and on facts in holding that proceedings under Section 148 are bad in law?"

9. Appearing for the Revenue, learned counsel Mrs.Bhatt vehemently argued that the Tribunal committed an error in declaring the reassessment proceedings to be invalid and holding that the gifts were genuine. She submitted that sizable amounts

were credited in the accounts of the assesseees' by way of gifts. There was no occasion for the donors to have made such large gifts.

10. Counsel submitted that original assessment was without scrutiny. It was therefore open for the Assessing Officer to reopen the assessment after recording proper reasons. In this context, she relied on the judgment of this Court in case of **Jayant Security & Finance Ltd. v. Assistant Commissioner of Income-tax, officer Circle**, reported in **[2018] 91 taxmann.com 181 (Gujarat)**.

11. In the context of genuineness of the gifts, counsel relied on following judgments:

I. In case of **Commissioner of Income-Tax v. P. Mohanakala** reported in **[2007] 291 ITR 278 (SC)**.

II. In case of **Laxmandas Sujandas Dalpat v. Income-Tax Officer**, reported in **[2016] 381 ITR 283 (Guj)**.

III. In case of **Kaushal H. Patel v. Income-Tax Officer**, reported in **[2014] 365 ITR 383 (Guj)**.

IV. In case of **Rajeev Tondon v. Assistant**

Commissioner of Income-Tax, reported in
[2007] 294 ITR 488 (Delhi).

12. On the other hand, learned counsel Shri Soparkar opposed the appeal contending that the entire issue of genuineness of the gifts was examined by the Assessing Officer in the block assessment proceedings, majority of the gifts were held to be genuine. This was after detailed inquiry where the statements of the donors were also recorded. It was thereafter simply not permissible for the Assessing Officer to examine the same question again in the regular assessment proceedings. He further submitted that even otherwise the gifts were genuine. The Commissioner of Income Tax (Appeals) and the Tribunal have come to concurrent findings which cannot be stated to be perverse. The donors were foreign based NRIs. The transaction of money was through banking channels. Identity of the donors was not in doubt. The donors had appeared before the Assessing Officer and confirmed the gifts. Their creditworthiness was also duly established. Counsel relied on following judgments:

I. In case of **Commissioner of Income-tax-V, v.**

Mahendra A. Patel, reported in [2013] 33 taxmann.com 231 (Gujarat).

II. In case of **Commissioner of Income-tax-VI, v. Heena Sharma**, reported in [2013] 33 taxmann.com 176 (Gujarat).

III. In case of **Commissioner of Income-tax, v. Pragati Co-operative Bank Ltd.**, reported in [2005] 149 Taxman 149 (Guj.).

IV. In case of **Murlidhar Lahorimal v. Commissioner of Income-tax** reported in [2006] 153 Taxman 451 (Gujarat).

13. We may first examine the question whether in the present assessment proceedings it was open for the Assessing Officer to test the genuineness of the gifts. Since facts of all four cases are substantially similar, we may refer to one such case of the assessee-Mukesh M. Sheth for the assessment year 2000-01. As noted, in his case, the return filed was accepted without scrutiny. Subsequently, he was subjected to search operations. Block assessment was carried out for the block period between 01.04.1996 to 12.09.2002. In such block assessment proceedings, the Assessing Officer examined two principal issues whether the assessee

had received as a partner of a firm on-money through sale of land and whether this amount was routed in his account through bogus gifts. In the order of assessment dated 30.09.2004, he held that during the search on 12.09.2002, incriminating details of on-money receipts on the sale of plots in one of the sales of Sheth group was found. However, since the entire on-money has been taxed in the hands of the firm in which the assessee is the partner, it was not taxed again in his hand. He thereupon proceeded to examine the question of investment of such on-money receipts. He considered the assessee's contention that the gifts were genuine. In this respect, he came to the following conclusions:

"GIFTS RECEIVED

(I) NRI gift from Bipin Bhagat	2,00,00,000	
(ii) Gifts from National Shroff, Rajkot	33,50,000	
Gift from Ramagauri C Bhakhda	14,00,000	2,47,50,000
Less : Gifts examined and found genuine		
(i) NRI gift from Bipin Bhagat	2,00,00,000	
(ii) Gifts from Sister in law	14,00,000	
(iii) Gifts from brother and sister in law through National Shroff	6,75,000	2,20,75,000
Balance gifts through National Shroff		26,25,000

It shows that a substantial amount of gift is from non relatives, without any occasion of such gesture, without any reciprocation by the assessee and for no valid substantial reason. Though the donors have admitted of extending gifts to the assessee for various reasons, but it is noticed that they are on relatively lower financial plan than that of the assessee and the reasons shown by them are general in nature. It is also seen that, a number of local gifts are routed through a local financier viz., National Shroff whose partner Shri Ranjitsinh Vaghela, on different occasions gave contradicting statements. Hence it indicates that the assessee has received on money.

Nevertheless, the on-money aspect has already been discussed and taxed in the hands of the firm M/s.Silver Stone Corporation, hence, no addition is made again in respect of the gift."

14. Few things need to be culled out from this order at this stage. Important is that the Assessing Officer while framing the block assessment seem to have accepted some of the gifts as genuine. Remaining gifts were found to be non-genuine and tracing the trail to the undisclosed income of the assessee through sale of land.

15. After this order was passed, the Assessing Officer desired to reopen the assessment of the

assessee for the said assessment year 2001-02 on the ground that the gifts were non-genuine. Section 158BA of the Act pertains to assessment of undisclosed income as a result of search. Relevant portion of which reads as under:

"158BA. Assessment of undisclosed income as a result of search

(1) Notwithstanding anything contained in any other provisions of this Act, where after the 30th day of June, 1995 a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A in the case of any person, then, the Assessing Officer shall proceed to assess the undisclosed income in accordance with the provisions of this Chapter.

(2) The total undisclosed income relating to the block period shall be charged to tax, at the rate specified in section 113, as income of the block period irrespective of the previous year or years to which such income relates and irrespective of the fact whether regular assessment for any one or more of the relevant assessment years is pending or not.

[Explanation.- For the removal of doubts, it is hereby declared that-

(a) the assessment made under this Chapter shall be in addition to the regular assessment in respect of each previous year included in the block period.

(b) the total undisclosed income relating to the block period shall not include the income assessed in any regular assessment as income of such block period;

(c) the income assessed in this Chapter shall

not be included in the regular assessment of any previous year included in the block period."

16. For our purpose, explanation clauses (b) and (c) are important. In order to avoid any doubt, these clauses provide that the total undisclosed income relating to the block period shall not include the income assessed in any regular assessment as income of such block period and conversely the income assessed in this chapter i.e. the block assessment, shall not be included in the regular assessment of any previous year including the block period. Therefore once a question of the genuineness of the gift was already examined by the Assessing Officer in the block assessment proceedings, it was thereafter not open for him in the regular assessment to undertake the very same scrutiny. In the block assessment, the Assessing Officer proceeded on the basis that whatever the on-money income the assessee has received, was routed through the bogus gifts. We are informed that during such block assessment proceedings, the Assessing Officer had carried out detailed inquiry with respect to the gifts. In fact, the donors were summoned, they appeared before the

Assessing Officer and the statements were recorded, in which, they owned up the gifts and also cited reasons for giving such lavish gifts. The Assessing Officer having come to definite conclusion in this respect after such detailed inquiry, it can be safely concluded that these amounts of gifts were part of the block assessment proceedings and could therefore not have been made part of the regular assessment all over again. Whether in such assessment, the Assessing Officer had found the gift to be genuine or non-genuine is of no consequence. Once the gifts were assessed in the block assessment proceedings, could not be subject matter of assessment in the regular assessment.

17. In the present case, as noted, some of the gifts were held to be genuine. Allowing the Assessing Officer to examine the same issue in the regular assessment and as in the present case, leaving the possibility of coming to conclusion that the gifts were not genuine, would give rise to two conflicting opinions of the authority of the same rank, and as in the present case, at times by the same officer.

18. For the above noted reasons which are somewhat different from those adopted by the Commissioner of Income Tax (Appeals) and the Tribunal, we do not propose to interfere with the Tribunal's final verdict. This is not a classical case where an assessment previously framed without scrutiny is sought to be reopened, nor it is the case where original assessment was after scrutiny, in which, the Assessing Officer had examined certain issues, expressed his opinion which is the subject matter of reopening bringing the principle of change of opinion.

19. There is yet another supplementary reason why the Revenue, in any case, cannot succeed. If the Revenue's proposition is that the assessee had received on-money through sale of land, which was introduced in the assessee's accounts through non-genuine gifts, the Revenue having attempted to tax the on-money receipts, could not have taxed the gifts again with the aid of section 68 of the Act.

20. On the question of genuineness of the gifts, the Tribunal has made certain observations. Since, in

our opinion, this issue was not germane in the regular assessment, though sought to be examined by the Assessing Officer, we would not make conclusive observations in this respect. Nevertheless, a few remarks may not be out of place. As is well settled, whenever any cash is found credited in the account of the assessee, the onus lies on the assessee to establish the source, genuineness and creditworthiness. In the present case, we are prepared to proceed on the basis that the assessee had established the identity of the donor and his or her creditworthiness. When however, large amounts are stated to have been gifted, that too by a person having no blood relation with the assessee, the question of genuineness of the gifts would require closer scrutiny. If the assessee does not point out any special occasion for a lavish gift being received from such a source, the burden to establish the genuineness of the gift cannot be lightly taken to have been discharged. The crux of the judgments cited by Mrs. Bhatt noted above is that the nature of gift and its genuineness would call for case wise scrutiny and the answer would depend on range of facts and

attendant circumstances. No single formula of rigid application can be laid down. We are compelled to make these observations because in rather peculiar and somewhat perplexing set of facts, in our opinion, the Tribunal has made superficial observations and mechanically accepted the genuineness of the gifts. In view of our conclusions, with respect to the first issue, we leave this question at this stage.

21. In the result, we express our common opinion with respect to all appeals as under:

I. In facts of the present case, it was not open for the Assessing Officer to examine the question of genuineness of the gifts in regular assessment for which he has resorted to reopening of assessments.

II. We express no conclusive opinion on the question of genuineness of the gifts *per-se*.

22. All Tax Appeals are dismissed.

(AKIL KURESHI, J)

(B.N. KARIA, J)

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