

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 1383 of 2007

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS.JUSTICE HARSHA DEVANI

and

HONOURABLE MR.JUSTICE A.G.URAIZEE

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 ?	

LAXMANDAS SUJANDAS DALPAT....Appellant(s)

Versus

THE INCOMETAX OFFICER....Opponent(s)

Appearance:

MR SN DIVATIA, ADVOCATE for the Appellant

MR NITIN K MEHTA, ADVOCATE for the Respondent

CORAM: **HONOURABLE MS.JUSTICE HARSHA DEVANI**
and
HONOURABLE MR.JUSTICE A.G.URAIZEE

Date : 25/08/2015

ORAL JUDGMENT**(PER : HONOURABLE MS.JUSTICE HARSHA DEVANI)**

1. This appeal under section 360A of the Income Tax Act, 1961 (hereinafter referred to as "the Act") is directed against the order dated 2nd March, 2007 passed by the Income Tax Appellate Tribunal, Ahmedabad Bench "D", Ahmedabad in ITA No.2556/Ahd/2005, whereby the appeal preferred by the respondent – revenue has been allowed.

2. By an order dated 09.04.2008, this appeal came to be admitted on the following question of law :

"Whether on the facts and in the circumstances of the case, Income-tax Appellate Tribunal, was right in law in reversing the order of CIT (A) of deleting the addition of Rs.7,02,000/- in respect of gifts received by the appellant as unexplained cash credit u/s 68 of the Income-tax Act, 1961?"

3. The assessment year is 2002-03 and the relevant accounting period is the year ended on 31.03.2002. The assessee, who is engaged in the business of developers/housing projects, filed return of income in the capacity of an individual on 31.03.2003 declaring total income of Rs.1,05,044/-. The assessee has shown his income from partnership firm – M/s Krishna Developers at Rs.31,441/- and income from M/s Rachit Land Developers, a proprietary concern of the assessee at Rs.86,103/-. Interest income on NSC and bank was also shown at Rs.9,565/-. The return was initially processed under section 143(1) of the Act, thereafter the same

was taken up for scrutiny. During the course of assessment proceedings, upon verification of the capital account, it was noticed that an amount of Rs.7,02,000/- had been credited as fresh capital introduced during the year. The source of the same was shown as gifts received from the following persons:

[1]	Ramesh Ksheshani	Rs.2,00,000/-
[2]	Vinod Manghnani	Rs.1,00,000/-
[3]	Niranjan Chhotala	Rs.1,00,000/-
[4]	Rupchand Ramlal Prajapati	Rs. 50,000/-
[5]	Piraram Chelaram Rabari	Rs. 50,000/-
[6]	Mahavir Prasad Prajapati	Rs. 50,000/-
[7]	Vinod Jugraj Dungar	Rs. 51,000/-
[8]	Pankajkumar Jain	Rs. 51,000/-
[9]	Amit B. Solanki	Rs. 50,000/-

4. The assessee had filed declaration of gift from the above persons. The Assessing Officer called upon the assessee to furnish the source of capital introduced and also directed him to produce persons from whom gifts were received to verify the identity, creditworthiness and genuineness of the gifts made by various persons. Out of the above nine persons, the assessee produced two persons, viz., Shri Niranjan Chhotalal Kshatriya, who had made a gift of Rs.1,00,000/- and Shri Piraram Chelaram Rabari, who had made a gift of Rs.50,000/-. Their statements under section 131 of the Act came to be recorded. According to the Assessing Officer, these persons did not have the capacity or source of making such gifts and that, before issue of cheque or gift, they had deposited cash in their bank account, for which no satisfactory explanation was given. The Assessing Officer further noted that these persons had no

relations with the assessee and that the other persons had not been produced. The Assessing Officer also considered the assessee's explanation in respect of the gifts from various persons and found that except for Shri Niranjana Chhotalal Kshatriya and Shri Piraram Chelaram Rabari, the identity of the other persons had not been proved and that in case of all the persons, their creditworthiness and genuineness was not proved. The Assessing Officer further noted that the reason for giving the gifts in all the cases was to help the assessee during the time of the earthquake. That these persons had no relations with the assessee and the assessee did not know the full names of the persons from whom such gifts were received and that there was no natural love and affection between the parties. The Assessing Officer, accordingly, came to the conclusion that the amount of Rs.7,02,000/- credited in the capital account of the assessee remained unexplained as the gifts were not genuine in nature and added the same to his total income under section 68 of the Act. The assessee carried the matter in appeal before the Commissioner (Appeals), who by an order dated 13.09.2005, allowed the appeal and set aside the addition. While allowing the appeal, the Commissioner (Appeals) recorded the following findings :

"2.2 I have considered the submissions of the Authorized Representative carefully. I find that the appellant has given the confirmation letters, Pan numbers and the copies of returns and bank statements of Indian donors and as regards two donors from Dubai i.e. Shri Ramesh Ksheshkani and Shri Vinodkumar Manghnani, the appellant has filed copy of confirmation letter and copy of passport and details regarding the period of stay of the

donors in Dubai. The donor Ramesh Keshkani has been staying at Dubai since last 24 years and Vinod Manghnani has been staying since last 13 years. Most of these donors have given gift from their cash in hand or from capital account. So the adequacy of current year's income to give the gift is not to be considered as from the accumulated income they have given the gifts. The decision of ACIT v. Hansa Chhaganlal cited by the Authorized Representative is fully applicable in the case of the appellant as the appellant has furnished the address of the donor and the financial capacity of the donor. Two of the donors have admitted before the Assessing Officer and confirmed the fact that they have given the gift to the appellant. Shri Piraram Rabari has stated in reply to question No.9 that he has made cash deposits in his bank account and has given the gift from his savings of salary. Similarly, Niranjana Kshatriya has confirmed in his statement that the cash deposits in his bank account were from his savings. The gift of Rs.1,00,000/- from Niranjana Kshatriya has been reflected in his capital account filed as annexure to his return of income filed on 27.5.2002 with ITO Ward 12(3), Ahmedabad. It has been held that ITAT Jodhpur Bench in the case of DCIT v. Ramdeo Kumar Chitlangia (89 TTJ 346) (Jodhpur) that blood relationship is no condition precedent for making a valid gift. In view of the above facts and details submitted by the Authorized Representative in support of the creditworthiness of the donors, the addition of gift of Rs.7,02,000/- made by the Assessing Officer is held to be not justified and the same is not deleted."

5. Against the order passed by the Commissioner (Appeals),

the revenue went in appeal before the Tribunal, which reversed the order passed by the Commissioner (Appeals) and upheld the order passed by the Assessing Officer in treating the gifts in question as unexplained cash credit and adding the same under section 68 of the Act. Being aggrieved, the assessee is in appeal.

6. Mr. S. N. Divatia, learned advocate for the appellant submitted that the Tribunal has failed to appreciate the material on record in proper perspective while holding the gifts to be unexplained cash credits. It was submitted that the assessee had duly discharged the onus which lay upon him by producing two of the donors and furnishing documentary evidence in support of the other donors, including the PAN Card numbers and evidence of acceptance of gift by the donors and had also established the capacity of the donors to make such gifts. It was submitted that the conclusions drawn by the Tribunal are based on surmises, conjectures and suspicion and cannot be equated to that of findings based on evidence. It was submitted that improper inference drawn from proven facts definitely gives rise to a substantial question of law.

6.1 Referring to the findings recorded by the Tribunal, it was submitted that the Tribunal has disbelieved the source of source in the hands of the persons who had given the gifts. The attention of the court was invited to the decision of this court in the case of **Murlidhar Lahorimal v. Commissioner of Income Tax**, [2006] 280 ITR 512 (Guj), wherein it has been observed that the Tribunal has gone on to discuss and question as to why the donor should make a gift to the assessee; the size of the donor's family and availability or

otherwise of the amount in the hands of the donor; the area of the land held by the donor; etc. The court observed that at best, these could be factors for the donor to be called upon to explain the source of the funds in his hands, but that could not be a ground for disbelieving a gift which had admittedly been received by the assessee as a gift and being treated as undisclosed income of the assessee. Reliance was also placed upon the decision of this court in the case of **Commissioner of Income Tax v. Pragati Co-operative Bank Ltd.**, [2005] 278 ITR 170 (Guj), for the proposition that once the assessee had given the names and addresses of the alleged creditors and it was in the knowledge of the revenue that the said creditors were income-tax assesseees, if the revenue did not make any effort to pursue the so-called alleged creditors, the assessee could not do anything further and the assessee had discharged the burden that lay on it. It was for the revenue to examine the source of income of the alleged creditors to find out their creditworthiness. Mr. Divatia, accordingly, submitted that it was for the revenue to pursue the so-called creditors and find out their creditworthiness and the burden could not have been thrown on the assessee.

6.2 The learned counsel further placed reliance upon the decision of this court in the case of **Commissioner of Income-tax-VI v. Bhanwarlal Sharma**, [2013] 214 Taxman 122 (Gujarat), wherein the court noticed that the Assessing Officer had not summoned any of the donors. However, he had issued letters under section 133(6) of the Act and had also called for confirmation letters which were received by him. The assessee had furnished all other requisite documents like copies of DD, gift deed, copy of PAN cards, copy of

acknowledgment of returns of the donors along with computation and balance sheet. It was also found that all the donors were assessed to tax except one who was based at USA. On thus having found identity of the donors so also creditworthiness and genuineness of the transaction having been established, the Tribunal did not accept the say of the revenue that the gifts were bogus. This court, accordingly, upheld the decision of the Tribunal by holding thus:

“We are conscious that various aspects discussed by both the Assessing Officer and CIT(A) were causing concern to those authorities. Gifts to assessee by 24 different unrelated persons, residing at different places in Mumbai on the same day, with the draft of huge sum from the same bank and deposit within a span of 2 to 3 days would raise the eyebrows. Their non reply of letter under section 133(6) and non appearance of assessee personally may further strengthen such suspicion coupled with difference in economic strata of assessee and that of these persons. Yet, these questions do not cross the realm of suspicion to enter the sphere of proof, let alone the arena of convincing evidence. Tribunal could with the aid of cogent reasonings convince us why such material proof was sufficient to accept the version of assessee and uphold his request to delete the addition of entire amount from the computation of his income.”

6.3 Reliance was also placed upon an unreported decision of this court in the case of **Smt. Neelamben Gopaldas Agrawal v. Income Tax Officer**, rendered on 19.11.2014 in Tax Appeals No.600 of 2005 to No.602 of 2005, wherein the

court placed reliance upon an earlier decision of this court in the case of *Murlidhar Lahorimal v. Commissioner of Income Tax* (supra) and held that the assessee cannot be asked to prove the source of source. It was submitted that in the present case, two of the donors had appeared before the Assessing Officer and confirmed the gifts and accordingly, the requirements of proving the genuineness of the gifts are duly satisfied. Insofar as two foreign donors are concerned, it was submitted that for the first time, it was the Tribunal which has raised the issue with regard to the original passbooks not being produced and therefore, it was not justified in not granting an opportunity to the assessee to produce the original passbooks, more so, when the lower authorities did not doubt the copies produced by the assessee. Referring to the findings recorded by the Tribunal that it was for the assessee to produce the parties as the same was necessary to establish identity and to enable the Assessing Officer for examination and further investigation regarding genuineness of persons and creditworthiness, it was submitted that all relevant details with regard to the said persons had been furnished to the Assessing Officer and hence, the Assessing Officer could have summoned the said persons on his own. It was submitted that the Commissioner (Appeals) after duly considering the material on record, had rightly held in favour of the assessee and that the Tribunal was not justified in reversing the same. It was, accordingly, urged that the decision of the Tribunal is required to be reversed and the order passed by the Commissioner (Appeals) deserves to be restored.

7. Vehemently opposing the appeal, Mr. Nitin Mehta, learned senior standing counsel for the respondent submitted

that the findings recorded by the Tribunal are findings of fact and re-appreciation of evidence and substitution of findings by the High Court is impermissible. It was submitted that once the explanation offered by the assessee is found to be unsatisfactory, the sums credited in the books are to be charged to income tax as income of the assessee. The duty is heavily cast upon the assessee to offer a reasonable explanation as regards the nature and source of the amounts found credited in the books maintained by the assessee. It was submitted that the Assessing Officer had carefully analyzed the evidence, including statements of the assessee and the donors and given cogent reasons for disbelieving the explanation tendered by the assessee which have been approved by the Tribunal and hence, no interference is called for. Referring to the findings recorded by the Assessing Officer, it was pointed out that a specific finding had been recorded after appreciating the material on record that two donors who were produced before the Assessing Officer, namely, Shri Niranjana Chhotalal Kshatriya and Shri Piraram Chelaram Rabari, did not have the capacity or source to make such gifts and that the cash had been deposited in their bank account before the gifts came to be made. It was submitted that Shri Ramesh Kheshkani, who is alleged to be a resident of Dubai, has not come forward to record his statement and that no document has been produced to prove the genuineness of the gift and creditworthiness of that person. It was submitted that in the case of Vinod Manghnani, who is also a resident of Dubai, the facts are similar and that nothing has been brought on record to prove the genuineness of the gift and creditworthiness of that person. It was submitted that the common factor in respect of the persons who have made the gifts is that the assessee has

no relations with them and therefore, the gifts have not been made in the natural course of love and affection. It was submitted that the reason given for the gifts, namely, on account of the earthquake, the said persons had made the gifts, is by way of an afterthought. Referring to the facts of the case, it was pointed out that insofar as Shri Rupchand Ramlal Prajapati, who is alleged to have given a gift of Rs.50,000/- is concerned, his salary income is only Rs.49,200/-. In the return of income, his salary income is not reflected. That though it has been recorded that most of the donors have been bringing customers for the assessee, they did not get any commission for bringing such customers and on the contrary, though they are persons of meagre means, they have given relatively huge gifts to the assessee. It was submitted that both the Assessing Officer as well as the Tribunal have made a detailed analysis of each donor and have come to the conclusion that the genuineness of the gifts as well as creditworthiness of the said persons have not been established. Moreover, except for the two persons who were produced before the Assessing Officer, even the identity of the other donors has not been established. Referring to the findings recorded by the Commissioner (Appeals) wherein he has recorded that the donors had given the gifts from their accumulated income, it was submitted that the same is not supported by an iota of evidence on record and is therefore, without any basis. It was submitted that the Commissioner (Appeals) while reversing the order passed by the Assessing Officer, has cursorily made reference to the evidence and without any detailed analysis in respect of each donor, by simply placing reliance upon certain decisions on which reliance had been placed by the assessee, deleted the additions. It was pointed out that as regards the two NRIs, all

that was produced by the assessee was their confirmations. It was submitted that the confirmations could not be relied upon unless the signatures were proved and therefore, the Tribunal was wholly justified in holding that the identity and creditworthiness of the said donors had not been proved.

7.1 In support of his submissions the learned counsel placed reliance upon the decision of the Supreme Court in the case of **Commissioner of Income Tax v. P. Mohanakala**, [2007] 291 ITR 278 (SC), wherein the court has observed that the expression “the assessee offers no explanation” means where the assessee offers no proper, reasonable and acceptable explanation as regards the sums found credited in the books maintained by the assessee. The court observed that it is true that the opinion of the Assessing Officer for not accepting the explanation offered by the assessee as not satisfactory is required to be based on proper appreciation of material and other attending circumstances available on record. The opinion of the Assessing Officer is required to be formed objectively with reference to the material available on record. Application of mind is the *sine qua non* for forming the opinion. The court observed that section 68 of the Act itself provides that where any sum is found credited in the books of the assessee for any previous year, the same may be charged to income tax as the income of the assessee of the previous year if the explanation offered by the assessee about the nature and source of such sums found credited in the books of the assessee is, in the opinion of the Assessing Officer, not satisfactory. Such opinion formed itself constitutes a *prima facie* evidence against the assessee, viz., the receipt of money, and if the assessee fails to rebut the said evidence, the

same can be used against the assessee by holding that it was a receipt of an income nature. It was submitted that in the facts of the present case, it is not the contention of the assessee that any finding of the Tribunal is not borne out from the record.

7.2 Reliance was also placed upon the decision of the Supreme Court in the case of **Commissioner of Income Tax v. P. R. Ganapathy**, [2012] 210 Taxman 572 (SC), wherein the court in a case where the Department had invoked section 68 of the Act, observed that the burden is on the assessee to show that the amount received by purported gifts from the two donors was a "gift" in the legal sense. The court observed that the assessee had not led evidence to show whether the alleged donors had adequate funds in their respective accounts to make these purported gifts in Singapore Dollars which was almost running into more than five lakhs. Mr. Mehta submitted that therefore, the financial capacity of the donor has to be established by the assessee and merely submitting tax returns is not sufficient and that the passbooks of the bank accounts should also be produced to show the financial capacity of the donors. The learned counsel further placed reliance upon the decision of this court in the case of **Commissioner of Income Tax v. Mira S. Khurana**, (2011) 333 ITR 488 (Gujarat), wherein the court has observed that the Tribunal had failed to appreciate that the Assessing Officer had granted opportunity to the assessee to prove the genuineness of the gift and creditworthiness of the donor, but the assessee had failed to adduce any proof in this regard. The onus then could not have been shifted to the Assessing Officer without dealing with the findings recorded by the subordinate

authorities. Reliance was also placed on the decision of this court in the case of ***Kaushal H. Patel v. Income Tax Officer***, [2014] 365 ITR 383 (Guj), with particular reference to paragraphs 6, 7 and 16 thereof. Reference was also made to the decision of this court in the case of ***Dinesh Babulal Thakkar v. Assistant Commissioner of Income Tax***, [2012] 341 ITR 632 (Guj), and more particularly, paragraphs 13 and 15 thereof. It was submitted that in the present case, the source of gifts itself has not been established and that this is not a case where the assessee is called upon to prove the source of source. As regards the decisions on which reliance had been placed by the learned advocate for the appellant, it was pointed out that the same are distinguishable from the facts of the present case and would not be applicable.

7.3 The decision of the Delhi High Court in the case of ***Sarita Aggarwal v. Income Tax Officer***, [2015] 92 CCH 0055 Delhi HC, was cited for the proposition that it is necessary to establish the factum of love and affection to establish the genuineness of gift. Reliance was also placed upon the decision of the Punjab and Haryana High Court in the case of ***Commissioner of Income Tax v. Y. M. Singla***, [2014] 366 ITR 242 (P & H), for the proposition that, to prove the genuineness of the transaction, the burden lies on the assessee and to discharge the onus, the assessee must prove (i) the identity of the creditor, (ii) the capacity of the creditor to advance money and (iii) the genuineness of the transaction. It was submitted that none of the declarations filed by the donors say that the gifts have been given for the purpose of earthquake and hence, it is an afterthought on the part of the assessee. It was urged that the Tribunal has given cogent and

sufficient reasons for arriving at the conclusion that the gifts are not genuine.

7.4 In conclusion, it was submitted that thus, firstly the burden of establishing the source of the donor lies on the assessee, which the assessee has failed to prove; secondly the assessee has failed to prove the relationship of natural love and affection between the donor and donee, and thirdly, the gift far exceeds the returned income, under the circumstances, the Tribunal was wholly justified in reversing the order passed by the Assessing Officer. It was, accordingly, urged that no question of law is involved in the facts of the present case and that the entire matter is in the realm of facts.

8. In rejoinder, Mr. Divatia, learned counsel for the appellant referred to the facts of the case to point out that Shri Niranjana Chhotalal Kshatriya, had in the statement recorded under section 131 of the Act, stated that he had deposited the cash and given the gift and that such amount is duly deposited in the capital account. Referring to the return of income filed by the said assessee, it was submitted that the return of income of the said assessee was duly submitted. As regards Shri Rupchand Ramlal Prajapati, it was pointed out that his return of income for the year 2000-2001 had been produced on record along with PAN card, xerox copies of balance sheet, statement of income, xerox copy of bank passbook, statement etc. As regards donor Shri Piraram Chelaram Rabari, it was pointed out that in his statement under section 131 of the Act, he has stated that he had deposited such amount out of his savings from his salary. It was submitted that thus, the source of the gifts has been duly established by the assessee by

producing sufficient material on record. As regards two NRI donors, it was submitted that the payments have been made through Emirates India International Exchange and through Thomas Cook Exchange Company. The amount has gone by Pay Order issued by the Money Exchangers who are authorized by the Reserve Bank of India. It was submitted that the Assessing Officer has not established as to how such funds could have gone from the pocket of the assessee to the NRI at Dubai. It was submitted that the Tribunal has observed that the original passbooks have not been produced, in which case the opportunity should have been granted to the assessee to produce the passbooks. As regards the decisions on which reliance has been placed by the learned counsel for the respondent, it was submitted that insofar as the decision of the Supreme Court in the case of **Commissioner of Income Tax v. P. Mohanakala** (supra) is concerned, all the authorities had recorded concurrent findings of fact, whereas in the present case, the Commissioner (Appeals) has held in favour of the assessee and reversed the order passed by the Assessing Officer. It was submitted that the question here is whether section 68 of the Act is applicable or not. It was submitted that this court in the case of **Murlidhar Lahorimal v. Commissioner of Income Tax** (supra) has held that section 68 and the genuineness of a gift are different things. Referring to the decision of this court in the case of **Kaushal H. Patel v. Income Tax Officer** (supra), it was submitted that the assessee did not give any explanation and hence, factually, the said decision is distinguishable and is not applicable to the facts of the present case. As regards the decision of this court in the case of **Commissioner of Income Tax v. Mira S. Khurana** (supra), it was submitted that in the facts of the said

case the court had struck down the order of the Tribunal as it had remanded the matter to the Assessing Officer without dealing with the findings recorded by the subordinate authorities. Reverting to the facts of the present case it was submitted the question regarding non production of the original passports of the NRIs is not borne out from the findings of the subordinate authorities and hence, the matter is required to be restored to the file of the Tribunal to decide the same after affording an opportunity to the assessee to produce the same. As regards the decision of the Supreme Court in the case of **Commissioner of Income Tax v. P. R. Ganapathy** (supra), it was pointed out that in the facts of the said case, the court had restored the matter to the Tribunal and directed the Tribunal to examine the question in the light of what was stated in the said decision and does not in any manner come to the aid of the respondent.

8.1 Mr. Divatia further submitted that the decisions of the Delhi High Court as well as the Punjab and Haryana High Court, on which reliance has been placed by the learned counsel for the revenue for the purpose of contending that the gift should be made out of natural love and affection, would not be applicable to the facts of the present case in the light of the view taken by this court in the case of **Murlidhar Lahorimal v. Commissioner of Income Tax** (supra). Reliance was placed upon the decision of the Rajasthan High Court in the case of **Commissioner of Income Tax v. Padam Singh Chouhan**, [2008] 3 DTR (Raj) 190 = 315 ITR 433, for the proposition that there is no legal basis to assume, that to recognize the gift to be genuine, there should be any blood relationship, or any close relationship, between the donor and

the donee. Instances are not rare, when even strangers make gifts, out of very many considerations, including arising out of love, affection and sentiments. It was submitted that the said decision would be squarely applicable to the facts of the present case and therefore, the Tribunal was not justified in disbelieving the veracity of the gifts made by the donors.

9. This court has considered the submissions advanced by the learned counsel for the respective parties and has perused the record in detail as well as the decisions cited by the learned counsel for the respective parties.

10. The principal question that requires to be addressed is as to whether the Tribunal was justified in reversing the order of the Commissioner (Appeals) at the first instance. A perusal of the order passed by the Assessing Officer reveals that he has discussed the details with regard to each donor while coming to the conclusion that the gift made by each of the donors was not genuine in nature. The Assessing Officer has further come to the conclusion that except for Shri Niranjana Chhotalal Kshatriya and Shri Piraram Chelaram Rabari, the identity of the other persons is not proved and that the bank accounts of all the persons, creditworthiness and genuineness of the gifts made by various persons is not proved. The Commissioner (Appeals) while reversing the order passed by the Assessing Officer, has recorded that the assessee had given confirmation letters, PAN numbers and copies of returns and bank statements of Indian donors and confirmation letter, copies of passbooks and details of stay of the donors at Dubai. According to the Commissioner (Appeals), most of the donors have given the gifts from their cash in hand or capital account

and adequacy of current year income to give gift is not to be considered as they have given gifts from the accumulated income. However, this finding of the Commissioner (Appeals) is not based on any supporting material. On the contrary, the evidence on record shows that the Indian donors have very meagre income and no reasonable person could ever come to the conclusion that they have the capacity to make such gifts. Considering the income of these persons, it is not possible for them to accumulate such income. The Commissioner (Appeals) has further found that the decision in the case of *ACIT v. Hansa Chhaganlal* is fully applicable to the present case as the assessee has furnished the address of the donor and the financial capacity of the donor. This finding is again *de hors* the record, inasmuch as, no material has been placed on record by the assessee to establish that the donors had the financial capacity to make such gifts. The Commissioner (Appeals) has also observed that Shri Piraram Chelaram Rabari has stated that he had deposited cash in his bank account and had given the gift from his salary. In this regard, the statement of Shri Piraram Chelaram Rabari recorded under section 131 of the Act reveals that he was working as a watchman (chowkidar) and two years prior thereto, he used to earn Rs.2,500/- and presently, was earning Rs.3,200/-. In answer to the query as to whether he had any income other than the salary income in the previous five years, he has stated that he used to get Rs.500/- for cleaning the shop. He has also stated that he has not deposited any money anywhere in the last five years and does not have any interest income. He is stated to have gifted Rs.50,000/- to the assessee. As regards his relationship with the assessee, he has stated that he has no relationship and that he had met him at Chandkheda on many occasions. On

the other hand, the assessee has stated that Shri Piraram Rabari used to bring customers for his scheme and they used to give some discount to such members and it is possible that such members may be giving him some commission. As regards Shri Niranjana Chhotalal Kshatriya, the Commissioner (Appeals) has observed that he has confirmed that the cash deposits in his bank account were from his savings and that the gift of Rs.1,00,000/- has been reflected in his capital account filed as Annexure to his return of income filed on 27.05.2002 with ITO, Ward 12(3), Ahmedabad. As regards the other donors, the Commissioner (Appeals) has not recorded any finding as to why the findings recorded by the Assessing Officer with reference to said donors are erroneous. The Commissioner (Appeals) has merely placed reliance upon the decision of the ITAT, Jodhpur Bench in the case of **DCIT v. Ramdeo Kumar Chitlangia**, 89 TTJ 346 (Jodhpur) that blood relationship is no condition precedent for making a valid gift and has deleted the addition of Rs.7,02,000/- made by the Assessing Officer.

11. The Tribunal after considering the record of the case in detail, has recorded the following findings :

"9. We have heard rival submissions and perused material available on record. Facts have been narrated in details above. At the outset, we would like to mention that cases regarding cash credits and gifts depend on intrinsic facts of each transactions and its only when parity of the facts is established that a principle settled by some judicial authorities can be applied to it. It is imperative to ascertain facts and determine the discharge of burden by

parity to the proceedings and consequential shift of the onus to other party in the given facts. First we shall take up creditors as under:

[i] Piraram Chelaram Rabari :

This person appeared before AO and it has not been disputed that he is working as watchman and is cleaning the shops. He has contended that neither he had deposited any amount and earned any interest, although, he was showing interest income in the return. On further questioning, he did not remember from whom interest has been earned. He did not disclose any source of income except watchman salary, besides, answer to question No.8, he stated that he has no relationship with the assessee and has only met on number of times. Whereas in answer to question No.35, assessee contended that I have business relationship with Piraram Chelaram Rabari. Answer of the assessee itself make statement of Rabari unbelievable, who did not state that there was any business relationship. We have to appreciate that AO has looked into the facts of the case as to whether a watchman has given substantial amount of gift to builder? Facts clearly raise question of proper inquiry. In the absence of clear facts to substantiate, burden on the assessee is of higher degree, inasmuch as, he has to establish as to how a watchman can have financial capacity to gift substantial amount to assessee who is much prosperous. Inconsistencies to replies of both the persons i.e. assessee and Rabari and the fact that Mr. Rabari utterly failed to establish his creditworthiness, gifts

in question cannot be accepted. AO has rightly treated the same as undisclosed income of the assessee. CIT (A) except some reference to case laws, has made no objection consideration.

[ii] Shri Niranjn Chhotalal Kshatriya :

He is only an accountant having earning of Rs.5,500/- per month, who is having household expenses of Rs.3,500/- and has given a gift of Rs.1,00,000/- to the assessee. In the assessment, he could not tell about any family members of the assessee and the reasons of friendship is only meeting at some Advocate's office. When a question was asked as to whether any other gifts was given to persons except Shri Laxmandas Sujandas Dalpat. He replied that he did not remember whether he made any gift to any other persons. As already mentioned, burden to prove that there was an element of natural love and affection, has to be established by the assessee. It is clear that Shri Niranjn Kshatriya did not remember, even the name of any family members of the assessee and the reason of friendship is only meeting at some Advocate office. Assessee in contradiction, in answer to question No.42, said that Shri Niranjn Kshatriya used to come with Jaswantbhai on "our occasion", implying thereby some family functions. Similarly, assessee contends that Shri Niranjn happens to meet him after six to eight months. In our opinion, statement of both persons are contradictory except a casual knowing each other, nothing has been established to show that elements of deep friendship so as to develop nature of love and affection. Under these

circumstances, it has to be assumed that this is accommodation transaction and not real gift. Further, statement of Shri Niranjan Kshatriya is assailed on the ground that in subsequent affidavit, he deposed that he knew wife and son of the assessee, looking at the earlier statement under section 131, subsequent affidavit becomes inadmissible being contrary to deposition on oath under statutory provision i.e. section 131 and cannot be relied on. In view of these facts and circumstances, gift cannot be held to be genuine.

Coming to two NRIs, it is evident that they were never produced before the AO. Assessee in his own statement also expressed his inability of any knowledge about members of the family of Shri Ramesh Keshkani and said that he met him through one Shri Mahadev Keshkani and he did not know full names and complete local address of the donor. He had not contacted him by mail or telephone since last six to seven years. Further, neither original passport nor affidavit sworn before any diplomatic authority from Shri Ramesh Keshkani was produced except only simple confirmation. Confirmations could not be relied on, unless signatory is proved and entire facts of the case is verified. In case of Shri Vinod Meghani also, no original passport was produced and he is not a relative. Assessee has no knowledge about the family members. He did not remember names and his family members and local addresses of Shri Vinod Meghani at Ahmedabad, he had not contacted him by mail or telephone since last six to seven years. In view of these glaring deficiency and proper establishment of identity of the donors in the form of

original passport and their proper existence, relationship as alleged by the assessee, we are unable to treat this gift as genuine gift as identity and creditworthiness could not be proved by assessee in terms of section 68.

Coming to remaining donors, they could never be produced by the assessee, as already held by the Hon'ble Delhi High Court in the case of Sajan Dass and Sons v. CIT, 264 ITR 435 showing movement through banking channels is not sufficient. Onus lies on the assessee to establish identity of the person's capacity. In the instant case, it was for the assessee to produce these parties as same was necessary to establish identity and to enable AO for examination and further investigation regarding genuineness of persons and creditworthiness could have been carried out. In the eventuality of assessee having failed to prove its burden, onus does not shift on the AO to accept gifts valid only on the basis of confirmations."

12. Thus, the Tribunal, after duly appreciating the material on record, has recorded findings of fact for the purpose of coming to the conclusion that the gifts in question are not genuine. In the present case, the returns of income filed by the Indian donors have been placed on record, which clearly reveal that the donors did not have the financial capacity to gift such huge sums of money. Clearly therefore, the assessee has failed to prove the creditworthiness of the donors. Even the donors who appeared before the Assessing Officer clearly did not have the capacity to make such gifts. In relation to the gifts received from the NRI donors, except for the fact that such amount was received from banking channel and their confirmations were

filed, no other supporting material had been produced by the assessee to prove the identity of the donors, the genuineness of the gifts and the creditworthiness of the parties. As held by the Supreme Court in the case of **Commissioner of Income Tax v. P. R. Ganapathy** (supra), the burden is on the assessee to show that the amount received by purported gifts from the donors was a gift in the real sense. In the facts of the present case, the assessee has not led evidence to show whether the alleged donors had adequate funds or that they had the financial capacity to make such gifts. The record reveals that the assessee did not have any close relations with the donors. Insofar as the Indian donors are concerned, except for Shri Niranjan Chhotalal Kshatriya, as regards the rest of the donors, the assessee in his statement under section 131 of the Act has stated that they used to bring customers for his scheme. From the record, there is nothing to reveal that the relationship between the assessee and the donors was the one involving natural love and affection. In the opinion of this court, having regard to the financial capacity of the donors as emerging from the record, considering the facts of the case from the point of view of a reasonable man taking a reasonable view, it is not possible to believe that the gifts in question are genuine.

13. The Supreme Court in **Commissioner of Income Tax v. P. Mohanakala** (supra) has held that a bare reading of section 68 of the Act suggests that there has to be credit of amounts in the books maintained by an assessee; such credit has to be of a sum during the previous year; and the assessee offers no explanation about the nature and source of such credit found in the books; or the explanation offered by the assessee in

the opinion of the Assessing Officer is not satisfactory, it is only then the sum so credited may be charged to income tax as the income of the assessee of that previous year. The expression "the assessee offer no explanation" means where the assessee offer no proper, reasonable and acceptable explanation as regards the sums found credited in the books maintained by the assessee. It is true the opinion of the Assessing Officer for not accepting the explanation offered by the assessee as not satisfactory is required to be based on proper appreciation of material and other attending circumstances available on record. The opinion of the Assessing Officer is required to be formed objectively with reference to the material available on record. Application of mind is the *sine qua non* for forming the opinion. The court after referring to its earlier decision in the case of **CIT v. Smt. P. K. Noorjahan**, [1999] 237 ITR 570, observed that in cases where the explanation offered by the assessee about the nature and source of sums found credited in the books is not satisfactory, there is, *prima facie*, evidence against the assessee, viz., the receipt of money, the burden is on the assessee to rebut the same, and if he fails to rebut it, it could be held against the assessee that it was a receipt of an income nature. The court further held that section 68 of the Act itself provides, where any sum is found credited in the books of the assessee for any previous year, the same may be charged to income-tax as the income of the assessee of the previous year if the explanation offered by the assessee about the nature and source of such sums found credited in the books of the assessee is in the opinion of the Assessing Officer, not satisfactory. Such opinion formed itself constitutes a *prima facie* evidence against the assessee, viz., the receipt of

money, and if the assessee fails to rebut the said evidence, the same can be used against the assessee by holding that it was a receipt of an income nature. In the facts of the said case, the court observed that the transactions though apparent were held to be not real ones. May be the money came by way of bank cheques and was paid through the process of banking transaction but that itself is of no consequence. In **Commissioner of Income Tax, U.P. v. Bharat Engineering and Construction Co.**, [1972] 83 ITR 187, the Supreme Court held that in the absence of satisfactory explanation from the assessee, the Income Tax Officer may assume that cash credit entries in its books represent income from undisclosed sources. But what inference should be drawn from the facts proved is a question of fact and the Tribunal's finding on that question is final. The above decision would be squarely applicable to the facts of the present case, inasmuch as, the explanation given by the assessee has not been found to be acceptable.

14. The learned counsel for the appellant has placed strong reliance on the decision of this court in the case of **Murlidhar Lahorimal v. Commissioner of Income Tax** (supra); however, in the opinion of this court, the said decision would not come to the aid of the appellant herein, inasmuch as, in the facts of the said case, the identity of the donor was established as the donor had appeared in person before the Assessing Officer, the genuineness of the transaction was established, not only by the receipt of the bank draft, but also by the fact of the transaction having borne gift tax once the assessment was framed. The primary onus which rested on the assessee, thus, stood discharged. The court, on facts, found

that the donor had produced evidence in support of the source from which the funds for making the gift were available with him and the revenue had not disputed any of these facts. Placing reliance upon its earlier decision in the case of *CIT v. Pragati Co-operative Bank Ltd.*, (supra) the court held that the assessee can be asked to prove the source of credit in the books, but cannot be asked to prove the source of the source. Adverting to the facts of the present case, the assessee has even failed to prove the source of the gift, inasmuch as, the financial capacity of the donors has not been duly established.

15. In the light of the above discussion, on the evidence which has come on record, it is not possible to state that the impugned order passed by the Tribunal is based on conjectures or surmises. The Tribunal, on the contrary, has considered all the relevant material and based its conclusions on the findings recorded by it after appreciating the material on record. From the findings recorded by the Tribunal, there is nothing to indicate that it has considered any irrelevant material or that any relevant material has been ignored, nor can it be said that the conclusions arrived at by the Tribunal are in any manner unreasonable or perverse to the record of the case, so as to warrant interference.

16. Insofar as the submission advanced by the learned counsel for the assessee that in the light of the finding recorded by the Tribunal that the original passports of the NRI donors had not been produced, the matter is required to be restored to the file of the Tribunal, in the opinion of this court, in the absence of any cogent material having been brought on record by the assessee to prove the financial capacity of the

NRI donors or the genuineness of the gifts, no case has been made out for restoring the matter to the file of the Tribunal.

17. For the foregoing reasons, the question is, accordingly, answered in the affirmative, that is, in favour of the revenue and against the assessee. The appeal is, accordingly, dismissed.

(HARSHA DEVANI, J.)

(A.G.URAIZEE, J.)

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