IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Income Tax Appeal No. 159 of 2016 (O&M)
Date of Decision: 20th July, 2016

Shri Namdev Arora ..Appellant

versus

Commissioner of Income Tax, Jalandhar and another

..Respondents

CORAM: HON'BLE MR. JUSTICE S.J.VAZIFDAR, ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE DEEPAK SIBAL.

Present : Mr. Salil Kapoor, Advocate,
Mr. Saurabh Kapoor, Advocate and
Mr. Sumit Lal, Advocate, for the appellant.

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S.J.VAZIFDAR, ACTING CHIEF JUSTICE

CM No. 13417-CII of 2016

Heard. For the reasons mentioned in the application, delay of 690 days in re-filing the appeal is condoned. Application stands disposed of.

Income Tax Appeal No. 159 of 2016 (O&M)

This is an appeal against the order of the Income Tax Appellate Tribunal confirming an addition by the Assessing Officer under section 69-A of the Income Tax Act, 1961 (for short 'the Act') and the enhancement of the appellant's income by the Commissioner of Income Tax (Appeals). The matter pertains to the assessment year 2008-09.

2. The appeal is admitted on the following substantial questions of law raised by the appellant:-

a) Whether in view of the facts and circumstances of the case, the Tribunal has erred in law and on facts in holding that AO/CIT(A) meant addition under section 68 of the Act when specifically addition is made under section 69-A and also in holding that such situation is covered under section 292-B?

b) Whether in view of the facts and circumstances of the case, the Tribunal has erred in law and on facts in upholding the

order of the respondent without even going into the relevant facts of the case and the nature of addition/disallowance made?

c) Without prejudice whether on the facts and in the circumstances of the case, the Tribunal erred in law and on facts in not considering the relevant fact that the AO and CIT(A) has never examined the applicability of Section 68 of the Act on the facts and circumstances of the case?

d) Whether on the facts and in the circumstances of the case, the Tribunal erred in law and on facts in upholding the order of AO/CIT(A) without giving opportunity as to the applicability of section of the Act?

e) Whether on the facts and in the circumstances of the case the findings arrived at by the Tribunal are perverse, in as much as no reasonable person correctly informed of the provisions of law would come to such a conclusion?

3. The questions being inter-linked are dealt with together. The main question is whether the Tribunal was justified in invoking the provisions of section 68 of the Act, although the assessment order and the order of CIT(A) were based on section 69-A of the Act.

4. Sections 68 and 69-A of the Act read as under:-

> **68.** Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year:
>
> **Provided** that where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless—
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> (*a*) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and
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> (*b*) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:
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> **Provided further** that nothing contained in the first proviso shall apply if the person, in whose name the sum referred to therein is recorded, is a venture capital fund or a

venture capital company as referred to in clause (*23FB*) of section 10.

Unexplained money, etc.

69A. Where in any financial year the assessee is found to be the owner of any money, bullion, jewellery or other valuable article and such money, bullion, jewellery or valuable article is not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of acquisition of the money, bullion, jewellery or other valuable article, or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the money and the value of the bullion, jewellery or other valuable article may be deemed to be the income of the assessee for such financial year."

5. The appellant filed a return declaring an income of ₹ 4,23,889/- which was processed under section 143(1) of the Act. A questionnaire was issued alongwith a notice under sections 142(1) and 143(2) of the Act.

6. The assessee derives income on account of his share as a partner in two firms and interest from two other firms. During the relevant corresponding financial year, the assessee deposited an aggregate sum of ₹ 1,71,50,000/- in his bank account. He was asked to explain the source of the money. He named the sources. By a letter dated 14.12.2010 he was asked to furnish documentary evidence of the source of the deposits and to produce one of the sources named by him, namely, one Dhruv Parti for examination. He was also asked to produce the books of accounts of the firm and to furnish certified copies of his accounts as appearing in their books of accounts. He furnished copies of his accounts in the firm as also copies of sale-deeds of purchase of the lands. It is important to note, however, that he did not furnish a confirmation of the said Dhruv Parti. Nor did he produce Dhruv Parti for examination stating that he was a non-resident and therefore,

was not available for examination. The assessee failed to comply with the subsequent requisitions to this effect on the same ground.

The Assessing Officer, therefore, requisitioned under section 133(6) of the Act said Dhruv Parti's non-resident account with Kotak Mahindra Bank Ltd. to ascertain the availability of funds with him. The bank statements revealed that on 29.03.2007 there was a credit balance of only ₹ 4972/- and on 16.04.2007 an aggregate sum of ₹ 19.30 lacs was deposited in cash in Dhruv Parti's account. The assessee received from Dhruv Parti by cheque a sum of ₹ 10 lacs, ₹ 10 lacs, ₹ 5 lacs and ₹ 5 lacs on 01.04.2007, 16.04.2007, 19.04.2007 and 14.06.2007, respectively, aggregating to ₹ 30 lacs.

7. The Assessing Officer held a sum of ₹ 19.30 lacs to be unexplained money and added the same to the assessee's income under section 69-A of the Act.

8. The CIT(A) noted that the assessee even after more than 4½ years of the receipt of the alleged loan had failed to submit any confirmation from Dhruv Parti that the amounts were advanced to the assessee as a loan. It was held that unless it was otherwise proved the assessee in possession of the money would be deemed to be the owner thereof; that there was nothing to show that Dhruv Parti retained a claim over this amount, that no prudent person would lend such a large amount without some document evidencing the loan and that there was not a shred of evidence in respect of the alleged loan. Dhruv Parti was unavailable at his residence at least on two occasions when the officers of the department went to search for him. The CIT(A) enhanced the addition to the assessee income to ₹ 30 lacs.

9. We are entirely in agreement with the conclusion of the CIT(A) on facts. The contention on behalf of the assessee that sufficient efforts were not made by the Assessing Officer to trace out Dhruv Parti and to examine his affairs was unwarranted. The contentions on behalf of the appellant are contrary to the normal course of human conduct. It is impossible to believe that an amount of ₹ 30 lacs was lent and advanced by Dhruv Parti to the appellant. There are several facts and circumstances that established the inherent improbability of the assessee's case of a loan. There is not a single document evidencing the loan. There is no explanation as regards the absence of any document evidencing the loan. There is nothing to suggest any special relationship between the parties on account whereof such a large loan would be advanced without the lender insisting upon any document evidencing the same. The loans admittedly have not been repaid upto date. There is no explanation for the same either. The assessee has not even established that he tried to trace said Dhruv Parti during all these years. He does not contend that Dhruv Parti never visited India during all these years. Nor does he contend that he ever tried to contact him in relation to the loan. It is equally important to note that it is not even the assessee's case that Dhruv Parti demanded interest on the loans during all these years.

10. As rightly held by the CIT(A) the fact that there were several other transactions in Dhruv Parti's account does not carry the assessee's case any further for there is nothing to indicate the source of such funds, namely, whether the funds belonged to Dhruv Parti or that he was acting as a conduit for others.

11. It is the assessee who claims to have received the amount as a loan. The burden, therefore, was on him to establish the same. The assessee has failed to discharge this burden. The authorities have infact established

that the facts and circumstances of the case militate against the assessee's case that the amounts were lent and advanced to him by said Dhruv Parti. On facts, therefore, the inference drawn by the authorities under the Act cannot be faulted. In these circumstances, the direction issued by the CIT(A) for the addition of ₹ 30 lacs to be made to the assessee's return is well founded.

12. The Tribunal upheld the findings of the CIT(A) on facts. For the reasons already stated these findings cannot be held to be absurd or perverse. In fact a view to the contrary would have been surprising.

13. This brings us to the legal issue raised by Mr. Salil Kapoor, the learned counsel appearing on behalf of the appellant. His submission is as follows: The Assessing Officer made the addition in view of section 69-A of the Act. The order of the CIT(A) did not mention any section. Presumably, therefore, the CIT(A) confirmed the addition and infact enhanced the same from ₹ 19.30 lacs to ₹ 30 lacs also under section 69-A of the Act. Section 69-A of the Act applies only where the amount sought to be added is not recorded in the books of accounts, if any, maintained by an assessee for any source of income and the assessee offers no explanation about the nature and source of acquisition of the money. Both the conditions must exist for the applicability of section 69-A of the Act. Section 69-A is inapplicable as the amounts received by the assesssee were entered in his books of account. The Tribunal, however, justified the addition not under section 69-A but under section 68 of the Act. He submitted that as the Assessing Officer and the CIT(A) had no jurisdiction to make the addition under section 69-A, the Tribunal could not have made the addition under section 68 without putting the assessee to notice that it

intended invoking section 68 of the Act. The Tribunal not having done so, the order is contrary to the rules of natural justice and is void.

14. The submission is not well founded. This is merely a case of a wrong section being mentioned in the assessment order and in the order of CIT(A). All the jurisdictional facts for invoking section 68 existed. More importantly, the enquiries made by the Assessing Officer in the assessment proceedings were not stated to be under any particular provisions of the Act. The enquiries were merely factual relating to the source of acquisition of the money. Had the Assessing Officer on the very same facts mentioned section 68 instead of section 69-A it would not have been open to the assessee to contend that he had not been put to notice that the Assessing Officer intended invoking section 68 of the Act. If he could not have done so in respect of the assessment order, he cannot do so in respect of the orders in appeal by the CIT(A) or by the Tribunal.

15. This as we mentioned is not a case where in the assessment proceedings the queries were raised specifically in relation to section 69-A of the Act. The queries were raised generally only to ascertain the facts. If for instance it had been found in the assessment proceedings that the amounts received by the assessee had not been recorded in his books of accounts, the additions could have been made under section 69-A of the Act. Merely because it was found on such facts that the money was recorded in the assessee's books of accounts it would not exclude the operation of section 68 of the Act. That is an independent ground/provision open to be invoked by the authorities.

16. The assessee has not been prejudiced in any manner whatsoever on account of the Assessing Officer having mentioned the wrong section.

Where in the assessment proceedings the enquiries are made by the Assessing Officer of facts and the Assessing Officer after considering the facts and circumstances of the case including the assessee's response, if any, thereto, makes an addition, which is justified and permissible under the provisions of the Act but inadvertently or even wrongly mentions a wrong provision of the Act, the assessment order cannot be set aside on that ground. It is open in such circumstances to the Appellate Authority or to CIT(A) or the Tribunal to uphold the addition under the correct section. This ofcourse would be in circumstances where the error has not prejudiced the assessee in any manner whatsoever. At the cost of repetition it is not even the assessee's case that during the assessment proceedings he was given to understand that the queries were raised by the Assessing Officer and/or that he responded to the same only on the basis of the provisions of section 69-A of the Act.

17. In this view of the matter, it is not necessary to consider the applicability of section 292-B of the Act.

18. All the questions are, therefore, answered in favour of the respondent/revenue and against the assessee to the above extent.

19. At the time of pronouncement Mr. Kapoor stated that the appellant had now obtained a confirmation of the loan from the said Dhruv Parti. He further stated that Dhruv Parti is expected in India in December this year. He requested us to remand the matter to enable the appellant to lead further evidence.

20. We are not inclined to accede to this request made after so many years especially when even now there is no evidence. The appellant merely expects to gather evidence in December in the event of the lender

Dhruv Parti visiting India. The petitioner is at liberty to adopt appropriate proceedings if he obtains the alleged evidence. Such an application would be dealt with in accordance with law. We refrain from making any observations in regard thereto including as to its maintainability.

20. The appeal is accordingly dismissed.

(S.J.VAZIFDAR)
ACTING CHIEF JUSTICE

20th July, 2016
'ravinder'

(DEEPAK SIBAL)
JUDGE

Whether reportable: YES