IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Pronounced on
12.09.2022	29.09.2022

Coram

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN
AND
THE HONOURABLE MR.JUSTICE C.SARAVANAN

T.C.A.No.142 of 2009

Shri.P.R.Ganapathy,
No.38/1, Secretariat Colony,
First Street, Kilpauk,
Chennai-600 010. ..... Appellant

-vs-

The Deputy Commissioner of Income-Tax Officer,
Central Circle II (1),
Chennai-600 034. ..... Respondent

Prayer: Tax Case Appeal filed under Section 260-A of the Income Tax Act, 1961 against the order passed by the Hon'ble Income Tax Appellate Tribunal, Chennai Bench 'B' in ITA No.36/Mds/2007 for the assessment year 2002-2003 dated 22 08.2008 received by the appellant on 02.05.2008.

For Appellant : M/s.N.V.Lakshmi

For Respondent : Mr.R.Karthik

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J U D G M E N T

This Tax Case Appeal has been filed, challenging the order dated 22.08.2008, passed by the Income Tax Appellate Tribunal, Chennai Bench 'B' in ITA No.36/Mds/2007 for the assessment year 2002-2003, by which the assessment made by the Assessing Officer, holding that the NRI gifts were not genuine and confirming the addition of Rs.46,44,150/- as part of the undisclosed income of the assessee, has been upheld by the Income Tax Appellate Tribunal. Aggrieved by the same, the Assessee is before this Court.

Brief Facts in nutshell:

2. It was averred by the Appellant / Assessee that consequent to the search conducted at his residence on 29.09.1995 under Section 132 of the Income Tax Act, 1961 (in short 'the IT Act, 1961), he was called upon to file a return in Form 2B and the Appellant filed the return indicating his undisclosed income as Rs.35,38,743/-. However, the reply submitted by the Appellant was not accepted by the Assessing Officer on the ground that evidences available on record prove otherwise.

2.1. The Appellant further averred that the amount of Rs.46,44,150/- received from Non-Resident Indian as gifts was not accepted by the Assessing Officer in respect of his undisclosed income for the reason that the Assessee had not established the genuineness of the NRI gifts. It was stated that pursuant to the earlier direction of the Tribunal dated 07.07.2005, the process was redone by the Assessing Officer and the Authority, after considering the reply and arguments made by the Assessee, reconfirmed the addition of Rs.46,44,150/- as undisclosed income of the Assessee.

2.2. Challenging the said order, the Appellant had preferred an appeal before the Income Tax Appellate Tribunal and the Tribunal in its order impugned herein did not accept the explanation offered by the Assessee and confirmed the order of the Assessing Officer, against which the Appellant has filed the present Appeal before this Court on the ground that there was no opportunity afforded to the Assessee to cross examine the persons, whose depositions were relied upon by the Department for calculating the amount as undisclosed income.

3. When the Appeal was taken up for hearing at the threshold, it was

admitted on the following substantial questions of law:

> "1. Whether the Income Tax Appellate order is right in law in confirming the assessment order which has been passed in total violation of principles of natural justice and which smacks of utter violation of rule of audi alteram partem?
>
> 2. Whether the Income Tax Appellate Tribunal is right in law in upholding the assessment order which treated the gifts received by the assessee as sham in nature on the basis of statements collected by the assessing officer from the donors relatives and on which the assessee was never given an opportunity to cross examine?
>
> 3. Whether the Income Tax Appellate Tribunal is right in law in upholding an assessment which has been framed on the basis of statements collected behind the back of the assessee and on which the assessee was not given an opportunity to cross examine despite the observation of the Hon'ble Tribunal while setting aside the original assessment in IT(SS) A.No.2253/Mds/97?

4. Learned counsel for the Appellant has submitted that there was no incriminating material produced by the Assessing Officer for coming to the conclusion that the NRI gifts were not genuine and the Assessing Officer had failed to provide an opportunity to cross examine the witnesses, thereby there was a violation of principles of natural justice. According to the learned counsel for the Appellant, all the statements have been obtained behind the back of the Appellant, which cannot be relied upon and that the supporting evidence by way of an self serving affidavit has been produced, which ought not to have been accepted by the Authorities concerned. Learned counsel for

the Appellant has further submitted that without collecting any evidence during search, the liability ought not to have been foisted on the appellant. Before the Tribunal, the following judgments were relied upon by the Appellant, which read as under:

i) CIT vs. L.G.Ramamurthi and others, (1977) 110 ITR 453 (Mad);

> "9. Mr.Swaminathan, learned counsel for the assessees, very strenuously contended that the principle of res judicata has no application to proceedings under the Income-tax Act, since each assessment is considered to be a separate and independent transaction and that, therefore, any finding recorded by any authority in respect of one year will not be binding in respect of subsequent years. However, we are of the opinion that having regard to the facts of the present case, the issue involved is more fundamental than the question of res judicata. Even assuming that this court "on the earlier occasion had not given any finding with regard to the nature of the gift, whether it was real or sham, and merely went on to consider the question of law embedded in the question actually referred, to this court, still **we are of the opinion that no Tribunal of fact has any right or jurisdiction to come to a conclusion entirely contrary to the one reached by another Bench of the same Tribunal on the identical facts**."

ii) Honda Siel Power Products Ltd., vs. CIT (2007) 295 ITR 466 (SC);

> "12. As stated above, in this case we are concerned with the application under Section 254(2) of the 1961 Act. As stated above, the expression "rectification of mistake from the record" occurs in Section 154. It also finds place in Section 254(2). The purpose behind enactment of Section 254(2) is based on the fundamental principle that no party appearing before the Tribunal, be it an assessee or the Department, should suffer on account of any mistake committed by the Tribunal. This fundamental principle has nothing to do with the inherent powers of the Tribunal."

5. Per contra, learned counsel for the Respondent has vehemently contended that despite specific direction, the Assessee had not produced the donors of the gifts to substantiate his case and all the documents furnished by the Assessee were highly unreliable. It was also contended that in the absence of any oral evidence produced on the side of the Assessee before the Assessing Authority to rebut the evidence of the respondent, the documents collected against him can be construed as an admissible evidence and therefore, the plea of violation of principles of natural justice lacks merit acceptance. Above all, there was no explanation forthcoming to prove that donors and the assessee are close friends, warranting exchange of gifts out of natural love and affection. It was argued that when the Assessee had failed to defend his case, there was no fault on the part of the respondent in assessing the income of the assessee based on the rule of preponderance of probabilities.

5.1. Learned counsel for the respondent drew our attention to the provisions of Section 68 of the IT Act, 1961, which is a charging section to state that if a tax payer is unable to prove the nature and source of money received, the money would be taxable under the Income Tax Act. Section 68 reads as follows:

> "68. Cash credits - 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."

5.2. Learned counsel for the respondent went on to add that the search was conducted under Section 132 of the IT Act, 1961, which empowers an Assessing Officer to seize books of account or other documents from the person from whose custody such documents are found and make copies thereof, or take extracts there form, in the presence of the Authorised Officer or any other person empowered by him in this behalf, at such place and time. In case the person from whom such documents are seized fails to offer suitable explanation, the material evidences collected during search can be taken as a piece of evidence against him so as to foist liability on that person. For the sake

of convenience, Section 132(4) of the IT Act, 1961 is reproduced below:

"4. The authorised officer may, during the course of the search or seizure, examine on oath any person who is fond to be in possession or control of any books of account, documents, money, bullion, jewellery to other valuable article or thing and any statement made by such person during such examination may thereafter be used in evidence in any proceeding under the Indian Income- tax Act, 1922 (11 of 1922), or under this Act.

Explanation.- For the removal of doubts, it is hereby declared that the examination of any person under this sub- section may be not merely in respect of any books of account, other documents or assets found as a result of the search, but also in respect of all matters relevant for the purposes of any investigation connected with any proceeding under the Indian Income- tax Act, 1922 (11 of 1922), or under this Act.

(4A) Where any books of account, other documents, money, bullion, jewellery or other valuable article or thing are or is found in the possession or control of any person in the course of a search, it may be presumed-

(i) that such books of account, other documents, money, bullion, jewellery or other valuable article or thing belong or belongs to such person;

(ii) that the contents of such books of account and other documents are true; and

(iii) that the signature and every other part of such books of account and other documents which purport to be in the handwriting of any particular person or which may reasonably be assumed to have been signed by, or to be in the handwriting of, any particular person, are in that person's handwriting, and in the case of a document stamped, executed or attested, that it was duly stamped and executed or attested by the person by whom it purports to have been so executed or attested.

5.3. Learned counsel for the respondent has also contended that wherever it was found that the transaction lacks creditworthiness or bogus one and created only for the purpose of evading payment of tax, the Assessing Officer is entitled to make additions by invoking the charging provision. In support of this submission, he has referred to a judgment of the Supreme Court in the case of ***Principal Commissioner of Income-Tax (Central)-1 vs. NRA Iron & Steel (P) Ltd***, reported in ***(2019) 103 Taxmann.com 48 (SC)***, wherein it was held as follows:

> "14. The practice of conversion of un-accounted money through the cloak of Share Capital/Premium must be subjected to careful scrutiny. This would be particularly so in the case of private placement of shares, where a higher onus is required to be placed on the Assessee since the information is within the personal knowledge of the Assessee. The Assessee is under a legal obligation to prove the receipt of share capital/premium to the satisfaction of the AO, failure of which, would justify addition of the said amount to the income of the Assessee.

15. On the facts of the present case, clearly the Assessee Company- Respondent failed to discharge the onus required under Section 68 of the Act, the Assessing Officer was justified in adding back the amounts to the Assessee's income."

5.4. Learned counsel for the respondent, with reference to a judgment of the Apex Court in the case of ***Commissioner of Income Tax vs. P.R.Ganapathy*** in ***(2012) 26 Taxmann.com 354 (SC)***, has advanced his argument, stating that the burden is on the assessee to show that the amount received by purported gifts from the donors was a gift in the legal sense. It was put forth by the respondent that when there was a proper appreciation of the facts by the Tribunal, then the finding of facts cannot be blindly reverted back so as to give a different interpretation, as held by the Supreme Court in the case of ***Commissioner of Income Tax vs. P.Mohanakala***, reported in ***(2007) 161 Taxmann 169 (SC)***. The relevant portion of the judgment is extracted hereunder:

"23. Relying on the decisions of this Court in Bejoy Gopal Mukherji Vs. Pratul Chandra Ghose [AIR 1953 SC 153] & M/s Orient Distributors Vs. Bank of India Ltd. & Ors. [AIR 1979 SC 867], Shri Iyer, learned senior counsel contended that issue relating to the propriety of legal conclusion that could be drawn on basis of proved facts gives rise to a question of law and, therefore, the High Court is justified in interfering in the matter since the authorities below failed to draw a proper and logical inference from the proved facts. We are unable to

persuade ourselves to accept the submission. The findings of fact arrived at by the authorities below are based on proper appreciation of the facts and the material available on record and surrounding circumstances. The doubtful nature of the transaction and the manner in which the sums were found credited in the books of accounts maintained by the assessee have been duly taken into consideration by the authorities below. The transactions though apparent were held to be not real one. May be the money came by way of bank cheques and paid through the process of banking transaction but that itself is of no consequence.

24. No question of law much less any substantial question of law had arisen for consideration of the High Court. The High Court misdirected itself and committed error in disturbing the concurrent findings of facts..."

Thus, it was argued by the learned counsel for the respondent that the judgment passed by the Tribunal does not warrant any interference by this Court, as re-appreciation of evidence without proper justification is against the dictum laid down by the Supreme Court (supra). Hence, it was prayed that the present Appeal is liable to the dismissed *in limine*.

6. Heard the learned counsel on either side and perused the material documents available on record, including various provisions of the Act and judgment relied upon by the parties.

7. On a conspectus of the facts obtaining in this case, it is seen that there was a search conducted in the premises of the Assessee under Section 132 of the IT Act, 1961 by the Officer to whom authority is given for such a search and seizure. The power of the Officer includes entry and search in any building, place, vessel, vehicle or aircraft in case he suspects that such books of accounts, other documents, money, bullion, jewellery or other valuable article or thing are kept; breaking open the lock of any door,box, locker, safe, almirah, etc., apart from other powers that have been extended to such Officer. It is the core contention of the respondent that in terms of Section 113 of the IT Act, 1961, the total undisclosed income of the block period, determined under section 158BC, shall be chargeable to tax at the rate of sixty per cent.

8. According to the Appellant / Assessee, the gifts that were taken into consideration for the purpose of charging tax were received from Non-Resident Indians (NRI) and the stand of the Appellant is that such gifts are exempted from payment of tax and the addition of Rs.46,44,150/- by the respondent is illegal and unjustifiable. However, on the side of the respondent, it was expostulated, contending that most of the gifts were made by the donors

residing outside Tamil Nadu and on enquiry with two donors, it came to light that on receipt of commission of Rs.1 lakh, gifts were arranged by them in favour of the assessee. In addition to their depositions, most of the relatives of the assessee had also reiterated the same version, which created doubts in the mind of the respondent in respect of creditworthiness and genuineness of gifts received by the Assessee. Therefore, after proper analysis of books of accounts and other documents, the gifts were subjected to liability of tax, as the appellant had failed to establish his onus.

9. It is no doubt true that only through search, the evidence has been collected by the respondent and the Assessee had not voluntarily disclosed on his own volition about the receipt of gifts from donors. The plea raised by the appellant that the nature of payment with regard to gifts was established through affidavits filed by donors and therefore, duty is cast upon the respondent to prove the onus, cannot be accepted for the simple reason that the Assessee had received gifts from 29 persons hailing from Kerala and there was no acceptable explanation as to the nature of relationship he had with those persons in the course of business transaction. Had the appellant given a convincing and believable explanation / reply to the respondent, the question of

charging additional tax would not have arisen. That apart, no gifts would be extended to a person after receipt of commission by the donors and the exchange of gifts must be warmhearted and not out of compulsion or demand. On a perusal of the classification issued by the Income Tax Department, the term 'gift' denotes the following:

> 1. Any sum of money received without consideration can be termed as ‘monetary gift’;
>
> 2. Specified movable properties received without consideration can be termed as ‘gift of movable property’;
>
> 3. Specified movable properties received at a reduced price (i.e. for inadequate consideration), can be termed as ‘movable property received for less than its fair market value’;
>
> 4. Immovable properties received without consideration can be termed as ‘gift of immovable property’;
>
> 5. Immovable properties acquired at a reduced price (i.e. for inadequate consideration) can be termed as ‘immovable property received for less than its stamp duty value’.

10. The case of the appellant / assessee regarding receipt of gifts does not fall in anyone of the category mentioned above and as such, the burden is automatically shifted to the assessee to rebut the same, as held by the Supreme Court in the case of ***CIT vs. P.Mohanakala (supra)***, which was relied upon by the respondent before the Tribunal. That apart, as per the exact dictionary meaning of the word 'gift' is, something voluntarily transferred by one person to

another **without compensation**. A literal meaning of 'commission' is, 'money that one gets for selling something'. On enquiry with two donors, namely, P.I.Joy and David Mathew, by the respondent, the former had deposed about the arrangement of gifts to the assessee on receipt of commission, whereas the latter had stated that no gift was proffered by him to the assessee. Thus, it is very obvious that the purported gifts received by the assessee are not at all gifts in its real sense. Hence, we are of the view that the order of the Tribunal is perfectly valid and is liable to be upheld.

11. In the result, this Tax Case Appeal is dismissed and the questions of law framed are answered against the appellant. No costs.

[S.V.N,J.,] **[C.S.N,J.,]**

29.09.2022

Index: Yes / No
Internet: Yes / No
Speaking Order / Non Speaking Order
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S.VAIDYANATHAN,J.

and
C.SARAVANAN,J.
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To:

1. The Deputy Commissioner of Income-Tax Officer,
   Central Circle II (1),
   Chennai-600 034.

2. Income Tax Appellate Tribunal,
   Bench 'B', Chennai.

Pre-Delivery Judgment in
T.C.A.No.142 of 2009

29.09.2022