
(2014) 03 P&H CK 0016
In the Punjab And Haryana At Chandigarh
Case No : I.T.A. No. 250 of 2008 (O&M)

Commissioner of Income Tax

APPELLANT

Vs

Rippen Ahuja

RESPONDENT

Date of Decision : 04-03-2014

Acts Referred:

Income Tax Act, 1961 — Section 148, 263, 263(1)

Citation : (2015) 275 CTR 577 : (2014) 365 ITR 150

Hon'ble Judges : Anita Chaudhary, J;Ajay Kumar Mittal, J

Bench : Division Bench

Advocate : Yogesh Putney, Advocate for the Appellant; S.K. Mukhi, Advocate for the Respondent

Judgement

Anita Chaudhary, J.—The Revenue is in appeal against the order dated July 13, 2007, passed by the income tax Appellate Tribunal, Bench "G", New Delhi (for brevity, "the Tribunal"), vide which the Tribunal has set aside the order dated October 19, 2004 passed by the Commissioner of income tax (in short, "the CIT") u/s 263 of the income tax Act, 1961 (for short, "the Act"), whereby the assessment order dated November 28, 2003, was held to be prejudicial to the interests of the Revenue. The instant appeal was admitted for determining the following substantial question of law:

(i) Whether, on the facts and in the circumstances of the case, the Hon'ble income tax Appellate Tribunal was right in law in cancelling the order passed by the Commissioner of income tax, u/s 263 of the income tax Act?

2. It is necessary to trace the factual matrix. The respondent-assessee filed return for the assessment year 2000-01 on January 5, 2001, declaring a total income of Rs. 4,24,100. It was processed and completed by the Assessing Officer after making an addition of Rs. 54,688 in the income of the assessee, vide assessment order dated November 28, 2003. The assessment order was found prejudicial to the interests of the Revenue. Consequently, the Commissioner of income tax issued notice u/s 263 of the Act to the assessee and called for his

explanation in respect of following gifts of Rs. 21 lakhs:

3. The respondent furnished explanation thereto and questioned the maintainability of the notice u/s 263 of the Act. His stand was that when the proceedings u/s 148 of the Act were initiated, the entire record was before the authorities, who, after a thorough examination, had exempted the amount from the income of the assessee being gifts. He took the stand that issuance of notice on mere suspicion or change of opinion was not valid. The assessee also took the stand that the persons from whom he received the gifts were income tax assesseees. With regard to donors, V.K. Sharma and Vikram Awasthy, it was submitted that they were family friends of the assessee and affluent businessmen. With respect of Smt. Kamlesh Ahuja, it was averred that she was the real aunt ("Tai") of the assessee. It was also pleaded that all the donors had confirmed giving gifts. It was urged that the notice be withdrawn.

4. The Commissioner of income tax, on receipt of the reply furnished by the assessee, called him to furnish the following details:

- (i) copy of the Commissioner (Appeals)'s order of the assessment year 2000-01;
- (ii) copy of bank accounts of the assessee for the relevant period;
- (iii) sources of gifts made by the alleged donors were to be explained along with their bank accounts, permanent account number, capital accounts, proof of filing income tax returns, mode of gifts made and occasions for making the alleged gifts;
- (iv) reasons and justification for splitting up the gifts by Sh. Vinay Kumar Sharma on three different dates; and
- (v) gifts deeds in respect of all the gifts claimed.

5. Despite availing of a number of opportunities, the assessee failed to produce any evidence in order to satisfy the Commissioner of income tax in respect of aforesaid queries, which led to the passing of the order by the Commissioner of income tax u/s 263 of the Act with the following observations:

The assessee has claimed to have received gifts amounting to Rs. 21 lakhs from Sh. Vinay Kumar Sharma, Sh. Vikram Awasthy and Smt. Kamlesh Ahuja. The assessee failed to furnish reliable information regarding the relationship, occasion and creditworthiness of the donors for establishing the genuineness of the alleged gifts as per the parameters laid down by the Hon''ble jurisdictional High Court in the case of Lall Chand Kalra v. CIT [1981] 22 CTR 135 (P & H). In the said case, the Hon''ble Punjab and Haryana High Court had held that the gifts shown by the assessee being one from a stranger and another from a relative could not be treated as genuine if there was no occasion for making the gifts and the financial capacity of the alleged donors was not proved on record. A number of opportunities were allowed to the assessee for this purpose but the requisite information/details have not been furnished by him. The contention of the

learned counsel of the assessee that the learned Commissioner of income tax (Appeals) has already passed an order in the case was found to be without basis as the appellate proceedings have not yet been decided.

In these circumstances, it is held that the assessment order passed by the Assistant Commissioner of income tax, Circle, Panipat, on November 28, 2003, is erroneous in so far as it is prejudicial to the interests of the Revenue. The same is hereby cancelled and the case is restored back to the file of the Assessing Officer for making a fresh assessment.

6. The assessee challenged this order before the Tribunal. The Tribunal, set aside the order of the Commissioner of income tax passed u/s 263 of the Act, vide the impugned order.

7. We have heard learned counsel for the parties and have also gone through the record.

8. The Tribunal was of the view that once the assessee had discharged the primary onus of proving the genuineness of the gifts and the Assessing Officer had completed the assessment without doubting the veracity of the transaction, it was beyond the scope of revisional proceedings. It was finally concluded that the original assessment proceedings were not erroneous, leaving any scope for the Commissioner of income tax to invoke the provisions u/s 263 of the Act.

9. Supporting the findings of the Tribunal, learned counsel for the respondent-assessee has relied upon Commissioner of Income Tax Vs. Unique Autofelts (P.) Ltd. , Commissioner of Income Tax Vs. Honda Siel Power Products Ltd., and Commissioner of Income Tax Vs. Leisure Wear Exports Limited,

10. To appreciate the controversy involved in the present case, in the right perspective, we would like to first refer to the provisions contained in section 263 of the Act, which read as under:

263. Revision of orders prejudicial to revenue.--The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

11. It is gathered from the language used in the provisions *ibid* that the Commissioner is empowered to exercise jurisdiction where he is satisfied that the order of the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the Revenue. The object of the aforesaid provision is to correct an order passed by the Assessing Officer which is erroneous and prejudicial to the interests of the Revenue as the Department has no remedy of appeal against the assessment order. Whether a revisional order fulfils the requirements of section

263 of the Act, depends upon facts of each case.

12. Section 263 of the Act has been a subject matter of interpretation in various decisions. The Hon'ble apex court in MALABAR INDUSTRIAL CO. LTD. Vs. COMMISSIONER OF INCOME TAX, has laid the following guiding principles for exercising jurisdiction u/s 263 of the Act by the Commissioner of income tax (page 87 of 243 ITR):

A bare reading of this provision makes it clear that the pre-requisite to exercise of jurisdiction by the Commissioner suo motu under it, is that the order of the income tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue. The Commissioner has to be satisfied with twin conditions, namely:-- (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent--if the order of the income tax Officer is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue--recourse cannot be had to section 263(1).

There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer; it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind.

The phrase "prejudicial to the interests of the Revenue" is not an expression of art and is not defined in the Act. Understood in its ordinary meaning, it is of wide import and is not confined to loss of tax. The High Court of Calcutta in DAWJEE DADABHOY and CO. Vs. S. P. JAIN AND ANOTHER., , the High Court of Karnataka in Commissioner of Income Tax, Mysore Vs. T. Narayana Pai, the High Court of Bombay in Commissioner of Income Tax Vs. Gabriel India Ltd., and the High Court of Gujarat in COMMISSIONER OF Income Tax Vs. SMT. MINALBEN S. PARIKH., treated loss of tax as prejudicial to the interests of the Revenue.....

The phrase "prejudicial to the interests of the Revenue" has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue, for example, when an income tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the income tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue unless the view taken by the income tax Officer is unsustainable in law. It has been held by this court that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of the Revenue-- Rampyari Devi Saraogi Vs. Commissioner of

Income Tax, West Bengal and Others, and in Smt. Tara Devi Aggarwal Vs. Commissioner of Income Tax, West Bengal, Calcutta, .

13. The Delhi High Court in Commissioner of Income Tax Vs. Vikas Polymers, examining the scope of section 263 of the Act and analysing the circumstances under which revisional power can be exercised by the Commissioner of income tax, observed as under (page 544):

At the same time, the words "prejudicial to the interests of the Revenue", as observed in DAWJEE DADABHOY and CO. Vs. S. P. JAIN AND ANOTHER., can only mean that "the orders of assessment challenged are such as are not in accordance with law, in consequence whereof the lawful revenue due to the State has not been realized or cannot be realized". Thus, the Commissioner's exercise of revisional jurisdiction under the provisions of section 263 cannot be based on whims or caprice. It is trite law that it is a quasi-judicial power hedged in with limitation and not an unbridled and unchartered arbitrary power. The exercise of the power is limited to cases where the Commissioner on examining the records comes to the conclusion that the earlier finding of the income tax Officer was erroneous and prejudicial to the interests of the Revenue and that fresh determination of the case is warranted. There must be material to justify the Commissioner's finding that the order of the assessment was erroneous in so far as it was prejudicial to the interests of the Revenue.

It is also trite that there is a fine though subtle distinction between "lack of inquiry" and "inadequate inquiry". It is only in cases of lack of inquiry" that the Commissioner is empowered to exercise his revisional powers by calling for and examining the records of any proceedings under the Act and passing orders thereon.....

14. The aforesaid judicial pronouncements have recently been followed by this court in CIT v. Rakesh Jain (I.T.A. No. 285 of 2009, decided on July 31, 2013) [2014] 2 ITR-OL 587 (P & H).

15. We proceed to examine the orders passed by the authorities below, in the light of law enunciated above.

16. The Commissioner of income tax prima facie found the assessment order to be erroneous and prejudicial to the interests of the Revenue and intended to examine the genuineness of the gifts amounting to Rs. 21 lakhs received by the assessee from different donors. Mere identification of the donor and showing the movement of the gift amount through banking channels is not enough to prove the genuineness of the gift. Since the claim of gift is made by the assessee, the onus lies on him not only to establish the identity of the person making the gift but also his capacity to make a gift and that it has actually been received as a gift. In the case of Tirath Ram Gupta Vs. Commissioner of Income Tax, it was held that a gift cannot be accepted as such to be genuine, merely because the amount has come by cheque or draft through banking channels, unless the identity of the donor, his creditworthiness, relationship with the donee and the

occasion are proved. Unless the recipient has proved the genuineness thereof, the gift can very well be treated to be an accommodation entry of the assessee's own money, which is not disclosed for the purpose of taxation in the instant case, the assessee failed to do so, except averring in his reply that donors, V.K. Sharma and Vikram Awasthy, were his family friends and had abundant source of income.

17. The issue regarding receipt of money by way of gift from strangers had attracted the attention of this court on many occasions and, in our opinion, this issue is no more *res integra*.

18. In I.T.A. No. 12 of 2000, titled as *The Commissioner of Income Tax, Jalandhar Vs. M/s. Udham Singh and Sons, Goraya*, this court while dealing with a situation where a gift was received by the assessee from a non-resident Indian with whom the assessee had no relationship, while relying upon various decisions rendered on the issue, held as under (page 141):

The matter of receipt of foreign gifts even earlier had engaged attention of the courts. This court in *Lall Chand Kalra v. CIT* [1981] 22 CTR 135 had held that non-resident Indian gift from a stranger was neither genuine nor valid. This judgment was followed in *Jaspal Singh Vs. Commissioner of Income Tax*, by this court as also judgment in *Sajan Dass and Sons Vs. Commissioner of Income Tax*, by the Hon'ble Delhi High Court. Recently, this court in I.T.A. No. 498 of 2005 decided on February 7, 2011, titled *CIT v. Puneet Chugh* had taken the same view holding as under:

We are of the view that the Assessing Officer and the Commissioner of income tax (Appeals) were justified in holding that the gift in question was bogus and the Tribunal committed patent error in accepting the gift as genuine. Admittedly, the donor had no relationship with the assessee. He had no occasion to give the gift. He was not produced. His financial capacity was not established. His bank statement was not produced. The Tribunal failed to appreciate these facts. It, thus, committed patent error of law in holding that the assessee discharged onus on him to prove the genuineness of the gift. Its order is, thus, perverse. In identical situation, this court held that non-resident Indian gift could not be accepted as genuine unless the assessee was able to prove natural love and affection and financial capacity of the donor. The observations of this court in *Jaspal Singh* are (309 of 290 ITR):

It is well-settled that mere identification of donor and showing the movement of gift amount through banking channel is not enough to prove genuineness of the gift. The assessee was required to establish that the donor had the means and the gift was genuine, for natural love and affection. Reference in this regard may be made to the judgment of this court in *Lull Chand Kalra v. CIT* [1981] 22 CTR 135 (P & H), the judgment of the Delhi High Court in *Sajan Dass and Sons Vs. Commissioner of Income Tax, Commissioner of Income Tax, West Bengal II Vs. Durga Prasad More, and Sumati Dayal Vs. Commissioner of Income Tax*

Bangalore,

Even this Bench in I.T.A. No. 72 of 1999 titled Hanuman Dass Vs. Commissioner of Income Tax and Another, held as under (page 137):

Taking up the case in hand, even when the donor had the means to make the gifts, there being neither any relationship nor there being any circumstance to show natural love and affection of the donor for the donee nor there being any occasion to make such gifts to the assessee and the authority of jurisdictional High Court being against the assessee, the authority cited by the assessee as Commissioner of Income Tax Vs. R.S. Sibal, does not support the case of the appellant. Thus, there is no perversity or impropriety in the impugned order and sequently the same is upheld.

19. When the same principles are applied to the instant case, we have no hesitation to conclude that the Tribunal has fallen into an error while setting aside the order of the Commissioner of income tax asking for fresh assessment. However, it is relevant to mention here that there is no dispute of the fact that the donor, Smt. Kamlesh Ahuja, was the real aunt of the assessee and, hence, the amount of Rs. 1 lakh, as gifted by her can only be excluded from the purview of fresh assessment proceedings. In the light of above discussion, we answer the substantial question of law accordingly. The impugned order passed by the Tribunal is set aside.