

CASE NO.:
Appeal (civil) 2540 of 2007

PETITIONER:
Commissioner of Income Tax

RESPONDENT:
P. Mohanakala

DATE OF JUDGMENT: 15/05/2007

BENCH:
S.H. Kapadia & B. Sudershan Reddy

JUDGMENT:
J U D G M E N T

CIVIL APPEAL NO. 2540 OF 2007
(Arising out of SLP(c) No. 17358 of 2006)
WITH
CIVIL APPEAL NOS. 2541, 2542, 2543, 2544, 2545, 2546
and 2547 OF 2007
(Arising out of SLP(C) Nos. 17356,
17364, 17365, 19565, 19563, 21066 & 19566 of 2006

B.SUDERSHAN REDDY, J.

Leave granted.

These appeals have been filed against the judgment of Madras High Court dated 29.3.2006 in TC (A) Nos. 74 to 76 and 78 to 82 of 2002 whereby the following questions have been answered by the High Court in favour of the assessees and against the revenue:

(a) Whether in the facts and circumstances, the Income Tax Appellate Tribunal was correct in law to accept the principle of preponderance of probabilities in holding that the claim of the appellant that the sum of Rs. 15,62,500/- received him by way of gifts through normal Banking Channels was not genuine and that it was liable to be assessed under Section 68 of the Income Tax Act, 1961?

(b) Whether in the light of the law established and based on the facts and in the circumstances of the case, the learned Income Tax Appellant Tribunal is legally justified in concluding that burden of proof cast on the appellant under Section 6B of the Income Tax Act, 1961 has not been discharged and the ingredients for invoking section 68 of the Income Tax Act are present?

(c) Whether in the facts and circumstances of the case, the conclusion of the Tribunal that the claim of gift is not genuine is reasonable and based on relevant material and not perverse?

These appeals relate to the assessment years 1995-96 and 1996-97. The dispute in all these appeals essentially relates to the addition made by the Assessing Officer in respect of several foreign gifts stated to have been received by the assessee from one common donor namely

Sampath Kumar. The gifts received were from one Ariavan Thotan and Suprotoman. It is during the enquiry by the Revenue it is asserted that they were the aliases of Sampathkumar. These gifts were made to A. Srinivasan and his wife, Smt. S. Kalavathy, his son, S. Balaji Manikandan and to one of his brothers, Rajendran and Smt. Mohanakala. Each one of them is an assessee within the jurisdiction of the appellant. The foreign gifts are received by the assessee during the assessment years 1993-94 to 1996-97. The detail of the gifts received by each one of the assesseees is as under:

Assessment years

Shri/Smt.

93-94

94-95

95-96

96-97

A. Srinivasan

6,40,758

14,46,933

26,47,647

8,64,500

S. Kalavathy

1,47,797

16,19,679

21,82,847

1550,00

S. Balaji Manikandan

84,423

5,68,015

21,85,604

8,64,500

A. Rajendran

15,62,500

R. Mohanakala

15,62,500

8,72,978

36,34,627

101,41,098

32,79,000

In all the aggregate gifts received by the assesseees is to the extent of Rs. 1,79,27,703/-. The Assessing Officer did not accept the explanation offered by the respective assesseees that the amount of credit is a gift from NRI and proceeded to add it as the income of the assesseees from undisclosed sources. The credit entries have been made during the period from 8.7.1992 to 19.10.1995. There is no dispute that the payments were made by instruments issued by a foreign bank and credited into the respective assessee's account by negotiation through a bank in India. Most of the cheques sent from abroad were drawn on Citibank, N.A. Singapore.

The Assessing Officer dealt with the controversy as regards the cash credit entries received from the foreign donor. He noticed that the gifts have been sent in the

name of Ariavan Thottan and received by A. Srinivasan and others who are all his family members. Each one of them is an individual assessee.

That all the assessees were summoned and their statements have been recorded by the Assessing Officer. Srinivasan who is the key person in his statement said that he knew Sampathkumar for the last 20 years and he had been helping Sampathkumar prior to 1985 by paying Rs. 100/- to 200/- every month as he had no source of income to get himself educated.

There are material inconsistencies in the statements made by other assessees which we are not required to notice in detail. Sampathkumar in his own statement stated that he was in Indonesia up to the year 1992 and employed as an Engineer. Thereafter, he shifted to England and started consultancy profession there. Later in the end of the year 1994-95, he joined New Century Machinery Ltd. Cheshire, SK 16 4XS and became its director in 1996. It is in his statement that he is paying taxes in England from his income earned in England. As far as his Indian income is concerned, he stated that he filed the returns for the assessment years 1996-97 & 1997-98 before the Income Tax Officer, Ward 1(4), CBE only on 23rd October, 1997. His investment in Indian companies according to him will be around for Rs. 5 crores and made out of his income earned in the foreign countries. He did not reveal the details of his bank account in India and stated that he would be submitting the details through his auditor which he did not. Except the self serving statement there is no material evidence as regards his financial status. He stated from 1972-73 he knew Srinivasan, Rajendran and their families. His father was a taxi driver, and was very poor. Srinivasan and his family members were supporting him when he was in India. To a pointed query as to whether there is any evidence to show that he was also known by any other name other than Sampathkumar, he stated that "no evidence. Only Mr. Srinivasan used to call me as Suprotoman."

The Assessing Officer after an elaborate consideration of the material available on record and the statements of the assessees and as well as that of Sampathkumar noted that all the gifts were received from Ariavan Thotan and Suprotoman. It is only after the enquiries by the department, it was informed by letter dated 25.4.1996 that Ariavan Thotan and Suprotoman are one and the same person. Even at that time, no mention was made about Sampathkumar. For the first time Sampathkumar's name figured in the letter dated 30.08.1996 and thereafter it was stated that the names of Ariavan Thotan and Suprotoman are the other names of Sampathkumar. The Assessing Officer while appreciating the contents of the letters brought on record came to the conclusion that Sampathkumar had obliged in giving 'gifts' to Srinivasan and his family members. It is further held that in all probabilities Sampathkumar may have received compensatory payments in lieu of the gifts made by him. The letters according to the Assessing Officer suggest that Sampathkumar reserved his right to receive suitable compensation from the respondents-asseesees. The Assessing Officer in the circumstances came to the conclusion that the gifts though apparent are not real and accordingly treated all those amounts credited in the books of assessees as the income of the assessees. On appeal the Commissioner of Income Tax concluded

that the story set up by the assessee is unacceptable and hard to believe and the "preponderance of probabilities, the common course of human living point to the contrary". The appeals were accordingly dismissed.

There was difference of opinion between two members of the Tribunal and the matter has been referred by the President, Income Tax Appellate Tribunal under Section 255 (4) of the Income Tax Act, 1961 (for short 'the Act') to the Senior Vice President to resolve the difference of opinion. In order to resolve the difference of opinion the Tribunal (through its Sr. Vice President) re-appreciated the entire material available on record and reheard the matter. The Senior Vice President concurred with the findings and conclusions arrived at by the Assessing Officer and the Commissioner of Income Tax. The Tribunal noticed that the letters exchanged "by the person who had sent foreign exchange to the assessee only indicate that there is no love and affection between them and that he is clearly materialistic and his statement of accepting a reciprocation is also an indication to the fact that he is not doing anything free but clearly the compensation was a round about manner of showing of he having been compensated either in India or abroad." The Tribunal also took note of the various other attending circumstances and found it difficult to accept the explanation offered by the assessee.

We may at this stage profitably note that the Assessing Officer, the Commissioner of Appeals and the Tribunal in one voice held that the explanation offered by the assessee as regards cash credit entries is not acceptable. The material and the evidence available on record according to each one of the authorities lead to one and only possible inference that the so-called gifts received by the assessee in reality are no gifts.

The High Court vide the impugned judgment in exercise of its jurisdiction conferred upon it under Section 260(A) of the Act reversed the finding of fact and allowed the appeals. The High Court virtually re-appreciated the evidence available on record and substituted its own findings for that of the Tribunal and the other authorities. The High Court came to the conclusion that the reasons assigned by the Tribunal and other authorities "are in the realm of surmises, conjectures and suspicions \005\005\005the authorities under the Act have failed to draw the only conclusion that is possible legally and logically." The judgment of the High Court is assailed in these appeals.

The learned Solicitor General strenuously contended that the approach adopted by the High Court is totally erroneous. The High Court in exercise of its jurisdiction under Section 260(A) of the Act may interfere with the order of the Tribunal provided substantial question of law arises for its consideration. Re-appreciation of evidence and substitution of the findings by the High Court is impermissible. The High Court exceeded its jurisdiction in disturbing concurrent findings of facts. The learned Solicitor General further contended that once explanation offered by the assessee is found unsatisfactory, the sums credited in the books are to be charged to income-tax as the income of the assessee. Duty is heavily cast upon the assessee to offer reasonable explanation as regards the nature and source of the amounts found credited in the books maintained by the assessee.

Shri T.L.V. Iyer, learned Senior Counsel appearing on behalf of the respondents-assessee submitted that the High Court did not exceed its jurisdiction in any manner whatsoever nor committed any error in arriving at proper

conclusion based on the evidence available on record. The conclusions drawn by the authorities below including the Tribunal were based on surmises, conjectures and suspicion which cannot be equated to that of findings based on evidence. Improper inference drawn from proven facts definitely gives rise to substantial question of law. It was also contended that even if the explanation offered by the assessee is not acceptable the amounts credited automatically cannot be treated as an income in the hands of the assessee unless such a question is framed and answered that unexplained cash credit was the income of the assessee.

In order to appreciate the contentions urged before us it would be appropriate to notice Section 68 of the Act which is re-produced:

Cash credits.

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.

The question is what is the true nature and scope of Section 68 of the Act? When and in what circumstances Section 68 of the Act would come into play? That a bare reading of Section 68 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 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. 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.

In *Sumati Dayal Vs. Commissioner of Income Tax, Bangalore* [1995 Supp.(2) SCC 453] this Court held:

"In all cases in which a receipt is sought to be taxed income, the burden lies on the Department to prove that it is within the taxing provision and if a receipt is in the nature of income, "the burden of proving that it is not taxable because it falls within exemption provided by the Act lies upon the assessee. But, in view of Section 68 of the Act, 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 that previous

year if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing Officer, not satisfactory. IN such a case there is, prima facie, evidence against the assessee, viz., the receipt of money, and if he fails to rebut, the said evidence being un rebutted, can be used against him by holding that it was a receipt of an income nature." (emphasis supplied)

In that case the amount was credited in the capital account in the books and the assessee offered her explanation about the said receipt being her winnings from horse races. The explanation was not accepted. There was no dispute that the amount was received by the assessee from various race Clubs on the basis of winning tickets presented by her. This Court based on the material available on record found that an inference about such a purchase has to be drawn on the basis of the circumstances available on record inasmuch as no direct evidence about such purchase be rarely available. This Court accordingly upheld the majority opinion of the Settlement Commission based on surrounding circumstances and applying the test of human probabilities. This authoritative pronouncement in our considered opinion is the complete answer to reject the submissions made by the learned senior counsel on behalf of the respondents.

In Commissioner of Income-Tax Vs. Smt. P.K. Noorjahan [1999] 237 IT 570, this Court while construing Section 69 of the Act observed that the intention of Parliament in enacting Section 69 was to confer a discretion on the Income Tax Officer in the matter of treating the source of investment which has not been satisfactorily explained by the assessee as the income of the assessee and the Income Tax Officer is not obliged to treat such source of investment as income in every case where the explanation offered by the assessee is found to be not satisfactory. "The question whether the source of the investment should be treated as income or not under Section 69 has to be considered in the light of the facts of each case. The contention of Shri Iyer was that the ratio of the decision would equally be applicable to interpret Section 68 of the Act. There is no dispute about the same but the assessee in no manner raised any plea that even if their explanation is not acceptable the same cannot be treated as an income in their hands. 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 can be held against the assessee that it was a receipt of an income nature. The alternative submission made by Shri Iyer before us would not help the assessee in this case in hand.

In K.S. Kannan Kunhi Vs. Commissioner of Income Tax, Kerala [1969] 72 ITR 757, the High Court came to the conclusion that the Income Tax Officer and the Appellate Assistant Commissioner have not considered the acceptability otherwise of the assessee's explanation about the credit nature, except making an assertion that it was not acceptable. On the facts it was held that whether it should be inferred that the

amounts constituted income of the previous year, though the explanation offered by the assessee was not acceptable, did not receive the consideration of the authorities. On the facts the findings of the Tribunal were held not valid. The decision does not show that it is the duty of the Assessing Officer to suo motu make an enquiry even in the absence of any plea and rebuttal by the assessee. This decision is required to be understood in the light of the ratio of the judgment in Sumati Dayal (supra).

In Commissioner of Income Tax, U.P Bharat Engineering & Construction Co. [1972] 83 ITR 187, the facts are that the Tribunal itself found that the cash credit entries could not represent the income or profit of the assessee as they were all made very soon after the assessee commenced its activities. This Court observed in the circumstances it would be reasonable to assume that those cash credit entries were capital receipts. It is held that in the absence of satisfactory explanation of 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. We are unable to appreciate as to how the said judgment renders any assistance and supports the contention urged by the learned counsel for the assessee.

In Commissioner of Income Tax, Orissa Vs. Orissa Corporation P. Ltd. [1986] 159 ITR 78, the Income tax Officer did not accept the assessee's accounts showing cash credits which were shown to have been received by way of loans from three individual creditors. The Income Tax Officer treated the entire amount as unproved cash credit and added the same to the income of the assessee. On appeal the Tribunal took the view that the assessee could not produce those persons alleged to be creditors, but it did not follow automatically and an adverse inference should be drawn that the amount represented undisclosed income of the assessee. The creditors were themselves income tax assesses and while being assessed, they had made statements before the respective Income Tax Officer admitting that they were allowing their names to be lent without giving loans as creditors of different assessee. In those circumstances, the Tribunal came to the conclusion that the assessee had discharged the burden that lay on him. This Court held that the Tribunal's conclusion was not unreasonable or perverse or based on no evidence and accordingly further held that no question of law as such had arisen for consideration.

In Commissioner of Income tax, Bombay City II Vs. Deviprasad Khandelwal & Co. Ltd. [1971] 81 ITR 460, the Bombay High Court took the view that in every case where the Income Tax Officer rejects the explanation submitted by an assessee in respect of unexplained cash credits in his books of accounts, a finding against the assessee must be made that the cash credit entry represents the assessee's income from undisclosed sources. After the Tax Authorities reject the explanation submitted by the assessee the further question that must always arise for decision would be, "whether it could justly, in the facts and circumstances of the case, be held that the unexplained cash credit was the income of the assessee." The Tribunal in that

case on the basis of evidence and surrounding circumstances even after disbelieving the explanation of the assessee still held that it cannot be held to be the income of the assessee. The said finding was held to be a finding of fact not to be interfered with by the High Court.

It is true that even after rejecting the explanation given by the assessee if found unacceptable, the crucial aspect whether on the facts and circumstances of the case it should be inferred the sums credited in the books of the assessee constituted income of the previous year must receive the consideration of the authorities provided the assessee rebut the evidence and the inference drawn to reject the explanation offered as unsatisfactory. We are required to notice 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 found 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 case in hand the authorities concurrently found the explanation offered by the assessee unacceptable. The authorities upheld the opinion formed by the Assessing Officer that the explanation offered was not satisfactory. The assessee did not take the plea that even if the explanation is not acceptable the material and attending circumstances available on record do not justify the sum found credited in the books to be treated as a receipt of an income nature. The burden in this regard was on the assessee. No such attempt has been made before any authority. All the decisions cited and referred to hereinabove are required to be appreciated and understood in the light of the law declared by this Court in *Sumati Dayal* (supra).

Whether the High Court was justified in interfering with the concurrent finding of fact arrived at by all the authorities including the Tribunal? The Assessing Officer found that all the so-called gifts came from Ariavan Thotan and Suprotoman. The assessee did not declare that they are the alias of Sampathkumar. It is only an afterthought they have come forward with the said plea. The Assessing Officer also found that the gifts were not real in nature. Various surrounding circumstances have been relied upon by the Assessing Officer to reject the explanation offered by the assessee. The Commissioner of Appeals confirmed the findings and conclusion drawn by the Assessing Officer. The Tribunal speaking through its Senior Vice President concurred with the findings of fact. The findings in our considered opinion are based on the material available on record and not on any conjectures and surmises. They are not imaginary as sought to be contended.

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. 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. No other point is urged. The appeals preferred by the Revenue Department deserve to be allowed and they are accordingly allowed. No costs.