IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

I.T.R. No: 18 of 1994

Judgment reserved on :30.4.2007

Date of decision: June 15, 2007

Shanta Lal Chopra **Applicant**

Versus

Commissioner of Income Tax, Patiala **Respondent**

Coram

The Hon'ble Mr. Justice Deepak Gupta, Judge.

The Hon'ble Mr.Justice Surinder Singh, Judge.

Whether approved for reporting?[1]

For the Applicant: Mr. M.M.Khanna, Senior Advocate with Ms. Pushpa Attri, Advocate

For the Respondent: Ms. Vandana Kuthiala, Advocate

Per Deepak Gupta, J. (Oral)

The following questions of law have been referred for decision under Section 256 of the Income Tax Act in Reference Application No. 149 of 1993 filed by the applicant and in Reference Application No. 172 of 1993 filed by the assessee:-

(i) In R.A. No. 149

1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the sum of Rs. 65,000/- received by

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[1] ***Whether the reporters of the local papers may be allowed to see the Judgment?***

the assessee from Sh. Anil Kapur and Rs. 1,90,000/- from Smt. Shanta Kapur, were not in the nature of receipts of advance money against proposed sale of property ?

2. Wheter, on the facts and in the circumstances of the case, the Tribunal was right in law in making the addition of Rs. 2,55,000/- to the income of the assessee whereas such addition could have been made only in the hands of the depositors or could be treated as sale proceeds in the assessee's hands in the year of completion of the project ?

In R.A. No. 172

1. Whether, on the facts and in the circumstances of the case, the tribunal was right in law in holding that the amount of received by the assessee from the banks FDRs was business income and not income from other sources ?
2. Whether, on the facts and in the circumstances of the case the Tribunal was right in law in holding that the amount of Rs. 30,000/- was received by the assessee as loan from Sh. Gulam Mohd. Dar was a genuine case credit ?

Brief facts of the case are that the assessee is engaged in the business of real estate. He used to purchase land, raise construction thereon and sell the property to different persons. For the assessment year 1989-90 the assessee had received a sum of Rs. 65,000/- from one Anil Kapur and Rs. 1,90,000/- from Smt. Shanta

Kapur, mother of Anil Kapur. According to the assessee these amounts were received as advance for sale of property. The Assessing Officer did not accept the version of the assessee and proceeded to treat these two advances as cash credit. The two amounts totaling Rs. 2,55,000/- were added to the income of the assessee as income from undisclosed sources. The assessee filed an appeal and thereafter approached the income tax Tribunal, but his claim that he had received this amount as an advance for sale of property was not accepted. All the authorities came to the conclusion that the version of the asessee was doubtful since the aforesaid two persons, namely Anil Kapur and Smt. Shanta Kapur had failed to show the source of the funds.

The first two questions have been referred at the instance of the assessee and according to him the amounts advanced were in the nature of advance mentioned for sale of property. The assessee further urges that in case this is found to be incorrect, then also the amounts should be added as income in the hands of the persons who had deposited the same and cannot be treated to be the cash credit in the hands of the assessee.

For the same year, the assessee had raised loans against security of certain FDRs from two banks.

He received interest of Rs. 1,41,412/- as interest on one FDR from one bank and Rs. 99,982/- as interest from another bank. The total amount of interest which accrued was Rs.2,41,395/-. As against this the assessee had paid interest in his loan account to the extent of Rs.6,49,500/-. He had accordingly adjusted the interest received by him against the interest paid by him. The Assessing Officer did not accept the version of the assessee and came to the conclusion that the deposits were made by the assessee not for the purpose of business and, therefore, the interest accruing on the fixed deposits had to be added to his income. However, the income tax Tribunal came to the conclusion that there was a direct nexus between the FDRs and the loans. The loans had been raised for the purpose of business and the FDRs were being pledged for the purpose of business. The Tribunal held that the amount of interest was income from business and not income from any other source. The revenue assails this finding of the Tribunal.

The assessee had also received a sum of Rs. 30,000/- from one Gulab Mohd. Dar. He had shown this loan. The Assessing Officer rejected the contention of the assessee even though Gulam Mohd. Dar had issued a confirmatory letter stating that he had advanced Rs.

30,000/- as loan to the assessee. The Tribunal inspected the accounts and found that the money had been repaid in the month of August, 1989 and the receipts obtained from the creditor were seen and the contention of the assessee that the amount was a loan was upheld. This finding of the Tribunal is also under challenge in the Reference.

We have heard Mr. M.M.Khanna, learned Senior Advocate, appearing on behalf of the assessee and Ms. Vandana Kuthiala, learned counsel appearing for the Revenue.

As far as the questions raised in assessee's reference are concerned, we are of the view that the learned Tribunal rightly came to the conclusion that the amount of Rs. 65,000/- advanced by Anil Kapur and Rs. 1,90,000/- advanced by Smt. Shanta Kapur were not advances towards property. On behalf of the assessee it has been argued that the aforesaid sums of Rs. 65,000/- and Rs. 1,90,000/- were received from Anil Kapur and Smt. Shanta Kapur He submits that this version is supported by the statement of Anil Kapur and affidavit of Smt. Shanta Kapur. It would be worthwhile to note that both the amounts are said to be advanced on the same day, i.e. 12.4.1988. The entire amount had been paid in

cash. In his statement, before the Assessing Authority, Anil Kapur has stated that he had advanced the money for purchase of a shop whereas the receipt, Annexure E, upon which the assessee relies, shows that this amount was advanced for a two bed room flat. The statement of Anil Kapur is, therefore, apparently incorrect. The amount of Rs. 1,90,000/- advanced by Smt. Shanta Kapur is also for a two bed room flat. This receipt is also dated 12.4.1988. It is not clear whether both these amounts were for two separate flats or for one flat. Both, Anil Kapur and Smt. Shanta Kapur, have failed to show the source of their funds. Other than the receipts, no agreements have been placed on record to show that these amounts were paid for purchase of properties. In normal course, any person advancing such a huge amount would have entered into agreement with the builder. Though these receipts mention that possession of the flat will be given within one year of the approval of the plan, there is no material to show that in fact any such flats were built or were handed over to Anil Kapur or Smt. Shanta Kapur till date. There is no agreement for sale of property entered into between the parties. No scheme of allotment has been produced by the assessee. We are, therefore, of the

view that the Tribunal rightly held that this money was not advanced for purchase of property.

As mentioned above, Anil Kapur and Smt. Shanta Kapur have failed to show source of their funds. Mr. M.M.Khanna, learned Senior Advocate, has urged that in case Anil Kapur and Smt. Shanta Kapur could not show the source of their income, when they themselves admit that they have advanced the amount to the assessee, the undisclosed income, if any, should be taxed in their hands and not in the hands of the assessee.

Mr. Khanna has relied upon **(1973) 87 ITR 349 Commissioner of Income-Tax (Central), Calcutta Vs. Daulat Ram Rawatmull**. In the said case the assessee firm had opened an over draft account with a limit of Rs. 10,00,000/- against collateral security of two fixed deposits of Rs. 5,00,000/-. One of these fixed deposits was in the name of a partner of the firm and the other in the name of the son of another partner. The Revenue had contended that these amounts belonged to the firm and was its concealed income. The Apex court held that merely because the son of the partner of the firm had been unable to give satisfactory explanation regarding source of Rs. 5,00,000/-, it could not be held that this money belonged to the firm. The Apex Court also

held that it was for the department to prove that the amount belonged to the firm.

Mr. Khanna has also placed reliance on **87 ITR 370 Commissioner of Income Tax, Bihar and Orissa Vs. S.P.Jain** wherein again the Apex Court has laid down that it is for the department to satisfactorily establish that the assessee was the real owner of the funds and the person in whose name the funds are shown is not the real owner thereof. The Supreme Court held that the department must not only show that the person who has purportedly advanced the funds has not shown any source of funds, but must also show that these funds were of the assessee.

In **(1976) 103 ITR 344, Sarogi Credit Corporation Vs. Commissioner of Income-Tax, Bihar,** again the Apex Court held that if there is credit entry in the books of the assessee and it is not in the name of the close family member or relation, but in the name of an independent party, the assessee is only required to give the identity of that party to the Income Tax Officer. Once the identify of a third party is established and there is other evidence to show that entry is not fictitious, the initial burden lying on the assessee shall be deemed to be discharged. The Apex Court held that it is not for the

assessee to explain from where the third party obtained the money or how he has come in possession of the same. Once the identity of the persons advancing the cash to the assessee is established and such persons pledged their oath and state that they have advanced the amounts in question, the burden shifts on the department to show why the assessee's version should not be accepted.

In **(1986) 159 ITR 78 Commissioner of Income-Tax, Orissa Vs. Orissa Corporation P. Ltd.** the assessee produced a letter of confirmation from the persons who had advanced the loans and disclosed their identities. All the creditors were income tax assesses, but the Revenue made no attempt to examine them. In these circumstances the Apex Court held that the Tribunal rightly came to the conclusion that the assessee had discharged the burden which lay on it.

In **(1995) 212 ITR 199 Commissioner of Income-Tax Vs. Baishnab Charan Mohanty** the Apex Court held as follows:-

> "When a question arises as to whether a cash credit appearing in the books of account of an assessee has to be accepted or to be rejected and addition to be made in accordance with section 68 of the Act, the assessee is required to establish the

> identity of his creditor, the capacity of the creditor to advance the money and the genuineness of the transaction. If the assessee establishes the aforesaid three pre-conditions, then it would be for the Department to disprove the same."
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> (emphasis supplied)

In **220 ITR 452 (MP) Ashokpal Daga (HUF) Vs. Commissioner of Income-Tax,** the Apex Court held that since the assessee had supplied relevant evidence showing prima facie that the entries were not fictitious the initial burden stood discharged.

As against this, Ms. Vandana Kuthiala, Advocate, has relied upon **1969 (72) ITR 194 Commissioner of Income Tax, U.P. Vs. Devi Prasad Vishwanath Prasad**, wherein the Apex Court held as follows:-

> "There is nothing in law which prevents the Income-tax Officer in an appropriate case in taxing both the cash credit, the source and nature of which is not satisfactorily explained, and the business income estimated by him under section 13 of the Income-tax Act, after rejecting the books of account of the assessee as unreliable."

After giving our careful consideration to all the judgments cited before us, we are of the considered view that the law as laid down by the Apex Court is that the assessee must disclose to the income tax authorities the

source from where he/she received the funds and must give full particulars to identify the person who had advanced him the said funds. In case such particulars are given and the said person appears before the income tax authorities and states that he/she has in fact advanced the amount to the assessee, then the burden will shift upon the Revenue to establish that the amounts belong to the assessee and not to the persons who have allegedly advanced the cash credit. However, the manner in which such burden is to be discharged by the assessee will depend upon the facts and circumstances of each case. In the present case we are clearly of the view that the version put forwarded by the assessee that he had received these amounts of Rs. 65,000/- and Rs. 1,90,000/- from Anil Kapur and Smt. Shanta Kapur as advances for purchase of property is totally false and not supported by the material on record. As pointed out above, the version given by Anil Kapur is different than that shown in the receipt. In normal course when any builder would take such huge amounts, in addition to a receipt, some agreement would have been entered into between the parties. Till date, there is no material on record to show that any property was ever handed over to Anil Kapur and Shanta Kapur. These two persons have

also failed to show the source of their funds. No doubt, in case a person who purportedly advances the amount comes before the income tax authorities and states that it is he who advanced the funds then normally the undisclosed income, if any, should be taxed in his hand. However, in the present case we are of the view that the assessee had falsified the accounts. He has failed to explain the nature and source of the funds. His explanation that these funds were obtained for advance of property has not been accepted by us to be correct. The only reason for him to make false statement was to avoid paying income tax. Anil Kapur and Smt. Shanta Kapur have also failed to show source of their funds. Therefore, in the totality of the circumstances of the case, we are of the view that the questions No. 1 & 2 raised by the assessee have to be decided against him.

As far as the questions raised by the Revenue are concerned, we shall take up the second question first. In our opinion this is a pure question of fact and not a question of law. We have also found that the Tribunal has given a finding of fact after going through the entire account books and while coming to the conclusion that Gulab Mohd. Dar had advanced a loan of Rs. 30,000/- in

favour of the assessee. This question is answered against the Revenue.

The only question which remains to be answered is whether the amount of Rs. 2,41,395/- earned by the assessee as interest should be taken as his business income or income from any other source. Ms. Vandana Kuthiala, Advocate, has relied upon **M/s. Tuticorin Alkali Chemicals and Fertilizers Ltd., Madras Vs. Commissioner of Income-tax AIR 1998 SC 315.**

In **Commissioner of Income Tax, Cochin Vs. Dr. V.P.Gopinathan (2001) 10 SCC 67,** the Apex Court held as follows:-

> "2. To take the facts of one of the two appeals before us as illustrative, the assessee had put moneys into fixed deposit with a bank and had earned in the assessment year in question interest in the sum of Rs. 1,17,444/- thereon. On the security of the amount so deposited, the assessee took a loan from the bank and paid in respect of the loan, interest to the bank in the sum of Rs. 90,410/-. The assessee claimed that he could be taxed only on the differential amount of Rs. 27,034/-. His contention was rejected by the Income Tax Officer and in first appeal. The Tribunal took the contrary view, and out of its judgment the questions quoted

above were referred to the High Court. The High Court answered the questions as indicated above on the basis that the situation was one of mutuality.

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5. It was not disputed , as it could not be, that if the assessee had taken a loan from another bank and paid interest thereon his real income would not diminish to the extent thereof. The only question then is: does it make any difference that he took the loan from the same bank in which he had placed the fixed deposit ? There is no difference in the eye of the law. The interest that the assessee received from the bankw as income in his hands. It could stand diminished only if there was a provision in law which permits such diminution. There is none, and, therefore, the amount paid by the assessee as interest on the loan that he took from the bank did not reduce his income by way of interest on the fixed deposit placed by him in the bank."

In the light of the aforesaid observations of the Apex Court, the income received by the assessee by the investment of its funds in fixed deposits was income in his hands as the income from other sources. This could not be treated to be his income from business purposes. There is no material to show any direct nexus between the income earned and the payment of interest. Therefore, question No. 1 raised in the reference application of the revenue is answered in its favour.

In view of the above discussion questions No. 1 and 2 raised by the assesssee in the reference filed by him are answered in favour of the Revenue and against the assessee. Question No. 1 raised in the reference application filed by the Revenue is answered in favour of the Revenue and against the assessee and question No. 2 is decided against the Revenue and in favour of the assessee.

The reference is answered accordingly. The Registrar General is directed to send a copy of this judgment to the Income Tax Tribunal.

(Deepak Gupta), J.

June 15, 2007(K) (Surinder Singh), J.