IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ITR NO.104 OF 1998
DATE OF DECISION: 26-07-2007

The commissioner of Income-tax, Jalandhar

.....Appellant

VERSUS

M/s Kulwant Industries, Jalandhar

.....Respondent

CORAM:- **HON'BLE MR.JUSTICE M M KUMAR**
HON'BLE MR. JUSTICE AJAY KUMAR MITTAL

PRESENT: Mr.Sanjiv Bansal, Advocate
for the appellant-revenue.

None for the respondent.

JUDGMENT

M M KUMAR, J.

The revenue has approached this Court by challenging order dated 16-12-1997 passed by the Income Tax Appellate Tribunal, Amristsar Bench, Amritsar (for brevity 'the Tribunal') in ITA No.312(ASR)/ 1991 in respect of assessment year 1989-1990. The revenue succeeded in persuading the Tribunal to refer the following question of law under Section 256(1) of the Income Tax Act, 1961 (for brevity 'the Act') for the opinion of this Court:

> *"Whether, on the facts and circumstances of the case, the Ld. ITAT was right in law to hold that the addition to*

the capital of the partner is not cash credit in the books of accounts of the firm but is cash credit in the case of the partner?"

Facts as emerge from the statement of the case are that M/s Kulwant Industries, Jalandhar (to be referred as 'assessee') is a partnership firm, which has four partners. The assessee firm drives its income from manufacture and sale of oil Engine parts. It filed its return on 25-08-1989 declaring an income of Rs.1,00,040/- and the assessment was completed by the Assessing Officer vide order dated 29-11-1989 under Section 143(3) of the Act. One of the partners Sh.Jaswinder Singh, who enjoyed 15% of the share in the assessee firm was asked to explain the credits, which appeared in his capital account amounting to Rs.25,000/-., which he claimed as gift by Non-Resident Indian. The Assessing Officer made an addition of Rs.25,000/- by treating the same as un-explained income credited in the capital account of Sh. Jaswinder Singh-partner.

The assessee firm challenged the order of assessment before the Commissioner of Income Tax (Appeal), Jalandhar, who vide his order dated 13-12-1990 deleted the addition of Rs.25,000/- by upholding the other additions. In the appeal filed by the revenue, the order of the CIT(A) was challenged on account of deletion of Rs.25,000/-, which was added by the Assessing Officer by treating the same as un-explained credit. However, the Tribunal upheld the view taken by CIT(A) with regard to deleting the amount of Rs.25,000/- in respect of Sh. Jaswinder Singh. The view of the Tribunal is discernible from para 6 of its order, which reads as under:-

"The gifts have not been accepted because there is no direct relationship between donor and donee and there

is no occasion for making gifts in question. The gifts have also been taken as genuine because the donee has not given gift to his own relations. The A.O. & the CIT (A) has taken into account circumstantial evidence as well as preponderance evidence into consideration. However, the authorities below have not denied the existence of NRE account maintained by the donor. The remittence of NRE A/C will come only from foreign earnings. The account is treated as genuine as no defect or non-existence of A/C is mentioned in the finding of the A.O.. The donor is also identified and the payment has been made by way of gift and as such payment is made through the cheque. The basic ingredients of cash credit is source of money and income and genuiness of the transaction. If the source is clearly and categorically explained and the amount is paid through genuine process then it is not advisable to refer to circumstantial and preponderance of the evidence. We, therefore, are of the opinion that in this case leading evidence is available on record which goes in favour of the appellant, as such it is not logical to go to the circumstantial evidence and then give a finding which will make leading evidence to look as illogical. We are of the opinion that there is no logic in treating the gifts as income of the firm."

No one has put in appearance on behalf of the respondent despite service.

After hearing the learned counsel for the revenue, we find that the findings recorded by the Tribunal are unassailable. It has been categorically found by the Tribunal that the gift is genuine for the reason that the donor is the real maternal uncle of the donee i.e. brother of his

mother. It has further been found that gift was made from the NRE account maintained by the donor and remittance in such an account could only be made from foreign earnings. The account has also been found to be genuine as per the findings recorded by the Assessing Officer which have been duly approved by the Tribunal. The identity of the donor stands established and the gift has been made by banking channel through cheque. For the aforementioned view, we place reliance on a judgment of Hon'ble the Supreme Court in the case of **C.I.T. v. DR. R.S. Gupta, (1987) 165 ITR 36**. The Supreme Court after detailed review of various judgments of the High Courts expressed the opinion that each case must be decided on the facts of that case. It was observed that when the assessee has a credit account with a firm or with family or with a banking company and that sum is available to the firm or the Company or HUF on the date of the gift then valid gift by book entries might be possible but where the same was not available with the firm or the family or a company, which was not a banking company or which had no overdraft facilities, mere book entries, even though there was acceptance of that gift by the donee, would not effectuate a valid gift. Referring to various ingredients of a valid gift, their Lordships' have observed as under:-

> *"In order to constitute a valid gift, there must be an existing property. In the case of entries in the books of account by credit and debit, the sums should be available on the date of gift in the account of the firm whose accounts are said to be credited or debited. In the case of banking companies or other firms and companies who have overdraft facilities, even if the sums are not in credit of the donor and are not with such companies or*

firms, gifts might be possible by adjustment of book entries. But in the case of non-banking companies or firms, if those companies or firms do not have overdraft facilities, it is not possible to make valid gift, if sums or funds are not available. This question has been examined by the various High Courts.

It is possible in certain circumstances for a donor to make a valid gift by instructing a firm or a company or a Hindu undivided family in which the donor has an account to give effect to the gift by debiting his account and crediting the account in the name of the donee. But in such cases, mere book entries would not suffice. The circumstances must be such as to make it clear that there were sufficient funds at the disposal of the donor by reason of which he could make the gift by such book entries. The firm, in which the donor may have an account, may or may not have sufficient cash balance but it must have sufficient provision for overdraft with the bank on the basis of which it could honour the instructions given by the assessee."

In the case of **Sonia Bhatia v. State of U.P., AIR 1981 SC 1274**, Hon'ble the Supreme Court considered the expression 'gift' in the light of Section 122 of the Transfer of Property Act, 1882, holding that a gift must have two initial characteristics, namely, (a) it must be made voluntarily; and (b) it should be without consideration. The aforementioned ingredients were apart from the requirement of acceptance during the life time of the donor while he is still capable of giving acceptance.

When the facts of the present case are examined in the light of the views expressed by Hon'ble the Supreme Court, it becomes evident that the donor in the present case is real maternal uncle of the donee

i.e. brother of his mother and the gift has been made from the NRE Account maintained by the donor and remittance in such an account could only be made from foreign exchange. The account has been found to be genuine as per the findings recorded by the assessing officer and duly accepted by the Tribunal. The identity of the donor stands established and the gift has been made through cheque by banking channel. Therefore, all the necessary ingredients of gift as laid down by Hon'ble the Supreme Court in R.S. Gupta's case (supra) and Sonia Bhatia's case (supra) stands satisfied and it is not open to any challenge. Moreover, the revenue has sought to raise all questions of fact as against the requirement of the law to raise only a question of law. We are further of the view that once broad features and basic ingredients constituting gift are satisfied then it cannot be replaced by circumstantial evidence. Therefore, the question of law raised is liable to be answered against the revenue.

In view of the above, the question aforementioned is answered against the revenue and in favour of the assessee.

(M M KUMAR)
JUDGE

(AJAY KUMAR MITTAL)
JUDGE

July 26, 2007
jt/P kapoor