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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **ITA No. 137/2003**

Date of decision: 27th November, 2014

PAWAN KUMAR AGGARWAL ..... Appellant
Through Mr. Mukul Gupta, Sr. Advocate with Mr. Vibhor Garg, Mr. Aseem Swaroop and Ms. Suvarna Kashyap, Advocates.

versus

INCOME TAX OFFICER ..... Respondent
Through Mr. Akash Vajpai, Advocate for Mr. Rohit Madan, Sr. Standing Counsel.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE V. KAMESWAR RAO

SANJIV KHANNA, J. (ORAL)

C.M. 59/2003

This is an application for stay.

Learned senior counsel appearing for the appellant-assessee states that he is not pressing the stay application. The same is accordingly dismissed as not pressed.

ITA No. 137/2003

This appeal under Section 260A of the Income Tax Act, 1961 (Act, for short) by the appellant-assessee Pawan Kumar Aggarwal impugns the findings recorded by the Income Tax Appellate Tribunal (Tribunal, for short) in their order dated 17th September, 2002, relating

to the genuineness of the gift of Rs.1 lac received by the assessee minor daughter Aushi Aggarwal. The appeal pertains to assessment year 1993-94 and was admitted for hearing vide order dated 13th April, 2004, on the following substantial question of law:-

> "Whether the order of the I.T.A.T. in reversing the order of C.IT. [sic, C.I.T. (Appeals)] is not perverse?"

2. As is apparent from the question itself, the finding of the Tribunal is factual and the issue is whether the aforesaid finding is perverse.

3. The appellant is an individual and father of minor Aushi Aggarwal, whose income was to be clubbed in terms of Section 64(1A) of the Act. It is an accepted and admitted position that Aushi Aggarwal had invested Rs.1 lac and Rs.5,000/- in Prayag Polymers (P) Ltd. on 18th August, 1992. The Assessing Officer called upon the assessee to explain the source of the said deposit made by the minor Aushi Aggarwal. The appellant-assessee, to explain the same, filed and relied upon declaration of gift purportedly executed by one Bhupinder Kumar, resident of Germany, who was maintaining a non-resident external account in Citibank N.A., New Delhi. The said declaration records that gift of Rs. 1 lac has been made out of natural love and affection. The assessee also filed a copy of the bank account statement of Bhupinder Kumar, the cheque prepared by Bhupinder Kumar for

issue of banker's cheque in favour of Aushi Aggarwal. The said ba had issued a certificate dated 10th August, 1992 certifying that Aushi Aggarwal had been paid an amount of Rs.1 lac by debit to the non-resident external account of Bhupinder Kumar. The Assessing Officer, however, did not accept the said explanation for various reasons set out in the assessment order and treated the purported gift of Rs.1 lac as assessee's own income from undisclosed sources.

4. The Commissioner of Income Tax (Appeals), however, deleted the said addition observing that the aforesaid documents showed that the gift was made by Bhupinder Kumar and it was not necessary that the donor or the donee should have blood relationship. He referred to Section 5(1)(ii)(b) of the Gift Tax Act, 1958 to the effect that relationship was not a condition for making a gift by an non-resident Indian. Accordingly, the addition made by the Assessing Officer was deleted.

5. Revenue preferred an appeal before the Tribunal and has succeeded by the impugned order dated 17th September, 2002. The said order records that during the course of arguments, the authorized representative of the assessee had admitted categorically that there was no relationship between the assessee/Aushi Aggarwal and Bhupinder Kumar. Therefore, the Tribunal felt that the assessee in this case had created evidence to cloak his own undisclosed funds as a gift. The

Commissioner of Income Tax (Appeals) had also expressed doubts, t had accepted the gift in view of the documents filed by the assessee. The Tribunal on the said aspect observed that the Commissioner of Income Tax (Appeals) had ignored the ground reality that gifts were exchanged between known circles and were not made or received from strangers. It was recorded that as per the assessee's own statement the donor and the donee were strangers to each other.

6. We are not impressed with the contention raised by the appellant-assessee that the gift should be accepted as genuine because under Section 5(1)(ii)(b) of the Gift Tax Act, 1958, it is not necessary or a condition that there should be relationship between the donor and the donee in case of a gift by a non-resident Indian. The Gift Tax Act, 1958 is a separate enactment. The said Act, however, is not applicable to gifts with effect from 1st October, 1998. Section 5 of the said Act relates to exemption in respect of certain gifts. The provision relied upon by the learned counsel for the assessee reads as under:-

> 5. Exemption in respect of certain gifts.—
> (1) Gift-tax shall not be charged under this Act in respect of gifts made by any person—
> (i) of immovable property situate outside the territories to which this Act extends;
> (ii) of movable property situate outside the said territories unless the person—
> (a) xxx
> (b) not being an individual, is resident in the said territories, during the previous year in which the gift is made;"

Our attention is also drawn to clause (iic), Explanation thereto a clause (iid) to Section 5(1) of the Gift Tax Act, 1958, which for the sake of convenience, are being reproduced below:-

> "(iic) being a citizen of India, or a person of Indian origin, who is not resident in India, to any relative of such person in India, of convertible foreign exchange remitted from a country outside India in accordance with the provisisons of the Foreign Exchange Regulation Act, 1973 (46 of 1973), and any rules made thereunder.
>
> Explanation.— For the purposes of this clause and clause (iid),—
>
> (a) a person shall be deemed to be of Indian origin if he or either of his parents or any of his grand-parents was born in undivided India;
>
> (b) "convertible foreign exchange" means foreign exchange which is for the time being treated by the Reserve Bank of India as convertible foreign exchange for the purposes of the Foreign Exchange Regulation Act, 1973 (46 of 1973), and any rules made thereunder;
>
> (c) "relative" has the meaning assigned to it in clause (41) of section 2 of the Income-tax Act;
>
> (d) "resident in India" shall have the meaning assigned to it in the Income-tax Act;
>
> (iid) being a citizen of India or a person of Indian origin, who is not resident in India, to any relative of such person in India of property in the form of any foreign exchange asset as defined in clause (b) of section 115C of the Income-tax Act"

What was highlighted by the Senior Counsel is that in clause (iic) and (iid), the word 'relative', which is defined in explanation clause (c) has been used, whereas, in Section 5(1)(iid), the legislature

conspicuously has not used the word 'relative'. It is difficult to accept the said contention. Section 5 deals in exemption and stipulation that when gift tax would not be charged. The said provision is of no relevance and application when we examine the question whether the assessee has been able to prove and establish the genuineness of the transaction, i.e. the gift, and establish the source of the entry made in the books of accounts. Admittedly, in the present case the minor daughter of the appellant had made investment of Rs.1 lac and when the assessee was called upon to explain the source of the deposit/income of her daughter, the assessee had submitted that Aushi Aggarwal had received a gift from a non-resident by the name of Bhupinder Kumar.

7. The Tribunal in the impugned order has not specifically referred to Section 68 of the Act, but when we notice and read the order of the Assessing Officer, he has specifically recorded that the addition of Rs.1 lac was being made as the assessee had not been able to prove and establish the source of the income/deposit of the minor Aushi Aggarwal and accordingly the said amount should be treated as income from undisclosed source. On the said aspect, the Assessing Officer has referred to the scrutiny of the bank account in the name of Aushi Aggarwal in Canara Bank, which was opened on 14th August, 1992 with deposit of Rs.5,100/- and thereafter a cheque of Rs.1 lac was

deposited on 18th August, 1992. On the same date itself, two chequ were issued in favour of Prayag Polymers (P) Ltd. During the course of assessment proceedings, the assessee was asked to prove and establish the donor's capacity to make the gift, relationship between the assessee and Bhupinder Kumar and also to produce a copy of assessment order made by the tax authorities of the country in which Bhupinder Kumar was residing. These details were required to establish and show genuineness of the transaction relating to the gift. The Assessing Officer has recorded that this information was not furnished. The Assessing Officer has further recorded that apparently there was no blood relationship between the donor and the assessee/donee and the donor had not been produced for examination. The capacity of the donor was also not proved and established. Accordingly, the Assessing Officer held that medium of gift was a conduit for funnelling his own undisclosed money. The Commissioner of Income Tax (Appeals) has only relied upon Section 5(1)(ii)(b) of the Gift Tax Act, 1958 to hold that the addition could not be sustained. He, however, accepted that the relationship between the donor and the donee had not been established. As far as production of assessment order in respect of the donor was concerned, it was observed that Bhupinder Kumar was not liable to be taxed in India and, therefore, production of assessment order was not relevant. He also observed

that onus of proof was discharged by the assessee by disclosing identity, capacity, source and confirmation from the donor.

8. Possibly, some of the information/confirmation may not have been possible for the appellant assessee to procure, but the close relationship, not necessarily blood relationship, between the parties could have been asserted and fortified. Genuineness of the transaction has to be examined by not only taking into consideration the paper/documents, which were executed, but surrounding circumstances are also relevant. These aspects are of significance and importance, when genuineness of a transaction is in issue. A gift is a voluntary act, by a person who out of love and affection transfers of money, moveable or immoveable asset to another person. Element of personal and close relationship between the two is the motivating factor as the donor parts with and transfers what belongs to him to someone, whom he/she loves and cares. This mandates and requires a close association between the donor and the donee, except where gifts are made for charity and philanthropic purposes. In the present case, the appellant merely relies upon the form of declaration by Bhupinder Kumar that the gift was made out of love and affection. However, it was accepted and admitted before the tribunal that the donor and donee/assessee were not known to each other. Thus, the statement in the declaration of gift regarding love and affection was apparently a mere formal

proclamation. It was a wrong and incorrect assertion. Assessee do not plead past relationship and why and for what reason the said Bhupinder Kumar felt the urge and desire out of love and affection to make a gift to Aushi Aggarwal, the minor daughter of the appellant-assessee. The assessee could have explained and shown that the said Bhupinder Kumar was known to him, but his contention was that he was not required to show and establish the relationship. Mere fact that the amount paid had emanated from the bank account of Bhupinder Kumar would not be suffice in the facts of the present case.

9. It is not necessary for the Revenue to show and prove how the assessee in this case through a conduit had transferred and brought into books of account, undisclosed income under Section 68 of the Act. In fact, this section casts a burden on the assessee to show genuineness of the transaction by establishing identity of the person from whom the payment was received, the source of payment, which necessarily need not be confined only to the details of the bank account from which payment was made but also corroborating and surrounding circumstances. This has always been the legal position, even prior to insertion of Section 68 of the Act. It was a well-accepted principle that income/cash credits which are not satisfactorily explained might be assessed as income. Even long prior to the introduction of Section 68 in the statute book, courts have held that where any amount was found

credited in the books of the assessed in the previous year and t assessed offered no explanation about the nature and source thereof or the explanation offered was in the opinion of the Assessing Officer not satisfactory, the sums so credited could be charged to taxed as income of the assessed for the relevant previous year. Section 68 was inserted in the Act only to provide statutory recognition to a principle which had been clearly adumbrated in judicial decisions. The whole history of the introduction of Sections 68 to 69D of the Act and the judicial decisions bearing thereupon clearly establish the proposition that these sections are only clarificatory and that even otherwise an addition can be made towards income from undisclosed sources. [See ***Commissioner of Income Tax, Orissa Vs. Orissa Corporation (P) Ltd.,*** *[1986]159ITR78(SC),* ***Yadu Hari Dalmia Vs. Commissioner of Income Tax, Delhi (Central)****, [1980]126ITR48(Delhi****), J. S. Parkay v. V. B. Palekar****, [1974]94ITR616(Bom),* ***Nanak C hand Laxman Ds Vs. C.I.T,*** *(1983) 140 ITR 151 (All)*]. Likewise, creditworthiness of the donor would depend upon the income and earning of the donor and whether and did he have necessary funds. Rarely one finds a poor man giving gifts to a rich and powerful, out of natural love and affection.

10. In the present appeal, we are considering whether the order passed by the Tribunal is perverse. The test of perversity is whether a reasonable person conversant with the legal provisions would have

reached to the conclusion or finding under challenge. If the reasoning and the finding of the tribunal is plausible, we would not interfere. This test is not satisfied in the present case

11. Keeping in view the aforesaid position, we do not find that the order passed by the Tribunal is perverse. Accordingly, the question of law is answered in favour of the respondent-Revenue and against the appellant-assessee. The appeal is disposed of. No costs.

SANJIV KHANNA, J.

V. KAMESWAR RAO, J.

NOVEMBER 27, 2014
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