

IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN
BEFORE S/SHRI CHANDRA POOJARI, AM & GEORGE GEORGE K., JM

I.T.A. No.356/Coch/2015
Assessment Year : 2004-05

Shri E. Ummer Bava, Contractor, Sakeena Manzil, Downhill, Malappuram. [PAN: ADKPB 9071F]	Vs.	The Assistant Commissioner of Income-tax, Circle-1, Tirur.
(Assessee-Appellant)		(Revenue-Respondent)

Assessee by	Shri P. Raghunath, Adv.
Revenue by	Smt. A.S. Bindhu, Sr. DR

Date of hearing	28/02/2019
Date of pronouncement	01/03/2019

ORDER

Per CHANDRA POOJARI, AM:

This appeal filed by the assessee is directed against the order of the CIT(A), Kozhikode dated 20/03/2015 and pertains to the assessment year 2004-05.

2. The assessee has raised the following grounds:

1. The order of assessment passed by the Assessing Authority as well as the order of the First Appellate Authority are both wrong, contrary to law, facts and circumstances of the case.

2.1 The assessing authority erred in holding that the Appellant has not proved the genuineness of the gift amounting to Rs. 80 lakhs received from his brother Sri E.Hamza Bava who was a Partner in Ms. Palm General Trading [L.L.C.] who had, in turn, proved that he had received Dhs. 11,00,000/- at the time of his retirement from the said L.L.C. The Assessing Authority ought to have noted that

the source of the donor has been proved properly by producing the Certificate issued by Ms. Palm General Trading [L.L.C.]

2.2 The learned Appellate Authority erred in refusing to place reliance on the Certificate by observing that "the appellant failed to establish any nexus between the retirement funds of donor and gifts received by the appellant" and further observing that "a corresponding declaration duly counter-signed by Indian Embassy in the relevant country ought to have been placed on record along with financial statement indicating financial status of the donor and deployment of income earned abroad". He has failed to note that the Donor had confirmed that he had made the gifts in favour of the Appellant through Demand Drafts which originated abroad.

2.3 The authorities below ought to have noted that the Appellant had [1]: disclosed the gift in the books of account as a credit in the capital account, [2]: filed photocopies of the instruments by which gift was received, [3]: had produced evidence for donor's source for the gift in the form of Third Party's Certificate. It ought to have been noted that when there is no dispute regarding the fact that the demand drafts had originated abroad and when the Assessing Authority has no case that the Appellant has any source of income outside the Country, the fact that the demand drafts have originated outside the country is conclusive with regard to the genuineness of the gift and the Certificate, conclusive proof of the source of the gift.

3.1 The Assessing Authority erred in applying the dictum laid down by the Hon'ble Supreme Court in MOHANAKALA's case which is distinguishable on facts. In fact, the donor in the said case was not related to the donee at all and the circumstances in which the gifts were made were not beyond suspicion and the donor in fact was found to have been of very poor means, having had to depend on the donee himself for even education expenses. As against this, in the case of the Appellant [1]: the Donor is the brother of the appellant/donee, [2]: the credits were direct gifts made through demand drafts by brother and [3]: the donor has been gainfully employed for over 35 years and is doing flourishing business.

3.2: The learned First Appellate Authority erred in not advertent to the above facts indicating that the dictum laid down in Mohanakala's case were not applicable to the facts of the case. In fact, no reference is made to the various contentions specifically raised in the grounds of appeal and during the hearing of the appeal.

3. The facts of the case are that the assessee is a PWD contractor. The return of income for AY 2004-05 was filed on 26/04/2005 declaring a total income of

Rs.31,43,979/-. The assessment was completed u/s. 143(3) r.w.s. 147 on a total income of Rs.35,67,020/- by making an addition of Rs.4,23,045/- to the returned income. Subsequently, the CIT, Calicut set aside the assessment order for verifying the submission of the gift amounting to Rs.80,00,000/- received by the assessee during the relevant previous year. The Assessing Officer passed the order u/s. 143(3) r.w.s. 263 of the Act on 25/11/2008, rejecting the claim of the assessee in receipt of gift amounting to Rs.80,00,000/- and assessed the same to the tax.

4. On appeal, the CIT(A) found that the assessee did not receive the gift amounts through banking channel as claimed by the Ld. AR. According to the CIT(A), the gift amounts had been received by the assessee by way of DDs and no nexus has been established between the source of funds for procuring these DDs by the donor and his earnings in the NRE bank account. A copy of the bank account for the relevant period of the donor has not been placed on record. It was seen that the donor had received fund on retirement as under:

Date	Amount (in Dirhams)	Approximate equivalent amount in rupees
15.04.2003	4 lakhs	Rs.40 lakhs
16.10.2003	4 lakhs	Rs.40 lakhs
01.03.2004	4 lakhs	Rs.40 lakhs

The CIT(A) found that no balance sheet or financial statement or cash flow statement of the donor was placed on record to indicate exhaustive resources of funds of the donor and the corresponding gifts. The CIT(A) also noticed that the above sums on retirement were received by the donor in the preceding financial year and therefore, there is no nexus between the gifts received by the assessee

this year and the above funds. Moreover, it was observed that the claim of the assessee that his brother received substantial amounts on retirement remains unverified in the absence of bank statements whose onus is on the assessee. The CIT(A) observed that the assessee was silent on the receipt of substantial gifts in the preceding financial year from the same donor. It was thus seen that there was no nexus established between the retirement funds of donor and gifts received by the assessee. If the funds were flowing from income earned abroad a corresponding duly countersigned by Indian Embassy in the relevant country ought to have been placed on record along with financial statement indicating financial status of the donor and deployment of income earned abroad. In view of this, the CIT(A) confirmed the addition made by the Assessing Officer.

5. Against this, the assessee is in appeal before us.
6. The Ld. DR relied on the order of the CIT(A).
7. After hearing both the parties, we find that a similar issue came up for consideration in assessee's own case in ITA No. 515/Coch/2011 dated 08/02/2013 wherein it was held as under:

"6. We have heard the rival contentions on this issue and perused the record. There should not be any dispute that the initial burden of proof to prove the cash credit is placed upon the assessee under the provisions of sec. 68 of the Act. If the assessee is able to discharge the same, then the burden of proof shifts to the assessing officer. In this regard, it would be apposite here to extract the observations made by Hon'ble Delhi High Court in the case of Premnath Goel and Co. Vs. CIT (2004)(271 ITR 390) below:-

"Section 68 of the Act requires an assessee to prove the credits appearing in his books of account, as to the nature and source of such amounts, so that if the explanation furnished is not satisfactory, the Assessing Officer can treat it as the assessee's income. The assessee is required to prove three important conditions namely,

- (i) the identity of the creditor
- (ii) the capacity of the creditor to advance the money and
- (iii) the genuineness of the transaction.

What evidence would be sufficient to establish the said conditions or what material would be relevant in a particular case, would depend on the facts of each case.

Based on the above said principle, if we analyse the facts prevailing in the instant case, we notice that the assessee has filed a confirmation letter from the donor, an affidavit from the donor and a certificate obtained from M/s Palm General Trading LLC. From the order of Ld CIT(A), we notice that the assessee has received the impugned amount of Rs.35.00 lakhs as under:-

Cheque No.	Month/year	Amount
2169557	April 2004	5,00,000
2169558	April 2004	5,00,000
2172511	April 2004	5,00,000
2172512	April 2004	5,00,000
111234708	June 2004	10,00,000
111325337	March 2005	5,00,000

		35,00,000
		=====

The Assessing officer has noticed that the assessee had received substantial gifts from the same person in the preceding assessment year also. Before the AO, the assessee could not explain the occasion for receiving the gift. The AO has given a categorical finding that the credit worthiness of the donor was not proved before him.

7. *During the course of assessment proceeding, the assessee has filed a confirmation letter and the same reads as under:-*

"I hereby confirm that I have sent Rs. 35,00,000/- (Rupees thirty five lakhs only) by DD/cheques, to my brother E. Ummer Bava, Down Hill, Malappuram during the year 2004-05.

I have been living in the Gulf for over 35 years and have my own business in the form of bakery, departmental store and real estate. I am

not assessed to Income tax and do not have a permanent account number.

I have sent the above amount to my brother out of love and affection, by way of gift".

8. *During the course of appellate proceedings before Ld CIT(A), the assessee has furnished a certificate obtained from M/s Palm General Trading LLC and the same reads as under:-*

"This is to certify that Mr. Essakanakath Hamza Bava partner of PALM GENERALTRADING (LLC) was retired on 31.03.2004. Within this period he was paid sum of Dhs 4,00,000/- (four lakhs) on 15.04.03, Dhs 4,00,000/- (four lakhs) on 16.10.03 and a sum of Dhs 3,00,000/- (three lakhs) on 01.03.04 towards the investment and share of profits. The company did not have any liability to him".

It is noticed that though the Ld CIT(A) has stated that the fresh evidence is not admissible as per Rule 46A of the IT Rules, yet the Ld CIT(A) has obtained a remand report from the assessing officer, which reads as under:-

"2. As per the above reference an opportunity under Rule 46A was given to test the evidence filed by the assessee which is a Xerox copy of Telex dated 3.1.2008 given by the Managing Director of M/s. Palm General Trading (LLC) to the effect that Shri E. Hamza Bava, partner of the said concern retired on 31.3 2004 and within this period he was paid 4 lakhs Dirhams on 15.4 2003, 4 lakhs Dirhams on 16.10.2003 and 3 lakhs Dirhams on 1 3.2004 towards the investment and share of profits and also to submit a report regarding the creditworthiness of the person in the light of the additional evidence given.

3. Shri R.V. Vishwanathan, Chartered Accountant, Authorised Representative of the assessee who attended the case was asked to furnish detailed evidences in this regard. It was reiterated by him that the sum of Rs. 35 lakhs credited in the Capital account of the as is the amount received from his own brother Shri E. Hamza Bava and the remittances were through banking channels from UAE and that the source of funds for his brother stands explained by way of certificate from the above mentioned company. It was stated by him that he has no other evidences other than what I already filed with the Deptt.

4. Though a sum of Rs. 356 lakhs has come to India to the assessee's bank accounts by way of Demand Drafts from UAE on various dates from April 2003 to Nov. 2003, this is not through the NRE accounts from Hamza Bava and though a certificate from M/s. Palm General Trading (LLC), UAE has been filed with regard to evidences that this money was deposited in

his bank accounts and from this bank account only; Demand Draft were taken within a reasonable time, as gift amount to his brother, Shri E. Ummer Bava. In the absence of full and complete details furnished, it is not known whether Shri E. Hamza Bava had also made certain other investments either in UAE or anywhere else. It is also not known whether Shri E. Hamza Bava had given any similar gift to his other close relatives. It is also relevant to note the decision of the Hon'ble Supreme Court in the case of Mohanakala 291 ITR 217, wherein it was held that receipt of money through banking channels was not a conclusive proof to show the genuineness of the transaction. Therefore, since the genuineness of the transaction has not been proved beyond doubt with all necessary evidences, it is not possible to accept the contention of the assessee regarding the gift received from his brother, Shri E. Hamza Bava. Therefore, the claim of gift of money to the assessee cannot be accepted as correct, based on the materials filed by the assessee" .

9. *Now let us examine as to whether the assessee has discharged the burden of proof placed upon him. In his letter dated 24.3.2011, the assessee has written that the donor was personally present on 16.3.2011 at Kochi in connection with the hearing of appeal and an affidavit was signed before a Notary at Kochi. It is further stated that the affidavit has been submitted affirming the above facts and explaining as to why the gift was not passed through his bank account. On the basis of the affidavit stated above, it was contended that the identity of the donor was proved. However, the copy of the affidavit was not placed in the paper book and further we do not find any discussion about the affidavit in the appellate order of Ld CIT(A). Be that as it may, we may presume that the assessee has discharged the identity of the donor.*

10. *Both the tax authorities have confirmed that the impugned gift amounts have been received by way of demand drafts and not through the bank account of the donor. The assessee has not brought on record any material to show that the said demand drafts were taken by the donor out of his own funds. Hence, as contended by the Ld D.R, we are of the view that the receipt of demand draft by itself shall not prove the genuineness of the transactions, particularly in the absence of any material to establish the nexus between the funds of the donor and the demand drafts. Hence, in our view, the genuineness of the transactions cannot be considered to have been established.*

11. *Regarding credit worthiness of the donor, we fully agree with the observations made by Ld CIT(A) in para 11 of his order, which reads as under:-*

"11. To start with, I find that the appellant did not receive the gift amounts through banking channel as claimed by the learned counsel for the appellant in the first written submissions. The gift amounts have been received by the appellant by way of DDs and **no nexus has been established** between the source of funds for procuring these DDs by the donor and his earnings in the NRE bank account. A copy of the bank account for the relevant period of the donor has not been placed on record. It is seen that the donor claims to have received funds on retirement as under:

Date	Amount (in Dirhams)	Approx. equivalent amount in rupees
15.04.2003	4 lakhs	Rs. 40 lakhs
16.10.2003	4 lakhs	Rs. 40 lakhs
01.03.2004	4 lakhs	Rs. 40 lakhs

Whether the above amounts received were applied for the purpose of making gift to the appellant, is not established as relevant bank account has not been furnished and no nexus between the receipt of above amounts and procurement of DDs for making gifts to the appellant has been established. No Balance Sheet or financial statement or cash flow statement of the donor has been placed on record to indicate exhaustive resources of funds of the donor and the corresponding investments. It is also seen that the above sums on retirement were received by the donor in the preceding financial year and therefore, there is apparently no nexus between the gifts received by the appellant this year and the above funds. The Assessing Officer has observed that the appellant also claims to have received substantial gifts in the preceding financial year from the same donor about which the appellant is totally silent. It is thus, seen that the appellant fails to establish any nexus between the retirement funds of donor and gifts received by the appellant. If the funds were flowing from income earned abroad a corresponding declaration duly counter signed by Indian Embassy in the relevant country ought to have been placed on record along with financial statement indicating financial status of the donor and deployment of income earned abroad".

We notice that the authenticity of the certificate given by the M/s Palm General Trading LLC has not been established by the assessee, for example, by producing the copies of books of account, bank account, agreement, other record etc. In the absence of supporting documents, the said certificate can only be considered as a self serving and bald certificate. Further the donor has failed to establish the nexus between the funds, if any, received by him from M/s Palm General Trading LLC and the impugned gifts. Hence, in our view also, it cannot be said that the assessee has established the credit worthiness of the donor.

12. Thus, the assessee, having failed to establish the genuineness of the transactions and the credit worthiness of the donor, cannot be said to have discharged the initial burden of proof placed upon him u/s 68 of the Act. Accordingly, we do not find any infirmity in the decision of Ld CIT(A) in upholding the addition of Rs.35.00 lakhs made by the assessing officer."

In the present case, the amount was received from the same parties which were not satisfactorily explained with regard to the capacity and genuineness of the transactions. Accordingly, on similar reasons as in the above order of the Tribunal, we confirm the addition made by the lower authorities.

In the result, the appeal of the assessee is dismissed.

Order pronounced in the open Court on this 01st March, 2019

sd/-
(GEORGE GEORGE K.)
JUDICIAL MEMBER

sd/-
(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Place: Kochi

Dated: 01st March, 2019

GJ

Copy to:

1. Shri E. Ummer Bava, Contractor, Sakeena Manzil, Downhill, Malappuram.
2. The Assistant Commissioner of Income-tax, Circle-1, Tirur.
3. The Commissioner of Income-tax(Appeals), Kozhikode.
4. The Pr. Commissioner of Income-tax, Kozhikode.
5. D.R., I.T.A.T., Cochin Bench, Cochin.
6. Guard File.

By Order

(ASSISTANT REGISTRAR)
I.T.A.T., Cochin

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