* IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Judgment Reserved on: 29th October, 2010*
Judgment Pronounced on: 03rd August, 2011

\+ ITA No.438/2008

COMMISSIONER OF INCOME TAX, DELHI ..... Appellant
Through: Mr.Vivek K. Tankha, ASG with
Mr.Rishabh Sancheti and
Mr.Sumeer Sodhi, Advocates

versus

Ms.MAYAWATI ..... Respondent
Through: Mr.S.C.Mishra, Sr.Advocate with
Dr.Rakesh Gupta, Mr.Shail Divedi,
Mr.Ashok Chhabra, Mr.Kunal Varma,
Mr.Ashwani Taneja and Mr.Johnson
Bara, Advocates

CORAM:
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE SURESH KAIT

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes.
2. To be referred to the Reporter or not? Yes.
3. Whether the judgment should be reported in the Digest? Yes.

SURESH KAIT, J.

The present appeal is preferred by the Revenue/Department against the order of Income Tax Appellate Tribunal (Delhi Bench) dated 30.11.2007. The facts of the instant appeal are as under:-

The Income Tax return for the Assessment Year 2003-04 was filed by the assessee on 06.08.2003 declaring total income of Rs.13,29,090/-. The Assessee enjoys the income from salary, house property and other sources.

The Assessing Officer, on perusal of the return, found that during the year under consideration, the assessee had received gifts from the following persons as per details given hereunder:-

Srl. No.	Doner's Name & Address	Amount (Rs.)	Cheque No.	Date	Bank
1	Mr.Pankaj Jain R/o KD-5, Kavi Nagar, Ghaziabad	2,00,000	171816	07.12.2002	Andhra Bank, Navyug Market, Ghaziabad
2	Sh.Ajay Agarwal, R/o KF-21, Kavi Nagar, Ghaziabad	10,00,000	921359	07.12.2002	PNB, G.T.Road, Ghaziabad
3	Sh.O.P.Khadaria, R/o B1-D, DDA Flats, SFS Gulabi Bagh, Delhi	1,00,000	592985	15.01.2003	State Bank of India, University Branch, Delhi

DETAILS OF IMMOVABLE ASSETS RECEIVED

Srl. No.	Doner's Name & Address	Details of property	Date	Value (Rs.) as per Gift Deed
1	Smt.Veena Jain R/o KD-5, Kavi Nagar, Ghaziabad	C-58, Inderpuri, New Delhi	16.11.2002	2203850
2	Sh.Ashok Kumar Jain, R/o KD-5, Kavi Nagar, Ghaziabad	C-57, Inderpuri, New Delhi	26.12.2002	4068450

Sh.Ashok Jain and Smt.Veena are husband and wife and Sh.Pankaj is nephew of Sh.Ashok Jain. Sh.Ashok Jain is a professional Advocate and Sh.Pankaj is a practicing Chartered Accountant and a partner of M/s P.Jain & Co.

We may mention here itself that the Assessee and her family members have received gifts from different persons at different times and these gifts have become subject matter of the scrutiny at various levels including Income Tax Department and additions have been made at the ends of the assessee and her family

members in different assessment years. However, so far as the present appeal is concerned, we are concerned only with the aforesaid gifts which Assessing Officer noticed during the year under consideration. Therefore, for the purpose of present appeal, our discussion would confine to these gifts only. We may also clarify that we have gone into the facts as well as material on record pertaining to this aspect only without being influenced by the other gifts purportedly received by the assessee as that is not the scope and domain of the present proceedings. With these introductory remarks we revert back to the issue at hand.

The Assessing Officer wanted to examine the genuineness of the aforesaid gifts. For this purpose he summoned the donors. He recorded the statement of Mrs.Veena Jain on 26.12.2004.

From the statement of Mrs.Veena Jain, the Assessing Officer brought out the following facts:-

1. She is Graduate.
2. The sources of income are rental, salary, interest, dividend, sale purchase of shares.
3. She is filing her income tax return since 1979 and the details of income declared by her is given hereunder:-

A.Y.	Gross	Net
2000-01	1,39,910/-	95,330/-
2001-02	1,35,920/-	98,720/-
2002-03	2,10,658/-	1,82,410/-

4. She does not pay wealth tax.
5. She is not a director, partner or proprietor in any company or firm or concern.
6. She has never gifted any amount to any social organization, temples and other religious organizations.
7. The gift is stated to be out of natural love and affection.
8. There is no correspondence with the donee and it is out of personal meetings as well as telephonic discussion.
9. The done has never gifted any amount to Smt.Veena Jain, the donor.
10. She has never received or given any gift in the past.

The Assessing Officer recorded his observation on the creditworthiness, it is seen that she herself had taken loan for purchase of property as she was not having sufficient funds for this purpose. She had sold her jewellery for purchase of the house. Therefore, he opined that the creditworthiness of the donor was not proved.

Summons under Section 131 of the Income Tax Act was issued to Sh.Ashok Jain. In compliance, Sh.Ashok Jain, Advocate appeared before the Assessing Officer and his statement was recorded by him from which the following facts were revealed:-

1. His sources of income are Tax Consultancy, Salary, dividend, interest, shares, sale and purchase and share income from M/s Bharat Associates, Ghaziabad.
2. He is filing his income tax return since 1971.
3. The details of income declared during the last three years is given as

A.Y.	Gross	Net
2000-01	3,12,000/-	2,77,630/-
2001-02	2,53,950/-	2,28,300/-
2002-03	2,95,770/-	2,70,440/-
2003-04	4,78,000/-	4,78,000/-

The family consist of self, wife two sons and one daughter. It is seen that all the family members had given gift to the assessee or her family members.

4. He has never given gift to social organizations, temples and other religious organizations in his individual capacity.
5. The gift was out of pure love and affection as the assessee puts Rakhi on his hands for more than 15 years regularly.

6. Although he does not have any correspondence with the done but personal meetings as well as over telephonic discussion were there.
7. He was inquired as to when he had taken the loan for purchase of property which was gifted by him and how he will repay the loans taken by him, he replied that the loan was taken for his self residence which was later on gifted. Since his bank accounts were seized the loan could not be repaid.
8. It was seen that the net income earned by him during the Assessment Year 2000-01 to 2002-03 was nearly 7,76,000/- only.
9. He has not received any gift from anyone nor he has given gift to anybody except to the assessee and her family members. He has not given any gift to social organization, temples and other religious organizations and even to his own real sisters or cousin sisters.
10. The assessee had taken the loans of more than 32 lacs from different persons to purchase the house which was gifted by him.

The Assessing Officer observed that in view of the above, as also the fact that there is no relation between the donor and the donee and the genuineness and creditworthiness is not proved.

Sh.Pankaj Jain

By profession he is a Chartered Accountant. He is assessed to tax at Ghaziabad. He is partner in P.Jain & Co. His statement on oath was recorded by Addl.DI(Investigation).

The Assessing Officer recorded that his statement revealed as under:-

1. He is a C.A. and is partner in M/s P Jain & Co. and is also doing the business of purchase and sale of shares.
2. The income declared during the last three years is given hereunder. He is filing his income tax return since 1994.

A.Y.	Gross	Net
2000-01	1,90,280/-	1,50,879/-
2001-02	1,96,553/-	1,32,577/-
2002-03	1,81,009/-	1,25,024/-

3. The family consists of self, wife and two dependent children.
4. He has admitted that no substantial amount has been gifted in his personal capacity to social organization, temples and other religious organizations. The sources of gift given to the assessee have been given above.
5. The gift is stated to be out of natural love and affection and regard for work done by her towards down trodden society.
6. He does not have any correspondence with the done but stated to be personal meetings were there.

7. The done has never made any gift to the donor and the donee has not received any gift from anyone.
8. When his attention was drawn to the statement recorded by Addl.DI New Delhi, he stated that he had been meeting with the donees at Hanuman Road, New Delhi and still meet them at our family functions as well as of donees. He has photographs to prove his visit and their visits. The phone no. etc, were not remembered by him at that time.

The Assessing Officer, after going through the above facts found that during the Assessment Year 2003-04 he had gifted a sum of Rs.17 lacs to her and the family members of the assessee. He had also made gift of Rs.2 lacs in the Assessment Year 2000-01 and in the Assessment Year 2004-05 made a gift of Rs.5 lacs to the assessee. As observed by the Assessment Officer that the entire case made by him is out of amount received from M/s Blue Bell Finance Co.

The Assessing Officer recorded in his assessment order that It is surprising that the assessee had gifted the amount out of loan taken from this concern M/s Blue Bell Finance Co. Since there was

no occasion for making the gift; the gifted amount was more than the income of the assessee; there was no relation between the donor and the done; the Assessing Officer held that it was only an arranged gift and an accommodation entry.

In nutshell the Assessing Officer did not accept the claim of the assessee in respect of the aforesaid two immovable properties namely C-57, Inderpuri, New Delhi and C-58, Inderpuri, New Delhi and added the same to the income of the assessee under Section 69 of the Income Tax Act. He also did not accept the gift of Rs.2.00 lac of Sh.Pankaj Jain and made addition of this amount also to the income of the assessee under Section 69 of the Act. However, gift of Rs.1.00 lac of Shri O. P. Khadaria and of Rs.10.00 lacs of Shri Ajay Aggarwal were accepted. In the final assessment order dated 30.03.2006, total income of the assessee was assessed at Rs.79,03,390/-.

The assessee preferred an appeal against the order under Section 143(3) dated 30.03.2006 passed by the Assessing Officer.

During the course of appellate proceedings, on the written submission of the assessee some clarification was sought from the

Assessing Officer as to the creditworthiness of the donors as well as the financial statement of affairs depicting net worth of Sh.Ashok Jain, Sh.Pankaj Jain and Smt.Veena Jain. In response to the same, the Assessing Officer submitted his Remand Report dated 30.10.2006 and certified the net worth of the donors as on 31.03.2002 as under:-

(i) Sh.Ashok Jain : Rs.1,14,74,817/-
(ii) Smt.Veena Jain: Rs.1,32,14,312/-
(iii) Sh.Pankaj Jain: Rs.1,36,01,314/-

On perusal of the above Report, it was seen that Sh.Ashok Jain had gifted immovable property worth Rs.40,68,450/-, Smt.Veena Jain has gifted immovable property worth Rs.22,03,850/- and Sh.Pankaj Jain has made a gift of Rs.2,00,000/. These gifts were seen in the light of the net worth and creditworthiness of the above three donors.

The CIT(A) noted that the Assessing Officer had in his impugned order disallowed the gifts of Sh.Pankaj Jain on the following grounds:-

(a) All the persons in Jain group have admitted that they do not know the donees personally and they are not aware about their addresses and other details related to the donees.

(b) It is seen that the entire gift of Pankaj Jain was made by him out of amount received from M/s Blue Bell Finance Company, it is surprising that the assessee has gifted the amount out of loan from the concern, since there was no occasion for making the gifts, the gifted amount is more than the income of the assessee, there is no relationship between the donor and the done, I hold that it is only an arranged gift and an accommodation entry.

(c) The learned Assessing Officer has held that 'since the assessee has not been able to prove the basic parameters as laid down by judicial pronouncements, i.e. the creditworthiness and genuineness of the gifts, the same are held to be

arranged gifts and will be added towards the income of the assessee u/s 68 of the Income Tax Act.

(d) The learned Assessing Officer has also held that the gifts in comparison to the annual income of donors were beyond comprehension.

(e) The learned Assessing Officer has also held that the amount of Rs.2 lacs received from Sh.Pankaj Jain has been found credited in books maintained by the assessee for her business activity and therefore the cash of Rs.2 lacs received by her will be charged under Section 68 of the Income Tax r/w Section 56(1).

The CIT(A), not agreeing with the said addition made by the learned Assessing Officer in the impugned order, was of the opinion that it deserves to be dropped on the basis of the following reasons:

1. Identity, creditworthiness of the donors had been proved with documentary evidence and coupled with the fact that he has appeared before the

Assessing Officer, confirms the genuineness of the gifts as well.

2. The Assessing Officer's claim that the said donor stated that he doesn't know the assessee or their whereabouts is not true and is not substantiated by the AO with any material.
3. The Assessing Officer had wrongly claimed that Sh.Pankaj Jain had gifted the said money out of loan from M/s Blue Bell Finance Company, because it was given out of repayment of deposits of the donor and his immediate family lying with the said company. Moreover, the Assessing Officer erred in stating that gift of Rs.2 lacs was received in cash from Sh.Pankaj Jain in spite of the assessee and donor furnishing documentary evidence regarding the payment of Gift through a proper bank cheque.
4. The learned Assessing Officer had failed to appreciate that the gifts cannot be rejected merely on the ground that there was no occasion or

relationship. The occasion for making the gift and relationship with donor are not very relevant, rather what is relevant is the genuineness of the transaction together with the identity and capacity of the donor.

CIT (A) held that the Assessee, had duly discharged the onus by filing substantial documentary evidence including gift deeds, copies of Bank Accounts, IT returns, sworn affidavits apart from stating on oath and reaffirming the gifts and also indicating amply his financial status. In this manner the assessee had, thus, proved the identity of all the donors, their source of immediate funds gifted to her, and all the donors have on oath confirmed that the gifts are genuine and were given to the assessee out of natural love and affection for her.

Likewise, CIT (A) hold that the assessee had justified that the gifts of Sh.Ashok Jain and Smt.Veena Jain deserved to be accepted on the following grounds:-

(i) The donors appeared before the Assessing Officer and confirmed the genuineness of the gifts as well, therefore

the identity, creditworthiness of the donors are proved with documentary evidence.

(ii) The conclusion of the Assessing Officer was not substantiated by any material that the donors do not know the whereabouts of the donee.

(iii) The occasion for making the gift and relationship with the donor are not very relevant, rather what is relevant is the genuineness of the transaction together with the identity and capacity of the donor.

(iv) The Assessing Officer cannot reject the gifts simply on the ground that since there was no occasion of relationship between the donor and the donee, therefore the gifts cannot be accepted.

(v) The assessee had duly discharged the onus by filing substantial documentary evidence including gift deeds, copies of bank accounts, IT Returns, sworn affidavit apart from stating on oath and reaffirming the gifts and also indicating amply his financial status. The assessee

and all donors have on oath confirmed that the gifts are genuine and were given to the assessee out of natural love and affection.

(vi) The onus is not on the assessee to explain how or in what circumstances the third party obtained the money and how or why he/she came to make a deposit of the same with the assessee. However, before coming to such a conclusion the department has to be in a possession of sufficient and adequate material. As already been decided in the case of **Vishnulal Karwa vs. ITO (1987) 32 Taxman 276 (JP) (MAG)** that mere suspicion by itself cannot lead to conclusion that the amount belonged to the appellant.

As per the CIT(A), it is not necessary as per the Income Tax Act that the donor and donee must be relatives either as per Gift Act or the Transfer of Property Act. The CIT(A) was of the opinion that the gifts received by the assessee cannot be questioned on the ground of no 'occasion' and no 'relationship'.

The requirements of gift are that they should be transferred by

one person to another of any existing moveable and immovable property. The transfer should be voluntary and should be without consideration of any money. The same should be out of natural love and affection and done must also accept the said gift.

Main issues were before the CIT(A) were as under:-

(i) Whether the Gifts of immovable properties received by the assessee from Shri Ashok Jain and Smt. Veena Jain were genuine?

(ii) Whether the gift received by the assessee of Rs. 2 lac from Shri. Pankaj Jain was genuine.

(iii) Whether the assessee is entitled to deduction u/s 16 (1)

(iv) Whether the A.O. was right in charging interest u/s 234B.

As regards the issue No. 1 of Sh. Ashok Jain who has gifted property No. C-57, Inderpuri. Sh. Ashok Jain is a practicing advocate and he is assessed to tad since last so many years. He has placed details of income tax assessment and bank account before Assessing Officer. He has filed an affidavit certifying the above gift and he has also appeared before the Assessing Officer for statement

on oath where also he has confirmed giving of gift out of natural love and affection. He has also brought on record that the assessee is his Rakhi Sister and has relationship for so many years which is even evidenced by photographs of family occasions etc. Sh. Ashok Jain has also submitted that reciprocation of gift not mandatory and his creditworthiness has been accepted by the Assessing Officer himself in the Remand Report.

Further, the immovable properties were first transferred and registered in the name of donor and then only gifted to donee. Thus, stamp duty was also paid twice and no lien of the donor remains on the property. Sh. Ashok Jain has also clarified that the donee has accepted the gift the same has been made without any consideration of money.

In spite of such overwhelming facts no evidence at all has been placed on record by the Assessing Officer to prove that the transaction of gift was Sham and Benami. The CIT (A) of the opinion that the genuineness of the gift transactions are conclusively established inasmuch as the identity and the capacity of donor, as well as factum of gift stands established. The CIT(A)

came to the conclusion on the settled law that once done furnishes the gift deed and affidavits of the donors, they suffice to prove the genuineness of gift. CIT(A) was of the opinion that once the initial burden of proving the genuineness of the gift and creditworthiness of the donor was discharged by the assessee the onus shifts on the Assessing Officer to prove if he contrary. The Assessing Officer was duty bound to bring new material on record in support of his view, however, mere rejection of good explanation does not convert good proof into no proof.

As regards applicability of Section 69, the CIT (A) was of the opinion that it is not the assessee who has made the investment. The donor has paid the stamp duty twice, the assessment of the donor has not been disturbed, the donor and donee are both accepting the factum of gift. Further the gift is also evidenced by documentary evidences like gift deeds, sworn affidavits, declaration before Assessing Officer etc. The donor has also given explanation for immediate source of gift. Therefore, keeping the aforesaid discussion into view the CIT (Appeal) was of the opinion that the donee has discharged not only the burden but also the onus cast on

her. Accordingly, the addition of Rs. 40,68,450/- was deleted.

As regards the gift of property No. C-58, Inderpuri, the CIT(A) did not agree with the assessment order passed by the Assessing Officer and addition made by the Assessing Officer of Rs.22,03,850/- was deleted. The basis of this conclusion were almost as in the case of gift made by her husband Mr.Ashok Jain regarding the property No. C-57, by Mr.Ashok Jain.

As regards the gift of Rs. 2 lacs received by the assessee from Sh.Pankaj Jain by provision he is a Chartered Accountant and assessed to tax since last so many years. The CIT (A) find that he has placed details of his income tax assessment and bank account and also filed affidavit certifying the above gift. He appeared before the Assessing Officer for statement on oath where he confirmed giving of gift. He has also established that he has been meeting the assessee, and his family members on family functions since so many years. The CIT (A) also found that the gift vide A-C payee cheque no. 17186 dated 17.12.2002 drawn on Andhra Bank for Rs. 2 lacs.

The CIT (Appeal), thus, accepted the genuineness of gift

inasmuch as the identity and capacity of the donors was proved and came to the conclusion that factum of gift stood established. He thus, partly allowed the appeal of the assessee.

The revenue as well as the assessee filed cross appeals registered as ITA No.279/Del/07 and ITA No.422/Del/07 against the aforesaid order dated 18.11.2006 for A.Y.2003-04 before Ld.Income Tax Appellate Tribunal. The revenue in its appeal ITA No.422/Del/07 took a stand that the Ld. CIT (Appeals) had erred in deleting the addition of Rs.2,00,000/- made on account of gift from Shri Pankaj Jain and further deleting the addition of Rs.40,68,450/- and Rs.22,03,850/- on account of claim of gift of property from Shri Ashok Jain and Smt.Veena Jain.

The ITAT dismissed the aforesaid two appeals vide its order dated 30.11.2007 and thereby confirmed the aforesaid order dated 15.11.2006 passed by ITAT recording the finding that all the three gifts are not only genuine, but also the identity and capacity of donors to make the gift stands duly and fully established. Section 68 has no applicability for the reason that cheque received from Shri Pankaj Jain had been deposited in her bank account. The gift

relating to immoveable properties cannot be covered under Section 68 f the IT Act. The additions cannot be sustained even under Section 69 of the IT Act. The grounds taken by the revenue were rejected.

The raison d'eter in the order of ITAT can be traced to the following : As per ITAT the issues of genuineness of gift of movable property and immovable properties. For this purpose it is necessary to refer to Chapter VII of the Transfer of Property Act 1882 which deals with gifts of movable and immovable properties. Section 122 defines 'gifts' as under:-

> "Gift" is the transfer of certain existing movable or immovable property made voluntarily and without consideration by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.
> Acceptance when to be made.
> Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.
> If the donee dies before acceptance, the gift is void."

Section 123 of the Transfer of Property Act deals with the procedure relating to transfer of property gifted for our convenience this provision is reproduced as under:-

> "For the purpose of making a gift of immovable property, the transfer must be effected by a

registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.
For the purpose of making a gift of movable property, the transfer may be (effected either by a registered instrument signed as aforesaid or by delivery)
Such delivery may be made in the same way as goods sold may be delivered."

On perusal of section 123 of the Transfer of Property Act the essential elements of gift are as under:-

(i) Donor's interest to make a gift.

(ii) the gift should be made voluntarily and without consideration by the donor.

(iii) Delivery of actual or constructive possession;

(iv) Acceptance of the gift by the donee or on his behalf.

In addition, gift of immovable property has to be through a registered document and transfer of immovable property has to be effected by a registered instrument signed by on behalf of donor attested by at least two witnesses, whereas in the case of movable property such gift should be effected either by registered instrument or by delivery. The ITAT has relied upon on the case of CIT. U.P. Lko Vs. Shyamo Bibi, Kanpur AIR 1967 (Alld.) 82 wherein the Court has observed that whether the transaction is gift or not has

to be examined in the light of Section 122 and 123 of Transfer of Property Act. The Court has also observed that there is on warrant for the saying that the law contained u/s 123 of Transfer of Property Act does not apply when an Income Tax Authority has to decide whether there was a gift or not. The observation of the Allahabad High Court reads as under:-

> "Section 123 of the Transfer of Property Act lays down the law governing all gifts made for whatever purpose and it is to be applied whenever the question arises there was a gift or not. Regardless of whether the question arises in a suit by a donee to recover possession or in a suit to define his title or in an income tax assessment proceeding it has to be answered with reference to the provisions of section 123 T.P. Act. There is no warrant for saying that the law contained in Section 123 T.P. Act does not apply when an income-tax authority has to decide whether there was a gift or not. Consequently, there has to be a delivery, if a gift is not made by a registered document. A question may arise whether a certain act done by the alleged donor amounts to delivery of property to the alleged donee but is cannot said that delivery is not required at all."

The Income Tax Act does not define 'gift'. However, in general terms gift consists in the relinquishments of one's own right of the property and creation of the right in another in that property. This concept is in consonance with the definition of gift

in Principles of Hindu Law by Mulla which defines gift as under:-

> "Gift consists in the relinquishment (without consideration) of one's own right (in property) and the creation of the right of another; and the creation of another man's right is completed on that other's acceptance of the gift, but nor otherwise."
> The definition of gift as given in Hallsburry's Laws of Englant Volume XVIII page 364 paragraphs 692 is as under
> "A gift under vivo may be defined shortly as the transfer of any property from one person to another gratuitously while donor is alive and not in expectation of death……."
> On the concept of gift we consider it proper to reproduce the observations of Lord Esher, M.r. made in Cochrane's case, (1890) 25 QBD 57 (supra) which are as under:-
> "……actual delivery in the case of a 'gift' is more than evidence of the existence of the proposition itself. It is one of the facts which constitute the proposition that a gift has been made. It is not a piece of evidence to prove the existence of the proposition; it is a necessary part of the proposition, and, as such, is one of the facts to be proved by evidence. The proposition is not that the one party has agreed or promised to give, and that the other party has agreed or promised to give, and that the other party has agreed or promised to accept. In that case, it is not doubted but that the ownership is not changed until a subsequent actual delivery. The giving and taking are not evidence to prove that there has been a gift, but facts to be proved to constitute the proposition that there has been a gift."

In view of the above, the ITAT have examined as to whether

these legal requirements as laid down in Section 122 and 123 of T.P. Act are satisfied in the case of gifts made to the present assessee or not. So far as the gift from Sh. Pankaj Jain is concerned, the transaction was carried out through account payee cheque and reflected in the bank account of the assessee, which is as per S.B. A/c No. 9195 on Union Bank of India, Moti Bagh, New Delhi. The amount of RS. 2 lac is gifted by Sh. Pankaj Jain S/o Sh. P.C.Jain, Kavi Nagar, Ghaziabad. The date of entry is 07.12.2002. Sh. Pankaj Jain has confirmed the transaction of gift and filed affidavit dated 07.12.2002 to this effect. The statement of Sh. Pankaj Jain was also recorded on 30.12.2005 on oath by the ACIT Central Circle-11.

The ITAT came to the conclusion that the donor is a Chartered Accountant. He is income tax assessee since 1994. His net worth as reported by the Assessing Officer to the CIT (Appeal) is Rs.1,36,01,314/-. Keeping the above documentary and oral evidence on record, the requirement of law for establishing a validity executed gift of movable properties are fully satisfied inasmuch as the donor gifted the amount voluntarily to the donee

and has delivered the possession to the gifted property to the donee.

The ITAT while dealing with the gift of property bearing No.C-58 Inderpuri, New Delhi, the donor and the donee both have signed this deed. This document is duly stamped and duly registered. Gift has been made irrevocable and absolute and once for all. The donor transferred and conveyed the free hold property with all attending rights to the donee by way of gift together with all privilege, easement and advantages appurtenant thereto.

The ITAT came to the conclusion from the above documentary and oral evidence that the donor made the gift of immovable property to the donee voluntarily. The gift was duly registered and, therefore, the requirement of Section 122 and 123 of the Transfer of Property Act are fully satisfied.

As regards gift of another immovable property i.e. C-57, Inderpuri, the ITAT after going through the record came to the conclusion that these gift also fulfilled the requirement of law and fully satisfied. The ITAT while coming to the above conclusion define that sufficient evidence was adduced by the assessee before

the Assessing Officer. After going through the assessment order the ITAT observed that the Assessing Officer while drawing adverse inference against the assessee in relation to these gifts was influenced by several other transactions of gift whereas he should have examined the genuineness and validity of these transactions. He has not recorded any finding to doubt the identity of the donors. He has not recorded any finding that the gifts were not made voluntarily or that the delivery of the possession of the properties gifted was not given to the donee. He has made absolutely no enquiries which would enable him to conclude that the transaction of gift were sham, false or not genuine.

The Tribunal has further observed that the Assessing Officer has not only conveniently ignored the relevant documentary evidences produced by the assessee, but has based his conclusion on extraneous considerations. On going through the assessment order it is found that he has been unduly influenced by the fact that so many persons had made several gifts to the assessee and to her family members not only during the assessment year under consideration but also in the preceding years and subsequent years.

There is also no evidence to substantiate the fact that the assessee was directly or indirectly benefited by such gifts, which were received by her family members nor has the Assessing Officer added the gifts received by family members as the income of the assessee from undisclosed sources while framing the assessment of the assessee for the year under consideration.

The ITAT has held that the Assessing Officer was wrongly influenced by the fact that there is no relationship between the donor and donee and, therefore, the genuineness of the transaction of gifts are not proved. The ITAT has taken a view that a gift may be made to a stranger. The reference of Section 123 of the Transfer of Property Act which has been made above does not require that the gift may be made to a relation only. Thus, the Assessing Officer has taken a incorrect view of law. The ITAT has referred the case of ***CIT Vs. Ms. Sunita Vachani 84 CTR Delhi/184 ITR 121 Delhi***, wherein the assessee had received gifts from abroad, the commissioner of Income Tax by invoking the provisions of Section 262 set aside the order of ITO and directed him to pass fresh assessment order. In that case CIT was of the view that the order

of ITO was prejudicial to the interest of revenue as the ITO had not examined sources of the gifts to satisfy himself about the genuineness thereof. On challenging, the ITAT had quashed the order of CIT(A). Division Bench of this Court observed while upholding the order of ITAT as under:-

> *"In our opinion, the tribunal had, on merits come to the conclusion that the gift were genuine. This is a pure question of fact. The tribunal has examined the evidence which was available on the record and has arrived at the aforesaid finding. Even though it may be surprising as to how large sums of money are received by a family in India by way of gifts from strangers from abroad, unless there is something more tangible than suspicion, it will be difficult to regard the moneys received in India from abroad as representing the income of the assessee in India. On the facts existing on the record, we are unable to come to the conclusion that any question of law arises. The petition is dismissed. No order as to cost."*

The ITAT has upheld the finding of CIT (A) that the assessee has fully discharged not only her onus but also the burden cast on her by proving the identity of donors and their creditworthiness as well as the genuineness of the gift. Accordingly, the ITAT upheld the findings of CIT (A) deleting the additions made on account of the said gifts by the AO.

As the ITAT has come to the conclusion that Section 68 has no applicability to the facts of the present case as the assessee is not maintaining any books of accounts. If that be so Section 68 does not apply in this case for the simple reason cheque received from Mr.Pankaj Jain has been deposited in her bank account in this regard. The ITAT was of the opinion that balance sheet/statement of the affairs cannot be equated to books of account because a pass book of the bank cannot be treated as a book of account of the assessee because this is proved by the banker, which is given to its customer and is only a copy of the customer's account in the books maintained by the bank. The bank does not act as an agent of the customer nor can it be said that the banker maintains the pass book under instructions of the customer (assessee) the relationship between the banker and customer is one of the debtor and creditor only. Therefore, a cash credit appearing in assessee's pass book relevant to a particular previous year, in a case where the assessee does not maintain books of account, does not attract the provisions of Section 68.

Keeping in view the above in the instant case neither the gifts

relating to immovable property can be covered under Section 68 nor the gift of Rs.2 lacs received by the assessee can be covered under the provisions. In view of the ITAT all gifts satisfied the requirement of a valid and genuine gift. The assessee has fully explained the same and therefore it cannot be said the addition can be sustained even u/s 69 of the Income Tax Act. In this manner the ITAT has dismissed the appeal of the Revenue Department.

The Revenue has preferred the instant appeal by challenging order/judgment passed by ITAT on 30.11.2007. Initially, the questions of law proposed by the Revenue were as under:-

> "(a) Whether the ITAT was correct in law in deleting the addition of Rs.40,68,400/- and Rs.23,03,850/- made by the Assessing Officer by treating the alleged gifts of immovable properties from Sh. Ashok Jain and Smt.Veena Jain on the ground that the genuineness and creditworthiness of the transaction and the donor has not been proved.
> (b) Whether the ITAT was correct in law in deleting the addition of Rs.2 lacs made by the Assessing Officer by treating this cash gift from Sh. Pankaj Jain as non-genuine and also on the ground that the creditworthiness of the donor has not been proved.
> (c) Whether the ITAT was correct in law by proceedings on the basis that the genuineness of a gift and the creditworthiness of a donor in respect of an alleged gift is to be examined and accepted merely on the basis of such documents/details, which may be furnished by the Assessee/donor in question,

without permitting any investigation in the matter by the Assessing Officer, as was done in the instant case by Ld. CIT (Appeals) in his Order dated 30.11.2007?
(d) Whether the ITAT erred in law by failing to draw and sustain a presumption of lack of genuineness, in the context of alleged gift, where the donor and the donee are wholly unrelated to each other and the donor allegedly gifted the immovable property, which has been purchased in the first place by the donor, by recourse of taking substantial monetary loan ?
(e) Whether the order of ITAT is perverse as it has ignored the relevant facts on records as well as the settled position of law."

Thereafter the revenue department filed reframed substantial question of law as under:-

(i) Whether the ITAT was correct in law in deleting the additions of Rs.40,68,400/-, Rs.23,03,850/- and Rs.2,00,000/- made by the Assessing Officer on account of bogus and non-genuine gifts received by the assessee ?

(ii) Whether the Order of ITAT is perverse as the assessee has failed to prove the genuineness and creditworthiness of the donors ?

(iii) Whether the ITAT was correct in law in upholding the Order of CIT (Appeals) who had accepted the documents at appellate stage without allowing the Assessing Officer to verify the correctness and genuineness of these documents and details ?"

Mr.Vivek K. Tankha, Additional Solicitor General submits

that Mrs. Veena Jain gifted property No. C-58, Inderpuri for payment of Rs.9.5 lacs from account No. 812 Andhra Bank. She took loans to the tune of Rs. 20 lacs. She was working with M/s Pankaj Jain and Co. of chartered accountant and getting a salary of Rs.5,000/- per month, her husband is also working in this firm. Learned Additional Solicitor General has pointed out that Smt. Jain has stated that she has not given any contribution for the welfare Jain Samaj during last seven years and the only gift she made to the assessee is one property no. C-58, Inderpuri, New Delhi and Rs.5 lac in July, 2003 to the assessee. She has also stated that she visited the resident of assessee for making above gift. The donee has not given any gift to her. She also stated that gift was made out of her personal saving and also out of the loan from her near relatives. As argued by the learned Addl. Solicitor that it is difficult to believe that she has given gifts of money and immovable assets by taking loan from various persons and later on gifted the assets to the assessee with whom she has no relation whatsoever although it is stated that assessee is **Rakhi/Dharam sister** of her husband. The value of gift given by her exceeded the income

declared by assessee during five years. The loan taken by the donor Smt. Veena Jain was never repaid and it remains the dispute of genuineness. Creditworthiness stand disputed since she did not have sufficient funds and she had taken loan and sold her jewellery.

In regard to the Mr.Ashok Jain, he gifted value of property C-57, Inderpuri, New Delhi is of worth Rs. 40,68,450/-. His source of income are tax consultancy, salary, dividend, interest, shares, sale and purchase of share, income from M/s Bharat Associates, Ghaziabad. He is filing his income tax return since 1971. The details of income declared during the last three years is given as under:-

Assessment year	*Gross*	*Net*
2000-01	Rs.3,12,000/-	Rs.2,77,630/-
2001-02	Rs.2,53,900/-	Rs.2,28,300/-
2002-03	Rs.2,95,770/-	Rs.2,70,440/-
2003-04	Rs.4,78,000/-	Rs.4,78,000/-

The family consists of self, wife, two sons and one daughter. It is not seen that all the family members had given gifts to the assessee or his family members. He has never given gifts to social organization, temples and other religious organizations in his

individual capacity. The gift was out of pure love and affection as the assessee puts Rakhi for more than 15 years regularly. Although he does not have any correspondence with the donee but personal meetings as well as over telephonic discussions were there. He was inquired by the Assessing Officer as and when he had taken the loan for purchase of property which was gifted by him and he will repay the loans taken by him. He replied that the loan was taken for the self residence which was later on gifted. Since his bank accounts were seized the loan could not be repaid. It is also a matter on record that the net income earned by him during the year 2001-02 and 2002-03 was nearly Rs.7,76,000/- only. It is also a matter on record that he never received any gift from anyone nor he has given gift to anybody except to the assessee and her family members. The assessee had taken the loan of more than Rs. 32 lacs from different persons to purchase the house which was gifted by him.

Learned Addl. Solicitor General has pointed out that the ITAT has observed in the judgment that AO was influenced by other transaction, whereas he should have examined the

genuineness and validity of these transaction separately. As per him the findings of Assessing Officer of this gift stand uncontroverted.

On non-genuineness he argued that the actual income was Rs.1 lac only whereas the gifts made were disproportionate. On non-creditworthiness loan taken to the tune of Rs.20 lac five months in advance by a person whose actual income is merely Rs.1 lac and jewellery sold to buy property to gift.

Further the Addl. Solicitor General argued that AO reacted on the observations made by the ITAT as Assessing Officer has wrongly co-related the loan taken in May with property purchased in September. On this issue he has argued that there was no other sources of legality to show by assessee hence this co-relation is correct. The burden is always on donor to show the sources of funds, and it was the assessee who was showing this loan of Rs. 20 lacs from Mangals as a source. He argued the findings of the ITAT is thus wholly perverse. He further argued that the exercise to distinction between the question of fact and question of law is normally difficult because there are some common areas between

the two, where the distinction must be clear. But finding on a question of fact can be changed as erroneous in law where there is no evidence to support it, or it is based on material which is irrelevant or partly relevant and partly irrelevant, or it is based on contentions or surmise or partly on these and partly on evidence or the finding is so perverse or unreasonable or no person acting judicially, instructed on law could have arrived at it.

Lastly, he argued that in this case the two donors had absolutely no connection with the assessee and they made gift to the assessee only because she needed money to buy a house and they warranted to help her. He argued that it appeared that this is not only quite unusual but also quite unnatural. It sounds rather uncredible that a complete stranger would want to gift lacs of rupees to a person only because the person wanted amount for purchasing the house.

The learned ASG has cited following judgments in support of his arguments:-

(i) *(2003)264IR 0435-(Delhi High Court) Sajan Dass and Sons Vs. Commissioner of Income Tax*

"Channels is not sufficient to prove the genuineness of the gift. Since the claim of the gift is made by the assessee, the onus lies on him not only to establish the identity of the person making the gift but also his capacity to make a gift and that it has actually been received as a gift from the donor. Having regard to the inquiries conducted by the Assessing Officer from the bank, with which the assessee was admittedly confronted and bearing in mind the fact that admittedly said Subhash Sethi was not related to the assessee,

We are of the view that the findings recorded by the Tribunal are pure findings of fact warranting no interference. We find it difficult to hold that on the facts of the instant case proper opportunity had not been granted to the assessee to prove the gift. In our opinion, the impugned order does not give rise to any question of law, much less a substantial question of law. The appeal, being devoid of any merit, is dismissed accordingly."

(ii) ***(2007) 292 ITR 0552-(Delhi High Court) Commissioner of Income Tax Vs. Anil Kumar , Madan B.Lokur and Gupta V.B.JJ, March 13, 2007***

"Here in the present case, there is nothing on record to show as to what was the financial capacity of the donors; what was the creditworthiness of the donors; what kind of relationship the donors had with the assessee; what are the sources of funds gifted to the assessee and whether they had the capacity of giving large amount of gift to the assessee.

Further, the assessee was asked to appear in person before the Assessing Officer, however, he never appeared.

Since, the assessee did not prove the genuineness of the transaction nor he established the identity of the donor, nor the capacity of donor to make the gift, as such the Income Tax Appellate Tribunal was wrong in deleting the addition of Rs.20 lacs on account of gift alleged to have been received by the assessee.

Accordingly, the present appeal filed by the Revenue is accepted and the impugned order passed by the Income-tax Appellate Tribunal is set aside."

(iii) ***(2007) 294 ITR 0488-(Delhi High Court) Rajeev Tondon Vs. Commissioner of Income Tax***

"We find from the facts of this case that two donors had absolutely no connection with the assessee and they made gifts to the assessee only because he needed money to buy a house and they wanted to help him. It appears to us that this is not only quite unusual but also quite unnatural. It sounds rather incredible that a complete stranger would want to gift lakhs of rupees to a person only because that person wanted the amount for purchasing a house. The taxing authorities were entitled to look into the surrounding circumstances, which they did, and came to the conclusion that the gifts could not be said to be genuine. On these facts, we find no reason why a different view should be taken.

(iv) *(2002) 254 ITR 0225-(Delhi High Court) Commissioner of Income Tax Vs. B.L.Passi*

"It is submitted by Ms. Bansal that the findings recorded by the Tribunal are perverse inasmuch as there is no material on record to support the same. It is asserted that after the matter had been set aside by the Commissioner of Income-tax (Appeals), fresh notices were sent to the parties, who, according to the assessed, had taken trucks on hire, to produce the books of account and other materials in support of the said claim, but the said notices were received back unserved and, therefore, the Tribunal has misdirected itself in relying on the statement of Vijay Kumar and the affidavit of the director. On the other hand, Mr. Aggarwal has vehemently argued that the findings recorded by the Tribunal are pure findings of fact based on relevant evidence and, therefore, no question of law, arises out of its order.

The exercise to distinguish between a question of fact and question of law is normally difficult because there are some common areas between the two where the distinction may not be clear. It is well settled that it is not possible to turn a mere question of fact into a question of law by asking whether on a matter of law the authority came to a correct conclusion upon a matter of fact. But a finding on a question of fact can be challenged as erroneous in law where there is no evidence to support it; or it is based on material which is irrelevant or partly relevant and partly

irrelevant; or it is based on conjectures or surmises or partly on these and partly on evidence; or the finding is so perverse or unreasonable that no person acting judicially and properly instructed on law could have arrived at it.

In the instant case, we find from the order of the Commissioner of Income-tax (Appeals), dated February 20, 1990, that one of the issues to be examined by the Assessing Officer in terms of the said order was whether the trucks, in question were given on hire or not, in other words, put to use during the previous year. The Commissioner of Income-tax (Appeals) thought it proper to give such a direction despite the fact that the statement of the said Vijay Kumar and the affidavit of the director of the transport company were already on record. To comply with the said direction, the Assessing Officer issued fresh notices by registered post to the parties who are said to have hired the trucks, but these notices remained unserved. Although copies of the paper books filed before the Tribunal have been placed on record but learned counsel for the assessed has not been able to point out any material/document which was brought on record by the assessed before the lower authorities during the course of re-examination of the issue in pursuance of the directions contained in the Commissioner of Income-tax (Appeals) order dated February 20, 1990. therefore, prima facie, the findings recorded by the Tribunal on the issue of user of trucks do

not seem to be based on any material. But we say no more lest it may prejudice the case of either side.

We are, therefore, of the view that the orders of the Tribunal give rise to substantial questions of law. We, accordingly, admit the appeal."

Refuting the aforesaid arguments, Mr. S. K. Mishra, Ld. Sr. Counsel for the Assessee, argued that question of law does not arise at all and the attempt of the Revenue is to only show that findings of the two authorities are perverse and even in this attempt it has failed. He pointed out that CIT (A) had called for a remand report from the Assessing Officer and who had himself submitted this report to the CIT (A) on the basis of which creditworthiness of the donors was fully proved beyond doubt. Even otherwise, this question cannot be raised for the first time in appeal under Section 266(A) when no ground of this nature was raised before the ITAT.

Learned counsel for the assessee has placed reliance upon the following judgments:-

(i) *Commissioner of Income Tax vs. TATA Chemicals Ltd. in ITA No.31/2000 decided on 03.04.2002* wherein it was held that :-

"Mr. Desai, learned counsel appearing for the appellant, pressed questions of law framed at serial Nos. (a), (b), (f) and (j) of the appeal memo. These questions read as follows :

"(a) Whether the interest which is already capitalised in the books can be claimed as revenue expenditure for the purposes of taxation ?

(b) When the three units situated in different places and there is no functional integrity, common accounts, organic unity and further there is an ample evidence borne out by the record that the units were distinct and having its own entity, whether the Tribunal is justified in coming to the conclusion that the units are one and others are the extension/expansion of the other only on certain things which are not fundamental, basis to the issue ?

(f) Whether the interest attributable to the borrowings for investments in tax-free bonds is allowable Under section 36(1)(iii) of the Income-tax Act as the said borrowings are not for the purpose of business ?

(j) Whether the expenses incurred by the respondent towards maintenance of guest house can be allowed as deduction Under section 37(4) of the Act ?"

4. The rest of the questions though raised were not pressed into service. Hence, our order is confined to the questions raised. The appeal on other questions stands dismissed as not pressed.

Consideration :

Question (a) :

As far as question (a) is concerned, it is not in dispute that this question was not raised before the Tribunal. Mr. Desai submitted before us that Under section 260A(6)(a) it is permissible for the High Court to determine any issue which is not determined by the Appellate Tribunal. The careful reading of the section will show that the High Court can decide only that question which was raised but not determined by the Tribunal. Therefore, it was necessary that the question sought to be raised ought to have been raised before the Tribunal and then if it had not determined it, one can say that it has not been determined by the Tribunal and, therefore, the High Court should look into it. In the present case, we do not find that this issue had been raised before the Tribunal. It is also not the case of the Revenue that the issue or question was raised but not decided by the Tribunal. In the circumstances, we do not propose to dwell on this question."

(ii) *Commissioner of Income Tax vs. R.S.Sibal in ITA No.264/2003 decided on 12.11.2003* wherein it was held that:

5. According to the Revenue, the impugned order involves the following substantial questions of law:

a) Whether ITAT was correct in law in deleting the addition of Rs. 9,25,000/- made by the A.O. under section 68 of the Income Tax Act being the alleged gifts of Rs. 7,00,000/- and Rs. 2,25,000/- received from the NRI's?

b) Whether ITAT was correct in holding that the assessed had filed the necessary evidence in support of the genuineness of the alleged gifts when the assessed had not established the relationship between the alleged donors and the donee?

c) Whether ITAT was correct in holding that the A.O. was not justified in not treating the gifts as genuine merely on suspicion conjecture and surmises?

d) Whether ITAT was correct in law in holding that the assessed had discharged the onus in establishing the nature of the transaction?"

6. We have heard learned counsel for the parties. Assailing the appellate orders, Mrs. Premlata Bansal, learned senior standing counsel for the Revenue, has vehemently urged that both the authorities have failed to appreciate that the assessed had not established the credit worthiness of the donors and their relationship with the assessed. It is asserted that there was no reason why two strangers would make gifts of heavy amounts to the assessed, who has failed to prove donors' love and affection for him. In support of the proposition that mere production of statements of account or identification of a donor is not sufficient to prove the genuineness of the gift, learned counsel has placed reliance on a decision of this Court in Sajan Dass & Sons v. Commissioner of Income-tax, 2003 (128) Taxman 621.

7. We are unable to agree with learned counsel for the appellant. There is no quarrel with the proposition that a mere identification of the donor and movement of the gift amount through banking channels is not sufficient to prove the genuineness of the gift and since the claim of the amount having been received as a gift is made by the assessed, onus lies on him not only to establish the identity of the donor but his capacity to make such a gift. But in the instant case, we find from the record that though the assessed had admittedly produced the bank statements, the Assessing Officer did not raise any query with regard to the capacity of the donors to make the gift. From the assessment order, we find that the only ground on which the genuineness of the gifts had been doubted was the alleged failure on the part of the assessed to establish his relationship with the donors. Admittedly, there is no blood relationship between the assessed and the donors. No such case was even pleaded by the assessed. The donors had

stated in their declarations that they had gifted the amounts to the assessed on account of their love and affections for him. Both the lower appellate authorities have recorded a categorical finding that by producing the afore-mentioned documents the assessed has discharged the onus which lay on him with regard to the genuineness of the gifts. The inference drawn by the appellate authorities, on appreciation of evidence is factual, giving rise to no question of law much less a substantial question of law.

(iii) *Murlidhar Lahorimal vs. Commissioner of Income Tax being ITA No.225/1994 decided on 14.11.2005* wherein it was held that:-

The Tribunal states that motivation for making the gift is not established. This finding is neither here nor there. The assessee was called upon to explain the credit entry found in its capital account. The assessee pointed out that it had received a gift from Shri Ramji Nanji. Shri Ramji Nanji appears before the assessing officer and confirms the fact of having made the gift. He produces evidence in support of the source from which the funds for making the gift are available with him. The gift is given by way of a bank draft. The revenue does not dispute any of these facts. In fact, the revenue commences the present proceedings on the day it makes gift tax assessment qua this very gift in the hands of the donor.

Despite this factual position, the Tribunal singularly fails to note the fact that the identity of the donor is established, the donor having appeared in person before the assessing officer, the genuineness of the transaction is established, not only by the receipt of the bank draft, but also by the fact of transaction having borne gift tax once the assessment was framed. The primary onus which rested with the assessee, thus, stood discharged. Thereafter, if the revenue was not satisfied with the source of the funds in the hands of the

donor, it was upto the revenue to take appropriate action. The Tribunal fails to consider all these aspects. In fact, the donor having filed gift tax return and assessment having been framed on the donor, is not taken into consideration by the Tribunal at all. This was a very strong factor in support of the explanation tendered by the assessee.

The Tribunal, to the contrary, goes on to discuss and question as to why the donor should make a gift to the assessee; the size of the donor's family and availability or otherwise of the amount in hands of the donor; the area of the land held by the donor etc. At best, these could be factors for the donor to be called upon to explain the source of the funds in his hands, but that could not be a ground for disbelieving a gift which had admittedly been received by the assessee as a gift and being treated as undisclosed income of the assessee.

Having gone through the statements of the donor as well as the assessee, it is apparent that despite minor discrepancies, the factum of the gift having been made has been accepted by the donor and in the circumstances, it cannot be stated that the credit entry in the capital account of the assessee did not reflect the true picture. The assessee had shown the same as gift received. The assessee tendered an explanation and nothing has been brought on record to even hold for a moment that the said explanation is not satisfactory. Though the same is stated as a conclusion, the reasoning for stating so is as to disbelieving source of source. In these circumstances, the impugned order of Tribunal cannot be sustained.

(iv) *Nek Kumar vs. Assistant Commissioner of Income Tax in ITA No.93/2002 decided on 22.07.2002* wherein it is held as under:-

Donor having given an affidavit and also filed a declaration that she has given the gift to the assessee and there being no material evidence whatsoever to show

that the money was deposited by the assessee or by any relative in the bank from where it came back to the assessee, the gift cannot be treated as non-genuine and, therefore, addition was not justified.

(v) *Commissioner of Income Tax vs. Mrs.Sunita Vachani in ITA No.101/1999 decided on 05.02.1990* wherein it was held as under:-

There were some gifts from abroad which not taxed by the Income-tax Officer. The Commissioner of Income-tax issued notice under section 263 of the Income-tax Act, 1961, and passed an order setting aside the order or Income-tax Officer and directing the Income-tax Officer pass a fresh assessment. The view of the commissioner of Income-tax Officer to that the order of the Income-tax Officer was prejudicial to the interests of the Revenue as the Income-tax Officer had gone into the sources of the gifts and had not satisfied himself about the genuineness thereof.

The assessed filed an appeal to the Tribunal went into the facts, saw the balance-sheet of the donors which had been placed on the record and then came to the conclusion that, on merits the decision of the Income-tax Officer to treat the moneys received as gifts was correct and, secondly there was no error committed by the Income-tax Officer and that there was nothing more which he would investigate into than what he had already done. The order of the Commissioner of Income-tax was accordingly, quashed.

In our opinion, the Tribunal had, on merits, come to the conclusion that gifts were genuine. This is a pure question of fact. The Tribunal has examined the evidence which was available on the record and has

arrived at the money are received by a family in India by way of gifts from strangers from abroad, unless there is something more tangible than suspicion, it will be difficult to regard the money received in India from abroad as representing the income of assessed in India. On the facts as existing on the record, we are unable to come to the conclusion that any question of law arises. The petition is dismissed. No order as to costs.

(vi) *Commissioner of Income Tax vs. Orient Enterprises in ITA No.91/1987 decided on 10.01.1990* wherein it is held as under:-

Whether the finding of the Tribunal that the assessed discharged his onus by giving conflicting statements is perverse and erroneous and not rationally possible ?

Whether the statements of Shri M. P. Jain, Shri M. K. Suri and Sher Singh recorded on March 23, 1979, April 2, 1979, and May 18, 1979 are relevant and admissible as evidence in view of their contradictions in their statements and to what extent the said statements can be relied upon by the Tribunal while considering the additions made under section 68 of the Income-tax Act, 1961 ?"

As is evident from the questions themselves, the case pertains to two cash credits of Rs. 4 lakhs and Rs. 1 lakh in the name of Krishnan Lal Prahlad Rai Saraf and Shri. M. K. Suri, respectively, on March 21, 1979, and March 26, 197 These cash credits related to the year 1979-80. The Income-tax officer examined Shri. M. K. Suri and came to the conclusion that the cash credits were not genuine and he added those amounts in the hands of the respondents. An appeal was filed before the Commissioner of Income-tax (Appeals) who confirmed

the order of the assessing authority. Further appeal was filed to the Income-tax Appellate Tribunal. The Tribunal took note of the evidence on record and also noticed the same contradictions which were there in the statements which had been recorded by the Assessing Officer. The Tribunal nevertheless came to the conclusion that the burden which had lain on the assessed for establishing the cash credits had been duly discharged on the basis of the evidence on the record.

It is contended by learned counsel for the petitioner that the aforesaid finding of the Tribunal is perverse. We are unable to agree with him. The Tribunal has referred to all the evidence on record which included confirmatory certificates which had been issued with regard to the said cash credits. The Tribunal has also referred to the statements of the witnesses which had been recorded and has then come to the conclusion that the burden which was on the assessed had been discharged. It is pertinent to note that one of the items on which reliance was placed by the Tribunal was that some payments by way of interest had also been made by cheques. In our opinion, it cannot be said that the conclusion of the Tribunal is perverse. The question as to whether the cash credits were genuine or not is a pure question of fact and we find no question of law arising in this case. The petition is, accordingly, dismissed. No costs.

(vii) ***Commissioner of Income Tax vs. Orissa Corporation (P) Ltd. being Appeals No.1379 & 1380 of 1974 decided on 19.03.1986*** wherein it is held as under:-

The question was again considered by this Court in Homi Jehangir Gheesta v. Commissioner of Income-tax, Bombay City [1961]41ITR135(SC) , when this Court reiterated that it was not in all cases that by mere rejection of the

explanation of the assessee, the character of a particular receipt as income could be said to have been established; but where the circumstances of the rejection were such that the only proper inference was that the receipt must be treated as income in the hands of the assessee, there was no reason why the assessing authority should not draw such an inference. Such an inference was an inference of fact and not of law. It was further observed that in determining whether an order of the Appellate Tribunal would give rise to a question of law the court must read the order of the Tribunal as a whole to determine whether every material fact, for and against the assessee, had been considered fairly and with due care; whether the evidence pro and con had been considered in reaching the final conclusion; and whether the conclusion reached by the Tribunal had been coloured by irrelevant considerations or matters of prejudice. It was further reiterated that the previous decisions of this Court did not require that the order of the Tribunal must be examined sentence by sentence through a microscope as it were, so as to discover a minor lapse here or an incautious opinion there to be used as a peg on which to hang an issue of law. In considering probabilities properly arising from the facts alleged or proved, the Tribunal did not Indulge in conjectures, surmises or suspicions.

(viii) *CIT vs. Sh.Kulwant Rai in ITA No.86/2006 decided on 13.02.2007* wherein it has been held that:-

In case of Kondiba Dagadu Kadam v. Savitribai Sopan Gujar [1999]2SCR728 it has been explained as to what can be termed as substantial question of law. It was held:

If the question of law termed as substantial question stands already decided by a larger bench of the High Court concerned or by the Privy Council or by the federal Court or by the Supreme Court, its mere wrong application to facts of the case would not be termed to be a substantial question of law. Where a point of law has not been

pleaded or is found to be arising between the parties in the absence of any factual format, a litigant should not be allowed to raise that question as substantial question of law in second appeal. The mere appreciation of the facts, the documentary evidence or the meaning of entries and the contents of the document cannot be held to be raising a substantial question of law. But where it is found that the first appellate Court has assumed jurisdiction which did not vest in it, the same can be adjudicated in the second appeal, treating it as substantial question of law. Where the first appellate Court is shown to have exercised its discretion in a judicial manner, it cannot be termed to be an error either of law or of procedure requiring interference in second appeal.

In another case reported as Panchugopal Barua v. Umesh Chandra Goswami [1997]2SCR12 , it has been laid down that existence of substantial question of law is sine qua non for the exercise of jurisdiction. It was held:

A bare look at Section 100 C.P.C. shows that the jurisdiction of the High Court to entertain a second appeal after the 1976 amendment is confined only to such appeals as involve a substantial question of law, specifically set out in the memorandum of appeal and formulated by the High Court. Of course, the proviso to the Section shows that nothing shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if the Court is satisfied that the case involves such a question. The proviso presupposes that the Court shall indicate in its order the substantial question of law which it proposes to decide even if such substantial question of law was not earlier formulated by it. The existence of a "substantial question of law" is thus, the sine qua non for the exercise of the jurisdiction under the amended provisions of Section 100 C.P.C.

Similarly in a decision of this Court reported as Mahavir Woolen Mills v. C.I.T. (Delhi) [2000]245ITR297(Delhi), meaning of "substantial question of law" has been explained. It was held:

The issue raised by the assessed in the appeal cannot be said to involve any question of law, much less a substantial question of law. A question of fact becomes a question of law, if the finding is either without any evidence or material, or if the finding is contrary to the evidence, or is perverse or there is no direct nexus between the conclusion of fact and the primary fact upon which that conclusion is based. But, it is not possible to turn a mere question of fact into a question of law by asking whether as a matter of law the authority came to a correct conclusion upon a matter of fact.

In Edwards v. Bairstow [1955] 28 ITR 579 , Lord Simonds observed that even a pure finding of fact may be set aside by the court if it appears that the commissioner has acted without any evidence or on a view of the facts which could not be reasonably entertained. Lord Radcliffe stated that no misconception may appear on the face of the case, but it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances the court may intervene.

The words " substantial question of law" has not been defined. But the expression has acquired a definite connotation through a catena of judicial pronouncements. Usually five tests are used to determine whether a substantial question of law is involved. They are as follows:

1)whether, directly or indirectly, it affects substantial rights of the parties, or

2) the question is of general public importance, or

3) whether it is an open question in the sense that the issue has not been settled by pronouncement of the Supreme Court or Privy Council or by the Federal Court, or

4)the issue is not free from difficulty, and

5) it calls for a discussion for alternative view.

Our attention was drawn by the learned counsel for the assessee that the creditworthiness of the donors was never challenged before ITAT, and therefore, in the instant appeal the revenue cannot challenge the same. It is further submitted that the alleged substantial questions of law raised by the Revenue in the revised statement does not arise from the order of the Tribunal as the same was neither the ground of appeal taken by the Revenue before the Tribunal, thus the Revenue cannot take this question in the present appeal. Learned counsel for the assessee further argued that there are three donors from one family – two of them namely Sh.Ashok Jain and Mrs.Veena Jain (Husband-wife) and Sh.Pankaj Jain (Nephew of Mr.Ashok Jain), thus aggregate gift is of Rs.64.72 lacs from three said persons. All the three donors have confirmed giving of gifts on oath in their respective affidavits and also appeared before the Department and gave their statements confirming giving of impugned gifts. All the three donors appeared before the Registrar and executed registered gift deeds since all three have a close relationship of more than 15 years and are family friends of the assessee. The ITAT has recorded

exhaustive finding of facts on the identity and capacity and genuineness of the gifts of all the three donors. Even the Assessing Officer has also recorded its finding of its creditworthiness of its three donors in his remand report. The assessee had filed sufficient material showing closeness between the donors and the assessee. Further, learned counsel for the assessee has pointed out as per as the findings of the Tribunal that the statement of donors were not confronted by the assessee. On the other hand, the other two gifts from Mr.Ajay Aggarwal and Mr.O.P.Khadaria, Advocate were accepted by the Assessing Officer and the findings were recorded by the CIT(A), the Tribunal has held that the addition cannot be made under Section 68 as books of accounts are not maintained and Section 68 is not applicable. He further clarified that there is no challenge of this finding by the Revenue in the present appeal.

We have considered the respective submissions of both sides and also minutely gone through the orders passed by the Assessing Officer, CIT (A) as well as ITAT. We find substance in the contention of the learned counsel for assessee that there are pure findings of facts recorded by the two authorities below on the

basis of evidence adduced which was sufficient to discharge the onus as well as burden caused upon her by proving the identity of donors, their credit worthiness as well as genuineness of the gifts. It has been established that the assets of Sh.Ashok Jain as on 31.03.2003 including movable/immovable assets were of Rs.1.25 crores, whereas the liability owned by Sh.Ashok Jain was only Rs.11.88 lacs less Rs.10.78 lacs. Keeping the assets owned by Sh.Ashok Jain we are of the considered view that he had the capacity to make gifts in question. Therefore, we do not find any force in the arguments of the learned ASG that Sh.Ashok Jain had no capacity to do the same.

Further in the case of Mrs.Veena Jain, details of assets proved on record show that the total assets of Mrs. Veena Jain were of Rs.1.34 crores & the liabilities were only of Rs.2.11 lacs. We have perused the assets owned by Mrs.Veena Jain and found that she had capacity to borrow first, and then to gift as per her desire. The capacity does not mean what you are earning monthly or annually. The capacity includes how much total assets a person own. So is the case of Mrs.Veena Jain here, she had an asset of Rs.1.34 crores,

definitely could borrow Rs.20 or 25 lacs easily. Second plea regarding Mrs.Veena Jain is that if a person buys any property for her personal use, she will definitely not make the gift for the same. Here on perusal of the record it is revealed that she has stated before the Department that the assessee is a Rakhi sister of her husband and she is great admirer of the assessee because she is working for the upliftment of the down trodden and poor persons of the society. Sometimes a person does not have to be related to a particular trust or a charitable institution, but in their view that trust or institution is doing a great service to the particular section of the society. Therefore, we do not find any force in the arguments advanced by the learned counsel for the Revenue. Further, it is also not necessary that a person should be a habitual donor. It depends from person to person, thinking to thinking and situation to situation. Sometimes a person keeps donating throughout their life and sometimes he donates once and sometimes during the last stage of his life. Therefore, we do not agree with the arguments advanced by the learned counsel for the Revenue.

Learned counsel for the Assessee has vehemently argued that the Revenue has relied upon the judgments cited above are not relevant in the facts and circumstances of the instant case. In the case of ***Sajan Dass and Sons vs. Commissioner of Income-Tax*** (Supra), the donor was not found related to the assessee, however, in the present case the donors have 15 years old relationship with the assessee as has been proved by the evidence, affidavits on oath and photographs. Therefore, the aforesaid case does not held the Revenue Department.

Another case of ***Anil Kumar*** (Supra) has also no relevance because in the said case the assessee was asked to explain the capacity and genuineness of the donor, however, the assessee did not appear before the Department. But, in the present case the assessee herself submitted all the relevant documents before the Revenue . That apart, all the donors appeared, confirmed and filed affidavits on oath. Therefore, this case of Anil Kumar is not relevant in the present situation.

So is the case of ***Rajeev Tandon*** (Supra) wherein, the donor was complete stranger, but in the present case all the donors have

15 years old relationship with the assessee as has been proved by evidence, documents and their statements.

Further, in the case of ***B.L.Passi*** (Supra) the noticee never appeared before the Department, however in the present case the donors have appeared and made statements on oath. Therefore, this case is also of no help to the Revenue.

On the perusal of the afore-cited judgments by the Revenue, we are also of the view that none is supporting the arguments advanced by the Revenue as all are on the different facts and circumstances.

All the donors appeared before the Department, submitted material including affidavits on oath, confirms the gifts made, established their old relations with the assessee and proved their capacity to make the gifts. We have noted that in earlier years also they had made gifts to the assessee and her family members, which were accepted by the Revenue. We have also noted that two gifts made by Sh.Ajay Aggarwal and Sh.O.P.Khadaria, Advocate were of Rs.10 lacs and Rs.1 lac respectively have been accepted by the

Department. The donors are persons of sufficient means. The assessee has fully discharged her legal obligations by disclosing the identity of all the donors. Further, donors have proved their genuineness and capacity to make a gift. All assessee as well as the donors had appeared before the Registrar and the gifts are duly registered. All gifts are absolute and without any lien of anyone. There is no evidence on record to prove that the assessee has favoured the donor in any manner whatsoever by acquiring the gifts in question. The capacity of any person does not mean how much they earn monthly or annually, but the term capacity has vided term and that can be perceived by how wealthy he is. All the formalities, as per law are met by the assessee and donors as well. All the donors have admitted that they are great admirer of the assessee as she is working for the upliftment of poor people.

The issue raised by the Revenue in the instant appeal cannot be said to involve any question of law, much less a substantial question of law. A question of fact becomes a question of law, if the finding is either without any evidence or material, or if the

finding is contrary to the evidence, or is perverse, as was held in the case of *Mahavir Woolen Mills* (Supra).

In the light of above facts and circumstances, we are of the considered view that no substantial question of law arises from the instant appeal. Therefore, we confirm the judgment passed by the ITAT and dismiss the instant appeal of the Revenue with no order as to costs.

SURESH KAIT, J

A.K.SIKRI, J

August 03rd , 2011
'nks/mr/mk'