

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

% Reserved on: 21st September, 2011
Date of decision: 31st October, 2011

+ **ITA NO.2072/2010**

COMMISSIONER OF INCOME TAXAppellant
Through: Ms. Suruchii Aggarwal, Advocate.

-versus-

HARNARAINRespondent
Through: None.

CORAM:
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

1. Whether reporters of local papers may be allowed to see the Judgment? No.
2. To be referred to the Reporter or not? No.
3. Whether the Judgment should be reported in the Digest? Yes.

SIDDHARTH MRIDUL, J.

1. The present Appeal filed by the Department under Section 260A of the Income Tax Act, 1962 (hereinafter referred to as the 'Act') was admitted on the following substantial question of law:-

“Whether the ITAT could have affirmed the order of the CIT(A) in deleting the penalty when the assessee despite filing return of income after date of search that is 18.6.2003 did not offer additional income till after questionnaire was served on him, when it was imminent that the assessee had no choice but to furnish details regarding the gift received?”

2. Despite service of notice none appeared on behalf of the Respondent/Assessee and the matter has been determined in their absence.

3. The facts as are necessary for the disposal of the present Appeal are that:-

- (a) A search and seizure action under Section 132 of the Act was conducted at the residential premises of the Assessee on 18th June, 2003.
- (b) The Assessee filed his return of income for the assessment year 2004-05 on 28th October, 2004.
- (c) Since a search was initiated under Section 132, a notice under Sections 143(2) and 142(1) along with detailed questionnaire was issued on 10th October, 2005. In response to this notice the Assessee filed details in response to the above questionnaire. The Assessee further offered an amount of ₹89,57,106/- received on account of gift for taxation vide letter dated 2nd December, 2005.

- (d) After examination of seized material pertaining to the Assessee and the reply filed by the authorized representative of the Assessee, income of the Assessee was assessed at ₹1,15,49,232/-.
- (e) It is pertinent to mention herein that the Assessee had filed a confirmation with regard to the receipt of gift. The Assessee had further filed copies of the gift deed and other related papers to support the gift. The Assessee had also offered the amount voluntarily without there being any detection by the Department. However, the Assessing Officer(AO) rejected the explanation of the Assessee and directed that since the Assessee has concealed particulars of income and furnished inaccurate particulars of income, penalty under Section 271(1)(c) was levied.
- (f) The Assessee carried the matter in appeal before the Commissioner of Income Tax (Appeals)[CIT(A)]. After making a detailed and elaborate discussion as to the facts of the case and the legal decisions

referred to in this connection by the Assessee before it, the CIT(A) deleted the penalty.

- (g) The Department carried the matter further in appeal before the Income Tax Appellate Tribunal (ITAT), which upheld the order of the CIT(A) and dismissed the appeal filed by the Revenue. The Revenue is in Appeal against that order of the ITAT date 22nd December, 2009 before us.

4. It was submitted on behalf of Ms. Suruchii Aggarwal, learned Counsel for the Revenue, that when the Assessee offered the gift for taxation, it was clearly established that the Assessee did not disclose his true income in the return of income filed by him and, therefore, the penalty had been correctly levied by the AO and, consequently, the order dated 28th February, 2007 passed by the CIT(A) and the impugned order dated 22nd December, 2009 passed by the ITAT deserved to be interfered with.

5. At this juncture, it would be appropriate and relevant to extract the submissions made on behalf of the Assessee before the CIT(A) as well as the ITAT:-

“Therefore, keeping in view of the fact that:

1. the appellant had submitted the sufficient evidence regarding the genuineness of receipt of gift.

2. the gift amount is being offered for taxation without accepting that the gift amount was his concealed income.

3. the appellant had offered the gift amount as income for taxation purpose at the initial stage of assessment proceedings.

4. the appellant had surrendered additional income before AO could detect the concealment of income.

5. the appellant had surrendered the amount on the condition that penalty would not be levied and the addition was being made on the basis of such surrender.

6. the appellant has surrendered the amount of gift merely for avoiding further litigation without accepting that he had deliberately furnished inaccurate particulars or concealed any income.

7. there may be a ground for making addition in the income of the assessee but that alone will not be enough for imposing penalty in absence of any material brought out by the Department to prove that assessee had willfully or due to fraud had concealed the income.

8. there was no circumstances to lead to a reasonable and positive inference that the assessee’s case – that the gift received was false.

9. the facts and circumstances are equally consistent with the hypothesis that it could have been genuine gift. Therefore, even taking recourse to Explanation, same circumstances or state of evidence on which the gift were treated as income, could not by themselves justify imposition of

penalty without anything more on record produced by the assessee or the Department.

10. there is no clinching evidence as regards to the concealment.

11. there was no fraud or gross or willful neglect on the part of the assessee in returning the correct income and that the initial burden cast on the assessee stood discharged. Moreover, the department in penalty proceedings made no effort to enquire the status of surrendered Gift."

6. It is also necessary at this stage to note the observation of the AO while making the assessment under Section 143(3) of the Act. The AO's assessment order under Section 143(3) reads as under:

"Assessee filed return of income on 28.10.2004 for the assessment year 2004-05 declaring total income of Rs. 25,92,126/-. Since a search was initiated u/s 132 of the Act on 18.06.2003 at his residence, a notice u/s 143(2) was issued on 07.10.2005. A detailed questionnaire alongwith notice u/s 142(1) of the Income Tax Act, 1961 was issued on 10.10.2005. Shri S.C. Verma, C.A. / A.R. of the assessee appeared before the undersigned from time to time and filed details in response to above questionnaire. He has further offered an amount of Rs. 89,57,106/- received on account of gift for taxation vide letter dated 02.12.2005. He has also filed a confirmation of the assessee in this regard. After the examination of seized materials pertaining to the assessee and reply filed by the A.R. of the assessee, income of the assessee is assessed at Rs.1,15,49,232/-. Since the assessee has concealed the particulars of income and furnished inaccurate particulars of income, penalty

proceedings u/s 271(1)(c) of the Income Tax Act are initiated."

7. The ITAT in the impugned order considered it proper to extract and approve the order of the CIT(A) as under:

"11. After considering all the facts and position of law, the CIT(A) deleted the penalty by passing a speaking and reasoned order. We, therefore, find it proper to extract the order of the CIT(A) as under:-

"I have considered facts of the case and arguments taken by Sh. Verma including various judicial decisions relied upon by him quite carefully. It is true that the additional income which was offered was not a part of return of income filed, to begin with for the Asstt. Year under consideration. However, it is further seen that during the course of research not a single evidence regarding non-genuineness of gift amount which is offered as additional income was found. On perusal of penalty order, it is seen that there is no mention of any inquiry/investigation/information that the Investigation Wing or with the assessing officer regarding the fact that whether the aforesaid gifts were not genuine one which were offered as additional income vide letter dated 02.12.2005. With this background, I have also gone through and copy of questionnaire dt.10.10.2005 in which Assessing Officer has raised simply query at query no. 10 in the questionnaire for the Asst. Year. "Had you taken/given any loan/gift during the F.Y. under consideration? If yes, please furnish details." This letter was received by the appellant on 12.10.2005 and thereafter, vide letter dt.2.12.2005, the appellant had furnished the details of gift received in the present year from NRIs and had also furnished the copies of gift deed along with reply. Besides this, in the same letter, the assessee made it clear that through

the aforesaid amount was received by the appellant as a gift but to buy the peace and to avoid any dispute, the appellant was offering the amount of gift received from NRIs for the present A.Y. as taxable income subject to the condition that no penalty action shall be initiated against the assessee under any section of I.T. Act. In the same letter, it was further made clear by the appellant that the gift under consideration as shown to have been received were genuine one and related document of gift were annexed along with the letter. From this it is clear that the Assessing Officer was not having any piece of information regarding the fact that the gifts were not genuine one and these were part of total income of the appellant. Even in the questionnaire, in the most general way it was inquired to furnish the details of any gift/loan if received during the relevant F.Y. It makes quite clear that this fact was not a detection by the Assessing Officer that the gifts were not genuine but it was the appellant who has offered without any specific inquiry regarding such gift by the Assessing Officer that the amount of gift can be considered as income though the relevant gift deed from NRIs from whom the gift claim to have been received were also filed along with the letter dt. 2.12.2005. It was further made clear in the aforesaid letter dt. 2.12.2005 that the said amount of gift has been offered as additional income without detection of the same by Assessing Officer. In this respect, the decision given by Hon'ble Supreme Court in the case of K.C. Builders vs. ACIT (2004) 265 ITR 562 and observations therein are quite relevant in which Hon'ble Supreme Court has observed that in the word "concealment" that there has been a deliberate act on the part of the assessee and the concealment inherently carries with it, the element of mens rea. Hon'ble Court has further observed that mere omission from return, any item of receipt does neither amount to concealment nor deliberate

furnishing inaccurate particulars of income unless and until there is some evidence to show or some circumstance found from which it can be gathered that the omission was attributable to and intention or desire on the part of the assessee to hide or conceal the income so as to avoid imposition of tax there upon. Hon'ble Supreme Court in the same judgment has further observed that a penalty u/s. 271(1)(c) may be imposed when it has to be proved that the assessee has consciously made the concealment or furnished inaccurate particulars of income. In the background of aforesaid judgment, the facts of present case are quite matching. Here also, there is no evidence to show that the omission to offer additional income on account of gift received was attributable to any intention or desire on the part of the assessee to hide or conceal the income. Hon'ble M.P. High Court also in the case of CIT vs. S.V. Electricals P. Ltd. (155 Taxman 158) has given a finding that where the assessee surrenders its full income though at a later has given a finding that where the assessee surrenders it full income though at a later stage, there was no question of any concealment on its part and no penalty, u/s. 271(1)(c) was levied. Hon'ble Jharkhand High Court in the case of CIT vs. Ashim Kumar Aggarwal (153 Taxman 226) has given a finding in that particular case that omission from return of income did not amount to concealment. In that particular case during the course of search cash balance was found and explanation furnished was rejected in the assessment order and thereafter, the Assessing Officer has also imposed the penalty then Hon'ble Jharkhand High Court has observed that even if it was presumed that particulars of income had not been properly disclosed by the assessee, then also, mere omission of the same form return of income did not amount to concealment. Contrary to this, in the present case, the affidavit from the donors were

furnished, there was no show cause seeking specific information regarding genuineness of specific gifts under consideration and it was the appellant who along with furnishing necessary evidence and explanation for genuineness of the gift had offered on his own the amount of gifts from NRIs as additional income for both the A.Ys. under consideration. Hon'ble Kolkata High Court in the case CIT vs. Kusum Products Ltd. (203 ITR 672) had held that without through revised return, the appellant has offered additional amount of cash credit though to begin with the confirmatory letters from the lenders were filed and the lenders subsequently denied the fact the fact of giving loan. However, in the present case, the donor has not denied the fact of giving gift. Similarly, Hon'ble Patna High Court in the case of CIT vs. Bimla Devi Sharma (192 ITR 482) has observed that mere rejection of assessee's explanation did not amount of concealment. In that particular, the explanation furnished regarding cash credit was not accepted by the AO. In the present case also, the explanation and evidence regarding fact of receiving the genuine gift were furnished and over and above, the same was offered as additional income. Further, Hon'ble Delhi ITAT in the case of Ram Commercial Enterprises Ltd. vs. ACTI (52 ITD 147) has given a finding that the assessee had substantiate its explanation with evidence regarding cash credit u/s. 68 when he filed confirmation and affidavit regarding source of money then penalty in that case u/s. 271(1)(c) was held to be not justified. Quite similarly in the present case, the confirmation and affidavit regarding genuineness of the gifts were furnished which means that the assessee has substantiated its explanation that evidence and, therefore, the facts of present case are also matching with the aforesaid decision.

6. Considering the aforesaid judicial analysis of various decisions, including various decisions

quoted by Sh.Verma, in my considered view, the AO was not justified in imposing the penalty u/s. 271(1)(c) of I.T. Act of Rs.29,55,845/- for the A.Y. 2004-05 and, therefore the same is hereby cancelled by allowing relevant ground of appeal. Here it shall be out of place to mention that the decision given by the Hon'ble Supreme Court in the case of K.P. Madhusudan is not applicable in the facts of the case rather the decision given by the Hon'ble Supreme Court in the case of K.C. Builders is squarely applicable to which is discussed and analyzed by me in the earlier part of this appellate order."

8. In the present case it is observed that the AO included the amount of gift in the total income of the Assessee merely on the basis of the Assessee's declaration. Also, the AO did not point out or refer to any evidence or material to show and establish that the gift received by the Assessee was either bogus or sham. Admittedly, the Assessee had offered the gift for taxation voluntarily and it was not the case of the Revenue that the same was done after its detection by the Department. Further, it was also not the case of the Revenue that material was found during the search indicating that the gift transaction was an arranged affair to accommodate the Assessee's unaccounted money. In this respect it is evident that the ITAT correctly came to the conclusion that the AO did not possess any piece of information that the gift was not genuine and was part of the undisclosed

income of the Assessee. In the questionnaire dated 10th October, 2005 the AO had simply raised a query for the relevant assessment year in the following manner:- *“Had you taken/given any loan/gift during the F.Y. under consideration? If yes, please furnish details”*. In response to this query the Assessee had furnished the details of gift received in the relevant year from NRI’s and had also furnished the copy of gift deed along with reply. Apart from this, simultaneously the Assessee made it clear that aforesaid amount was received by the Assessee as gift, but to buy peace and to avoid any dispute the Assessee was offering the amount of gift as taxable income subject to the condition that no penalty action should be initiated against the Assessee. Furthermore, it was made clear by the Assessee that the gift under consideration was a genuine one and the related documents of gift were sent to the AO. Thus it was quite clear, that this entire transaction was not detection of the AO that the gift was not genuine, and that the Assessee had offered the amount without any specific enquiry regarding such gift by the AO.

9. In *K.C. Builders v. ACIT*, (2004) 265 ITR 562, the Hon'ble Supreme Court observed that word 'concealment' requires there to be a deliberate act on the part of the assessee, and the concealment inherently carries with it the element of *mens rea*. It was further observed that a mere omission from return of any item of receipt does neither amount to concealment nor deliberate furnishing of inaccurate particulars of income unless and until there is some evidence to show or some circumstance found from which it can be gathered that the omission was attributable to an intention or desire on the part of the assessee to hide or conceal the income so as to avoid imposition of tax thereupon. It was also held by the Supreme Court that before a penalty under Section 271(1)(c) is imposed it has to be established that the assessee had consciously made the concealment or furnished inaccurate particulars of income.

10. It is also observed that the CIT(A) had relied on the decision of the Madhya Pradesh High Court and the Jharkhand High Court in the case of *CIT v. S.V. Electricals P. Ltd.* (155 Taxman 158) and *CIT v. Ashim Kumar Agarwal* (153 Taxman 226) respectively where it was held that where the assessee

surrenders his full income, though at a later stage, there was no question of any concealment on his part and consequently no penalty under Section 271(1)(c) was leviable, and that a omission from return of income did not amount to concealment.

11. In view of the discussion above and the cited decisions, surrender of the amount by the Assessee after receipt of the questionnaire could not lead to an inference that it was not voluntary, in the absence of any material on record to suggest that it was bogus or untrue. It is further evident that there was neither any detection nor any information in the possession of the Revenue which might lead to a conclusion that there was a detection by the Revenue of concealment. Accordingly, the question of law framed is answered against the Revenue and in favour of the Assessee. The Appeal is dismissed. No costs.

SIDDHARTH MRIDUL, J.

ACTING CHIEF JUSTICE

OCTOBER 31, 2011

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