IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 13.10.2015

+ **ITA 59/2003**

COMMISSIONER OF INCOME TAX, DELHI .....Appellant

versus

SUDHIR BUDHRAJA ..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Dileep Shivpuri, Senior Standing Counsel with Mr Sanjay Kumar, Junior Standing Counsel.

For the Respondent : Dr Rakesh Gupta with Ms Poonam Ahuja, Mr Somil Agarwal, Mr Rohit Kumar Gupta.

CORAM:
DR. JUSTICE S.MURALIDHAR
MR. JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. This is the Revenue's appeal under Section 260A of the Income Tax Act, 1961 (hereafter the 'Act'), against an order dated 30th July, 2002 passed by the Income Tax Appellate Tribunal (hereafter 'Tribunal') in ITA No. 1124/Del/2001. The aforesaid appeal (ITA No. 1124/Del/2001) was preferred by the Assessee impugning an order dated 12th March, 2001 passed by the Commissioner Income Tax (Appeals) [hereafter 'CIT(A)'] rejecting the Assessee's appeal against an assessment order dated 27th

March, 1998 passed by the Assessing Officer (hereafter 'AO') in respect of Assessment Year 1995-96.

2. The principal controversy involved in the present appeal relates to an addition of ₹1,87,38,100/- made by the AO to the taxable income of the Assessee under Sections 68 and 69 of the Act. This addition was made as the AO held that the Assessee had been unable to establish his claim that a sum of US $ 6 lacs received by him was a gift. The Assessee's appeal to the CIT(A) against the said decision was also rejected. On a further appeal, the Tribunal held that the Assessee had established the source of the gift as well as the creditworthiness of the donor and, accordingly, deleted the addition. Aggrieved by the aforesaid decision, the Revenue has preferred the present appeal.

3. The present appeal was admitted on 5th March, 2004 and the following questions of law were framed for determination by the Court:-

> "Whether ITAT was correct in law in deleting the addition of US $ 6 lacs (Rs.1,87,38,100/-) made by the A.O. U/s. 68 and 69 of the Income Tax Act ?
>
> Whether order passed by the ITAT is perverse in laws and on facts when ITAT had observed that the assessee had proved the capacity of the donor?"

4. The aforesaid questions have to be considered in the backdrop of the following facts:-

4.1 The Assessee is a Chartered Accountant. The Assessee filed a return of income for the Assessment Year (AY) 1995-96 on 31st October, 1995 along with the requisite audit report under Section 44AD of the Act, returning an income of ₹2,59,300/-.

4.2 The return filed by the Assessee indicated gross professional receipts of ₹18,95,901/- out of which ₹18,05,400/- was received as consultancy fees from a US based company – M/s Blackfin Development Company Inc., USA (hereafter referred to as 'Blackfin'). In addition the Assessee had also received US$ 6,00,000/- (US dollars Six hundred thousand) from Blackfin. It was the Assessee's case that Blackfin had remitted the amount at the instance of Sh. Jaspal (hereafter the 'donor') and insofar as the Assessee was concerned, it was a gift from Sh. Jaspal.

4.3 Out of the aforesaid sum of US$ 6,00,000/- a sum of US$ 5,80,000/- had been credited to the Assessee's savings account on 12th May, 1994. The balance US$ 20,000 was retained in an Exchange Earner's Foreign Currency Account (hereafter 'EEFC A/C'), of which US$ 10,000 was

subsequently withdrawn in the financial year 1994-95 and the remaining US$ 10,000 was withdrawn during the relevant financial year. During the assessment proceedings on 3rd March, 1997, the donor appeared before the AO and was examined on oath. The donor affirmed that he and the Assessee had been close friends since 1971 and the remittance made was as a gift from him out of love and affection for the Assessee. He also stated that he had a business turnover of US$ 3-4 million.

4.4 The Assessee also produced a letter dated 2nd April, 1994 written by the donor to the Assessee wherein he mentioned that the Assessee had stood like a pillar in his times of crisis and, therefore, as a token of love, the donor had arranged to send the said funds to the Assessee. In addition to the above evidence, the Assessee was also examined on oath on 14th March, 1997 and 28th May, 1997. Thereafter, the Income Tax Authorities conducted a survey under Section 133A on the Assessee's business premises.

4.5 The AO also sent a questionnaire to the donor, *inter alia*, asking him to provide the following details:-

"(i) Details of all the past and present business activities alongwith annual turnover of such activities.

(ii) Tax statements for the business outside India in places like Dubai, China, Russia, Africa, USC etc.

(iii) Statements of assets and liabilities for the year 1992 to 1996 giving details of properties, stocks and other assets acquired during the above period, alongwith cost of such assets and date of purchase.

(iv) Documentary evidence in support of the claim that the annual business turnover was 3-4 millions as claimed in the statement of Shri Jaspal recorded on 3.3.97.

(v) Copies of bank statements of bank accounts in India and abroad.

(vi) Description of the nature of business association with Blackfin Development Co. giving details of the goods and/or services in which Shri Jaspal and Blackfin Development together.

(vii) Copy of business agreement with Blackfin.

(viii) Evidence for share of profit from business association with Blackfin and dealings in Africa.

(ix) To produce evidence to show that Shri Jaspal was actually associated with M/s Blackfin and further that the money remitted by Blackfin to Shri Budhiraja actually belonged to Shri Jaspal and Blackfin remitted this amount to Jaspal. In this context, Shri Jaspal was also requested to give a note on his acts of involvement in the business of Blackfin and a copy of the transactions of business done together, the profit sharing agreement, the profit computation from such business and details as to how the money matters were settled exactly."

4.6 The donor responded to the above questionnaire by a letter dated 25th March, 1997, *inter alia,* stating that he had offered all explanations to the queries raised during the course of the recording of his statement on 3rd March, 1997, which included explanations regarding his capacity and capability to make the gift as also the source from which such gift was made. He did not provide any details regarding his foreign assets, businesses and other personal matters as according to him, the same did not have a direct bearing on the assessment of the Assessee's income. However, on 27th March, 1997, the donor faxed a copy of the confirmation certificate from Blackfin which was typed on the letter head of Blackfin and signed by Art De Pue of Blackfin before a Notary Public of the State of Texas, USA on 26th March, 1997.

4.7 The aforesaid certificate confirmed that the donor was a business associate of Blackfin since 1993, that in accordance with an arrangement, he had to receive a certain amount in June 1994 and that on his instructions, a sum of US$ 6,00,000/- was remitted by Blackfin on 8th May, 1994 through its bank account with National Bank, USA to the Citibank Account of the Assessee in India.

4.8 During the survey conducted on the premises of the Assessee, the Income Tax Authorities, *inter alia,* found a ledger which recorded a credit of ₹3,32,412/- on 5th September, 1995 under the Account "Fee-Income". This amount represented the withdrawal of US$ 10,000 by the Assessee from the EEFC A/c.

4.9 The Assessee was called upon to produce the agreement with Blackfin pursuant to which the Assessee had been engaged to provide consultancy services. In response thereto, the Assessee, during the course of hearing held on 24th February, 1998, produced a copy of the agreement dated 4th June, 1994 with Blackfin, to provide consultancy services in terms of which the Assessee was to be remunerated at the rate of US$ 20,000 per month inclusive of reimbursement of any out of pocket expenses incurred on behalf of Blackfin. The Assessee also produced some correspondence with Blackfin including a letter dated 4th October, 1994 issued by Blackfin terminating the agreement with the Assessee after a period of 90 days.

4.10 The AO passed an assessment order dated 27th March, 1998, *inter alia*, holding that although the entity of the donor had been established, the Assessee had failed to establish the capacity of the donor to make the gift or

the genuineness of the transaction. The AO drew an adverse inference from the fact that the Assessee had not been able to persuade the donor to produce the documentary details as required by the AO. The AO noted that there were certain discrepancies in the statements of the donor and the Assessee, inasmuch as the donor did not know the date of the Assessee's marriage and there were also some inaccuracies in the names of the children of the Assessee as mentioned by the donor. The AO held that the Assessee had failed to substantiate his claim of having received the gift and added the amount of the aforesaid gift as income in the hands of the Assessee.

4.11 The Assessee preferred an appeal before the CIT(A) and also sought to produce additional evidence in the form of a statement of accounts of the donor as certified by Blackfin. The statement of accounts indicated that the sum of US$ 6,00,000/- which was remitted to the Assessee had been reduced from the account of the donor maintained by Blackfin. However, the CIT(A) did not interfere with the assessment made by the AO and, by an order dated 12th March, 2001, rejected the Assessee's appeal.

4.12 The Assessee appealed before the Tribunal against the order dated 12th March, 2001 passed by the CIT(A) rejecting the Assessee's appeal, which was allowed by the Tribunal after considering the facts and circumstances of the case.

5. In order for the Assessee to sustain its claim that the receipt in question was a gift, the Assessee had to explain the source of the receipt as well as establish the genuineness of the transaction. The Tribunal held that the Assessee had discharged its burden as to the identity of the source as well as the capacity of the donor. The Tribunal's findings are, essentially, findings of fact and there is little scope to interfere with the same unless it is concluded that the findings are perverse in law and/or are not based on any material. In ***CIT v. Sunita Vachani***: **(1990) 184 ITR 121 (Del)** this court held that :

> "in our opinion, the Tribunal had, on merits, come to the conclusion that the 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 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 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."

Thus, it is essential to consider whether the Tribunal's decision on facts is based on any cogent material and is otherwise sustainable in law.

6. In order to address this issue, it is necessary to examine the material that persuaded the Tribunal to accept the Assessee's claim that the amount of US$ 6,00,000/- (US Dollars Six hundred thousand) received by the Assessee was indeed a gift and not income received from abroad by the Assessee.

7. There is no dispute that the identity of the donor has been established. The donor had appeared before the AO and recorded his statement on oath. He had affirmed (i) that he had gifted the amount in question to the Assessee out of love and affection; (ii) that the amount had been remitted by Blackfin at his instance; (iii) that he had known the Assessee since 1971 and was close to the Assessee; (iv) that his average annual income was 3-4 million dollars (equivalent to ₹15 crores approximately); and the donor had also answered all other questions that were put to him.

8. In addition, the Assessee had recorded his statement affirming that he had received the gift from the donor. His statement also clearly indicated that he and the donor were friends since long and the donor was a highly successful businessman.

9. The Assessee had produced a letter dated 2nd April, 1994 wherein the donor had mentioned that the Assessee had stood by him in his time of crisis and, therefore, he was arranging some funds as a token of love and affection towards the Assessee.

10. In addition to the above material, the Assessee had also produced a copy of the notarised certificate issued by Blackfin confirming that the donor and Blackfin were associated since 1993 and the donor was to receive monies from Blackfin and that a sum of US$ 6,00,000/- had been remitted by Blackfin to the Assessee through its bank account on the instructions of the donor.

11. In addition to the above material, the Tribunal also took note of the copy of the account of the donor with Blackfin that was produced which indicated that the share of the donor before 30th June, 1993 was US$ 12,50,300 and during the ensuing year the sum had increased by

US$ 4,34,600 and had decreased by US$ 6,00,000/- (US Dollars six hundred thousand) - the amount remitted to the Assessee as gift - as well as other amounts, which resulted in the amount lying to the credit of the donor to be reduced to US$ 4,99,400 as on 30th June, 1994. The Tribunal also noted that the Assessee had submitted a copy of a rent deed which indicated that the donor had leased Hotel Sunrock in Dubai from one Mr Abdul Rehman Ahmad at a rent of 23 lac Dhirams (equivalent to ₹2.25 crores).

12. According to the Tribunal the above material was sufficient for the Assessee to discharge his onus that the amount of US$ 6,00,000 received by him was a gift.

13. The reasons that persuaded the AO to hold otherwise were essentially (i) the discrepancies in the statements of the donor and the Assessee; (ii) the failure on the part of the donor to respond to the questionnaire and provide details as to his businesses, bank account, business agreements with Blackfin etc; (iii) the fact that the Assessee had received ₹18,05,400/- amount as consultancy fees from Blackfin and this indicated a business connection between Blackfin and the Assessee; (iv) that US$ 10,000 withdrawn by the Assessee from the EEFC Account

(which was a part of the alleged gift) had been credited in a ledger as "Fee Income".

14. Insofar as the issue regarding discrepancy in the statement of the donor is concerned, we find that the same is not material in determining the question of the genuineness of the gifts or the capacity of the donor. The AO had found that there were some inaccuracies in the statements made by the donor inasmuch as he had not accurately named the children of the Assessee; the donor had described the family of the Assessee as *"His wife Smt. Arti, daughter Shriya, Shom (Shirom). They stay with Sudhir's parents at New Rajinder Nagar, New Delhi."* but, the Assessee had stated that he had three children and his son master Shirom was a minor. Further, the donor had stated that he and the Assessee knew each other since 1971 and had done their CA together; but, the Assessee had affirmed that he and the donor had done their graduation and CA together during the period 1967 to 1975. In addition, the AO also found certain other minor discrepancies. The Tribunal had noted the above and did not consider the discrepancies to be material. We do not find any infirmity with this view as it is apparent that the discrepancies in the statement are not significant.

15. Insofar as the failure on the part of the donor to provide his business details, details of his assets, bank accounts and his agreements with his associates and other information is concerned; clearly, a donor could not be expected to share such details, which understandably may be considered as confidential. The donor had, therefore, responded by saying that the details sought for did not have a bearing on the assessment proceedings. In order for the Assessee to discharge its burden, he had to show that the donor was a person of means and that such gift has been made out of love and affection. The Assessee had produced the donor who answered all questions put to him. The Assessee as well as the donor had sworn statements indicating their close relationship going back several years. The certificate dated 26th March, 1997 issued by Blackfin and the statement of account of the donor in the books of Blackfin clearly indicated that the donor had access to the funds necessary for making the gift in question. The rent deed relating to a hotel in Dubai also indicated that the donor was a person of means. The donor himself had affirmed that his annual income was 3-4 million dollars. Plainly, the above material could not be ignored by the AO. The donor himself was under no obligation to subject himself to the inquisition by the AO. The Tribunal had considered the above and

had concluded that the Assessee had discharged the burden. The AO on the other hand had not identified any material that was available with the Assessee, or should have been available with the Assessee, and had been withheld by him. In our opinion, the Tribunal rightly considered the issue in its correct perspective while holding that the Assessee had discharged his burden.

16. Insofar as the professional consultancy fee received from Blackfin is concerned, the Assessee had produced a copy of the agreement as well as the letter of termination. The agreement itself was in force for a period of six months and in terms of the agreement, the Assessee was to receive a sum of US$ 1,20,000 against, which the Assessee had received a sum of US$ 1,16,833. Whilst the receipt of the consultation fee indicated that the Assessee had rendered certain services, the Tribunal rejected the conclusion that this could cast a doubt on the nature of the amount received by the Assessee as a gift. The agreement was only for a period of six months and the Assessee had affirmed that except for the said arrangement it had no connection with Blackfin. Further the discrepancy in the amount received by the Assessee as consultancy fees and the amount receivable in terms of

the agreement could not possibly be a ground for doubting the amount of gift as consultancy fees.

17. The alleged ledger showing withdrawal of US$ 10,000 as fee would also be considered as insufficient for treating the gift in question as income.

18. The Tribunal had evaluated the material and evidence on record and had concluded that the Assessee had discharged its burden of justifying the receipt in question as gift. On the other hand that the AO had no material or had not collected any evidence to reject the claim made by the Assessee. Apart from doubting and questioning the material produced by the Assessee, the AO had not produced any positive evidence which could lead to the inference that the amount received by the Assessee was not gift.

19. In ***Umacharan Shaw & Bros v. CIT***: **(1959) 37 ITR 271 (SC)**, the Income Tax Officer did not consider the firm in question as being genuine and rejected the Assessee's claim for registration of the said firm. The Appellate Assistant Commissioner upheld the decision of the ITO and rejected the Assessee's appeal. Assessee's further appeal to the Tribunal met the same fate. The Supreme Court set aside the decision of the Tribunal and directed registration of the firm in question. The Court held that there

was no material on which the Income-tax Officer could come to the conclusion that the firm was not genuine and further observed "*the conclusion is the result of suspicion which cannot take the place of proof in these matters"*. In the present case too, the AO had rejected the evidence produced and based his conclusion only on surmises; there was hardly any material for him to conclude that the amount in question was not a gift.

20. In the aforesaid circumstances, we are unable to accept that there is an infirmity in the order passed by the Tribunal. The findings of the Tribunal are based on sufficient material and cannot be stated to be perverse. In view of the aforesaid, the questions of law are answered against the Revenue and in favour of the Assessee. The appeal is, accordingly, dismissed.

VIBHU BAKHRU, J

S. MURALIDHAR, J

OCTOBER 13, 2015
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