

**Ganji. K. Chheda Vs. Ito**

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**Court :** Mumbai

**Decided On :** Dec-21-2001

**Reported in :** (2004)87TTJ(Mumbai)257

**Appeal No. :** ITA No. 185/Mum/2000, 21st December, 2001 A.Y. 1995-96

**Appellant :** Ganji. K. Chheda

**Respondent :** ito

**Judgement :**

ORDER

G.C. Gupta, J.M.

This appeal by the assessee for the assessment year 1995-96 is directed against the order of the Commissioner (Appeals).

2. The 1st ground of appeal of the assessee is that the Commissioner (Appeals) erred in enhancing the assessment by adding back a sum of Rs. 50,000 in respect of loan received from Nina Vaidya. We have heard the parties. The learned counsel for the assessee has argued that the identity of the creditor, Smt. Nina Vaidya, is proved on record. The GIR number as AC/Cir. 21/Not allotted was furnished and that confirmation letter has been filed and that a sum of Rs. 50,000 has been shown as receipt on 15-7- 1994, by way of cheque. The Commissioner (Appeals) has held that the credit entry of Rs. 50,000 in the name of Smt. Nina Vaidya is not proved and accordingly directed the assessing officer to bring to tax

this amount of Rs. 50,000 under section 68 of the Income Tax Act and the assessment of the appellant was enhanced, The Commissioner (Appeals) has observed that the assessee has failed to furnish the zerox copy of the acknowledgement of Smt. Nina Vaidya of having filed her return of income for the assessment year 1995-96. Enquiries were made with the AC, Circle 21, relating to the filing of return by Smt. Nina Vaidya for the assessment year 1995-96 and the AC, Circle 21, has pointed out that no case in the name of Smt. Nina Vaidya for the assessment year 1995-96 is borne on his registers. The Commissioner (Appeals) has pointed out that in the copy of the Bank account of Smt. Nina Vaidya it is noticed that there is a debit entry of Rs. 25,000 on 19-7- 1994, and there is no entry for the balance sum of Rs. 25,000. In fact, as per this Bank account, Smt. Nina Vaidya had a balance of Rs. 38,304 as on 12-2-1994 and after she took FD of Rs. 35,000 the balance was Rs. 3,304 only. After this, two deposits in cash of Rs. 25,000 and Rs. 10,000 have been made in the month of March from out of which Smt. Nina Vaidya had issued a cheque of Rs. 25,000. The Commissioner (Appeals) observed that the lady-creditor is in receipt of an average salary of around Rs. 3,000 per month and it is not known how this lady could save any amount to advance a huge amount of Rs. 50,000 to the appellant. The Commissioner (Appeals) observed that there is no entry for the amount of Rs. 25,000 although in her confirmation letter she has confirmed that she has advanced as a sum of Rs. 50,000 by cheque on 15-7- 1994 and this shows that the confirmation letter in the name of Smt. Nina Vaidya is a false confirmation and accordingly the assessing officer was directed to tax sum of Rs. 50,000 in the name of Smt. Nina Vaidya under section 68 of the Act.

3. Copy of the Bank account of Smt. Nina Vaidya is filed before us. From the copy of the Bank account, it is not clear that by which Bank entry the amount of Rs. 50,000 was credited in the books of the assessee. The facts being not clear, we consider it appropriate that the matter be set aside to the file of the assessing officer who should verify from the books of the assessee the credit entry of Smt. Nina Vaidya and decide the issue on merits in accordance with the law after providing reasonable opportunity to the assessee. We order accordingly.

4. Ground of appeal No. 2 of the assessee is that the Commissioner (Appeals) erred in confirming addition of Rs. 3 lacs in respect of gift received from Mr. Kirti Soni. The learned counsel argued before us that the assessee had received a gift from Mr. Kirit S. Soni by cheque No. 005331 dated 5-4-1994, drawn on NRE account No. 716479. The appellant had furnished all the relevant details of the gift at the time of assessment before the assessing officer. The assessee further confirmed the gift by filing an affidavit. The assessing officer on the basis of statement of one Mr. Ashok v. Shroff, a constituted attorney of the donor, held that the gift received by the assessee is not a genuine gift. Part of the statement of Mr. Ashok v. Shroff was furnished to the appellant. The appellant was summoned and his statement was recorded under section 131 on 22-9-1998. The learned counsel argued that copies of the pass book of the donor were furnished before the assessing officer. The same mentioned his nature of business as 'goldsmith'. The assessing officer insisted for the production of the donor before him and in response thereto assessee took appropriate steps and wrote letters to the donor. The assessee made a specific request to the assessing officer in his letter dated 28-12-1998, to issue summons to the donor. Details of the donor were also furnished in the letter. The assessee has furnished affidavit of the donor reconfirming the gift in which the donor has categorically mentioned that the gift is a genuine gift and the same is not one of those transactions where Mr. Ashok v. Shroff is involved. Regarding the credibility and genuineness of the donor, the assessee by his letter dated 28-12-1998, brought to the notice of the assessing officer that the assessee and the donor hail from same place and he has already made efforts to produce the donor before him. The assessee made further request to the assessing officer to issue fresh summons to the donor to enforce his attendance before the assessing officer. The assessee in this letter made a specific request to give an opportunity for cross-examination of Mr. Ashok v. Shroff. The learned counsel argued that the amount of gift was given to the assessee for its utilization for charitable purpose of 'Gaushala' at the native place of the donor. The learned counsel argued that Mr. Ashok v. Shroff is a witness of the assessing officer since the assessing officer is relying on the 'statement of Mr. Ashok v. Shroff and, therefore, the assessee is entitled to an opportunity for cross-examination of Mr. Ashok v. Shroff. Mr. Shroff is not a witness of the assessee and

accordingly the assessee could not produce him. The assessee has filed affidavit of the donor before the Commissioner (Appeals) when the donor came to India. The learned counsel argued that the addition has been made only on suspicion and there is no material to doubt the creditworthiness of the donor or genuineness of the gift. The learned counsel has relied upon the series of judgments as under

- (i) Oriental Wire Industries (P) Ltd. v. CIT (1980) 131 rM 688 (Cal)
- (ii) Prakash Textile Agency v. CIT : [1980]121ITR890(Cal)
- (ii) Shankar Industries v. CIT : [1978]114ITR689(Cal)
- (iv) CIT v. Orissa Corpn. (P) Ltd. : [1986]159ITR78(SC)
- (v) Meh ta Parikh & Co.. v. CIT (1956) 30 ITR 181
- (vi) CIT v. Mrs. Sunita Vachani : [1990]184ITR121(Delhi)
- (vii) Kishan Chand Chellaram v. CIT : [1980]125ITR713(SC)
- (viii) CIT v. Baichand H. Gandhi : [1983]141ITR67(Bom)
- (ix) CIT v. Oriental Trading : [1963]49ITR723(Bom)
- (x) CIT v. Sarogi Investment (P) Ltd. (1975) 103 ITR 343
- (xi) CIT v. P.K. Noorjahan : [1999]237ITR570(SC)
- (xii) Smt. Prabhavati Shah v. CIT : [1998]231ITR1(Bom)
- (xiii) CIT v. Jaipur Udyog Ltd.
- (ixv) Electra Jaipur (P) Ltd. v. Income Tax Officer (1988) 26 ITD 236 (Del)
- (xv) Jagbir Singh v. Income Tax Officer (1987) 23 ITD 15 (Del)
- (xvi) Dwarka Prasad v. Income Tax Officer
- (xvii) Abhay Kumar Shroff v. Income Tax Officer

5. The learned departmental Representative has opposed the arguments of the learned counsel of the assessee. The learned departmental Representative argued that the onus is on the assessee to prove the genuineness of the transaction and creditworthiness of the donor. He argued that the assessee has failed to file evidence in support of the transaction of gift and no evidence was furnished before the assessing officer. He argued that in the NRE account of the donor a sum of about Rs. 4 crores was deposited and withdrawn within a short period of two months for which no concrete evidence of the source of the money was given by the assessee. The learned departmental Representative has drawn our attention towards the portions of the statement of Shri Gangji K. Chheda recorded on 22-9-1998, wherein he has undertaken to prove the capacity of the donor and also to furnish evidence in due course. Mr. Shroff has signed the gift cheques and accordingly it must be in the knowledge of Mr. Shroff. The gift has been made in Indian currency and no amount has come from abroad. There is no relationship between the donor and the donee and there was no occasion to make the gift. The learned departmental Representative argued that no part of the gifted amount was utilised for charitable purposes of 'Gaushala' and the amount was effectively used only for the business purposes for four years. He argued that there shall be some channel to bring the money from Dubai to India and in this case no evidence of the same has been furnished before the assessing officer. The donor is admittedly a resident of Dubai. The entire evidence gathered by the assessing officer was made known to the assessee and it does not lie in the mouth of the assessee to say that the principles of natural justice have been violated by not affording an opportunity to the assessee to cross examine Mr. Ashok V. Shroff. He has relied upon the decision of the Hon'ble Delhi High Court K.L. Agarwal v.CIT : [1991]190ITR303(Delhi) .

6. We have considered the rival submissions carefully. The assessee has originally filed the return showing an income of Rs. 28,296 and the return was processed under section 143(1) (a) of the Act, Subsequently, the assessing officer received information from his colleague Income Tax Officer Ward 26(5) when he had come across a similar gift made by Shri Kirit Soni and the Income Tax Officer Ward 26(5) intimated the assessing officer that Mr. Ashok V. Shroff, Power of

Attorney holder of Mr, Kirit Soni had given a statement before the Enforcement Authority wherein Mr. Shroff had admitted that he used to purchase foreign currency from the black market and deposit the same in the NRE account of Mr. Kirit Soni. Mr. Shroff used to issue NRE cheques on this NRE account to various persons after collecting the equivalent amount of cheques in rupees at the premium of 10 per cent to 12 per cent in cash. This information was received by the assessing officer from Income Tax Officer Ward 26(6) and accordingly notice under section 148 was issued to the assessee and the reassessment proceedings were started. In this case Mr. Ashok V. Shroff, the constituted Power of Attorney holder of the donor Shri Kirit Soni, has signed the gift cheques. The assessing officer has called upon the assessee to establish the identity and credit worthiness of the donor and also the existence of love and affection between the donor and the donee and also the genuineness of the gift. The assessing officer had also called upon the assessee to produce the donor alongwith necessary documentary evidence. The assessing officer also recorded the statement of the appellant and in this statement it was brought out by the assessing officer that the assessee was not aware of the business activities of the donor Mr. Kirit Soni, The assessee in turn had never given any gift to Mr. Kirit Soni. It was also brought out by the assessing officer in the statement recorded of the assessee that the assessee did not have any social interaction with the donor Kirit Soni as neither Mr. Soni invited the assessee to his family functions nor the assessee had invited Kirit Soni in his family functions. Thus, there seems to be no element of family relationship between the assessee and the donor. We are also unable to appreciate the version of the assessee that the gift was received by him from Mr. Kirit Soni to construct a 'Gaushala' in his native place for the reason that the assessee has not produced any evidence to show that he had, in fact, undertaken construction of 'Gaushala' for charitable purposes. The fact is that the assessee has been utilizing this amount of gift effectively for his business purposes for four years. The donor is a 'goldsmith' performing the functions of goldsmith in Dubai and in the passport of Mr. Kirit Soni against the column profession 'Goldsmith' has been specifically mentioned. Accordingly, Mr. Kirit Soni is only doing the work of goldsmith and is not a dealer in gold or precious stones. Further it is an admitted fact that the foreign exchange was deposited in cash in the NRE account of the donor, Mr. Kirit

Soni and there is no evidence on record either by the donor Kirit Soni or by the assessee to show that why such huge cash deposits were made in the NRE account and from where and which channel the money came and that why Kirit Soni had not made any declaration before the customs authorities when he entered India bringing in huge foreign currency. All these facts lead to an irresistible conclusion that the statement of Mr. Ashok V. Shroff before the enforcement directorate reflects the true state of affairs relating to the modus operandi employed by him to sell the NRE cheques by collecting Indian rupees and to issue cheques after depositing foreign currency purchased through the illegal channels. This itself demolishes the stand of the appellant regarding the creditworthiness of the donor Mr. Kirit Soni. The assessee-appellant and the donor had not meet each other, nor they have any family relationship. They are said to have met in the office of somebody else. They have not met after the transaction of gift. No channel of money coming from abroad to India has been shown. It is not shown that the donor Mr. Kirit Soni is an assessee in a foreign country.

7. It is well established principle of law that in the case of cash credits the onus is on the assessee to establish the capacity and identity of the creditors as also the genuineness of the transaction. Similar is the position in regard to gift and the degree of proof in the case of gift would still be higher. The assessee has undoubtedly not discharged its onus of proving the genuineness of gift. Mr. Ashok V. Shroff is a constituted attorney of the donor and the donor or his constituted attorney are clearly the witnesses of the assessee. Where the assessee could not produce or examine its witness, it is the assessee whose case shall fail. The initial onus of proving the transaction of gift as genuine, is not proved in this case. We have to consider the human probabilities and there is not a single circumstance in this case which goes in favour of the genuineness of the transaction. On a careful examination of the evidence on record, it is evident that the two important factors, viz., the capacity of the donor to make the gift and the genuineness of the gift, is not proved. Though it is true that the mere fact that the gift has been received from the stranger might not be enough to hold that gift to be non-genuine, yet, the initial onus is on the assessee to establish that the gift received from a stranger is genuine. The donor Mr. Kirit Soni is said to have made the gifts worth about Rs. 4 crores during a short period of two months to unknown persons for no apparent

reasons. The story of the assessee is not believable as it did not accord with the human probabilities. In this case the creditworthiness of the donor and the genuineness of the gift is not proved by the assessee. In this view of the matter, we see no mistake in the order of the Commissioner (Appeals) and accordingly ground of appeal No. 2 of the assessee is dismissed.

8. Ground of appeal No. 3 of the assessee is that the lower authorities erred in charging interest under section 234 BC of the Act. The learned counsel argued that the charging of interest was not ordered in the assessment order and the issue is covered in its favour by the decision of the Supreme Court in CIT v. Ranchi Club Ltd. : [2001]247ITR209(SC) and the Commissioner (Appeals) should have adjudicated the issue and that the assessing officer should have given an opportunity before charging interest. The learned departmental Representative has opposed these arguments.

9. We have considered the rival submissions. In view of the ruling of the Hon'ble Supreme Court the issue is sent back to the assessing officer for fresh determination in accordance with law after affording opportunity to the assessee.

10. In the result, the appeal of the assessee is partly allowed.

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