

ito Vs. Shammi Sachdeva

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Court : Delhi

Decided On : May-05-2004

Reported in : (2004)91TTJ(Del)77

Appeal No. : ITA No. 3836/Del/2000 5 May 2004 A.Y. 1992-93

Appellant : ito

Respondent : Shammi Sachdeva

Advocate for Pet/Ap. : R.K. Khiwani,;for the assessed; Ms. S. Narasamma,;for the Revenue

Judgement :

ORDER

S.K. Yadav, J.M.:

This appeal is preferred by the revenue against the order of the Commissioner (Appeals) on a solitary ground that the Commissioner (Appeals) has erred in deleting the addition of Rs. 2,24,000 on account of bogus gift. The assessed has also filed the cross-objection in which besides supporting the order of the Commissioner (Appeals) he has raised a plea that the Commissioner (Appeals) has not adjudicated ground No. 10 relating to charging of interest of Rs. 21,204 under section 234B of the Income Tax Act, 1961 (hereinafter called the Act).

2. I have heard the rival submissions and carefully perused the orders of the authorities below and documents placed on record and noticed that the return of income filed by the assessed was processed on 13-10-1992. Subsequently, the Department of Enforcement Directorate had conducted investigation in the case of Shri Sameer-Mahajan, who had given gifts to various beneficiaries in India out of his NRI account No. 99 maintained with the New Bank of India, defense Colony, New Delhi. The statement of Shri Mahajan was recorded by the Enforcement Directorate on 29-10-1991, wherein he had admitted that the cheques issued from his above bank account were not gifts, but in consideration, he had received cash to the equivalent amount and premium thereon at 12 per cent from the beneficiaries. The assessed is one of the beneficiaries, who had alleged to have received a gift of Rs. 2,00,000 from Shri Sameer Mahajan. On the basis of the statement of Shri Sameer Mahajan, the assessing officer formed an opinion that the assessed has paid Rs. 2,24,000 in cash to Shri Sameer Mahajan for purchase of the above gifts. He accordingly issued a notice under section 148 on 10-3-1998 with the prior approval of the CIT and in response thereto, the assessed filed return declaring income of Rs. 53,270. In response to the notice under section 143(2) the assessed has filed letter dated 23-4-1999 and 6-10-1999 stating therein that consequent to the statement of Shri Sameer Mahajan, the assessed was also summoned by the Enforcement Directorate to examine the contravention of provisions to section 9 of the FERA Act. Not accepting the Explanationn of the assessed, the FERA department levied a penalty of Rs. 10,000 against which an appeal was filed before the FERA Board and vide its order dated 16-12-1997, the FERA Board has exonerated the assessed by holding that it has not been prima facie established by the authorities that the assessed has made contraventions of the provisions of section 9. Copies of the orders of the FERA Board were filed before the assessing officer with the request that since nothing has been established on record that the assessed has made the payment of cash of Rs. 2,24,000 in order to receive a gift of Rs. 2,00,000, no addition can be made on account of bogus gifts. The assessing officer was not satisfied with the Explanationns of the assessed and he accordingly made an addition of Rs. 2,24,000 in the hands of the assessed against which an appeal was filed before the Commissioner (Appeals) and the Commissioner (Appeals) re-examined the

issue in the light of the statements of Shri Sameer Mahajan. Before the Commissioner (Appeals), the assessed has placed reliance upon the immunity granted by the Government. Being satisfied with the Explanations of the assessed, the Commissioner (Appeals) deleted the addition.

3. Now the revenue has carried the matter before the Tribunal and placed heavy reliance upon the order of the assessing officer.

4. The learned counsel for the assessed, on the other hand, has invited our attention to its letter dated 23-4-1999, written to the assessing officer through which the assessed has invited the attention of the assessing officer to the speech of the then Finance Minister, Dr. Man Mohan Singh made on 24-7-1991, according to which two schemes were launched to attract the inflow of the foreign exchange. Under the first scheme, the Hon'ble Finance Minister has proposed that the remittance in foreign exchange can be made to any person in India. Even if the remittance is received as gift by the donee in India, it would not be subjected to gift-tax. The source of funds out of which the remittances are made would not be subject to scrutiny under the direct tax laws and exchange control regulations. He further proposed to provide immunity for such remittances under these laws. The scheme came into force with immediate effect, i.e., 24-7-1991 though its details would be announced by the Reserve Bank of India very shortly. A request was further made to the assessing officer through its letter that the statement of Shri Sameer Mahajan was recorded by the Directorate of Enforcement at the back of the assessed. As such, it should not be relied on for taking an adverse view against the assessed without affording an opportunity to the assessed to cross-examine him. The assessed requested the assessing officer to summon Shri Sameer Mahajan and he was ready to deposit the diet money. These contentions of the assessed were not taken into account by the assessing officer while disbelieving the Explanations of the assessed. Shri Sameer Mahajan has also retracted from his earlier statement after 12 days or so, i.e., on 10-11-1991, by writing a letter to the Dy. Director Enforcement, stating therein that his earlier statement recorded was extracted from him under coercion and undue influence and it was not a voluntary statement. The learned counsel further invited our attention to the passport, gift deed and affidavits of Shri Sameer Mahajan to prove

the genuineness of the gifts. He also placed reliance upon the judgment of the jurisdictional High Court in the case of J.T. (India) Exports v. Union of India (2002) 4177 CTR (Delhi) 108, in support of its contention that the rule of audi alteram partem must be followed before drawing adverse inference against the party. It was further held that audi alteram partem rule says that none should be condemned unheard. In support of its contention that the State is bound by his promises, the learned counsel for the assessed has relied upon the judgment of the Apex Court in the case of Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh : [1979]118ITR326(SC) .

5. Having considered the rival submissions and from a careful perusal of the record, I find that the revenue authorities have reopened the assessment on the basis of the statement of Shri Sameer Mahajan recorded by the Directorate of Enforcement on 29-10-1991, but Shri Sameer Mahajan has retracted from this statement by writing a letter on 10-11-1991 after 12 days only. Nothing has been brought on record by the revenue to establish that the assessed had ever paid Rs. 2,24,000 to Shri Sameer Mahajan. It is also evident from the record that on the basis of the statement of Shri Sameer Mahajan, Enforcement Directorate has examined the assessed and after rejecting his Explanation, they slapped a penalty of Rs. 10,000 for contravention of provisions of section 9 of the FERA against which an appeal was filed before the FERA Board, who after adjudicating the correctness of penalty has exonerated the assessed by holding that it has not been prima facie established that the assessed has made any contravention of the provisions of section 9. It means that the assessed has not paid cash of Rs. 2,24,000 to Shri Sameer Mahajan. In the light of these facts, I am unable to understand how far the statement of Shri Sameer Mahajan is reliable for treating the receipt of gift to be a bogus gift. I cannot remain oblivious from the scheme launched by the Hon'ble Finance Minister through his speech dated 24-7-1991, granting immunity for foreign remittances. According to the Scheme, if the remittance is received as a gift by the donee in India, it would not be subjected to gift-tax and the source of funds out of which remittance is made would not be subject to scrutiny under the direct tax laws and exchange control regulations. The scheme coming into force with immediate effect, i.e., 24-7-1991. It means, at the

time when the gift was received, the scheme was in operation, according to which, the source of gift cannot be examined by the revenue authorities. I have also examined the judgment referred to by the assessed and find that once the State promises to its subjects, it is estopped from retracting it in future. If I examine the other aspect of principle, I find that the statement of Shri Sameer Mahajan was recorded at the back of the assessed and the assessed was never afforded an opportunity to cross-examine Shri Sameer Mahajan. Without following the rule of audi alteram partem, the revenue authorities have no right to rely upon the statement of Shri Sameer Mahajan for making an addition. In these circumstances, I do not find any justification in the additions made by the assessing officer. I, therefore, agree with the findings of the Commissioner (Appeals) who has rightly deleted the additions.

6. In cross-objection besides supporting the order of the Commissioner (Appeals), the assessed has raised a plea that its ground No. 10 relating to charging of interest under section 234B was not adjudicated, but from perusal of the order of the Commissioner (Appeals) I find that the Commissioner (Appeals) has adjudicated this issue in his order. In any case, I find force in the contention of the assessed that without passing a direction in the assessment order, interest under section 234B cannot be charged. In support of this view, I rely upon the following judgments of the jurisdictional High Court

(i) CIT v. Kishan Lal (HUF) : [2002]258ITR359(Delhi) ;

(ii) CIT v. Insilco Ltd. : [2003]261ITR220(Delhi) ; and

(ii) CIT & Ors. v. Ranchi Club : [2001]247ITR209(SC) .

7. I, therefore, delete the interest charged under section 234B of the Income Tax Act.

8. In the result, the appeal filed by the revenue is dismissed and the cross objection filed by the assessed is allowed.