Mohan Anand Vs. Assistant Commissioner of

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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Feb-13-2002

Reported in : (2002)82ITD708(Delhi)

Judge : P Singh, R Syal

Appellant : Mohan Anand

Respondent : Assistant Commissioner of

Judgement :

1. This appeal by the assessee is directed against the order passed by CIT(A) on 27-3-1991 in relation to assessment year 1982-83.

2. The facts concerning this case are that the assessee was Managing Director of M/s. Kapri International Pvt. Ltd. and Director of M/s.

Dior International Pvt. Ltd. Both the companies were controlled by the assessee and the members of his family. Search and seizure proceedings were conducted on 6th July, 1983 and certain incriminating documents were found and seized from the assessee's premises. Original assessment was made on 17th June, 1985 on total income of Rs. 82,942. The CIT considered the order of the Assessing Officer to be erroneous and prejudicial to the interests of the revenue and resorting to provisions of Section 263, he set aside the order to be framed afresh vide his order dated 9-12-1986. Subsequently assessment was completed by Assessing Officer under Section 143(3) read with Section 263 on 28-2-1989 at Rs. 6, 19, 940.

3. The first grievance of the assessee in this appeal relates to the addition of Rs. 3,84, 544 on account of foreign gifts. During the course of search operations, some documents containing receipts of certain amounts in foreign currency were recovered. It was observed by the Assessing Officer that the gifts of Rs. 1,92,307 each appeared in the bank accounts of Master Sanjeev Anand and Sandeep Anand, the minor sons of assessee with Canara Bank, Lajpat Nagar, New Delhi on 26-3-1982. It was further noticed that there was a withdrawal of Rs. 1,90,000 each in the two accounts on 29-3-1982 in favour of M/s. Dior International Pvt. Ltd. and M/s. Kapri International Pvt. Ltd. as a result of which 1900 shares of Rs. 100 each were allotted to Master Sandeep Anand in Kapri International and 1900 shares of Rs. 100 each of Dior International were allotted in the name of Master Sanjeev Anand.

The Assessing Officer called upon the assessee to establish the genuineness of the gifts and file full evidence regarding alleged gifts received from foreigners with respect to the identity, capacity to advance and the evidence that the amount of gifts emanated from the funds of the foreigner. In the absence of satisfactory evidence having been given by the assessee, the Assessing Officer held that the gifts were undisclosed income of the assessee and the shares purchased by the minor sons in the two companies were benami holdings of the assessee.

In consequence of the earlier order passed by CIT under Section 263, the Assessing Officer also found that the companies agreed to surrender a sum of Rs. 4.00 lakhs, in the settlement proceedings with the Department, to cover under-invoicing and foreign gifts. He opined that if the amount of foreign gifts was relatable to surrendered income of Rs. 4.00 lakhs, then the amount in question was to be assessed as deemed dividend under Section 2(22)(e) of the IT Act, 1961 as the amount was utilised by the assessee by way of purchase of shares in the benami names of his minor sons. In the final analysis, the Assessing Officer confirmed the impugned addition from two angles, viz. first, the unexplained foreign gifts and second, deemed dividend under Section 2(22)(e).

4. Aggrieved thereby, the order of the Assessing Officer was assailed before the first appellate authority who upheld the addition of Rs. 3,84, 614 by holding that

the gifts received by minor sons of the assessee were undisclosed income of the assessee and the shares acquired by the minors were the benami holdings of the assessee. As regards the applicability of Section 2(22)(e), the CIT(A) found the same to be inapplicable. In the result the addition was held to be valid on account of insufficient explanation given by the assessee as regards the foreign gifts received by the minor sons of the assessee and the same addition confirmed by the Assessing Officer taking into account the provisions of Section 2(22)(e) was held to be not in accordance with law.

5. Before us the ld. counsel for the assessee contended that the Assessing Officer exceeded his jurisdiction in considering the genuineness of the foreign gifts in so far as the CIT under Section 263 had directed him only to frame assessment after considering the taxability of the amount in question under Section 2(22) of the Act.

Referring to the notice issued by CIT placed at pages 12 & 13 of the paper book, the ld. counsel pointed out that the CIT held the order of the Assessing Officer to be erroneous and prejudicial to the interests of the revenue only on the ground that the amount in question was liable to be assessed as deemed dividend under Section 2(22)(a) & (e) of the Act. Taking us through the order of the CIT, the ld. counsel asserted that the direction of the CIT was only to consider the taxability of the amount in question under Section 2(22) and not otherwise examining the genuineness of the gifts received by the minor sons of the assessee. He, therefore, vehemently argued that the Assessing Officer exceeded his jurisdiction when, in addition to considering the applicability of Section 2(22), he also proceeded to examine the genuineness of the foreign gifts which was not the subject-matter of direction given by the CIT. Referring to decisions in CIT v. Mansa Ram [1991] 190 ITR 4531 (All), Surendra Overseas Ltd. v.CIT [1979] 120 ITR 872 (Cal.) and Cawnpore Chemical Works (P.) Ltd. v.CIT [1992] 197 ITR 296 (All), the ld. counsel urged that the action of the Assessing Officer in considering the genuineness of the foreign gifts in the hands of assessee did not have the sanction of law. The ld. counsel submitted that the CIT(A) had sustained the addition only on the issue of ingenuineness of the foreign gifts while holding that the provisions of Section 2(22) were not attracted. It was pointed out that the Department had not filed any appeal before the Tribunal in so far as the

applicability of Section 2(22) was concerned. It was therefore submitted that the action of CIT(A) in upholding the addition by declaring the foreign gifts to be ingenuine deserved to be turned down.

6. It was further tendered by the ld. counsel that in accordance with the settlement with the Department the Assessing Officer was precluded from looking into the genuineness of the gifts. Our attention was invited towards the copy of the settlement with the Income-tax Department placed at pages 1,2,3 of the paper book and the relevant portion reading as under: - As regards foreign gifts, there is no direct evidence to link the amounts with any concealed income earned in India or outside and the amounts of foreign gifts, in question, can be taxed neither under the IT Act nor Gift-tax Act on the facts of the case. The facts found during the course of search and seizure proceedings regarding under invoicing etc., are also not conclusive. All considered, it would be reasonable to make an addition of Rs. 4, 00,000 to cover under invoicing if any. Rest of the amount of foreign gifts recovered and debited in the accounts of Mohan Anand and his three sons will be accepted and considered in accordance with law.

In the light of this settlement the ld. counsel pointed out that the Assessing Officer was bound by the settlement of the Department with the assessee and his group companies and he was refrained from going beyond that by considering the taxability of the foreign gifts in the hands of the assessee. As the amounts surrendered was Rs. 4.00 lakhs and the alleged foreign gifts were only for a sum of Rs. 3,84, 614, the ld. counsel contended that there was no case for making or sustaining any addition on this score. On merits the ld. counsel submitted that the assessee had given satisfactory evidence in support of the genuineness of the gifts. Confirmation by the donor and the copy of his passport were shown to have been placed on record at pages 5 to 10 of the paper book. In the final analysis the ld. counsel pleaded that the CIT(A) erred in so far as he upheld the addition made by the Assessing Officer by examining the genuineness of the foreign gifts.

7. In the oppugnation, the ld. DR relied on the order of the CIT(A). On a specific query raised from the Bench to the effect if the Department was also in appeal against the order of CIT(A), she expressed her inability to point out any evidence

of having filed the appeal by the revenue despite the fact that one day's time was given to her to consult the concerned officer.

8. We have considered the rival submissions in the light of material placed before us and precedents relied upon. First of all we will deal with the legal arguments raised by the assessee's counsel as regards the embargo on the power of the Assessing Officer to consider the genuineness of the foreign gifts received by minor sons of the assessee when the direction of the CIT under Section 263 was to consider the taxability only under Section 2(22). We have perused the order of the CIT. After examining the various facts and the submissions the assessee, the CIT vide para 8 of his order cancelled the assessment to be framed afresh after considering the taxability of the amounts in question under Section 2(22) of the Act. The concluding line of the order of the CIT reads as under: - The ITO is directed to frame the assessment afresh de novo, in accordance with law and prescribed procedure after allowing opportunity to the assessee.

9. On reading of the last para of CIT's order, it is manifest that the direction was given to the Assessing Officer to frame the assessment afresh de novo. There is no dispute about the fact that in the earlier lines of the said para, he had referred to framing assessment after considering the taxability of the amounts under Section 2(22) of the Act. When the concluding para of his order is read in entirety it becomes obvious that the whole issue of foreign gifts was restored to the file of Assessing Officer for deciding it afresh. Examining the taxability under Section 2(22) of the Act or considering the genuineness are two different aspects of the same matter. When the issue was remitted to the file of the Assessing Officer for de novo adjudication, we do not find any infirmity having crept in the Assessing Officer's action in examining that issue from a different angle. It is not the case where the Assessing Officer resorted to make additions on issues, which were not the subject-matter of the order passed by CIT under Section 263. Various case law relied upon by ld. AR are distinguishable from the facts of the present case in as much as here the CIT gave a direction to 'frame the assessment afresh de novo' of the issue in question. The issue remaining the same, the contentions of the ld. counsel in this regard are bereft of any force.

10. As regards the sustenance of addition by the CIT(A) on account of unsatisfactory explanation given by the assessee with regard to the genuineness of foreign gifts, it is noted that a settlement was made by the assessee with the Chief Commissioner of Income-tax, as a result of which a sum of Rs. 4.00 lakhs was surrendered on account of the fact that during the course of search and seizure proceedings certain under-invoicing was noted but which could not be established conclusively. Taking into consideration the issue of under-invoicing and the foreign gifts, it was agreed to surrender a sum of Rs. 4.00 lakhs to cover under-invoicing and a further agreement was reached that the foreign gifts received by the assessee and his minor sons would be accepted. The relevant extract of the settlement has been noted in one of the foregoing paras. In spite of the settlement, the Assessing Officer made addition of Rs. 3,84, 614 by holding the foreign gifts received by the minor sons of the assessee to be ingenuine and held the same to be the undisclosed income of the assessee. This action of the Assessing Officer was confirmed by the CIT(A) by holding that the decision arrived at in the meeting was not binding on Assessing Officer and no authority could give an undertaking on behalf of the Assessing Officer. On perusal of the minutes of settlement, it is noted that the Income-tax Officer was party to the settlement inasmuch as he had signed the settlement along with Chief Commissioner and other authorities of the Department. Once an agreement was entered into by the assessee with the Department for surrendering a specific amount on account of under-invoicing by the company and consequently acceptance by the Deptt. of the foreign gifts received by the assessee and his minor sons, which settlement was honoured by the assessee, we fail to understand as to how the Assessing Officer can go back from the stand taken by the Department. It was open to the Revenue not to accept any surrender and proceed to make additions in accordance with law. Having made the settlement with the assessee on a particular point and taxed the same accordingly, it can't be heard of examining the merits of the case all over again and making addition in violation of the settlement.

But for the settlement, there was no conclusive material with the Revenue to make addition in the hands of company for under-invoicing.

If the course of action, as adopted by the Revenue is permitted, it would mean blowing hot and cold in the same breath for the reason that the one hand of the department would make an understanding with the assessee for surrendering a particular amount and the other hand would accept the same and also make another addition on the same count in violation of the understanding. This approach of the Revenue deserves to be deprecated.

11. Be that at it may, we will examine the case on merits also. Before proceeding further it is important to bear in mind that a particular income can be earned by one person only. If it is held to be earned by X, it can't be said to have been earned by Y as well and vice versa. By including the amount of foreign gifts, admittedly out of under-invoicing. In the hands of the assessee, the Assessing Officer not only taxed the amount in the hands of company but also in the hands of the assessee as his individual undisclosed income. When the group companies of the assessee accepted under-invoicing and surrendered a sum of Rs. 4.00 lakhs, it became the income of the company in which the assessee was a director. Once an income was accepted to be that of company and the amount therefrom passed to the shareholder, it was only the applicability of Section 2(22) which could have been considered for its application. Since the CIT(A) reversed the action of the Assessing Officer for taxing this income under Section 2(22)(e) and the revenue has not come up in second appeal before the Tribunal, we hold that the addition in the hands of the assessee made by treating the foreign gifts received by the minor sons of the assessee as ingenuine can't stand. This ground is, ergo, allowed.

12. The second grievance of the assessee relates to the addition of Rs. 1,41,185 on account of money taken in imprest account by the directors.

As a consequence of the order passed by CIT under Section 263, the Assessing Officer noted that during the accounting period relevant to assessment year under consideration M/s. Dior International Pvt. Ltd. and M/s. Kapri International Pvt. Ltd., in both of which assessee was a shareholder, advanced loans to him amounting to Rs. 69,000 and Rs. 72,185 respectively. The Assessing Officer held that Section 2(22) was applicable with respect to these two amounts and added the same to the income of assessee resulting into addition of Rs. 1,41,185. Before

the first appellate authority it was contended on behalf of the assessee that one of the important conditions for applicability of Section 2(22)(e) was that shareholder should have a requisite shareholding in the company and since the assessee was not holding 20% of shares as was the mandate of the section at the relevant time, he was not liable to be considered for this purpose. The CIT(A) held that the shares purchased out of the foreign gifts by the minors were the shares of the assessee held in the benami names of minors and when shareholding of the assessee was considered along with such benami shares, the assessee became a beneficial shareholder to comply with the provisions of Section 2(22) of the Act. Considering the facts of the case, the CJT(A) sustained the addition made by the Assessing Officer on this issue.

13. Before us the ld. counsel for the assessee reiterated that the assessee was not holding requisite number of shares to come within the ambit of Section 2(22)(e). The ld. counsel pointed out that the assessee was holding only 821 shares which were 16. 76% of the total holdings and as such his case was not governed by the provisions of Section 2(22)(e). He pointed out that the decision of the CIT(A) in adding the shareholding of his minor sons acquired out of proceeds of foreign gifts could not be considered as the holding of the assessee.

14. Referring to page No. 20 of the paper book which is the copy of account of assessee in the books of M/s. Kapri International, the ld.counsel pointed out that the entire amount of Rs. 72,185 could not be added to the assessee's income for the reason that assessee had advanced certain amounts to the company prior to the dates of repayment made to him and the addition under Section 2(22)(e) could be made only to the extent of loan given by company and not repayment of earlier deposit made by the assessee with the company. Similar submissions were advanced in respect of addition of Rs. 69,000 sustained by CIT(A) on account of advances received from M/s. Dior International Pvt. Ltd. In the final submissions the ld. counsel pointed out that the addition, if at all, was required to be made should be suitably reduced. In the opposition the ld. DR relied on the order passed by the CIT(A).

15. Having heard the rival submission in the light of material placed before us and precedents relied upon we have to decide whether the shares held by minors are to be considered alongwith that of the assessee for the purposes of Section 2(22)(e). In CIT v. T. P. S. H.Sokkalal[l999] 236 ITR 981 (Mad.), it was held that the, shares held by a shareholder in her own name as well as in her capacity as guardian for the minor were to be taken into account for determining whether the shareholder of the company was a person having substantial interest in the company for Section 2(22)(e). It is not disputed that in the instant case shares were acquired by minor sons out of foreign gifts received by them. Since the genuineness of gifts was not established and it is the admitted position that the gifts to the minors were the result of under-invoicing by the company, we have no hesitation in holding that the shares acquired by the minor sons of the assessee out of alleged foreign gifts were the shares of the assessee in question held in the benami names of minors. In the present case, viewed either from the angle of the ratio decidendi of T. P. S. H. Sokkalal's case (supra) or its own facts, the shares held by minors are liable to be clubbed with the shareholding of assessee in his own name and when so clubbed the case of assessee clearly comes within the purview of the limit as contained in Section 2(22)(e) of the Act.

16. As regards the applicability of Section 2(22)(e) on account of amount advanced to the assessee is concerned, we find that no evidence has been brought on record to show that the amount in question was advanced on account of imprest to meet business expenses. Nothing was shown as to which expenses were incurred out of the so called imprest.

We therefore hold that the amount in question was not imprest. However we find force in the submissions of the ld. counsel that all the debit entries appearing in assessee's account with the companies can't be considered as deemed dividend under Section 2(22)(e) for the reason that this section, inter alia, refers to advance or loan to a shareholder and not repayment of deposit. If any amount is deposited by the shareholder with the company, its repayment does not attract the provisions of Section 2(22)(e) because it does not result in advancing or giving loan to the shareholder. At the same time it is equally important to note that subsequent adjustment of earlier loan or advance given by the company to its shareholder

would not detract the application of the provisions of Section 2(22)(e), which gets attracted at the moment a loan or advance is given. This view is in conformity with the decision of the Apex Court in the case of Miss P. Sarda v. CIT [1998] 96 Taxman 11(SC). We, therefore, remit this matter to the file of the Assessing Officer to work out the addition on this issue by following our guidelines laid down above, after affording a reasonable opportunity of being heard to the assessee.

17. The next grievance of the assessee in this appeal relates to upholding the addition of Rs. 11,200 on account of travellers cheques.

During search and seizure operations travellers cheques amounting to Rs. 11,200 were found and seized. During the course of proceedings under Section 132(5) the assessee explained that these were issued by State Bank of India and were purchased out of funds of M/s. -Kapri International to enable the assessee to undertake foreign trips for the purpose of business of the company. The Assessing Officer found that no such entry appeared in the books of the company to show that the travellers cheques were issued to the assessee and he accordingly added it to assessee's income. The action of the Assessing Officer was echoed by the CIT(A).

18. Before us the ld. counsel for the assessee reiterated the submissions as advanced before the lower authorities. From the aforesaid facts and the records of the case, it is explicit that except the assertions, the assessee could not show us as to how the said sum was recorded in the books of account of the company. In the absence of any evidence given by the assessee in support of his claim, it would not detain us any further in repelling this contention of the ld. AR.This ground is ergo not allowed.

19. The last ground, being the charging of interest under Sections 139(8) and 207, being consequential is accordingly disposed of.