

IN THE INCOME TAX APPELLATE TRIBUNAL  
“D” Bench, Mumbai  
Before Shri B.R. Baskaran (AM) & Shri Ravish Sood(JM)

I.T.A. No. 4311/Mum/2014  
(Assessment Year 2005-06)

Mrs. Rinku G. Shah 52, K.K. Street Gulalwadi Mumbai-400 004.	Vs.	ITO-15(1)(4) Mumbai.
(Appellant)		(Respondent)

PAN No.AULPS9271n

Assessee by	Shri S.C. Tiwari
Department by	Shri Purushottam Kumar
Date of Hearing	10.1.2017
Date of Pronouncement	31.1.2017

ORDER

Per B.R. Baskaran (AM) :-

The appeal filed by the assessee is directed against the order dated 28.3.2014 passed by the learned CIT(A)-26, Mumbai and it relates to A.Y. 2005-06.

2. The assessee is aggrieved by the decision of the learned CIT(A) in confirming the assessment of long term capital gains of ₹ 1.12 crores and gift of ₹ 35 lakhs as income of the assessee from undisclosed sources u/s. 68 of the Act.

3. This appeal has been listed for hearing before the Division Bench as per the directions given by Hon'ble Third Member, vide his order dated 5.12.2016 which is available on record. Hon'ble Third Member has sent back the appeal to the Division Bench for considering it afresh in accordance with law without being influenced by the opinion expressed by learned Members, who had heard the matter earlier. Accordingly, this appeal has been listed before us for fresh hearing and adjudication.

4. Facts relating to the case are stated in brief. The Revenue carried out the survey operation u/s. 133A of the Act in the business premises of M/s. Dhanera Metal Corporation. During the course of survey proceedings, it was found that the assessee along with his family members named Shri Pinakin L. Shah, Smt. Nisha Pinakin Shah and Smt. Manjula L. Shah have generated long term capital gains on sale of shares by availing accommodation entries given by Shri Mukesh Choksi, Director of the M/s. Mahasagar Securities Private Limited. Long term capital gains declared by Shri Pinakin L. Shah, one of the family members of the assessee, was taxed as unexplained credit u/s. 68 of the Act. The Assessing Officer also noticed that the assessee has received gifts to the extent of ₹ 35 lakhs as in the case of Shri Pinakin L. Shah in whose hands gifts were treated as bogus and taxed u/s. 68 of the Act.

5. The AO noticed that the assessee had also declared long term capital gains of ₹ 1,25,70,665/- for the year under consideration and received gifts to the tune of Rs.35.00 lakhs during the year under consideration. Hence, on the basis of decision taken in the case of Shri Pinakin L. Shah, the Assessing Officer took the view that both long term capital gains and gift receipts are assessable as income of the assessee and accordingly reopened the assessment of the assessee by issuing notice u/s. 148 of the Act.

6. The assessee had generated long term capital gains on sale of shares of a company M/s. Talent Infoway Limited. The Assessing Officer noticed that the Assessing Officer, in the case of Shri Pinakin L. Shah, has taken support of the statement recorded from Shri Mukesh Choksi, Director of M/s. Mahasagar Securities P. Ltd. on 7.8.2006 and 4.1.2007. In the said statements, Shri Mukesh Choksi had admitted that he has provided accommodation entries for generating long term capital gains on sale of shares. The Assessing Officer relied on the findings given in the case of Shri Pinakin L. Shah to reject the claim of the assessee that he has actually earned long term capital gains on sale of shares. Accordingly, the Assessing Officer assessed long term capital

gains amount of ₹ 1,12,40,537/- u/s. 68 of the I.T. Act, by following the said decision. The Assessing Officer also assessed the gift amount of ₹ 35 lakhs in the hands of the assessee u/s. 68 of the Act.

7. The assessee challenged the assessment order by filing the appeal before the learned CIT(A) who passed the order on 27.1.2011 by deleting the assessment of long term capital gains as well as gift receipts as unexplained cash credit in the hands of the assessee. The Revenue challenged the order passed by the learned CIT(A) and Tribunal vide its order dated 5.4.2013 restored the matter back to the file of the learned CIT(A) for adjudicating the issues afresh. Accordingly, the learned CIT(A) passed the impugned order, wherein he confirmed the order of the AO in assessing long term capital gains and gifts as income of the assessee. Aggrieved by the order passed by the learned CIT(A), the assessee has filed the appeal before the Tribunal. On account of the order passed by Hon'ble Third member, this appeal is listed before us.

8. We have heard the parties and perused the record. Learned AR submitted that the Assessing Officer has wholly relied upon the assessment order passed in the case of Shri Pinakin L. Shah for assessing Long term capital gains and gift receipts as income of the assessee. He submitted that the Tribunal on identical issues has deleted the addition in the case of Shri Pinakin L. Shah. He further submitted that the Tribunal, vide its order dated 5.4.2013, had passed a composite order in the case of the assessee and also in the case of Smt. Manjula L. Shah. In the case of Smt. Manjula L. Shah also the Assessing Officer assessed the long term capital gains as well as gifts as unexplained cash credits in the hands of the assessee. He submitted that in the case of Smt. Manjula L. Shah also, the Tribunal has deleted both the additions vide its order dated 31.10.2014 passed in ITA No. 3112/Mum/2014). Learned AR further submitted that the Assessing Officer has made inquiries with M/s. Mahasagar Securities Pvt. Ltd (the broker firm through whom the assessee had transacted in shares) during the course of assessment proceedings in the case

of Shri Pinakin L. Shah. The above said broker firm has confirmed that the shares transactions entered by the assessee's group were genuine. Further, Shri Pinakin L. Shah was given an opportunity to cross examine Shri Mukesh Choksi and during the course of cross examination also, Shri Mukesh Choksi confirmed the transactions of Shri Pinakin L. Shah and his family members to be genuine. Shri Mukesh Choksi further submitted that the statement given by him before ADIT(Inv) was without verification of correct facts and record and accordingly, retracted the statement given by him before ADIT(Inv). Learned AR submitted that the very basis on which the impugned additions have been made have lost its credibility due to retraction of Shri Mukesh Choksi as well as due to confirmation of transactions by M/s. Mahasagar Securities Pvt. Ltd. Learned AR accordingly submitted that the decision rendered by the Tribunal in the case of Smt. Manjula L. Shah on identical facts should be followed in the instant case also.

9. On the contrary, learned Departmental Representative submitted that the decision rendered by the Coordinate Bench of the Tribunal in the case of Smt. Manjula L. Shah should not be followed as then Accountant Member who had passed the dissent order has distinguished the same. Accordingly, learned Departmental Representative placed heavy reliance on the order passed by the Accountant Member in the earlier hearings.

10. We have heard the rival contentions and perused the record. We have earlier noticed that Hon'ble Third Member has restored the matter to the Division Bench to consider the issues afresh in accordance with the law. Further Hon'ble Third Member has specifically stated that the Division Bench will not be influenced in any manner by the opinion expressed by both learned Members on the earlier occasion and they shall adjudicate the matter afresh. In view of the specific directions given by Hon'ble Third Member, we decline to refer to the orders passed by both the Members on earlier occasion. Accordingly we are not able to adhere to the request made by learned DR.

11. We noticed that the facts available in the present case are identical with the facts found in the case of Smt. Manjula L. Shah. We noticed that the Coordinate Bench of this Tribunal in the case of Smt. Manjula L. Shah has dealt with both these issues and has decided both the issues in favour of the assessee. For the sake of convenience, we extract below the decision rendered by the Tribunal in the case of Smt. Manjula L. Shah in respect of Long term capital gains:-

*18. Now in the set aside proceedings, the learned CIT(A) in the second round without analyzing the facts which were there in the record and also which was the mandate of the Tribunal order, has simply reproduced the statement on oath of Shri Mukesh Choksi given before the Investigation Wing earlier and held that, since he has admitted of providing accommodation entries, therefore, any transaction carried out with him is nothing but bogus transaction. Thereafter he has rejected the assessee's plea for cross-examination in the present case on the ground that the objection has been raised for the sole purposes of obstructing the process of law. We are unable to understand as to how the cross-examination of a witness, who has given a statement behind the back of the assessee can be solely relied upon, once the assessee has adduced all the relevant material and evidences in her favour. If the sole basis of adverse view is the statement of a third party which is being used against the assessee, then the principles of natural justice demand that the same witness should be put to cross-examination. This is more so, when all the transaction with the broker is duly supported by documents in which he himself has confirmed the transaction. It becomes all the more relevant because the said witness himself has retracted his statement in the case of Shri Pinakin L. Shah and has categorically admitted that the transactions with Shri Pinakin L. Shah and the family members, (which also included the assessee) is genuine. On the face of such a retraction, the entire premise of the conclusion drawn by the learned CIT(A) gets effaced. It is quite trite law that evidences brought on record by way of confession or statement which stands retracted, must be substantially corroborated by other independent and cogent evidences which would lent to credibility before the Court to rely on such contentions. Here in this case the statement of Shri Mukesh Choksi stands retracted as he has admitted that sale of shares in case of Pinakin L. Shah and his family members are genuine and earlier statement was without verification of records. All the evidences which were filed by the assessee in relation to share transactions has neither been inquired upon nor has been rebutted by some cogent material on record. The learned CIT(A) has merely relied upon the statement of Shri Mukesh Choksi, given earlier. Even if we rely on such a statement, which has been reproduced by the learned CIT(A) from pages 7 to 9 of the appellate order, then it can be seen that, nowhere the*

*name of the assessee has surfaced nor any reference is made to assessee or her family, hence such a statement that he was engaged in providing accommodation entries to all, cannot be taken at a face value, unless the same is corroborated by a cogent material qua the assessee.*

*19. Another important fact which is noticeable is that the purchases of shares have been made in the earlier assessment year and such purchases have not been doubted by the Department. Only the net sale proceeds, which has been shown as long term capital gain, has been added, that is, sales minus purchases. If the factum of purchases recorded in the balance sheet of the earlier years is not disproved, then the sale of the same shares in this year cannot be prima facie held to be bogus. The addition itself has not been made on account of entire sale proceeds, but only on account of net long term capital gain, which itself goes to show that the Department has not carried out proper inquiry or has brought any material on record in the case of the assessee to prove that the entire sale transaction of the assessee is not genuine. The presumption, based on surmises, that how the value of shares in one year has arisen many fold giving rise to exempt long term capital gain, has to be based on concrete material and independent enquiry. Here, in this case, Shri Mukesh Choksi, before the A.O., has given a letter during the course of the assessment proceedings of Shri Pinakin L.Shah that the transaction with the family of Shri Pinakin L.Shah are genuine which necessarily implies assessee also. If we analyze the similarity of the case of Shri Pinakin L.Shah and Smt.Manjulaben L.Shah (the assessee), then we find that the facts relating to purchase and sale transaction of shares and resultant long term capital gains are exactly identical, and therefore, there cannot be a different finding in the case of the assessee to what has been given in Pinakin L. Shah, which stand confirmed from the stage of Hon'ble High Court. Thus even on merits, as discussed above, we do not find any reason to confirm the addition on account of long term capital gain, which has been added as income of the assessee u/s 68, and therefore, the same stands deleted. In the result the addition of Rs.1,41,80,926/- is deleted.*

12. Coming to the issue of gift received by the assessee, learned AR submitted that the donors are not related to the assessee and the assessee has received gifts prior to the date of insertion of provisions of section 56(2)(v). He further submitted that identical issue was considered in the case of Smt. Manjula L. Shah and the Coordinate Bench of the Tribunal has deleted the addition.

13. On the contrary, learned Departmental Representative placed reliance on the order passed by the learned CIT(A).

14. In respect of gifts received by the assessee, we noticed that the coordinate Bench has considered an identical issue in the case of Smt. Manjula L. Shah and for the sake of convenience, we extract below the decision taken by the co-ordinate bench on this issue.

*20. Now coming to the addition on account of gift, we find that the Assessing Officer has made the addition primarily on the ground that the proof of source and capacity of the donors have not been given, except gift deeds. The assessee's case had been that it has not only given the confirmation letters from the donors, but also their affidavits confirming the transaction of giving of the gifts. Not only that, the donors have also given their Income-tax particulars, copy of the balance sheet, wherein the gifts have been shown and filed alongwith the income tax returns. Thus, the prima facie onus of the assessee was discharged. It has also been submitted that the donors were the family friends, who were in touch with the family and had regular business deals. The A.O. has instead held that exactly similar facts were there in the case of Shri Pinakin L. Shah also, and therefore, based on the finding given therein, he has confirmed the addition. In the first round up till the stage of CIT(A), the addition of gifts have been deleted. Now the CIT(A), in pursuance of the ITAT order, decided the issue by merely stating that Shri Mukesh Choksi and his associates were providing accommodation entries, and therefore, this transaction is also not genuine and the assessee was unable to establish the relationship with the donors to show that there was love and affection. Hence the donors were merely entry providers. From the records, it is seen that the assessee and her family had received gifts from Shri Mukesh Choksi and his family, the details of which has been incorporated at page 23 of the impugned appellate order. The assessee had received gifts of Rs.10 lakh from Shri Mukesh Choksi and Rs.10 lakh from Shri Maniklal Chimanlal Choksi. In the case of Shri Pinakin L. Shah, one of the donors were common, wherein the Tribunal has deleted the said addition. This order of the Tribunal has now been affirmed by the Hon'ble High Court also. In the case of Shri Pinakin L. Shah, the Tribunal deleted the gift received from Shri Mukesh Choksi and his family, after observing and holding as under:-*

*"6.4 Be it as it may, the assessee, in this case has furnished confirmations letters from the donors, and has also filed affidavits from the donors, wherein they have admitted to have given the said gifts. The donors are all income-tax assessee and these gift transactions are reflected not only in their balance sheets but also in their income-tax returns. The submission of the assessee that all*

*the donors were family friends and were in touch with the family and that they had regular business deals for many years prior to the date of gifts and also in the subsequent years to the date of gifts is not disputed by the revenue by way of any evidence or analysis of available information. The assessee submitted that the persons are not strangers to each other and do have long association. When the assessee produced confirmation letters, affidavits, income-tax details in support of his contention that he had received gifts, rejecting these evidences merely on the basis of preponderance of probabilities, in our considered opinion, is bad in law. The assessing officer, when he doubts the genuineness of the gifts, he should have conducted enquiries by way of summoning the donors and examining them on oath or verifying the antecedents of those people and by gather atleast some evidence against the transactions. The assessing officer rejected the entire evidence filed in just two lines, which are extracted for ready reference:*

*'Except for filing fresh evidence from the donors, the assessee has not proved creditworthiness of the donors nor filed copy of the income-tax return. The retraction of the assessee is without any substance of proof. In view of the above facts and circumstances, the gift received by the assessee is treated as unexplained credit u/s 68 of the Act.'*

*When the permanent account number and income-tax details are furnished to the assessing officer by way of confirmation letters as well as affidavits, the AO observing that no details have been furnished, in our considered opinion is not correct. No attempt has been made to examine the balance sheet to find out the creditworthiness. We also find that the assessing officer had recorded the statement of only one of the donors i.e. Shri Mukesh R.Chokshi and in reply to question (at page 178 of the paper book) Shri Chokshi stated on oath that he has given Rs.5 lakhs out of love and affection to his business customer and friend and that he would submit his balance sheet to prove this. There is no evidence whatsoever found by the revenue, which contradicts the evidence filed by the assessee. Under these circumstances, in our considered opinion, the addition by invoking the theory of preponderance of probabilities is bad in law.*

*6.5 Coming to the case laws relied upon by the revenue, in the case of CIT vs. P Mohana Kala 291 ITR 278 (SC), the assessee in that case were receiving gifts from a stranger, who was a common donor. Most of the cheques in that case were drawn on a single bank and it was held unacceptable. The Hon'ble Supreme Court held that, in cases where explanation offered by the assessee about the nature and source of the sums found credited in the books is not satisfactory then there is prima*

*facie evidence against the assessee. In this case, there is no recording that the gifts in question are found recorded in the books of the assessee as a credit. Basically the gifts were received by Master Abhay P Shah by way of crossed cheques from close business associates of Shri Pinakin Shah, who were also family friends and these were credited to his bank account. In the absence of books of account for the minor and an entry in those books of account no addition can be made as held by the Hon'ble Bombay High Court in the case of CIT v. Bhaichand V Gandhi 141 ITR 67 (Bom.).*

*6.6. The gift not being from the strangers and as there is evidence filed which is not controverted the ratio of the decisions relied upon by the CIT(A) cannot be applied to the facts of this case. In fact to meet such a situation only section 56(2)(v) was introduced in the Act by the Finance Act, 2005 with effect from 01.04.2005 for gifts received after 01.09.2004. In this case all the gifts were received before 23.08.2004. Hence this section was not applied. In view of the above discussion, we are of the considered opinion that the addition u/s 68 has to be necessarily deleted. The appeal; of the assessee is allowed.”*

*21. Thus, we hold that so far as the issue of gift is concerned, the same is arising out of similar set of facts, which were there in the case of Shri Pinakin L.Shah, and hence the findings given therein, will apply mutatis mutandis in the present case also. In that case the issue of gifts as incorporated above was decided on the analysis of facts, and merits therefore, the same reasoning will apply here also as there are similar set of donors. Further without there being any proper reasoning by the learned CIT(A) and analysis of the documents and affidavits furnished, we do not feel persuaded to take contrary view and hold that the addition of gifts for sums aggregating Rs.20 lakh cannot be sustained. Here in this case, one very important fact is that, after the assessee has filed all the relevant documents and evidences in support of gifts, the department has neither carried out any enquiry nor has rebutted the evidence with any material, except for relying on unsubstantiated statement of Mukesh Choksi, which too was not specific on gifts. Thus without any rebuttal by department, the primary onus which lied upon the assessee stood discharged and the amount of gift cannot be added u/s 68. Hence same is deleted.*

15. Since the facts available in the instant case are identical with the facts available in the case of Manjula L Shah, we intend to follow the decision rendered by the co-ordinate bench in the case of Manjula L Shah on both the issues. Accordingly we set aside the order passed by Ld CIT(A) and direct the

AO to delete the assessment of Long term capital gains and gift receipts u/s 68 of the Act.

16. In the result, the appeal filed by the assessee is allowed.

Order has been pronounced in the Court on 31.1.2017.

Sd/-  
(RAVISH SOOD)  
JUDICIAL MEMBER

Sd/-  
(B.R.BASKARAN)  
ACCOUNTANT MEMBER

Mumbai; Dated : 31/1/2017

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)  
ITAT, Mumbai

PS