

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'G': NEW DELHI**

**BEFORE SH. VIJAY PAL RAO, JUDICIAL MEMBER
AND
SH. O.P. KANT, ACCOUNTANT MEMBER**

ITA No. 3888/Del/2010
Assessment Year: 2005-06

Sh. Sidharth Jain, C-780, New Friends Colony, New Delhi. (PAN: AAAPJ2273Q)	Vs.	Income Tax Officer, Ward 22(2), New Delhi
(Appellant)		(Respondent)

Appellant by	Sh. B.N. Goshwamy, Adv.
Respondent by	Ms. Anima Barnwal, Sr.DR

Date of hearing	23.12.2015
Date of pronouncement	24.02.2016

ORDER

PER O.P. KANT, A.M.:

The present appeal by the assessee is directed against the order dated 21.06.2010 of learned Commissioner of Income Tax (Appeals) 6XXIII, New Delhi, passed for the assessment year 2005-06. The assessee raised the following grounds of appeal:

- 1. That the learned Commissioner of Income Tax(Appeals) has grossly erred in treating the income from United Estates Block-A, as income from property.*
- 2. That the income from United Estates has been throughout been treated as income from business in the preceding 20 years and by the Rule of Consistency the same treatment should have been give.*
- 3. That the learned Commissioner of Income Tax grossly erred in sustaining the addition of Rs. 6,67,100/- representing cash withdrawal from the appellant's bank account as income of the appellant.*

4. *That the explanation of the appellant filed on 18.03.2010 could not be treated as additional evidence since date-wise details and withdrawal were already shown in the cash summary before the Assessing Officer.*
5. *That likewise the addition of Rs. 3,13,428/- representing opening cash balance shown in the state of affairs, has wrongly been treated as income of the appellant from other sources.*
6. *That the learned appellant authority has erred in sustaining the addition of Rs. 5 lacs representing gift and by treating the same as income from other sources.*
7. *That the order as made is against law and facts of the case.*

2. The facts in brief are that the assessee filed return of income declaring income of Rs. 1,68,429/- on 21.07.2005 . The case was selected for scrutiny and notice under Section 143(2) of the Income-tax Act, 1961 (for short 'the Act') was issued and the assessment was completed on 31.12.2007, making additions under Section 69A of Rs. 6,67,100/- in respect of unexplained deposits in bank in the current year , addition of Rs. 3,13,428/- towards unexplained opening cash balance and addition for unexplained gift of Rs. 5 lacs. The rental income shown by the assessee under the head 'profit and gains of business' was assessed by the Assessing Officer under the head 'income from other sources.' Aggrieved, the assessee filed an appeal before the learned Commissioner of Income Tax (Appeals), who upheld the additions made by the Assessing Officer, however, he held that the rental income was to be assessed under 'income from house property.' Aggrieved with the above findings of the Commissioner of Income Tax (Appeals), assessee is before us with the present appeal.

3. In ground nos. 1 and 2, the assessee has challenged treating the rental income received under the head 'income from house property' as against declared under the head 'profit and gains of business'. The rental income was

received in respect of immovable property bearing no. 2781/1, 2782/3 and 2762 located at Lothian Road, Kashmiri Gate, Delhi. The sale deed of this property was registered in the name of M/s. Universal Industries Ltd., Delhi. On 17th February, 1982, M/s Universal Industries Ltd. conferred the right to hold the immovable property against the interest free advance of Rs. 30 lacs from M/s. -United Estatesø a partnership firm through its partner Sh. Subhash Chandra Jain. M/s. United Estate was given license with exclusive rights/management of the said property, including inducting the tenants and recovery and realize rent from the tenants. However, the liability to pay municipal taxes, charges and other expenses remained with M/s. Universal Industries Ltd. Subsequently, on 6th July, 1999, M/s. United Estates transferred its all rights/obligations and vested the same with the assessee and, thereafter, the assessee is showing income from the property under the head òprofit and gains of businessö from year to year. In the year under consideration, the Assessing Officer asked for copy of lease agreement between the M/s. United Estates and the assessee and due to inability of the assessee in furnishing the said agreement, the Assessing Officer held that the assessee was not the owner of the property. The Assessing Officer held that simple transaction with the landlord to collect the rent on behalf of the landlord could not result into the business activity and in the absence of agreement, the Assessing Officer treated the rental income received under the head òincome for other sourcesö. Before the learned Commissioner of Income Tax (Appeals), the assessee submitted copy of the said agreement

between M/s. Universal Industries Ltd. and M/s. United Estates and another agreement between M/s. United Estates and the assessee. According to the Commissioner of Income Tax (Appeals), the income should have been assessed under the head 'Income from house property'. The findings of the learned Commissioner of Income Tax (Appeals) are as under:

“8. It is observed that the assessee has taken the income from commercial property as business income. On the other hand, the ld Assessing Officer has taken the same as ‘Income from other Sources’. It is observed that on 17.02.1982, an agreement was signed between M/s. Universal Industries Ltd. (First Party) with M/s. United Estates (Second Party). The first party had approached the second party for an advance of Rs. 30,00,000/-. The second party as a matter of security was given the commercial properties located at Shop Nos. 2781/1, 2782/3 and 2762, Lothian Road, Kashmere Gate, Delhi. The amount of Rs. 30,00,000/- was given by the second party to the first party and no interest was to be paid by the first party. The second party obtained the right to manage the said property and to even introduce tenants and to recover the realize rents from all tenants with some exceptions. The first party was liable for the payment of all municipal taxes, charges and other expenses of maintaining the said property. The second party was entitled to maintain repair and control of the said properties and also to made additions, alteration of construction, which was permissible by law. The first party was the Licensee and the second party was the Sub-Licensee. The agreement was renewed on 6.7.1999.

9. It is crystal clear from the above that this arrangement has continue since 17.02.1982. Indubitably, the assessee was also in receipt of commercial property which had been rented out. From the said rented property, the assessee had also obtained the right to collect rent and also change tenants, if required. Further, the assessee could also made additions, alterations and construction on the said property. The only exception was that the assessee could not pay the municipal taxes. In other words, minus the said exception, the assessee was practically the owner of the said property. Thus in accordance with the decision of Commissioner of Income Tax Vs. Poddar Cement (P) Ltd. (1997) 226 ITR 625(SC), which has held as under:-

“We are conscious of the settled position that under the common law ‘owner’ means a person who has got valid title legally conveyed to him after complying with the requirements of law such as Transfer of

Property Act, Registration Act, etc. But in the contest of s. 22 of Income Tax Act, 1961 having regard to the ground realities and further having regard to the object of Income Tax Act, 1961, namely, 'to tax the income', we are of the view, 'owner' is a person who is entitled to receive income from the property in his owner right."

10. The validity of the agreement has continued for almost 25 years. The assessee has collected the rent, in his own right. Under the Income Tax Act, the same would be assessed under 'Income from House Property' as under the said head all such income is assessed for renting out. The stand taken by the assessee that the income as assessed to tax as 'business income' and that by the Assessing Officer as 'income from other sources', are incorrect on appreciation of law and facts. However, the deductions as provided under 'Income from House Property' should be given to the assessee while giving the appeal effect.

3.1 At the time of hearing, the learned Authorized Representative of the assessee submitted that the income from the property is getting assessed under the head ÷profit and gains of businessö since 1982. Further, he submitted that in assessment years 1992-93 and 1993-94, the case was scrutinized by the Assessing Officer and rental income was held as income from other sources, however, the learned Commissioner of Income Tax(Appeals) has reversed the findings and Revenue did not file any further appeal against those orders. In the year subsequent to the year under consideration also, the income offered under the head ÷profit and gains of businessö has been accepted by the Assessing Officer and thus there is no reason to depart from the Rule of Consistency.

3.2 On the other hand, learned Sr. Departmental Representative submitted that no *res judicata* is applicable in the case of income tax proceedings. Relying upon the judgment in the case of Commissioner of Income Tax Vs. Poddar Cement (P) Ltd. (1997) 226 ITR 625(SC), he submitted that income from the

property has been rightly assessed by the Commissioner of Income Tax(Appeals) under the head ÷income from the house propertyö.

3.3 We have heard the rival submissions and perused the material on record. It is seen that the property consists of more than 100 shops and the tenants frequently exit the properties and thus the assessee is required to regularly make agreements. The assessee has also employed staff for recovering of rent from the tenants. In view of the facts, the activity carried out by the assessee definitely falls under the business activity. Further, in the earlier years as well as in the subsequent year, the Revenue has accepted the contention of the assessee then there is no reason to deviate from the stand taken only in respect of one year violating the Rule of Consistency. Accordingly, we reverse the findings of the learned Commissioner of Income Tax(Appeals) and direct the Id Assessing Officer to accept the income declaring by the assessee under the head ÷profit and gains of businessö. Accordingly, this ground of the appeal is allowed.

4. In ground nos. 3 and 4, the assessee has challenged the additions of Rs. 6,67,100/- representing unexplained cash in cash flow statement. In the course of scrutiny proceedings, the assessee submitted cash flow statement of cash deposited and cash withdrawn from his bank accounts maintained in Standard Chartered Bank, ICICI Bank and HDFC Bank. In the said cash flow statement, the source of petty cash of Rs. 6,67,100/- was stated to be petty cash withdrawal. However, the assessee could not co-relate those withdrawals with the bank accounts and, therefore, the Assessing Officer held that the assessee could not

explain the source of the amount stated to be petty cash withdrawn and accordingly he held the amount of Rs. 6,67,000/- as unexplained. In the appellate proceedings before the Commissioner of Income Tax(Appeals) the assessee submitted that the Assessing Officer had not given reasonable opportunity of hearing to the assessee and, therefore, requested to file the details of such petty withdrawals. However, the learned Commissioner of Income Tax(Appeals) rejected the admission of additional evidence and confirmed the addition.

4.1 Before us, the learned Authorized Representative of the assessee submitted that those petty cash withdrawal were from the bank accounts of the assessee and duly accounted for and, therefore, no addition was required.

4.2 Learned Sr. Departmental Representative, relying on the order of the lower authorities, submitted that the sources of withdrawals were not reflected in the cash flow statement.

4.4 We have heard the rival submissions and perused the material on record. As both the parties are contesting on the cash flow statement, thus, in the interest of justice, we feel it appropriate to restore the matter back to the file of the Assessing Officer and direct to verify whether the cash flow statement was prepared on the basis of cash deposited and withdrawal from the bank accounts and wherever there is deficiency to explain the source of cash, the same may be treated as unexplained and the issue may be decided afresh in accordance with

law after providing due opportunity of hearing to the assessee. The ground of the assessee is thus allowed for statistical purpose.

5. In ground no. 5, the assessee has challenged the addition of Rs. 3,13,481/- held as unexplained opening balance of cash flow statement. The Assessing Officer held that the assessee could not explain availability of opening cash balance. Before the learned Commissioner of Income Tax(Appeals), the assessee submitted additional evidence containing cash flow details of preceding year. However, the additional evidence was not admitted by the learned Commissioner of Income Tax(Appeals) and the addition was confirmed.

5.1 Before us, the learned Authorized Representative submitted that on the basis of cash summery of preceding year, the opening balance stands explained, whereas, the learned Departmental Representative relied on the order the lower authorities.

5.2 We have heard the rival submissions and perused the material on record as the cash summery of preceding year has not been verified by the Assessing Officer. Accordingly, we restore the matter to the file of the Assessing Officer to examine the cash summery and decide the issue afresh after providing opportunity of hearing to the assessee. The ground of the appeal is accordingly allowed for statistical purpose.

6. In ground no. 6, the assessee has challenged the addition of gift of Rs. 5 lakhs. In the course of assessment proceedings before the ld AO, the assessee failed to furnish the copy of passport of the donor Sh. Ajay Saini and his income

particular and thus, the Assessing Officer held the gift received as unexplained cash credit under Section 68 of the Act. Before the learned Commissioner of Income Tax(Appeals), the assessee submitted that the donor had provided copy of Income-tax return (ITR) for assessment year 2005-06, however, his passport could not be obtained from him despite several reminders as the donor became non-cooperative with the assessee. In the remand proceeding, on the request of the assessee the summon under Section 131 of the Act was issued and in response to the same, the Authorized Representative of the donor filed a copy of ITR for assessment year 2005-06 and copy of bank statement reflecting transactions of Rs. 5 lacs. The learned Commissioner of Income Tax(Appeals) though accepted the identity of the donor, however, he did not accept the creditworthiness and genuiness of the donor and sustained the addition.

6.1 Before us, the learned Authorized Representative submitted that the donor is Non-resident Indian and the gift was given out of love and affection as a kind and financial help to the assessee and all the ingredients of Section 68 were duly fulfilled by the assessee.

6.2 Learned Departmental Representative, on the other hand, relied on the other of the authorities below.

6.3 We have heard the rival submissions and perused the material on record. The assessee has been provided sufficient opportunity by the learned Assessing Officer as well as by the learned Commissioner of Income Tax (Appeals), however, the assessee failed to establish the creditworthiness of the donor. The

finding of the learned Commissioner of Income Tax(Appeals) on this dispute are well reasoned. The relevant findings are reproduced as under:

“25. From the above, it is evident that Sh. Ajay Saini, indeed existed. His identity stands established. However, to appreciate the facts, we need to see the surrounding circumstances that whether the donor had the capacity to give out a gift of Rs. 5,00,000/- and whether the transaction was genuine. It is well settled law that the Assessing Officer can take note of surrounding circumstances as held in Commissioner of Income Tax vs. Durga Prasad More (1977) 82 ITR 540 and Smt. Sumati Dayal Vs. Commissioner of Income Tax (1995) 214 ITR 801 (SC). In the later decision, the Apex Court has held that considering the surrounding circumstances and applying the test of human probabilities is a must. Firstly, it is surprising to note that the assessee who is able to receive a gift of Rs. 5 lacs, could not produce the passport of Sh. Ajay Saini and vide letter dated 13.04.2010, written to the Assessing Officer has stated that he could not obtain the same and therefore, action under section 131 of the Act should be taken. It is also surprising to note that the donor who could oblige the assessee by giving gift has made himself un-available for verification of such facts. When all the circumstances like absence of relation, absence of occasion, no counter gifts, gifts from persons of little means, are put together lead to one and only conclusion that the gifts are not genuine. At this juncture, it may be prudent to refer to the return filed by the said donor, Sh. Ajay Saini for assessment year 2005-06 with Dy./Asstt. Director of Income Tax, Cir.2(2), International Taxation, New Delhi. Perusal of the same suggests that the assessee had income from house property to the tune of Rs. 4,22,672/- only. The other income was to the tune of Rs. 25,170.09 from ‘Income from Other Sources’, plus Rs. 12,000 from bank interest. In other words, the total income of the assessee for the year was Rs. 4,35,842.69. On the other hand, the donor has given a gift of Rs. 5,00,000/-. This looks impossible on a wider appreciation of the surrounding circumstances and test of human probabilities. In fact, the donor did not even have the capacity to give out a gift of Rs. 5,00,000/-. This is in accordance with the decision of the Apex Court in Commissioner of Income Tax Vs. P. Mohanakala (2007) 291 ITR 278 (SC) and Rajeev Tandon Vs. Asstt. Commissioner of Income Tax [2007] 294 ITR 488 (Delhi).

26. In view of the discussion above, the assessee fails in Ground of Appeal No. 6.”

6.4 In view of above facts and circumstances, we hold that the CIT(A) has given well reasoned finding on the issue in dispute and no interference is required in the findings of the learned Commissioner of Income Tax (Appeals). Accordingly, the ground of the appeal is dismissed.

7. In the result, the appeal filed by the assessee is allowed partly for statistical purpose.

The decision is pronounced in the open court on 24th February, 2016.

Sd/-

(VIJAY PAL RAO)
JUDICIAL MEMBER

Dated: 24th February, 2016.

RK/-

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Sd/-

(O.P. KANT)
ACCOUNTANT MEMBER

Asst. Registrar, ITAT, New Delhi