IN THE INCOME TAX APPELLATE TRIBUNAL
"H" Bench, Mumbai

Before Shri Ravish Sood, Judicial Member
and Shri N.K. Pradhan, Accountant Member

ITA No.7295/Mum/2017
(Assessment Year: 2007-08)

Kailash A. Kothari 128/130, Sarang Street, Mumbai – 400 020	Vs.	I.T.O, Ward 17(2)(2) Aayakar Bhavan, M.K. Road, Mumbai 400 020

PAN – AAEPK4502D

(Appellant)	**(Respondent)**

Appellant by: Shri Ramesh Sahu, A.R
Respondent by: Shri V. Vinod Kumar, D.R

Date of Hearing: 05.11.2019
Date of Pronouncement: 08.11.2019

O R D E R

PER RAVISH SOOD, JM

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-28, Mumbai, dated 06.09.2017, which in turn arises from the order passed by the A.O under Sec. 271(1)(c) of the Income Tax Act, 1961 (for short 'Act'), dated 21.11.2017. The assessee has assailed the impugned order on the following grounds of appeal:

"1. The Ld. Commissioner erred in law in upholding the order of the Assessing Officer of adding the cash gift amount of Rs.11,00,000/- given by the Assessee's Sister to him as his income. He ought not to have done so.

2. The Ld. Commissioner erred in law in rejecting the Affidavit and Declaration of Gift by Mrs. Badamiben N. Jain, sister of the Appellant and doubting her creditworthiness. He ought not to have done so.

3. The Ld. Commissioner erred in law in holding that neither there was any occasion nor purpose or reason to give gift by sister to her brother the Appellant.

4. The Ld. Commissioner erred in law in upholding the Order of Penalty passed u/s 271(1)(c) of the I. T. Act, 1961, by Assessing Officer."

2. Briefly stated, original assessment under Sec. 143(3) was framed by the A.O vide his order dated 27.02.2009. However, pursuant to the directions issued by the Commissioner of Income Tax-13, Mumbai, in exercise of the powers vested with him under Sec. 263 of the Act, the assessment framed by the A.O under Sec. 143(3), dated 27.02.2009 was set aside. Consequent to the directions of the Commissioner of Income Tax-13, Mumbai, a revised assessment order under Sec.143(3) r.w.s 263, dated 31.12.2010 was passed by the A.O assessing the total income of the assessee at Rs.14,50,800/-. In the course of the assessment proceedings, the A.O not finding favour with the claim of the assessee that he had received a gift of Rs.11 lac in cash from his elder sister Smt. Badamiben N. Shah, had thus made an addition of the said amount to the returned income of the assessee. Accordingly, the A.O after inter alia assessing the impugned cash gift of Rs.11 lac as the income of the assessee, had assessed his income at Rs.14,50,800/-. The A.O while culminating the assessment under Sec. 143(3) r.w.s 263, dated 31.12.2010 had also initiated the penalty proceedings under Sec. 271(1)(c) of the Act.

3. Aggrieved, the assessee assailed the aforesaid addition of Rs. 11 lac made by the A.O in appeal before the CIT(A). However, the CIT(A) not finding favour with the contentions advanced by the assessee upheld the order of the A.O and dismissed the appeal.

4. Being aggrieved with the sustaining of the addition of Rs. 11 lac by the CIT(A), the assessee had carried the matter in appeal before the Tribunal. However, the Tribunal vide its order passed in ITA No. 2334/Mum/2012, dated 01.11.2017, not being persuaded to subscribe to the contentions advanced by the assessee as regards the genuineness of the impugned cash gift of Rs. 11 lac which was claimed to have been received by him from his sister, dismissed the appeal. The Tribunal while dismissing the appeal of the assessee had observed as under :

> "10. We have carefully considered the submissions and perused the records. We find that in this case the assessee has claimed to have received a gift of Rs.11 lacs from his elder sister. The sister had shown statement of income of Rs.93,112/- for assessment year 2007-08. No return of income was filed. The source of gift in the hands of the sister has been further explained as gift from her two daughters and son at Rs.3,00,000/-, Rs.3,50,000/- and Rs.2,80,000/- respectively. Rest amounts have been claimed to have come from the opening balances in the hands of the assessee. The daughters are still students and the son has just taken up a job. These persons are not filing the return of income. No statement of bank account of the said donor has been produced. No detail of the working of the opening balance in her hand has been produced. The husband of the sister is an accountant without much income. In this factual scenario, we find that it is abundantly clear that the said donor did not have the

> capacity to grant the gift of Rs.11 lacs to the assessee. Hence, as the assessee has failed to discharge the onus regarding cogently proving the capacity of the donor to give the gift. Hence, we do not find any infirmity in the order of learned CIT-A.
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> 11. The case laws relied upon by the learned counsel of the assessee are not applicable on the facts of the case. In none of those cases, it was emanating that gifts should be allowed when it is abundantly clear that the donor had no capacity to give the gift.
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> 12. Accordingly, in the background of aforesaid discussion and precedent, we do not find any infirmity in the order of learned CIT-A. Accordingly we uphold the same."

The miscellaneous application filed by the assessee i.e M.A. No. 459/Mum/2018 (arising out of ITA No. 2334/Mum/2012) was also dismissed by the Tribunal vide its order dated 24.06.2019.

5. The A.O after receiving the order of the CIT(A) issued a 'Show cause' notice (for short 'SCN'), wherein the assessee was called upon to explain as to why penalty under Sec.271(1)(c) may not be imposed on him in respect of his wrong claim of having received a cash gift of Rs.11 lac from his sister. The explanation advanced by the assessee in his attempt to impress upon the A.O that no penalty under Sec.271(1)(c) was called for in his hands, however, did not find favour with the A.O. Observing, that the assessee had deliberately raised a wrong claim of having received a cash gift of Rs. 11 lac, the A.O imposed a penalty under Sec.271(1)(c) of Rs.3,37,388/-.

6. Aggrieved, the assessee assailed the order passed by the A.O imposing penalty under Sec. 271(1)(c) in appeal before the CIT(A). Observing, that the assessee had failed to place on record any evidence as regards the creditworthiness of the donor, genuineness of the gift transaction, occasion for receiving the gift, and also the fact that he had never reciprocated any gift transaction with his sister, the CIT(A) was not inclined to accept the claim of the assessee that he had received a genuine gift from his sister. It was observed by the CIT(A) that though the assessee had came forth with a superficial explanation, however, as he had failed to substantiate the same, therefore, the bonafides of the same could not be proved. Accordingly, the CIT(A) holding a conviction that the explanation offered by the assessee was flimsy and unsubstantiated, therefore, the onus cast upon him in terms of Explanation 1(B) had remained undischarged. On the basis of his aforesaid deliberations the CIT(A) dismissed the appeal.

7. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. The ld. Authorized Representative (for short 'A.R') for the assessee at the very outset of the hearing of the appeal submitted, that the assessee being aggrieved with the

order of the Tribunal wherein the quantum assessment had been confirmed has preferred an appeal before the Hon'ble High Court. Apart therefrom, it was submitted by the ld. A.R, that the assessee had deposited the entire amount of penalty of Rs.3,37,888/- that was imposed on him under Sec.271(1)(c) of the Act. It was submitted by the ld. A.R that the order of the CIT(A) confirming the penalty imposed by the A.O under Sec. 271(1)(c) may be set aside and the matter be remanded to the file of the A.O for fresh adjudication.

8. Per contra, the ld. Departmental Representative (for short 'D.R') relied on the orders of the lower authorities. It was submitted by the ld. D.R that as it was conclusively proved that the assessee had raised a bogus claim of having received a gift from his elder sister Smt. Badamiben N. Shah, therefore, the A.O had rightly imposed penalty under Sec.271(1)(c), which thereafter had been confirmed by the CIT(A). It was averred by the ld. D.R that as the appeal of the assessee was devoid and bereft of any merit, therefore, the same was liable to be dismissed.

9. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. As is discernible from the assessment order passed by the A.O under Sec.143(3) r.w.s 263, dated 31.12.2010, the amount of Rs.11 lac claimed by the assessee to have been received as a gift in cash from his elder sister Smt. Badamiben N. Shah has been held to be a bogus gift transaction. As observed by us hereinabove, the A.O had added the aforesaid amount of Rs.11 lac as the income of the assessee from undisclosed sources. The assessee had unsuccessfully assailed the assessment order in appeal before the CIT(A). As observed by us hereinabove, the order of the CIT(A) upholding the quantum addition of Rs.11 lac made by the A.O had thereafter been approved by the Tribunal vide its order passed in ITA No. 2334/Mum/2012, dated 01.11.2017.

10. Observing, that the assessee had deliberately raised a wrong claim of having received a gift of Rs.11 lac in cash from his sister, the A.O had vide his order dated 21.11.2012 imposed penalty of Rs.3,35,888/- under Sec.271(1)(c) in the hands of the assessee. Order passed by the A.O imposing penalty under Sec.271(1)(c), dated 21.11.2012 was on appeal confirmed by the CIT(A), vide his order dated 06.09.2017.

11. We have given a thoughtful consideration to the facts of the case in the backdrop of the orders of the lower authorities and the contentions advanced by the authorised representatives for both the parties. It has been the claim of the assessee that he had during the year under consideration received a gift of Rs.11 lac in cash from his elder sister Smt. Badamiben N. Shah. As can be gathered from the orders of the lower authorities, the genuineness of the gift transactions was not accepted by them, for the reason, that neither the creditworthiness of the donor nor the genuineness of the transaction was established. Apart therefrom, it was noticed that the assessee had also failed to place on record the occasion for having received the aforesaid gift. Also, the absence of any such occasion where the assessee had reciprocated a gift transaction with his sister, also did not inspire any confidence as regards the genuineness of the gift transaction with the lower authorities. In fact, as observed by the CIT(A), the assessee had only succeeded in establishing the identity and the relation of the donor. On a perusal of the financial status of the donor i.e the elder sister of the assessee Smt. Badamiben N. Shah, we find that the same does not inspire any confidence as regards her creditworthiness for having gifted an amount of Rs. 11 lac in cash to the assessee. As is discernible from the orders of the lower authorities, the elder sister of the assessee i.e Smt. Badamiben N. Shah is married to an accountant and has three children. Although, it is the claim of the assessee that he had received a gift of Rs.11 lac in cash from his sister, however, no evidence had been filed by the assessee either in the course of the assessment proceedings or in the penalty proceedings which could substantiate his said claim. Rather, we find that the limited financial means of the donor i.e Smt. Badamiben N. Shah (sister of the assessee) clearly militates against the aforesaid claim of the assessee. Considering the fact that the sister of the assessee had not even filed her return of income for the year under consideration, the aforesaid claim of the assessee does not inspire any confidence and raises serious doubts as regards its veracity. In our considered view, keeping in view the financial status of the assese's sister, it can safely be concluded that she did not have the creditworthiness for gifting an amount of Rs.11 lac in cash to the assessee. On a perusal of the order of the Tribunal in the quantum appeal of the assessee, we find that it has been the claim of the assessee that the source of the amount of Rs.11 lac that was gifted by the assese's sister was from the amount of gifts which she had received from her children viz. (i). Ms. Payal Kumari Nihalchand Jain (daughter) : Rs.3,50,000/-; (ii). Ms. Reena Kumari Nihalchand Jain (daughter) : Rs.3,00,000/-; and (iii). Shri Parag Kumar

Nihalchand Jain (son) : Rs.2,80,000/-. Apart therefrom, it was claimed that the balance amount of Rs. 1,70,000/- (out of the impugned cash gift of Rs. 11 lac) was sourced from the cash in hand available with the assesse's sister. We find that the aforesaid claim of the assessee was rejected by the Tribunal, wherein it was observed, that the daughters of the assesse's sister were students, while for the son had only recently taken up a job. Also, it was observed, that neither of the aforesaid siblings of the assesse's sister had filed any return of income for the year under consideration. Further, it was observed by the Tribunal, that the assessee in order to substantiate the genuineness of the gift transaction had neither placed on record any statement of the bank account of his sister, nor filed any working to substantiate that the balance amount was soured from the cash in hand available with her.

12. We have deliberated at length on the issue under consideration, and are unable to persuade ourselves to subscribe to the claim of the ld. A.R that the assessee had received a genuine gift from his elder sister. In fact, a perusal of the orders of the lower authorities and the material available on record not only reveals that the assessee had failed to establish the creditworthiness of the donor, but the very fact that the impugned gift had been received in cash also does not inspire any confidence as regards the genuineness of the transaction itself. Also, we are in agreement with the view taken by the CIT(A), that the assessee could not point out the occasion for receiving a substantial amount of Rs.11 lac as cash gift from his sister, who herself was a person of limited financial means. Further, the fact that the assessee had also not placed on record any material which would reveal that he had at any occasion reciprocated a similar gift to his sister, also supports the fact that no genuine gift was received by the assessee from his sister. In sum and substance, the assessee had only been established the identity and the relation of the donor. Accordingly, as observed by the Tribunal while disposing off the quantum appeal of the assessee, the creditworthiness of the donor as well as the genuineness of the transaction could not be proved by the assessee.

13. We find that in the course of penalty proceedings also the assessee could not place on record any documentary evidence which could have substantiated his explanation of having received a genuine gift of Rs.11 lac from his sister. In our considered view, the assessee had not only failed to substantiate his explanation that he had received a cash gift of Rs.11 lac from his sister, but he had also failed to substantiate the bonafides of his aforesaid explanation. We

find that the claim of the assessee that the amount of Rs. 11 lac received as cash gift from his sister, was sourced from the gifts which she had received from her siblings and her personal savings is in fact a concocted story that was hatched in order to justify the availability of funds with her. In our considered view, the A.O had rightly observed that as the assessee had deliberately raised a wrong claim of having received a cash gift of Rs.11 lac from his sister, therefore, the same tantamounts to concealment of income on his part. In the totality of the facts, we are in agreement with the view taken by the CIT(A) that the assessee had concealed his income as per the provisions of Explanation 1(B) to Sec. 271(1)(c) of the Act. At this stage, we may herein observe, that even in the course of the proceedings before us the assessee had failed to place on record any documentary evidence which would substantiate the genuineness of the gift transaction. Accordingly, finding no infirmity in upholding of the penalty imposed by the A.O under Sec. 271(1)(c) by the CIT(A), we find no reason to dislodge the well reasoned view taken by him.

14. Before parting, we may herein observe, that the ld. A.R in the course of the hearing of the appeal had submitted, that as the assessee being aggrieved with the upholding of the quantum addition by the Tribunal has preferred an appeal before the Hon'ble High Court, therefore, for the said reason the penalty proceedings may be kept in abeyance. In order to drive home his aforesaid contention, the ld. A.R had relied on the judgment of the Hon'ble High Court of Bombay in the case of a Commissioner of Income tax -10, Mumbai Vs. M/s Wander Pvt. ltd. (ITA No. 2753 of 2010, dated 21.08.2012). We have perused the aforesaid judgment of the Hon'ble High Court and are of the considered view that as the same is distinguishable on facts, therefore, it would not assist the case of the assessee. In the aforesaid case, as the appeal of the assessee having been admitted by the Hon'ble High Court was pending adjudication, therefore, it was observed that no prejudice would be caused to the revenue by the order of the Tribunal which had restored the issue of levy of penalty under Sec. 271(1)(c) to the file of the A.O, with a direction, that the same may be decided after receipt of the decision of the Hon'ble High Court on the quantum appeal of the assessee. As in the case of the assessee before us, the appeal had only been filed with Hon'ble High Court and had not been admitted till date, therefore, the same being distinguishable as against the facts which were involved in the aforesaid case before the Hon'ble High Court would thus not assist the case of the assessee

before us. Accordingly, we do not find any substance in the claim of the assessee, who had sought restoring of the issue of levy of penalty to the file of the A.O, with a direction that the same may be adjudicated after receiving of the order of the Hon'ble High Court. As such, the aforesaid claim of the assessee is rejected.

15. In terms of our aforesaid observations the order of the CIT(A) is upheld.

16. Resultantly, the appeal filed by the assessee is dismissed.

Order pronounced in the open court on 08.11.2019

Sd/-	Sd/-
(N.K. Pradhan)	(Ravish Sood)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 08.11.2019
PS. Rohit

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

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