IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN
BEFORE S/SHRI N.R.S.GANESAN, JM and B.R.BASKARAN, AM

I.T.A. No. 434/Coch/2010
Assessment Year : 2007-08

Late Shri Rajesh Kumar T.R. Rep. by L/H Smt. Uma Maheswari, M/s. S. Veeriah Reddiar, Alappuzha. [PAN: ACHPR 9612A]	**Vs.**	The Assistant Commissioner of Income-tax, Circle-1, Kottayam.
(Assessee -Appellant)		**(Revenue-Respondent)**

Assessee by	Shri R.Krishnan, CA
Revenue by	amt. S. Vijayaprabha, Jr. DR

Date of hearing	18/06/2012
Date of pronouncement	05/07/2012

O R D E R

Per B.R.BASKARAN, Accountant Member:

The appeal of the assessee is directed against the order dated 21-04-2010 passed by the Ld. CIT(A)-IV, Kochi and it relates to the assessment year 2007-08.

2. The assessee is assailing the decision of the Ld. CIT(A) in holding that the gift of Rs. 75.00 lakhs received by the assessee is in the nature of remission of liability and hence taxable u/s. 41(1) of the Act.

3. The facts relating to the issue are stated in brief. The assessee is engaged in the business of retail trade in textiles under the trade name M/s. Seemati. During the course of assessment proceedings, the Assessing Officer noticed that there was considerable increase in the capital of the assessee. On further analysis, it was noticed that the assessee has received a sum of Rs. 75 lakhs as gift from his maternal uncle

named Shri V. Thiruvenkitam. The Assessing Officer noticed that the assessee has received this gift by way of book entry, i.e., by crediting his capital account and debiting the business account of donor M/s. Veeriah Reddiar (Dist.), i.e. the proprietary concern of the donor. Prior to passing the gift entry, the assessee owed a sum of Rs. 72.55 lakhs to the above said concern. Though the assessee filed a letter from his uncle, Shri V. Thiruvenkitam, in which he had confirmed the payment of gift, yet the Assessing Officer opined that the gift received by the assessee is required to be treated as cessation/remission of trading liability as stated in sec. 41(1) of the Act. Accordingly, he added the sum of Rs. 75 lakhs referred above u/s. 41(1) of the Act. The assessee carried the matter in appeal before the Ld. CIT(A) but could not succeed. Aggrieved, the assessee is in appeal before us.

4. We have heard the rival contentions and carefully perused the record. There is not dispute with regard to the fact that the donor, Shri V.Thiruvenkitam was the proprietor of M/s. Veeriah Reddiar and the assessee has purchased goods from the that concern. It is also not disputed that the assessee owed a sum of Rs. 72.55 lakhs to M/s. Veeriah Reddiar as at the beginning of the year under consideration. There is also no dispute with regard to the fact that the maternal uncle of the assessee, Shri V.Thiruvenkitam, the proprietor of M/s. Veeriah Reddiar, has confirmed the gift of Rs. 75 lakhs given by him to the assessee. The contents of the confirmation letter are extracted in para 3 of the assessment order and the same reads as under:

> "3. this is to confirm that I have gifted a sum of Rs. 75,00,000 by means of book entry by debit to my personal account on 23-05-2006 to my nephew (sister's son) Dr. T.R. Rajesh Kumar, M/s. Veeriah Reddiar, Alleppey.
>
> In fact it was the desire of me and my late wife, T. Seethalakshmi that we provide some help to my nephew to come up in business that prompted me to make the gift.
>
> I am a regular assessee in your files with PAN ACHPR 9611D amd the personal account reflected in my statements filed with the return of income is after debiting this sum of Rs. 75 lakhs".

5. Now the question that arises is whether the provisions of sec. 41(1) of the Act, which reads as under, are attracted to the impugned transactions:

> "41(1) Where an allowance or deduction has been made in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee (hereinafter referred to as the first-mentioned person) and subsequently during any previous year,-
>
> (a) the first-mentioned person has obtained, whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof, the amount obtained by such person or the value of benefit accruing to him shall be deemed to be profits and gains of business or profession and accordingly chargeable to income-tax as the income of that previous year, whether the business or profession in respect of which the allowance or deduction has been made is in existence in that year or not….".

6. The AO as well as the Ld CIT(A) has noticed that the gift has been given by the donor by way of book entry, i.e., by reducing the balance due from the assessee and hence taken the stand that such reduction of liability would amount to "remission of trading liability". The Ld D.R strongly supported the view expressed by the ld CIT(A).

7. However, according to the Ld. AR, the balance outstanding in the account of M/s. Veeriah Reddiar cannot be fully considered as a trading liability (as assumed by the tax authorities), as the said account was having mixed transactions, i.e., the transactions of general nature and also transactions of trading nature. The Ld. AR further submitted that the Assessing Officer would not have invoked the provisions of sec. 41(1), had the assessee received the gift by way of cheque and utilised the proceeds thereof for making payment to M/s. Veeriah Reddiar, the net effect of which would be reduction of the outstanding balance in that account. Accordingly, the Ld. AR submitted that the book entry passed by the assessee has also had the very same effect and hence a different view could not have been taken by the tax authorities. He further submitted that the book entry passed by the assessee should be considered as "constructive receipt of gift" and "constructive payment of outstanding liability". Accordingly, he contended that the provisions of sec. 41(1) of the Act would not apply to the impugned transaction, as there is no cessation or remission of liability.

8. It is well settled proposition of law that the taxability of the transactions does not fully depend on mere book entries passed by the assessee. The Hon'ble Supreme Court in the case of CIT Vs. Sugauli Sugar Works (P) Ltd (236 ITR 518) has gainfully referred to the following observations made by the Full bench of Hon'ble Gujarat High Court in the case of CIT Vs. Bharat Iron and Steel Industries (1993) (199 ITR 67):-

> "In our opinion, for considering the taxability of amount coming within the mischief of section 41(1) of the Act, the system of accounting followed by the assessee is of no relevance or consequence. We have to go by the language used in section 41(1) to find out whether or not the amount was obtained by the assessee or whether or not some benefit in respect of trading liability by way of remission or cessation thereof was obtained by the assessee and it is in the previous year in which the amount or benefit, as the case may be, has been obtained that the amount or the value of the benefit would become chargeable to income tax as income of that previous year.

9. Thus, the book entry passed by the assessee by reducing the creditor's balance and increasing the assessee's Capital balance is not the only criteria to be considered for the purpose of invoking the provisions of sec. 41(1) of the Act. What is required to be seen is whether the assessee has obtained, whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof. In the instant case, the tax authorities have treated the transaction of gift as "remission of trading liability". Though the assessee disputes that the reduction of sundry creditor's balance would not fall in the category of "remission of trading liability", yet, in our view, the said question would not have much significance in the facts and circumstances of the instant case.

10. In the instant case, the question to be decided is whether the amount of Rs.75.00 lakhs received by the assessee from his maternal uncle by way of gift can be termed as remission of liability in the facts and circumstances of the case. In our view, the question should be decided by duly considering the facts surrounding the case. There cannot be any dispute that the gift is given out of personal consideration and "remission of liability" takes place out of business consideration. A gift would retain its character

as "gift", unless there is some material to show the contrary. In the instant case, the donor is the maternal uncle of the assessee herein and the donor has also confirmed the payment of gift. The payment/receipt of gift has been accounted by passing entries in the books of both the donor and the done. The department has not shown that the gift made by way of book entries is in violation of any law. What we notice is that the AO was more carried away by the entries passed by the assessee as is evident from the following observations made by him:-

> "13. ....As a result of the 'gift', assessee's credit balance with M/s Veeriah Reddiat (Distribution) has come down. This amounts to cessation/remission of trading liability. It is clearly shown in paragraphs 6 to 8 that the transaction comes within the purview of section 41(1). The argument of the assessee that section 4191) does not contemplate cessation of a sundry creditor is without any basis.
>
> 14. The assessee is pursuing a business. He received the amount in question in the course of business (as detailed above, from the cessation of a trading liability). There is a clear nexus between the activities of the assessee and the amount received by him. Therefore it is not in the nature of a casual or nonrecurring receipt. Accordingly it cannot be considered as a gift. Reliance is placed on the decision of Hon. Supreme Court in Dr. K. George Thomas Vs. CIT (1985) (156 ITR 412 (SC)."

11. In the case of Dr. K.George Thomas, the assessee therein was propagating religious faith and publishing newspaper. He received donations from USA for furtherance of his objects. The Hon'ble Supreme Court held that the said donations cannot be considered as casual and non-recurring receipt, but it is taxable as receipts arising from the carrying on of a vocation. In our view, the said decision cannot be applied to the facts of the instant case. The existence of both personal relationship and business relationship, in our view, cannot convert a "gift" into a "remission of trading liability", unless the situation warrants so.

12. While the gift is given by a person to another person who is personally related to him, the remission of trading liability takes place in business relationships. Normally, the remission of trading liability takes place only due to adverse business situation faced by a business concern. In the instant case, nothing was brought on record by the department to show that the assessee's business was in critical condition, which would warrant remission of liability for its survival. Thus the existence of business consideration warranting remission of trading liability was not brought on record by the department. On the contrary, we notice that the assessee has declared an income of Rs.16,13,228/- during the year under consideration, which fact shows that the business of the assessee was in healthy condition. Hence, in our view, business consideration is totally absent in this case and personal consideration for giving the gift outweighs more here. Hence, we are of the view that there is no case to presume that the concern M/s. Veeriah Reddiar has remitted the liability in favour of the assessee. From the facts prevailing in the instant case, we are of the view that the amount of Rs.75.00 lakhs received by the assessee can only be termed as "Gift". Hence, the provisions of sec. 41(1) cannot be invoked to the said gift received by the assessee.

13. In view of the foregoing discussions, we set aside the order of the Ld. CIT(A) on this issue and direct the Assessing Officer to delete the addition of Rs. 75 lakhs made by him u/s 41(1) of the Act.

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

Pronounced accordingly on 05-07-2012

sd/-	sd/-
(N.R.S.GANESAN)	(B.R.BASKARAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Place: Kochi
Dated: 5th July, 2012
GJ
Copy to:
1. Late Shri Rajesh Kumar T.R. Rep. by L/H Smt. Uma Maheswari, M/s. S. Veeriah Reddiar, Alappuzha.
2.The Assistant Commissioner of Income-tax, Circle-1, Kottayam.

3.The Commissioner of Income-tax(Appeals)-IV, Kochi.
4.The Commissioner of Income-tax, Kottayam.
5. D.R., I.T.A.T., Cochin Bench, Cochin.
6. Guard File.

By Order

(ASSISTANT REGISTRAR)
I.T.A.T, COCHIN