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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
R-217
\+ **ITA 33/2004**

KULBHUSHAN KHOSLA ..... Appellant
Through: Dr. Rakesh Gupta with Ms. Poonam Ahuja and Mr. Rohit Kumar Gupta, Advocates.

versus

COMMISSIONER OF INCOME TAX .... Respondent
Through: Mr. Rohit Madan, Senior standing counsel with Mr. Akash Vajpai, Advocate.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE VIBHU BAKHRU

O R D E R
% 14.12.2015

Dr. S. Muralidhar, J.:

1. This appeal under Section 260A (1) of the Income Tax Act, 1961 ('Act') by the Assessee is directed against the impugned order dated 22nd May 2003 in ITA No. 92/Del/2002 for the Assessment Year ('AY') 1994-95.

2. While admitting this appeal on 28th February 2005, the Court framed the following question of law for consideration:

> "Whether the Income Tax Appellate Tribunal was correct in law and on facts in upholding the action of Assessing Officer in reopening the assessment originally framed under Section 143 (3)?"

3. The facts leading to the filing of the present appeal are that the Appellant-Assessee, Kulbhushan Khosla, filed his return for the AY

1994-95 on 14th November 1994 declaring an income of Rs. 3,36,970. The Assessee showed income from salary, business and other sources during AY in question. The Assessee had also done export business.

4. The return was picked up for scrutiny, and enquiries were raised by the Assessing Officer ('AO') during the course of the assessment proceedings. Specific to the case on hand, the AO called for details of the foreign donors of gifts which were disclosed by the Assessee. Specific queries were raised by the AO about the donors of the gifts and whether such gifts had been received in the past as well. On 1st December 1995 a reply was furnished by the Assessee in which it was *inter alia* stated in para 5 as under:

> "5. Details and confirmation of the foreign gifts of Rs. 5,65,000 received by the Assessee during the AY 1994-95 from the donors from their concerned Non-resident external account is hereby enclosed along with certificate from the bank maintaining the non-resident external account of the respective donors."

5. A further reply was submitted by the Assessee pursuant to the hearing on 25th January 1996. In this reply he stated, with particular reference to the donors of the gifts, as under:

> "1. The donors are family friends for the last several years.
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> 2. The bank certificates certifying the payment from NRE Account of Donors have already been filed.
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> 3. No documentary evidence can be filed to establish love and affection between persons.
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> 4. Gifts whenever received have been declared as per requirement of the law.
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> 5. As far as I know they come and stay with their friends and relations whose particulars I have never asked for.

6. These are not known to me. As far as their particulars are concerned I have got no records.

7. They do not stay with me."

6. The foreign donors had also submitted affidavits before the Assessing Officer ('AO'). Harjinder Singh, resident of Darmstadt, Germany confirmed that he had gifted a sum of Rs. 3,25,000 to the Assessee out of natural love and affection on different dates. This was an affidavit dated 27th December 1993. A letter of confirmation from Deutsche Bank, New Delhi Branch addressed to Vijaya Bank, Bhikaji Cama Place, New Delhi with whom the Assessee had an account confirming the clearance of the cheques issued to the Assessee in his favour from the NRE account of Harjinder Singh was also submitted. There is also an affidavit of Bajrang Bahadur Khare, resident of Nirestein, Germany dated 6th January 1996 regarding gift of Rs. 90,000 in favour of the Assessee to the NRE account maintained by him. The affidavit of Mr. Praveen Kumar Rai, resident of Battersea, London regarding the gift of Rs. 1,50,000 has also been submitted.

7. In the assessment order dated 6th February 1997 the assessment was completed at an income of Rs. 3,34,841. A perusal of the said assessment order reveals that the AO was satisfied with the explanation offered regarding the donors or the foreign donors of the gifts since there was no mention of that fact in the assessment order, although as noticed hereinbefore, detailed enquiries were made on that behalf.

8. On 9th February 2001, the AO addressed a letter to the Assessee informing him that the assessment was reopened on the basis of the valuation report received from the Departmental Valuation Officer

('DVO') in respect of the immovable properties of the Assessee at D-44, Okhla Industrial Area, New Delhi and D-27, Ranjit Nagar, New Delhi. The same letter further mentions that "it has been brought on record that foreign gifts amounting to Rs. 6,75,000 have been received by you, which needs verification." In response thereto, the Assessee by his letter dated 3rd January 2000, filed before the AO on 3rd January 2001, had submitted that the original return filed on 14th November 1994 should be treated as his return in response to the aforementioned notice.

9. At this stage it is necessary to examine the reasons for reopening of the proceedings under Section 147/148 of the Act. Two broad grounds were urged. One ground was the underestimation of investment in the construction of factory and shop in around two locations and the second ground was the receipt of foreign gifts. After considering the Assessee's explanation, that the properties in question were built in 1981 and 1988 respectively, and not during the AY in question, the AO dropped this point and made no addition on this account in the assessment. As far as the foreign gift in the sum of Rs. 5,65,000, the AO came to the conclusion that the Assessee failed to establish the genuineness of the NRI gifts and that of his relationship with the donor. Accordingly, the said amount was treated as the concealed income of the Assessee in the re-assessment order dated 29th March 2001 and was added back to the total income of the Assessee.

10. In the appeal filed before the Commissioner of Income Tax (Appeals) ['CIT (A)'] the validity of the above addition was examined. In the order sheet dated 7th December 1998 it was *inter alia* noted by the AO as under:

> "Further the Assessee had during the year under consideration received foreign gifts amounting to Rs. 22,55,000 in his name and in the names of Anil Khosla, Rakesh Khosla, Yogesh Khosla and Virendra Khosla. It is also seen that during the AY 93-94, he had received foreign gifts amounting to Rs. 6,75,000. Enquiries reveal that Shri Khosla is laundering his black money through these NRI gifts and donors are not even remotely related to him. I am therefore satisfied that the income already assessed is under assessed and the income has escaped assessment.
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> Since I am satisfied that this is fit case of understatement and the income has escaped assessment, I seek the approval of DCIT for reopening the case under Sections 147 and for issue of notice under Section 148."

11. The Assessee did point out that all the information in his possession had already been disclosed by him during the original assessment proceeding and that unless some new information had been received by the AO regarding the NRI gifts, he would not file any further details. The CIT (A), however, viewed that as "an attempt to block further investigation in the matter and detract the attention of the AO from the main issue." The CIT (A) took the view that the said issue of NRI gifts was not examined property and that since "the AO did not consider all the material available with him at the time of original assessment, it cannot be said that the AO was trying to review a concluded matter." The remand report was called for from the AO by the CIT (A). Thereafter the CIT (A) concluded that there was nothing to suggest that the AO's "reasons to believe" were irrational, malafide or stemmed from mere suspicion, guess or surmise, nor can it be said that the reasons were vague, indefinite, farfetched or remote. Accordingly, the addition was upheld.

12. The Assessee then appealed to the ITAT. By the impugned order

dated 22nd May 2003, the ITAT upheld the orders of the AO as well as the CIT (A). It was noted by the ITAT that the AO had made a reference to the Foreign Tax Division ('FTD') of the Central Board of Direct Taxes ('CBDT') for making inquiries abroad about the real identity and financial status of the donors. "As the inquiries were pending and the assessment was getting time barred, the AO completed the assessment without reaching any conclusion on this point. He left an office note in the assessment order to reopen the case on receiving any adverse information from the FTD." The ITAT also noted that the Assessee had challenged the reopening of the assessment *inter alia* on the ground that "no adverse material or new information was received from the FTD up to the time of the reopening the Income Tax assessment."

13. The ITAT concurred with the CIT (A) and concluded that:

> "nothing prevented the Assessing Officer in the initial assessment from perusing the evidence which had been placed before him and his initial duty was to peruse such evidence and come to the conclusion whether onus which lay on the Assessee had been discharged or not. This exercise does not seem to have been carried out. The other course, which was open to the Assessing Officer was to have accepted the Assessee's stand and not making an addition and vis-a-vis the office not any adverse material coming to his possession later on could have been the basis for reopening. The third course, which was open to the Assessing Officer was to have made the addition itself by considering the Assessee's evidence on merits and thereafter left it open to the Assessee to challenge the addition in further appeals to the Commissioner of Income Tax (Appeals) and the Tribunal."

14. The ITAT negatived the plea that the reopening could have been made only on the receipt of adverse material from the FTD. ITAT held that "a mistake committed by one Assessing Officer cannot be perpetrated and in case the office note is in direct conflict with a legal

provision it cannot bind the successor Assessing Officer, who if he feels that an item of income had escaped assessment, then he bound to act with reference to a provision of law and not allow the proceedings to lapse only because the report of the FTD as in the present case is not receive."

15. This Court has heard the submissions of Dr. Rakesh Gupta, learned counsel for the Assessee as well as Mr. Rohit Madan, learned Senior standing counsel for the Revenue.

16. The reasons for reopening the assessment have been set out in an office note which has been extracted in para 28 of the impugned order of the ITAT. This office note was apparently prepared by the AO at the time of finalizing the initial assessment. It reads as under:

> "**Office Note**
> The assessment is completed after detailed discussion with the Additional CIT, R-ll, New Delhi who guided me to make a reference to the F.T.D. Branch to ascertain the genuineness of these NRI gifts. Also make reference to the valuation cell to ascertain the correct value of the assets *for Health Tax Purposes.* It has been observed that the Assessee has received huge gifts from NRI's last year relevant to the Asst. Year 1993-94, the gift received have been declared Rs. 6,75,000 and in this year he has shown at Rs. 5,65,000 investigations were made from the banks and it was found that during the year under consideration has received the following gifts either in the name of himself and or in the name of his family members."

17. Below the office note, list of 16 donors has been set out. The office note states that in order to verify the genuineness of the gifts and to scrutinize the corresponding entries in their books of account in their respective countries, a detailed letter has been sent to the FTD Branch of the CBDT. It is, in that context, stated that "if anything achieve received from the FTD (Foreign Tax Division) Branch the assessment shall be

reopened". In other words, the reopening of the assessment was made contingent upon some material being received from the FTD. It is not denied by the Revenue that till date no such adverse material *qua* the Assessee has been received from the FTD.

18. In the absence of any material, as anticipated by the AO in the office note, it is difficult to appreciate on what basis the AO could form the "reasons to believe", that for the AY in question any income has escaped assessment. What seems to have been overlooked by the CIT (A) as well as the ITAT is that the original assessment was framed after detailed questionnaires were sent to the Assessee and replies furnished by him thereto giving the details of all the donors as well as their affidavits. These were examined by the AO. The mere fact that the AO may not have mentioned in the assessment order that the above exercise was undertaken need not mean that he did not pay attention to the materials before him. There was no warrant for the ITAT to have drawn such presumption. In fact the affidavits of the donors coupled with the confirmation letters of the Bank, as noted hereinabove, were materials touching upon the aspects of genuineness of the identity of the donors. Unless there was material which controverted the said documents produced by the Assessee in the form of the report of the FTD, it could not be said that there was any adverse material which could justify the formation of 'reasons of believe' within the meaning of Section 147/148 of the Act for reopening the assessment.

19. This was a case where the original assessment was completed under Section 143 (3). In other words there was a complete scrutiny of the accounts and all the affidavits of the donors furnished by the Assessee pursuant to the questionnaires issued to him by the AO. In the absence of

any adverse material, the reopening of the assessment was at best due to change of opinion of the AO that some income had escaped assessment. This was impermissible under Section 147 of the Act.

20. As noted by the decision of this court in ***CIT v. Multiplex Trading & Industrial Co. Ltd.*** (decision dated 22nd September 2015 in ITA 356/2013), "it would be impermissible for the AO to reopen the assessment unless the AO, on the basis of credible and tangible material, which was not in his possession during the initial assessment, believes that income of the Assessee has escaped assessment." In **Oriental Insurance Company v. CIT** (decision dated 15th September 2015 in ITA 174/2013), it was observed:

> "9. A bona fide reason to believe that income has escaped assessment is a necessary pre-condition that clothes the AO with the power to reopen the assessment, which has otherwise attained finality. The reasons to believe must have a 'direct nexus' and a 'live link' with the formation of an opinion by the AO that taxable income of an Assessee has escaped assessment.
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> ....
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> 12. It is well established that reasons to believe that income had escaped assessment is a necessary precondition for the AO to assume jurisdiction. Clearly, it would be difficult to sustain that this precondition is met if such reasons to believe that income of an Assessee has escaped assessment are based on palpably erroneous assumptions. The reason to believe must be predicated on tangible material or information. A reason to suspect cannot be a reason to believe; the belief must be rational and bear a direct nexus to the material on which such a belief is based."

21. For all the aforesaid reasons, this Court finds that there was no justification for the ITAT to have upheld the action of the AO in the reopening of the assessment through Sections 147/148 of the Act.

22. The question framed is answered in the negative, i.e., in favour of the Assessee and against the Revenue. The impugned order of the ITAT and the corresponding orders of the CIT (A) as well as the AO are hereby set aside.

23. The appeal is allowed but, in the facts and circumstances of the case, with no order as to costs.

S. MURALIDHAR, J

VIBHU BAKHRU, J

DECEMBER 14, 2015
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