

1.6 In the assessment proceedings as well as the appellate proceedings, the assessee stated that he knew Sri M S Muthuswamy but contended that it was his daughter Smt Kumudini who placed the order for purchase of the jewellery and he had no knowledge of how and when the money was paid to the jewellers he and his wife had not actively participated in the transaction but he was not in a position to produce evidence due to the unfortunate demise of his daughter in 2000.

1.7 In obedience to the directions of the Hon'ble High Court, commissions u/s 131 of the Act were issued to the Income tax Officer, Non-Corporate Ward-1(4), Coimbatore for examination of Sri M S Muthuswamy. A sworn statement was recorded from him on 26.08.2015 the relevant extracts from which are reproduced below:

(Q 1 to Q 3 relate to introduction, educational qualification and income tax particulars of the deponent.)

Q4. Please state whether you know Shri N Jayakrishna, Hyderabad and if knows, please explain how did you know him and come into contact with him?

Ans. I know Shri N Jayakrishna, Hyderabad as a customer. He approached me for the purpose of purchase of jewellery and diamonds.

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Q5. Please explain whether you know Smt. Kumudini, daughter of Shri N Jayakrishna and please explain whether she met you personally in connection with the purchase of jewellery and diamonds?

Ans. No. I do not know Smt. Kumudini and no such person met me for the above purpose.

Q6. Please explain the details of advances received from Shri N Jayakrishna, purpose of the advances as recorded in your books and details such as who took delivery of the jewellery, how and to whom the cash refund was handed over and how the refund cheques were delivered, i.e. whether by post or handed over in person etc.

Ans. The following amounts were received by me in cash at Hyderabad from the PA of Shri N Jayakrishna on the dates mentioned below during my visit to Hyderabad in connection with my business.

09-01-1996	:	Rs.9,45,000/-
30-01-1996	:	Rs.9,18,750/-
15-02-1996	:	Rs.4,90,000/-

The diamond jewellery was handed over in Coimbatore to the PA of Shri N Jayakrishna. I do not remember his name now. The refund cheques and cash were also handed over to his PA in Coimbatore.

Q7. In the summons issued to you, you were asked to produce the books of account for the above transactions. Please explain why you have not produced the books of account as required?

Ans. I am not in possession of the books of account for the above transactions, since I am not keeping the old records and the same were destroyed during demolition of the old buildings, which were reconstructed later. Hence, I am not able to produce the relevant books of account now.

1.8 A copy of the statement recorded from Sri M S Muthuswamy on 26.08.2015 was provided to the assessee; and vide this office letters dated 11.09.2015 and 14.09.2015 he was afforded an opportunity to cross-examine Sri M S Muthuswamy as directed by the Hon'ble High Court. The assessee requested for a certified copy of the deposition vide his letter dated 20.09.2015 and the same was provided to him vide letter dated 06.11.2015. The assessee's A.R. replied vide letter dated 17.11.2015 stating that the assessee did not want to cross-examine Sri M S Muthuswamy at that stage since the latter had stated all the facts in his statement dated 26.08.2015. The assertions made in the letter are summarized as under:

- a) There is no dispute on the cash payments to Sri M S Muthuswamy. The dispute is on the question as to who paid the cash and what are the sources thereof. The answers to these questions are readily available in the answer to Q No.6 of the jeweller's sworn deposition.

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- b) From the answer given by Sri M S Muthuswamy to Q No.6 of his statement, it is confirmed that the assessee neither paid any money to the jeweller nor received any jewellery from him.
- c) The source of the cash paid by his late daughter Smt. N Kumudini was her marriage gifts and monies given by him and his wife from out of withdrawals from their bank account.
- d) It is stated that the assessee has not paid any money to Sri M S Muthuswamy nor received any jewellery from him and hence he is not responsible for the alleged payment to Sri M S Muthuswamy.
- e) The cash paid by the assessee's daughter to Sri M S Muthuswamy cannot be treated as unexplained income in the hands of the assessee.

1.9 Subsequently, the assessee vide his letter dated 01.03.2016 requested for an opportunity to cross-examine Sri M S Muthuswamy. Accordingly, commissions u/s 131 of the Act was issued to the Income tax Officer, Non-Corporate Ward-1(4), Coimbatore to summon Sri M S Muthuswamy for the purpose of cross examination which was arranged on 28.03.2016 at Coimbatore.

2.0 The relevant extracts from the cross examination of Sri M S Muthuswamy by the assessee before the Income tax Officer, Non-Corporate Ward-1(4), Coimbatore are reproduced below:

(Q1 relates to identification particulars of Sri M S Muthuswamy.)

- Q2. By Shri N Jayakrishna: Did I approach you for the purchase of jewellery?
Ans. By Shri M S Muthuswamy: You have not approached me for purchase of jewellery.
- Q3. By Shri N Jayakrishna: When I am from Hyderabad, why should I purchase jewellery from you in Coimbatore?
Ans. By Shri M S Muthuswamy: Your daughter's relatives are there in Coimbatore who approached for selection/design.
- Q4. By Shri N Jayakrishna: When you deal with thousands of customers, how could you remember me as your customer?
Ans. By Shri M S Muthuswamy: I was informed that she is the daughter of Shri.Jayakrishna.
- Q5. By Shri N Jayakrishna: How the cash receipts were treated by you in my account?
Ans. By Shri M S Muthuswamy: For the sake of identity of their relatives.
- Q6. By Shri N Jayakrishna: When I have not paid the amounts to you personally how can you say that the money was received from me? It could be on behalf of any other person or my daughter or any other family member. Is it not?

Ans By Shri M S Muthuswamy: *It could be.*

Q7. By Shri N Jayakrishna: *Did you receive any purchase order in writing from me or did you give any estimation to me or did you get any written approval from me for purchase of jewellery?*

Ans. By Shri M S Muthuswamy: *No. Not necessary for readymade jewellery.*

Q8. By Shri N Jayakrishna: *Did my PA tell you that he was sent by me and the money was sent by me?*

Ans By Shri M S Muthuswamy: *No.*

Q9. By Shri N Jayakrishna: *When you are not in possession of the books of account and records destroyed during demolition of your old buildings, how do you remember that the amounts were received from me on those particular dates?*

Ans By Shri M S Muthuswamy: *I thought so.*

Q10. By Shri N Jayakrishna: *In the above facts, do you confirm that the amounts were not paid by me personally to you and the jewellery was not received by me personally?*

Ans By Shri M S Muthuswamy: *Yes.*

2.1 After the cross-examination, the assessee filed further submissions on 29.03.2016 enclosing copies of evidence filed in the original assessment proceedings. The contents of the letter dated 29.03.2016 are summarized below:

- i) It is not in dispute that the assessee and his wife Smt. N Padmaja Devi have withdrawn monies from their respective bank accounts for purchase of jewellery for their daughter. Details of the withdrawals have been filed earlier. The fact of the withdrawals totaling Rs.16.46 lakhs have been confirmed in the assessee's sworn statement and affidavit. There is no contrary evidence on record to prove that the sum of Rs.16.46 lakhs was not available to them or was utilized for any other purpose. The assessee confirms that they were not utilized for any other purpose.
- ii) The fact of receipt of cash gifts of Rs.10.08 lakhs was confirmed in the assessee's statement and necessary evidence in the form of confirmation letters from the donors were also filed. There is no evidence contrary to the same.
- iii) The aggregate funds available to late Kumudini Devi were therefore Rs.26.54 lakhs while the amounts given for purchase of jewellery were only Rs.23,53,750/. Reliance was placed on the decision of the Hon'ble A.P. High Court in the case of D. Yashoda 70 ITR 515 wherein it was held that withdrawals made earlier are available to the assessee unless there was evidence to the contrary.

- iv) The assessee had given an assertive statement regarding availability of funds whereas no contrary evidence was brought out by the Assessing Officer.
- v) The assessee did not visit Coimbatore at any time for purchase of jewellery or for making deposit with Mr.Muthuswamy nor is there any evidence to confirm that monies were paid to the jeweller by the assessee. On the other hand Mr.Muthuswamy confirmed that the assessee did not approach him for purchase of the jewellery or paid amounts to him for the same.
- vi) It is settled law that where any undisclosed investment is alleged to have been made in the name of the assessee, burden lies on the department to prove that it was the assessee who made the investment. There is no evidence to contradict the assessee's assertions that he did not deposit the monies or purchase the jewellery. The assessment cannot be made on guess work or assumption. Reliance was placed on the decision of the Hon'ble Supreme Court reported in 57 ITR 532 and 26 ITR 775 in this regard.
- vii) Statements made by the assessee on oath and affidavits given by the assessee and his wife cannot be disregarded without contrary evidence.
- viii) It is not correct to say that the cash gifts received by Smt. Kumudini at the time of her marriage were not available or constituted unexplained investment of the assessee.
- ix) In the cross examination, Sri M S Muthuswamy categorically admitted that the assessee did not approach him for purchase of jewellery and stated that the assessee's daughter and her relatives had approached him for selection of jewellery and that the relatives had informed him that she was the daughter of Sri N Jayakrishna of Hyderabad which was the reason for his maintaining the account in the assessee's name.
- x) The amounts paid by Smt Kumudini to Sri M S Muthuswamy cannot be assessed as unexplained investment in the hands of the assessee.

2.2 After completion of the examination and cross examination as directed by the Hon'ble High Court and after considering all the submissions made by the assessee during the present proceedings, the assessment is finalized as under.

2.3 From the examination and cross-examination, it is evident that the claim made by the assessee all along that it was his daughter who made the deposits with the jeweller and purchased the articles is not correct. According to Shri M S Muthuswamy, it was the assessee's P.A. who gave him the monies when he was visiting Hyderabad on business purpose and received the jewellery at Coimbatore which was not disputed by the assessee.

2.4 The claim of the assessee that the investment of Rs.23,53,750/- was made by his daughter was not established. On the other hand the jeweller had affirmed that he did not know Smt. Kumudini and she did not approach him in this matter. This fact was not disputed in the cross examination.

2.5 The reference made by the assessee to the answers given by Sri M S Muthuswamy to Q No.s 3, 4 and 5 of the cross examination to draw support for the claim that the assessee was not involved in the transaction is not correct for the reason that Sri M S Muthuswamy was clear in his statement that monies were paid by the P.A. of the assessee at Hyderabad and the jewellery was handed over to the P.A. in Coimbatore and refund of surplus monies were also handed over to the P.A. in Coimbatore which was not disputed in the cross examination.

2.6 It is evident from the cross examination that in asking the jeweler to confirm that he did not personally pay the amounts or take delivery of the jewellery, the assessee is trying to evade from his accountability in the transaction. This is obvious from the fact that the assessee was putting such questions though the jeweller never said that monies were received from the assessee directly or that the jewellery was handed over to him.

2.7 The monies were deposited by the assessee's P.A. and jewellery was received by the P.A. and refund amounts were received by way of cheque in the name of the assessee. The fact that the assessee's P.A. was dealing with the matter and some monies out of the advances were received back through cheques and deposited in the assessee's a/c establishes that the transaction was done under the directions of the assessee and expressing ignorance is only on the ground that he was not physically present at the time of the transaction. Here, it may be stated that a person of the assessee's status who engages the services of a P.A. would not normally be present personally for all his transactions.

2.8 As the matter now stands, it is the assessee's P.A. who paid the monies and took delivery of the jewellery and there is no information with regard to handing over of the money by Smt. Kumudini to the P.A. or taking the jewellery from him.

2.9 The irrefutable conclusion is therefore that the transaction had taken place with the direct or indirect participation of the assessee and he is answerable for the availability of sources for the monies invested with the jeweller.

3.0 It is noteworthy that the payments made by the P.A. at Hyderabad were recorded in the books of the jeweller with full details of residential address and telephone number of the assessee. Thus, it is established that it was the assessee who paid the cash of Rs.23,53,750/- by proxy to Sri M S Muthuswamy, Prop: Sre Venco Jewellers, Coimbatore in January and February 1996 for the purchase of jewellery.

3.1 The present assessment proceedings are in obedience to the specific directions of the Hon'ble High Court to examine Sri M S Muthuswamy and to give the assessee an opportunity to cross-examine him. The issues with regard to the legality of proceedings u/s 147 raised before the Hon'ble ITAT which were to be kept open as directed by the Hon'ble High Court were not raised by the assessee in the present proceedings. So far as the availability of sources for making the investment is concerned, no fresh evidence has been brought in during these proceedings. Hence, there is no reason to differ from the observations and findings recorded in the assessment order dated 28.03.2002 holding the advances of Rs.23,53,750/- made with Sri M S Muthuswamy, Prop: Sre Venco Jewellers, Coimbatore as unexplained investments u/s 69B of the Act and confirmed by the learned CIT(Appeals) in his order dated 10.03.2003.

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3.2 Accordingly, the total income is assessed at Rs.24,56,750/- as determined in the assessment order dated 28.03.2002.

Computation of income and tax payable:

Income assessed as per assessment order dated 28.03.2002 Rs.24,56,750/-

Tax thereon	Rs. 9,56,700/-
Add: Interest u/s 234B	Rs.11,62,456/-
Interest u/s 234C	Rs. 204/-
	Rs.21,19,360/-
Add: Refund issued u/s 143(1)	Rs. 5,870/-
	Rs.21,25,230/-
Less: Prepaid taxes	Rs. 22,970/-
Total payable	<u>Rs.21,02,256/-</u>

This should be paid as per Demand Notice enclosed.

Penalty proceedings u/s 271(1)(c) of the I T Act are separately initiated.



(Signature)
(T Mythili)
Income Tax Officer
Ward-14(5), Hyderabad.

Copy to the assessee.

(Signature)

10. On perusal of the above, we find that the Ld. AO has reproduced the relevant statement of the jeweller recorded on 26.08.2015 and also the cross examination of the jeweller by the assessee on 28.03.2016. The Ld. AO has elaborately recorded the relevant facts of the case for making the impugned addition. We further find that a crucial fact emerging from the record is that, part of the said cash payment of Rs.23,53,750/- resulted in refund of the balance amount by the jeweller through cheque in the name of the assessee, which was handed over by the jeweller to the PA of the assessee and the cheque was subsequently deposited in the bank account of the assessee. This fact of refund by cheque in the name of the assessee and its deposit in the assessee's bank account