आयकर अपीलीय अधिकरण,चण्डीगढ़ न्यायपीठ, ""बी" , चण्डीगढ़

IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH, 'B', CHANDIGARH

श्री संजय गर्ग, न्यायिक सदस्य एवं श्रीमती अन्नपूर्णा गुप्ता, लेखा सदस्य

BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER AND Ms. ANNAPURNA GUPTA, ACCOUNTANT MEMBER

आयकर अपील सं./ **ITA No. 773/CHD/2018**

निर्धारण वर्ष / Assessment Year : 2011-12

Shri Pankil Garg, Aggarwal Bhawan, Shahbad (M)	बनाम	The Pr. CIT, Karnal
स्थायी लेखा सं./PAN No. AFOPG2875E		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/Assessee by : Shri K.R. Chhabra, Advocate

राजस्व की ओर से/ Revenue by : Sh. G.S. Phani Kishore, CIT DR

सुनवाई की तारीख/Date of Hearing : 15.07.2019

उदघोषणा की तारीख/Date of Pronouncement : 17.07.2019

आदेश/Order

Per Sanjay Garg, Judicial Member:

The present appeal has been preferred by the assessee against the order dated 19.3.2018 of the Pr. Commissioner of Income Tax, Karnal [hereinafter referred to as' PCIT'] against the revision order passed u/s 263 of the Act, whereby, the Ld. PCIT has set aside the assessment order passed by the Assessing Officer with a direction to make assessment afresh u/s 143(3) read with section 147 of the Income Tax Act, 1961 (in short 'the Act').

2. The appeal of the assessee is barred by limitation period of 06 days. A separate application for Condonation of Delay has been moved by the assessee pleading that the counsel for the assessee due to medical reasons could not file the appeal within the stipulated period. The averments made in the application have been corroborated with the affidavit of the counsel for the assessee.

Considering the grounds mentioned in the application for Condonation of Delay which are duly supported with the affidavit and also considering the shortness of the delay period of only 06 days, the delay in filing the present appeal is hereby condoned.

3. Brief facts relating to the issue are that the assessee filed his return of income on 9.3.2012 declaring an income of Rs. 14,32,982/-. The assessment was completed by the Assessing Officer vide order dated 13.3.2014 u/s 143(3) of the Act accepting the returned income. Subsequently, the Assessing Officer reopened the assessment u/s 147 read with section 148 of the Act on the ground that the assessee during the year under consideration had received a gift of Rs. 5,90,000/- from his 'Hindu Undivided Family'('HUF'). The Assessing Officer was of the view that since the amount of said gift was more than Rs. 50,000/-, hence, the same was exigible to tax as 'income from other sources' u/s 56(2)(vii) of the I.T. Act. However, the assessee in the reopened assessment proceedings relied upon the decision of the Coordinate

Rajkot Bench of the Tribunal order dated 17.5.2011, in the case of '**Vineetkumar Raghavjibhai Bhalodia vs ITO'** passed in ITA No. 583/Rjt/2007 for assessment year 2005-06, which has been further followed by the Hyderabad Bench (SMC) of the Tribunal, order dated 17.6.2015 in **'Mr.Biravelli Bhaskar vs ITO'** ITA No. 398/Hyd/2015 for A.Y. 2008-09, wherein, it has been held that 'HUF' being a group of relatives, hence, the gift by the ''HUF'' to an individual is nothing but a gift from group of relatives and further as per the exclusion clause 56(2)(vii) of the Act, a gift from relative is not exigible to taxation, hence, the gift received by the assessee from the 'HUF' was not taxable. The Assessing Officer accepted the contentions raised by the assessee and accordingly assessed the income of the assessee at the returned income.

However, subsequently, the Ld. PCIT invoking his jurisdiction u/s 263 of the Act, set aside the order passed by the Assessing Officer and held that the 'HUF' does not fall in the definition of relative in case of an 'individual' as provided in Explanation to clause (vii) to section 56(2) as substituted by Finance Act, 2012 with retrospective effect from 1.10.2009. That though, the definition of a relative in case of a 'HUF' has been extended to include any member of the 'HUF', yet, in the said extended definition, the converse case is not included that is to say in the case of individual, the 'HUF' has not been mentioned in the list of relatives. Ld. PCIT, thus, formed a view that though a gift from a

member thereof to the 'HUF' was not exigible to taxation as per the provisions of section 56(2)(vii) of the Act, however, a gift by the 'HUF' to a member exceeding a sum of Rs. 50,000/- was taxable. She also rejected the contention of the assessee that the aforesaid gift amount was received by the assessee from the income of the 'HUF' and thus was exempt from taxation u/s 10(2) of the Act, holding that to claim exemption u/s 10(2) of the Act, the member 'HUF' must receive any amount for a consideration out of the income of the 'HUF'. That since the assessee had received the aforesaid amount of Rs. 5,90,000/- without consideration, hence, the same was not tax exempt. She also held that the decision of the Coordinate Rajkot Bench of the Tribunal in the case of 'Vineetkumar Raghavjibhai Bhalodia vs ITO' (supra) and Hyderabad Bench in 'Mr.Biravelli Bhaskar vs ITO' (supra) were not in consonance with the statutory provisions of section 56(2)(vii) and section 10(2) of the I.T. Act and, thus, the Assessing Officer had made a mistake in not taking recourse to the clear and unambiguous provisions of section 56(2)(vii) of the Act and in unduly placing reliance on the judicial decisions which were not in accordance with the provisions of law. She, therefore, held that the order passed by the assessing officer was erroneous and prejudicial to the interest of Revenue. She, accordingly, set aside the order of the Assessing Officer and directed the Assessing Officer to make assessment afresh.

4. Being aggrieved by the above order of the Ld. PCIT, the assessee has come in appeal before us.

5. We have heard the rival contentions and have also gone through the record. In this case, originally, the assessment was framed u/s 143(3) of the Act accepting the returned income. The assessment was reopened u/s 147 of the Act only to examine the issue as to the taxability of the amount of gift received by the assessee from his 'HUF'. The issue was examined by the Assessing Officer and he accepted the returned income holding that the gift received from 'HUF' was not exigible to tax by relying upon the decisions of the Coordinate Rajkot Bench of the Tribunal in the case of Vineetkumar Raghavjibhai Bhalodia vs ITO' (supra) and Hyderabad Bench of the Tribunal in 'Mr.Biravelli Bhaskar vs ITO' (supra).

The decisions of the higher judicial authorities were binding upon the Assessing Officer and the Assessing Officer accordingly followed the same. In view of this, the Assessing Officer took a possible view in the light of the direct judicial decisions on the issue. Under the circumstances, the order of the Assessing Officer cannot be said to be erroneous. The Hon'ble Supreme Court in the case of 'Malabar Industries Co. Ltd. vs CIT' (2000) 243 ITR 83 has held that for exercise of jurisdiction by the Commissioner u/s 263 of the Act, pre-requisite condition is that the order of the Income Tax officer is erroneous in so far as it is prejudicial to the interest of Revenue. Thus,

the Commissioner has to be satisfied if the twin conditions namely (i) the order of the Assessing Officer sought to be revised is erroneous and; (ii) it is prejudicial to the interest of Revenue. The Hon'ble Supreme Court has further held that if one out of the aforesaid twin conditions is absent, the recourse cannot be had to section 263(1) of the Act by the Commissioner. As observed above, since the Assessing Officer had duly applied his mind to the issue and followed the decisions of the higher judicial authorities i.e. Coordinate Benches of the Tribunal (supra), hence, in the light of the decision of the Hon'ble Supreme Court in the case of 'Malabar Industries Co. Ltd. vs CIT' (supra), the order of the Assessing Officer cannot be held to be erroneous and, therefore, the Ld. PCIT wrongly exercised jurisdiction u/s 263 of the Act and the same cannot be held to be justified. The order of the Ld. PCIT is liable to be set aside on this score alone.

6. We would like to further add that the Ld. PCIT while passing the impugned order, held that the decisions of the Coordinate Rajkot and Hyderabad Benches of the Tribunal (supra) were not correct decisions which, in our view, tantamount to judicial indiscipline. When there were direct decisions of the higher courts available with the assessee which were duly cited before the Ld. PCIT and also which were duly discussed in the impugned order of the Assessing Officer, the Ld. PCIT neither had any power nor any justification to say that the Assessing

Officer should not have placed reliance on the said judicial decisions. If such a course is allowed to subsist, then there will be no certainty and finality to the litigation. If the decisions passed by the higher authorities are not followed by the lower authorities, there will be chaos resulting into never ending litigation and multiplication of the cases. In view of the above discussion, the impugned order of the Ld. PCIT is non sustainable as per law.

7. Now coming to the observations made by the Ld. PCIT on the merits of the case. The assessee in this case has taken a plea that the aforesaid gift has been received by the assessee out of the income of the 'HUF' and that the same was exempt u/s 10(2) of the I.T. Act. There is a direct decision of the Coordinate Rajkot and Hyderabad Benches of the Tribunal (supra) on this issue, holding that for getting any exemption u/s 10(2) of the Act, the individual assessee must satisfy two conditions, firstly, he is a member of the 'HUF' and, secondly, he receives a sum out of the income of the such 'HUF', may be of earlier years. The Ld. PCIT in the impugned order passed u/s 263 of the Act, however, held that the word ‘paid out’ means that sum must be paid out either in return of ‘goods’ or ‘services’ or that the same must be for some consideration. Such an interpretation by the Ld. PCIT of section 10(2) of the Act is wholly misconceived. There is no rebuttal or denial either in the order of the Assessing Officer or in the order of the Ld. PCIT in

respect of the contention of the assessee that amount in question was received out of the income of the 'HUF'. In view of this, the assessee, otherwise, is entitled to exemption u/s 10(2) of the Act.

8. Now coming to the findings of the Ld. PCIT that as per the provisions of section 56 (2)(vii) of the Act, though the members of the 'HUF' are to be taken relatives of the 'HUF' for the purpose of the said section, however, the converse is not true that is to say that 'HUF' is not a relative of the individual member as per meaning of relative given in the case if individual under explanation to section 56(2)(vii) of the Act.

Before further deliberating on this question, we deem it necessary to first discuss as to what constitute 'HUF' (Hindu Undivided Family). The 'HUF' has been included within the meaning of word 'person' in section 2(31) of the Income Tax Act, 1961 as a separate taxable entity but 'HUF' has not been defined in the Income Tax Act, whereby, it means that the expression 'HUF' in the Act is used in the sense in which a 'Hindu Joint Family' or a 'Hindu Undivided Family' ('HUF') is understood in the personal laws of Hindus. A Hindu joint or undivided family is not created for any business purposes, rather, it is a normal condition of Hindu society and prevalent throughout India based on the social necessity. Subject to the subsequent amendments in Hindu Succession Act, as per the Hindu Law and Usage, a 'Hindu Joint Family'

consists of male members descended lineally from a common male ancestor, together with their mothers, wives or widows and unmarried daughters bound together by the fundamental principle of ‘sapindaship’ or family relationship which is the essence and distinguishing feature of the institution. It is purely a creation of law and cannot be created by an act of parties except in the case of adoption or a marriage, only when a stranger can become a 'HUF' member. An undivided family is a normal condition of a Hindu society which is ordinarily joint not only in estate but also in food and worship. The cord that knits of the family together is not property but relationship. There is no presumption that a family is joint because it is possessed of joint property. If the persons in the family live together and are joint in food and worship, irrespective of the fact that there is joint property of the family, it constitutes 'HUF'. It is a fluctuating body, its size increases with birth of a member in the family and decreases on death of a member in the family. Females go and come into the 'HUF' on marriage. A ‘coparcenary’ is a narrower body than a joint family and consists of only persons who take by birth an interest in the joint family property and can enforce a partition whenever they like. Though, members of 'HUF' are entitled to be maintained out of the joint family funds, however, the members of the narrower body within 'HUF' called ‘Coparcenary’ have birth rights in the joint family property. Hindu Law does not recognize an 'HUF' as an entity separate from the members of the family. In an 'HUF', the

members collectively own it. The interest and share of the members in the estate of the family is undivided and undetermined. All the members collectively own and enjoy the property without determination of their shares until the same is partitioned. There is community of interest and unity of possession between all the members and upon the death of any of them, the others take by survivorship and not by succession. An 'HUF' though treated as a separate entity for taxation purposes, it differs in several respects from a 'corporation' and from a 'partnership firm' as the later entities can be formed by an act of parties and strangers can be their members, however, 'HUF' is a creation of law and the members having natural relationship and a stranger cannot become its member except by adoption or marriage. Apart from that, in a partnership firm, each of the members of the partnership firm has a definite and determined share in capital as well as in the profits of the firm. A member of the firm subject to the terms of the agreement / partnership deed may deposit or withdraw his capital but that is not so in the case of a 'HUF'. Neither there is any definite share of any of the members in the estate of the 'HUF' nor any member is entitled to any share in the profits if the 'HUF' is engaged in any business. The income of the 'HUF' goes to the common kitty. The property and the income of the 'HUF' is managed by 'Karta' or Manager of the 'HUF' who generally is a senior most male member of the family. The powers of the 'Karta' of management to the properties of the 'HUF' are wide and he is not

liable to give day to day accounts of the properties to the members of the 'HUF'. Since the property of the 'HUF' does not belong solely to an individual member and the shares of the members are not determined, hence, the 'HUF' is made a taxable entity in itself. As per the provisions of section 10(2) of the I.T. Act, any sum received by an individual, as a member of 'HUF', which has been paid out of the income of the family or out of the income of the estate of the family is not exigible to taxation. The said exemption has been given on the pattern of a partnership firm to avoid double taxation of the same amount. In the case of partnership firm, when the partnership firm has been assessed to income tax separately, then, the share of profit received by an individual person is not taxable. If a member does not opt to receive his share out of the profits of the firm and opts that the same be added towards his capital in the firm, even then, when the said partner either on dissolution of the firm or otherwise receives back his capital, the said capital is not taxable as an income of the partner, rather, the same is taken as a capital receipt. However, in the case of 'HUF', or to say in the strict sense in case of 'coparcenary', the individual members receive their share on partition. However, during the subsisting coparcenary or to say broadly 'HUF', no member is entitled to receive any definite share out of the income of the 'HUF'. It is left to the prudence and wisdom of the manager who has to manage the affairs of the 'HUF', he may spend the money or property of the 'HUF' in the case of a need of a

member, such as on the marriage of a unmarried female member or in case of certain treatment of any disease of the member or in case of educational needs of any children in the 'HUF'. The amount spent may be more than that the member may have gotten on the partition of the 'HUF'. The Karta of the 'HUF', even can gift of the 'HUF' property for pious purpose and even he can contract a debt for the legal necessity and for family purposes and can bind the other members to the extent of their interest in the family property.

In the above scenario, the property of the 'HUF' neither cannot be said to belong to a third person nor can be said to be in 'corporate entity', rather, the same is the property of the members of the family. It is because that the share of each of the individual member in the property or income of the 'HUF' is not determinate, hence, the family, as such, is treated as separate entity for taxation purposes. 'HUF' otherwise is not recognized as a separate juristic person distinct from the members who constitute it. A member of the 'HUF' has a pre-existing right in the family properties. A Coparcener has a pre-existing right and interest in the property and can demand partition also, however, the other members of the 'HUF' have right to be maintain out of the 'HUF' property. On division, the share in the estate / capital of the 'HUF' cannot be treated as income of the recipient, rather, the same will be a capital receipt in his hands. However, in the case of a partnership firm, if a member receives an amount which is more than his share in the capital or in the

profits of the firm, the amount received in excess of the share can be treated as a gift by the firm or by other partners to that individual which will be exigible to income tax. However, in the case of an 'HUF', since there is not any determined share of any member in the family property, any amount received by a member of a 'HUF' from property of 'HUF' cannot be said to be more than his share in the property, rather, the same is given to him in the normal course of management of family affairs as is deemed fit or prudent by manager / 'karta' of the 'HUF' and it cannot be said that such an amount received by a member of 'HUF' is the income of the said member. It is received out of the common kitty in which such a member has also a joint interest along with other family members. All the ancestral property belong to the family managed by the head of the family and once income of the family is assessed or subjected to tax as per the provisions of the Income Tax Act, then, the distribution / payment out of the joint family property to any member of the family cannot be said to be income of such a member. The justification of the payment or the quantum of amount paid to any member by the 'Karta' / manager of the 'HUF' is though subject to challenge by other members of the HUF , if found to be not genuine or not for family good, however, a third person cannot question it. Family income flows into a common pool from which resources are drawn to meet needs of all the members which are regulated by the head of the family. In such circumstances, any amount received by a member of the

'HUF', even out of the capital or estate of the 'HUF' cannot be said to be income of the member exigible to taxation. Since such a member himself has a pre-existing right in the property of the 'HUF', hence, it cannot be said to be a gift without consideration by the 'HUF' or by the other members of the 'HUF' to that recipient member. In such circumstances, the provisions of section 56(2)(vii) are not attracted in case an individual member receives any sum either during the subsistence of the 'HUF' for his needs or on partition of the 'HUF' in lieu of his share in the joint family property.

However, the converse is not true i.e. to say in case an individual member throws his self-acquired property into common pool of 'HUF'. The 'HUF' or other members of the 'HUF' do not have any pre-existing right in the self-acquired property of a member. If such an individual member throws his own/self-earned or self-acquired property in common pool, it will be an income of the 'HUF', however, the same will be exempt from taxation as the individual members of an 'HUF' have been included in the meaning of 'relative' as provided in the explanation to section 56(2)(vii) of the Act. It is because of this salient feature of the HUF that in case of individual, the HUF has not been included in the definition of relative in explanation to section 56(2) (vii) as it was not so required whereas in case of HUF, members of the HUF find mention in the definition of 'relative' for the purpose of the said section.

In view of the above discussion, the amount received by the assessee from the 'HUF', being its member, is a capital receipt in his hands and is not exigible to income tax.

In view of our observations made above, the appeal of the assessee stands allowed on all the three counts as discussed above.

Order pronounced in the Open Court on 17.07.2019.

Sd/-	Sd/-
(अन्नपूर्णा गुप्ता / ANNAPURNA GUPTA)	**(संजय गर्ग / SANJAY GARG)**
लेखा सदस्य/ Accountant Member	**न्यायिक सदस्य/ Judicial Member**

Dated : 17.07.2019
"आर.के."

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

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्ड फाईल/ Guard File

आदेशानुसार/ By order,
सहायक पंजीकार/ Assistant Registrar