SUMATI DAYAL

v.

COMMISSIONER OF INCOME TAX, BANGALORE

MARCH 28, 1995

[S.C. AGRAWAL, B.L. HANSARIA AND SUJATA V. MANOHAR JJ.]

Income Tax Act, 1961 S.68—Receipts claimed to be winnings from races—Genuineness of—Claim rejected by Settlement Commissioner as non-genuine—Held valid.

The appellant had been carrying on business as a dealer in art pieces, antiques and curios at Bangalore. During the assessment years 1971-72 and 1972-73, the appellant received amounts of Rs. 3,11,831 & 93,500 by way of race winnings in Jackpots and Treble events in races at Turf Clubs in Bangalore, Madras and Hyderabad. The said amount was shown by the appellant in the capital accounts in the books. She filed a return declaring an income of Rs. 27,829 & 3,827 and also made a sworn statement before Income Tax Officer. Basing on the sworn statement, the Income Tax Officer made an assessment order holding that the sum of Rs. 3,11,831 & 93,500 were not winning, in race and he treated the said receipts as income from undisclosed sources and assessed the same as income from other sources. Appeals filed against the two orders before Income Tax Appellate Tribunal were withdrawn by the appellant. She moved applications before the Settlement Commissioner stating that a reasonable addition on a reasonable basis should the commission hold that the drawings of 1970-71 & 1971-72 were not adequate for purchase of Jackpot tickets, other expenses in connection with the races and losses if any estimated by the Settlement Commission to have been sustained by her. On the said application, the Commissioner of Income Tax submitted his report urging that the assessee lacked any knowledge of race techniques and the theory of probabilities precluded any systematic and continuous winnings at races on as many as 16 occasions during a period of less than two years and that the books of accounts did not indicate the expenditure on travel and other incidental expenses which had been incurred by the appellant for attending the races at Bangalore and Hyderabad. Further he asked for reopening of the assessment for the assessment year 1970-71 wherein

A appellant had won a sum of 76,681 and which was not brought to tax by the Income Tax Officer.

The Settlement Commission (by majority) upheld the assessment for the assessment years 1971-72 and 1972-73, made by the Income Tax Officer and confirmed by the Appellate Assistant Commissioner of Income Tax but
B did not accede to the request of the Commissioner of Income tax that the assessment for 1970-71 was not so connected with the case pending before them. Upholding the said order and dismissing the appeals this Court.

HELD: 1. It is no doubt true that in all cases in which a receipt is
C sought to be taxed as income, the burden lies on the Department to prove that it is within the taxing provision and if a receipt is in the nature of income, the burden of proving that it is not taxable because it falls within the exemption provided by the Income-tax Act, lies upon the assessee. [1178-D]

D *Parimisetti Seetharamamma* v. *Commissioner of Income Tax, A.P.*, (1965) 57 ITR 532, relied on.

2. But, in view of Section 68 of the Act, where any sum is found credited in the books of the assessee for any previous year same may be charged to income tax as the income of the assessee of that previous year
E if the explanation offerred by the assessee about the nature and source thereof is, in the opinion of the Assessing Officer, not satisfactory. In such a case there is, prima facie, evidence against the assessee viz; the receipt of money, and if he fails to rebut, the said evidence being unrebutted, can be used against him by holding that it was a receipt of an income nature.
F While considering the explanation of the assessee the Department cannot, however, act unreasonably. [1178-E-F]

Sreelakha Banerjee & Ors. v. *Commissioner of Income Tax, Bihar & Ors.*, (1963) 49 ITR 112, relied on.

G 3. It was not disputed the amounts were received by the appellant from various race clubs on the basis of winning tickets presented by her. The dispute was as to whether they were really the winnings of the appellant from the races. Apparent must be considered as real until it is shown that there are reasons to believe that the apparent is not real. The taxing
H authorities are entitled to look into the surrounding circumstances to find

out the reality and the matter has to be considered by applying the test of human probabilities. [1179-B] A

Commissioner of Income Tax v. *Durga Prasad More,* (1971) 82 ITR 540, relied on.

4. After considering surrounding circumstances and applying the test of human probabilities the Settlement Commission has rightly concluded that the appellant's claim about the amount being her winning from races is not genuine. It cannot be said that the explanation offered by the appellant in respect of the said amounts has been rejected unreasonably and that the finding that the said amounts are income of the appellant from other sources is not based on evidence. [1182-D] B C

5. The Chairman of the Settlement Commission in his dissenting view which has emphasised that the appellant did possess the winning ticket which was surrendered to the Race Club and in return a crossed cheque was obtained. The observation by the Chairman of the Settlement Commission ignores the prevalent malpractice that was noticed by the Direct Taxes Enquiry Committee and the recommendations made by the said Committee which led to the amendment of the Act by the Finance Act of 1972 whereby the exemption from tax that was available in respect of winnings from lotteries cross-word puzzles, races, etc. was withdrawn. The observation that if it is alleged that the tickets were obtained through fraudulent means, it is upon the alleger to prove that it is so, ignores the reality. The transaction about purchase of winning ticket takes place in secret and direct evidence about such purchase would be rarely available. An inference about such a purchase has to be drawn on the basis of the circumstances available on the record. [1181-F-H, 1182-A-B] D E F

Having regard to the conduct of the appellant as disclosed in her sworn statement as well as other material on the record an inference could reasonably be drawn that the winning tickets were purchased by the appellant after the event. [1182] G

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 1344-45 of 1977.

From the Order dated 24.2.77 of the Income Tax Settlement Commission, New Delhi in A.No. 12/1/76-IT. H

A B.K. Mehta, H.S. Parihar and K.S. Parihar with him for the appellant.

J. Ramamurthy, Y.P. Mahajan and Ms. A. Subhashini with him for the Respondent.

B The following Judgement of the Court was delivered by

S.C. AGRAWAL, J. These appeal filed by the assessee against the order dated February 24, 1977 passed by the Income Tax Settlement Commission (hereinafter referred to as 'the Settlement Commission'), relate to assessment years 1971-72 and 1972-73. The appellant carries on C business as a dealer in art pieces, antiques and curios at Bangalore. During the assessment year 1971-72 the appellant received a total amount of Rs. 3,11,831 by way of race winnings in Jackpots and Treble events in races at Turf Clubs in Bangalore, Madras and Hyderabad. The said amount was shown by the appellant in the capital account in the books. The appellant D filed a return on March 27, 1972 declaring an income of Rs. 27,829. The appellant also made a sworn statement on January 6, 1973 before the Income Tax Officer and on the basis of the said statement the Income Tax Officer made an assessment order dated March 27, 1974 wherein he held that the sum of Rs. 3,11,831 is not winnings in races and he treated the said receipts as income from undisclosed sources and assessed the same as E income from other sources. For the assessment year 1972-73 the appellant showed receipts of Rs. 93,500 as race winnings in two Jackpots at Bangalore and Madras and the said amount was credited in the capital account in the books. The appellant filed a return declaring an income of Rs. 3,827 on February 3, 1973. In his assessment order dated August 31, 1974 the F Income Tax Officer included the amount of Rs. 93,500 as income from other sources and assessed the income of the appellant on that basis. The appeals filed by the appellant against the two assessment orders were disposed of by the Appellate Assistant Commissioner by order dated December 12, 1975 whereby the assessment of Rs. 3,11,831 as income under the head other sources for the assessment year 1971-72 and Rs. G 93,500 for the assessment year 1972-73 was confirmed. The appeals filed against the said order before the Income Tax Appellate Tribunal were withdrawn by the appellant under Section 245M(2) of the Income Tax Act, 1961 [hereinafter referred to as 'the Act'] and on August 6, 1976 she moved the application giving rise to this appeal, before the Settlement Commission H wherein the appellant stated that she was agreeable to a reasonable addi-

tion on a reasonable basis should the Commission hold that the drawings of 1970-71 and 1971-72 were not adequate for purchase of Jackpot tickets, other expenses in connection with the races and losses, if any, estimated by the Settlement Commission to have been sustained by the appellant. On the said application the Commissioner of Income Tax submitted his report dated January 29, 1977 wherein he urged that the action of the Department in taxing the entire winnings as income tax undisclosed sources should be upheld inasmuch the appellant lacked any knowledge of race techniques and the theory of probabilities precluded any systematic and continuous winnings at races on as many as 16 occasions during a period of less than two years. In his report, the Commissioner also submitted that the books of accounts did not indicate the expenditure on travel and other incidental expenses which had been incurred by the appellant for attending the races at Bangalore and Hyderabad. The Commissioner also asked for reopening of the assessment year 1970-71 where the appellant had won a sum of Rs. 74,681 and which was not brought to tax by the Income Tax Officer.

The matter was heard by three members of the Settlement Commission. By order dated February 24, 1977 two members of the Commission [Shri R.S. Chadda and Shri K.Srinivasan] upheld the assessment for the assessment years 1971-72 and 1972-73 made by the Income Tax Officer and confirmed by the Appellate Assistant Commissioner of Income Tax; but did not find it possible under Section 245-E to accede to the request of the Commissioner of Income Tax that the assessment for 1970-71, which was made without bringing to tax the alleged race winnings of Rs. 74,681, may be reopened on the view that the assessment for 1970-71 was not so connected with the case pending before them as to make it necessary to reopen it for the proper disposal of the assessments for 1971-72 and 1972-73. The Chairman of the Settlement Commission, Shri C.C. Ganapathy, has, however, dissented from the said view.

Shri B.K. Mehta, the learned senior counsel appearing for the appellant, has submitted that the source of the receipt of the amounts has been established by the appellant by placing on record the certificates from the various race clubs which show that the said amounts were received by way of winnings form races and the burden lay on the Department to show that the said amounts were not winnings from races but was an income from other sources. The submission of Shri Mehta is that in the present case the Department has not adduced any evidence to discharge the said burden

A which lay on it and the majority view of the Settlement Commission is unsustainable inasmuch as it is based on no evidence and is founded on mere suspicion and surmises. According to Shri Mehta the Chairman of the Settlement Commission, in his dissenting opinion, has correctly applied the law. Shri Mehta has placed reliance on the decisions of this Court in *Parimisetti Seetharamamma* v. *Commissioner of Income Tax, A.P.,* (1965) B 57 ITR 532; *Sreelakha Banerjee & Ors.* v. *Commissioner of Income Tax, Bihar & Ors.,* (1963) 49 ITR 112; and *Commissioner of Income Tax, Orissa* v. *Orissa Corporation P. Ltd.,* (1986) 159 ITR 78. Shri J. Ramamurthy, the learned senior counsel appearing for the Revenue, has supported the majority view and has submitted that having regard to the facts and C circumstances of the case the receipts claimed to be winnings from races were income from other sources and that no case is made out for interference by this Court in an appeal under Article 136 of the Constitution.

It is no doubt true that in all cases in which a receipt is sought to be D taxed as income, the burden lies on the Department to prove that it is within the taxing provision and if a receipt is in the nature of income, the burden of proving that it is not taxable because it falls within exemption provided by the Act lies upon the assessee. [See : *Parimisetti Seetharamamma* (supra) at p.536]. But, in view of Section 68 of the Act, where any sum is found credited in the books of the assessee for any previous year the E same may be charged to income tax as the income of the assessee of that previous year if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing Officer, not satisfactory. In such a case there is, *prima facie,* evidence against the assessee, viz., the receipt of money, and if he fails to rebut, the said evidence being F unrebutted, can be used against him by holding that it was a receipt of an income nature. While considering the explanation of the assessee the Department cannot, however, act unreasonably. [See : *Sreelakha Banerjee* (supra) at p.120]

In the instant case the amount is credited in capital account in the G books of the appellant. The appellant has offered her explanation about the said receipts being her winnings from races. The said explanation has been considered in the light of the sworn statement of the appellant dated January 6, 1973 and other material on record. The Income Tax Officer and the Appellate Assistant Commissioner have not accepted the explanation H offered by the appellant. The two members constituting the majority in the

Settlement Commission have also taken the same view. A

There is no dispute that the amounts were received by the appellant from various race clubs on the basis of winning tickets presented by her. What is disputed is that they were really the winnings of the appellant from the races. This raises the question whether the apparent can be considered as real. As laid down by this Court, apparent must be considered real until B it is shown that there are reasons to believe that the apparent is not the real and that the taxing authorities are entitled to look into the surrounding circumstances to find out the reality and the matter has to be considered by applying the test of human probabilities. See : *Commissioner of Income Tax* v. *Durga Prasad More,* (1971) 82 ITR 540, at pp.545, 547. C

In this context it would be relevant to mention that in order to give effect to the recommendations of the Direct Taxes Enquiry Committee (under the Chairmanship of Justice K.N. Wanchoo, retired Chief Justice of India) the definition of "income" in Section 2(24) of the Act was D amended with effect from April 1, 1972 by the Finance Act, 1972 so as to include within its ambit, winnings from lotteries, cross word puzzles, races including horse races, card games and other games of any sort or from gambling or betting of any form or nature whatsoever. The reason underlying the said amendment was that exemption from tax that was enjoyed in respect of such winnings had provided scope for conversion of "black" E money into "white" income. The said exemption from tax was available in respect of such winnings during the assessment years 1971-72 and 1972-73.

During the year 1970-71 (pertaining to assessment year 1971-72) between April 6, 1970 to March 20, 1971, the appellant claims to have won F in horse races a total amount of Rs. 3,11,831 on 13 occasions out of which 10 winnings were from Jackpots and 3 were from Treble events. Similarly, in the year 1971-72 the appellant won races on 2 occasions and both the times winnings were from Jackpot. In her sworn statement dated January 6, 1973, the appellant had stated that she started going for races from the end of 1969 and that she first won Jackpot on December 12, 1969 on the G first day she went or races. The appellant also stated that she worked out the combination on the basis of what her husband advised her but she used to add a few horses of her own although she admitted that she did not know anything about the performance of these horses before December 1969. As regards her husband, the appellant stated that he won once in H

A Calcutta and once in Madras and he had similar wins also. The appellant had also stated that she had not gone to races in 1972. The appellant admitted that she had been buying Jackpot tickets of the value of Rs. 2,000, Rs. 1,400 and even tickets for Rs. 3,000 have been bought and that on the first day she won the Jackpot she purchased a Jackpot combination ticket for approximately Rs. 2,500 and that on November 8, 1970 she had bought B two combinations, each for about Rs. 2,000. The appellant also admitted that she had not claimed any loss in races and only winnings were shown and stated that she won similar amounts which were not accounted and the losses were met out of the said amounts. The appellant further stated that she had no record of her expenditure at the race course as against her C claim of winnings.

Having regard to the said statement of the appellant, the two members, constituting the majority on the Settlement Commission, came to the conclusion that the apparent is not the real and that the appellant's claim about her winning in races is contrived and not genuine for the D following reasons :

(i) The appellant's knowledge of racing is very meager.

(ii) A Jackpot is a stake of five events in a single day and one can E believe a regular and experienced punter clearing a Jackpot occasionally but the claim of the appellant to have won a number of Jackpots in three or four seasons not merely at one place but at three different centres, namely, Madras, Bangalore and Hyderabad appears, *prime facie,* to be wild and contrary to the statistical theories and experience of the frequencies and prob- F abilities.

(iii) The appellant's books do not show any drawings on race days or on the immediately preceding days for the purchase of Jackpot combination tickets, which entailed sizable amounts varying generally between Rs. 2,000 and Rs. 3,000. The drawings G recorded in the books cannot be co-related to the various racing events at which the appellant made the alleged winnings.

(iv) While the appellant's capital account was credited with the gross amounts of race winnings, there were no debits either for expen- H ses and purchase of tickets or for losses.

(v) In view of the exceptional luck claimed to have been enjoyed by the appellant, her loss of interest in races from 1972 assumes significance. Winnings in racing became liable to income tax from April 1, 1972 but one would not give up an activity yielding or likely to yield a large income merely because the income would suffer tax. The position would be different, however, if the claim of winnings in races was false and what were passed off as such winnings really represented the appellant's taxable income from some undisclosed sources.

The majority opinion concludes that it would not be unreasonable to infer that the appellant had not really participated in any of the races except to the extent of purchasing the winning tickets after the events presumably with unaccounted funds.

The Chairman of the Settlement Commission, in his dissenting opinion, has laid emphasis on the fact that the appellant had produced evidence in support of the credits in the form of certificates from the racing clubs giving particulars of the crossed cheques for payment of the amounts for winning of Jackpots, etc. The Chairman has rejected the contention regarding lack of expertise in respect of the appellant and has observed that the expertise is the last thing that is necessary for a game of chance and anybody has to go and call for five numbers in a counter and obtain a Jackpot ticket and that books containing information are available which are quite cheap.

This, in our opinion, is a superficial approach to the problem. The matter has to be considered in the light of human probabilities. The Chairman of the Settlement Commission has emphasised that the appellant did possess the winning ticket which was surrendered to the Race Club and in return a crossed cheque was obtained. It is, in our view, a neutral circumstance, because if the appellant had purchased the wining ticket after the event she would be having the winning ticket with her which she could surrender to the Race Club. The observation by the Chairman of the Settlement Commission that "fraudulent sale of winning ticket is not an usual practice but is very much of an unusual practice" ignores the prevalent malpractice that was noticed by the Direct Taxes Enquiry Committee and the recommendations made by the said Committee which led to the amendment of the Act by the Finance Act of 1972 whereby the

A exemption from tax that was available in respect of winnings from lotteries, crossword puzzles, races, etc. was withdrawn. Similarly the observation by the Chairman that if it is alleged that these tickets were obtained through fraudulent means, it is upon the alleger to prove that it is so, ignores the reality. The transaction about purchase of winning ticket takes place in secret and direct evidence about such purchase would be rarely available. B An inference about such a purchase has to be drawn on the basis of the circumstances available on the record. Having regard to the conduct of the Appellant as disclosed in her sworn statement as well as other material on the record an inference could reasonably be drawn that the winning tickets were purchased by the appellant after the event. We are, therefore, unable C to agree with the view of the Chairman in his dissenting opinion. In our opinion, the majority opinion after considering surrounding circumstances and applying the test of human probabilities has rightly concluded that the appellant's claim about the amount being her winning from races is not genuine. It cannot be said that the explanation offered by the appellant in respect of the said amounts has been rejected unreasonably and that the D finding that the said amounts are income of the appellant from other sources is not based on evidence.

In the circumstances, no case is made out for interference with the order passed by the Settlement Commission. The appeals, therefore, fail E and are accordingly dismissed with costs.

K.S.D. Appeals dismissed.