IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH, CHENNAI

BEFORE Dr. O.K.NARAYANAN, VICE-PRESIDENT
AND SHRI VIKAS AWASTHY, JUDICIAL MEMBER

I.T.A. Nos. 532 to 537/Mds/2012
Assessment Years : 2004-05 to 2009-10
AND
C.O.No.58/Mds/2012 (in ITA No.537/Mds/2012)

The Joint Commissioner of Income-tax(OSD), Central Circle-IV(3), Chennai. (Appellant)	Vs.	Shri V. Deenadayalavel, No.6,S.M.Narayana Nagar, Anna Nagar, West Extn. Chennai – 600 101. PAN – AAIPD 2446 F (Respondent/Cross objector)

Appellant by : Ms. Anupama Shukla, IRS, CIT
Respondent by : Shri N. Devanathan, Advocate &
Shri B.S.Purushottam, CA

Date of hearing : 14th June, 2012
Date of pronouncement : 22nd June, 2012

O R D E R

PER Dr. O.K.NARAYANAN, VICE PRESIDENT

This is a bunch of six appeals and one cross objection. All the six appeals are filed by the Revenue for the six assessment

years from 2004-05 to 2009-10. The cross objection is filed by the assessee for the assessment year 2009-10.

2. All these appeals and the cross objection are directed against the common order passed by the Commissioner of Income-tax(Appeals)-I at Chennai on 12.12.2011 and arise out of the assessments completed under sec.153A read with section 143(3) of the Income-tax Act, 1961.

3. The assessee is an individual. He is employed with M/s. Sayeed Mohammed Sons Traders in Singapore. The assessee is working for the last 20 years in Singapore. He is a permanent resident of that country. He mainly earns salary income which is taxed in Singapore under the Singapore's tax laws. The assessee also derives income by way of commission in import and export of agricultural produces like raw cashews.

4. The employment of the assessee is in Singapore and the salary is received and taxed under the Singapore's tax laws and therefore, the salary earned by the assessee was always Singapore income and not Indian income. The activities of the

assessee as broker/agent in import and export of cashews are also carried out outside the territories of India. The import and export of raw cashews are not made into India or out of India. He is importing from African countries and exporting to other countries. He has no business connection with India. Therefore, the income by way of brokerage and commission earned by the assessee also partook the character of foreign income. The assessee is also a non-resident for the purpose of Indian Income-tax laws.

5. The assessee maintains a NRE account with South Indian Bank of Anna Nagar at Chennai. The correspondent banks of South Indian Bank remitted the brokerage and commission due to the assessee to the above said NRE account in Chennai by way of cheques/demand drafts/TTs. The assessee has not offered such remittances credited in Indian bank account for taxation on the ground that those income accrued outside India. The assessee does not have any other account in India.

6. Even though the assessee operates in the above background, the assessing authority initially proposed to tax all

such remittances made in his Indian bank account. The assessing authority invoked sec.5 to bring the remittances as part of assessee's total income taxable in India. He held that by virtue of sec.5, the remittances credited in assessee's Indian bank account had to be treated as income received or deemed to be received or accrued or arose or deemed to be accrued or arose in India. He, therefore, held that even if the assessee is a non-resident, the remittances are liable for taxation in India.

7. The assessee filed detailed replies to the propositions mooted by the assessing authority. He argued before the Assessing Officer that he has no business connection in India; he does not carry on any business in India with any person; he does not have any place of business in India; he is a non-resident of India and therefore, in such circumstances the remittances cannot be treated as taxable income in the hands of the assessee only for the reason that brokerage and commission are remitted in assessee's Indian bank account. He argued that the brokerage and commission have already been received outside India and remittances to his Indian bank account are made thereafter and,

therefore, there is no reason to hold that the remittances were in the nature of income accrued or arose or received or so deemed, in India. The assessee also relied on the judgment of the Hon'ble Supreme Court rendered in the case of CIT v. Ogale Glass works Ltd. (25 ITR 529). In the said decision, the Hon'ble Supreme Court has held that the payment is to be construed as having been made where cheques are posted. The assessee contended that the remittances are first collected by foreign banks in places like Europe, Germany, Canada, Zurich, Australia, Dubai etc. and, therefore, the payments should be treated as having been made in those countries and thereafter the transfer of funds to Indian bank account is only appropriation of that proceeds and could not be treated as the instrument of payment posted in India.

8. The Assessing Officer having found force in the above arguments, examined the case in detail, by analyzing all the credits reflected in Indian bank account of the assessee. The assessing authority bifurcated such remittances under two heads. The first head related to remittances made by way of demand drafts and cheques. The second head related to remittances

made to Indian bank account by way of TTs. The Assessing Officer accepted the contention of the assessee that the remittances made to India by way of demand drafts and cheques would be treated as received outside India. Therefore, he held that the remittances made by the assessee to his Indian bank account by way of demand drafts and cheques are not taxable for these impugned assessment years.

9. But the Assessing Officer took a different view in the case of remittances transmitted through TTs. He held that by virtue of the instrument of transfer, i.e. TTs, the amounts have to be held received in India and therefore, such remittances covered by TTs are taxable in India. Accordingly, for the assessment years 2004-05 to 2008-09, he brought to tax the remittances credited in assessee's Indian bank account through the medium of TTs.

10. As far as the assessment year 2009-10 is concerned, the Assessing Officer held that the assessee was a resident and, therefore, his entire income would be taxable in India for the assessment year 2009-10. The assessments were completed accordingly.

11. The assessments were taken in appeals before the Commissioner of Income-tax(Appeals).

12. One of the grounds raised by the assessee before the Commissioner of Income-tax(Appeals) was of jurisdiction. This ground was rejected by the Commissioner of Income-tax(Appeals). On the question of treating TTs remittances, the Commissioner of Income-tax(Appeals) held that TTs are also in the same category of demand drafts and cheques and, therefore, remittances covered by TTs cannot be treated differently and those remittances should also be treated as having been received by the assessee outside India. The TTs are first received by correspondent bank for South India Bank in New York. That bank is HSBC Bank. It is thereafter the correspondent bank which transfers the amounts in dollars to the assessee's account in India. He held that the argument of the assessee that TTs are also in the same category is correct. He accepted the contentions for all the assessment years from 2004-05 to 2008-09 and held that remittances covered by TTs are not taxable in India.

13. In respect of assessment year 2009-10, the Commissioner of Income-tax(Appeals) had to examine the residential status of the assessee. The Assessing Officer has treated the assessee as non resident on the ground that the assessee stayed in India during the previous year relevant to the assessment year 2009-10. The Commissioner of Income-tax(Appeals) accepted the contention of the assessee that even if the assessee was residing in India for the assessment year 2009-10, by virtue of his earlier non resident status for more than 15 years, the correct status of the assessee should be not ordinarily resident. The Commissioner of Income-tax(Appeals) held that the Assessing Officer has overlooked the provisions of sec.6(6) which distinguishes not ordinarily resident from resident. The Commissioner of Income-tax(Appeals) after having found that the status of the assessee for the assessment year 2009-10 was not ordinarily resident, he examined whether the remittances would be taxable in India or not. On the basis of his earlier decision, in the context for assessment years 2004-05 to 2008-09, the Commissioner of Income-tax(Appeals) held that the assessee did

not generate any taxable income in India. He had no business income in India. The entire remittances credited in assessee's Indian bank account represented the income earned by the assessee outside the Indian territory and received outside India and thereafter remitted to the assessee's Indian bank account. Therefore, he held that for assessment year 2009-10 also, the remittances are not taxable in India. Non indian income of an assessee, who is not ordinarily resident, is not taxable in India as in the case of a non resident. Accordingly, the appeal of the assessee was allowed for assessment year 2009-10 as well.

14. It is against the above orders of the Commissioner of Income-tax(Appeals) that the Revenue has come in appeals before us.

15. We heard Smt. Anupama Shukla, the learned Commissioner of income-tax, appearing for the Revenue and Shri N. Devanathan, the learned counsel along with Shri

B.S.Purushottam, Chartered Accountant appearing for the assessee.

16. On going through the facts of the case, we find that there are no disputes on the facts of the case except the true nature of remittances transmitted through the medium of telegraphic transfer. The assessee is living in Singapore. He is a non resident. He is a permanent resident of Singapore. He is employed there. His salary income is taxed as per Singapore's tax laws. He is also earning income by way of brokerage and commission. Brokerage and commission are earned out of import and export of agricultural produces like cashew nuts. All those imports and exports have nothing to do with India, as imports are made from African countries and exports are made to other countries and no activity is routed through Indian waters. Therefore, by virtue of the operations carried on by the assessee, his income cannot be treated as income received or accrued or arose or deemed so, in India.

17. The case of the Revenue is built up on the point where the assessee was paid his brokerage and commission. In the case of

cheques and demand drafts, the Assessing Officer himself has accepted the contentions of the assessee that they were received outside India and on realization of those instruments, the proceeds were remitted to assessee's Indian bank account. These transactions were carried out by the correspondent bank of South Indian Bank with which the assessee has an account in India at Chennai. The correspondent bank of South Indian Bank in New York is HSBC Bank. In London, the correspondent bank is HSBC Bank. In Germany, the correspondent banks are Commerzbank AG and Standard Chartered Bank (Germany) GMBH. In Japan, the correspondent bank is Hongkong & Shanghai Banking Corp., CPO. In Canada, the correspondent bank is The Bank of Nova Scotia. In Zurich, the correspondent bank is UBS AGP. In Australia, the correspondent bank is again HSBC Bank and in Dubai, it is Bank of Baroda.

18. Now, the dispute is only with the remittances through TTs. The Commissioner of Income-tax(Appeals) has made a finding that the correspondent bank of South Indian Bank receives funds from the parties who are dealing with the assessee. It is after

having received the brokerage and commission in the accounts of the foreign correspondent banks that those funds are transferred to assessee's Indian bank account in foreign currency; mainly US dollars. Therefore, it is apparent that as in the case of cheques and demand drafts, remittances through TTs also are first received in foreign countries by the correspondent banks of the South Indian Bank. It is after crediting the receipts of brokerage and commission first in the accounts of the foreign correspondent banks that the funds are transferred to assessee's Indian bank account by TTs in foreign exchange. The cheques and drafts are negotiable instruments facilitating the transfer of funds from one person to another. Telegraphic transfer is a transmission device which helps transactions of funds from one place to another with precision and safety. In the modern digital world at present, almost all transactions of funds all over the world are made by bank transfers. Therefore, that method of transaction of funds by itself does not decide whether the income was received by the assessee in India or not. We have to see the first point of landing of the brokerage and commission transmitted to India through

TTs. They are first landed in the accounts of the foreign correspondent banks. They are landed in other countries. The Hon'ble Supreme Court in the case of CIT v. Ogale Glass Works Ltd. (25 ITR 529) has held in a case where the cheques were posted in Delhi, in law, it amounted to payment in Delhi. In the light of that decision, when the funds covered by TTs first landed in the accounts of foreign correspondent banks outside India, it is to be seen that the assessee received his brokerage and commission outside India. It is only after receiving those brokerage and commission outside India that the corresponding funds were transferred to the assessee's Indian bank account by TTs. Therefore, the Commissioner of Income-tax(Appeals) has rightly held that the amounts received by TTs are the income earned by the assessee outside India and, therefore, not exigible to Indian taxation.

19. In the course of argument, the learned Commissioner has placed reliance on the decision of the Authority of Advance Rulings rendered in the case of SKF Boilers & Driers (P) Ltd. reported in 68 DTR (AAR) 106. In that case, the Indian character

of the income was determined by the authority on the basis of situs of the right to receive the income. The authority held that even though the agents have rendered services abroad and the commission has also remitted abroad, the income becomes Indian income on the ground that the right to receive the income arose in India. We are of the view that the above decision of the authority does not have any factual relation to the present case. In this case, the right to receive the brokerage and commission always remained outside India and what was received by the assessee in his Indian bank account is a subsequent remittance of funds from foreign accounts to Indian accounts. As far as the assessee is concerned, the right to receive the income did not arise in India. Therefore, we find that the above judgment relied on by the Revenue is not applicable to the present case.

20. Incidentally, it is also to be mentioned that the learned counsel appearing for the assessee, has relied on the Double Taxation Avoidance Agreement between India and Singapore stating that the DTAA overrides Indian Income-tax laws and therefore, in view of Article 7 of the DTAA, the profits of an

enterprise of a contracting State shall be taxed only in that State except where the enterprise has a permanent establishment in other contracting States. The learned counsel submitted that in such situation, the profits attributable to the permanent establishment alone will be taxable in that State. As the money is received from out of Indian territory, they are out of Indian profits. The learned counsel has also placed reliance on the decision of the Hon'ble Supreme Court in the case of CIT v. P.K.Noorjahan (237 ITR 570). It is seen that the assessee does not have any permanent establishment in India or any business connection and, therefore, there is no need to expand the scope of enquiry.

21. In the facts and circumstances of the case, we uphold the common order of the Commissioner of Income-tax(Appeals) on the issue of taxability of brokerage and commission.

22. Therefore, the appeals filed by the Revenue are liable to be dismissed.

23. Now, we may consider the cross objection filed by the assessee for the assessment year 2009-10.

24. The case of the assessee is that the Commissioner of Income-tax(Appeals) has erred in sustaining the addition of ₹18,66,032/- being 25% of the jewellery as unexplained in the hands of the assessee.

25. The question of unexplained jewellery is considered by the Commissioner of Income-tax(Appeals) in paragraphs 23 to 28 in pages 8 to 17 of his order. The Commissioner of Income-tax(Appeals) has accepted that the jewelleries were found and seized from different bed rooms, and prima facie, belonged to different individuals who files the returns in their individual capacity. It is on this ground that he has deleted major portion of the addition to the extent of 75%.

26. The balance 25% of the jewellery value has been confirmed by the Commissioner of Income-tax(Appeals) on the ground that

the gifts of jewellery made by the assessee to those individuals, who are relatives, cannot be ruled out and to that extent, the assessee must answer for the acquisition of the jewellery. It is to cover up that proposition that the Commissioner of Income-tax(Appeals) has sustained the addition to the extent of 25%.

27. After discussing the issue of unexplained jewellery in a detailed manner, the Commissioner of Income-tax(Appeals) has clearly held that the Assessing Officer has not taken into account various explanations relating to gifts and sridhan received by those persons. Ultimately, the Commissioner of Income-tax(Appeals) also held that the differences in different individual hands, if not explained, has to be assessed only in their hands. It is after coming to such categorical findings, that the Commissioner of Income-tax(Appeals) makes a presumption that the assessee might have gifted some jewellery to those individuals and to that extent, assessee must be accountable for the funds utilized for the acquisition of jewellery. Even if such case is visualized, we are of the view that the addition cannot be

made in the hands of the assessee. While dealing with the brokerage and commission income of the assessee, we have already held that the assessee does not earn any income in Indian taxable territory. We have also held that he is a non resident. He is employed in Singapore. The import and export transactions out of which he earned additional income are again carried out outside Indian territory. The funds available to the assessee in India are withdrawn from his account with South Indian Bank at Chennai. Therefore, even if the assessee has spent some funds in gifting gold jewellery to his family members, those funds emanated from non taxable funds available in his bank account. It does not belong to any income liable for taxation in India. Therefore, even if the proposition of the Commissioner of Income-tax(Appeals) is accepted, there is no justification for making any addition in the hands of the assessee. The addition of ₹ 18,66,302/- is accordingly deleted.

28. In result, the appeals filed by the Revenue are dismissed and the cross objection filed by the assessee is allowed.

Order pronounced on Friday, the 22nd of June, 2012 at Chennai.

Sd/-
(VIKAS AWASTHY)
Judicial Member

Sd/-
(Dr. O.K.NARAYANAN)
Vice-President

Chennai,
Dated the 22nd June, 2012

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Copy to:

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR