W.P. No. 369 of 2014
IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Original Side

Utanka Roy
Vs.
Director of Income Tax, International Taxation
Transfer Pricing, Kolkata & Ors.

For the Petitioner : Mr. R.K. Biswas, Advocate

For the Respondents : Md. Nizamuddin, Advocate

Hearing concluded on : December 1, 2016
Judgment on : December 15, 2016

DEBANGSU BASAK, J.:-

The petitioner has assailed an order under Section 264 of the Income Tax Act, 1961.

Learned Advocate for the petitioner has submitted that, the petitioner was working as a marine engineer and had rendered services as such to a foreign shipping company during the assessment year 2011-2012. The petitioner had filed income tax return for such assessment year under the residential status as non-residential Indian. He had disclosed a receipt of a remuneration of Rs. 5,63,850/- in US Dollars. The petitioner was issued an assessment order cum intimation under Section 143(1). The petitioner did not file

any appeal. The petitioner had applied under Section 264 of the Income Tax Act, 1961.

Learned Advocate for the petitioner has submitted, referring to ***2011 (198) Taxman 551 (Director of Income Tax v. Prahlad Vijendra Rao)*** that, the income received by the petitioner is exempt from income tax as the petitioner had received his salary for work done outside India for a period of 286 days during the assessment year. Relying upon ***2001 (247) ITR 260 (Commissioner of Income Tax v. Avtar Singh Wadhwan)*** the learned Advocate for the petitioner has submitted that, the interpretation of Section 5 given by the impugned order is wrong. In support of the proposition that, income of a non-resident Indian is exempt from income tax and that such income has to be assessed in view of the guidelines laid down by different authorities, learned Advocate for the petitioner has relied upon ***2005 (276) ITR 216 (Smt. Phool Lata Somani v. Commissioner of Income Tax & Ors.)***, ***2008 (297) ITR 17 (Commissioner of Income Tax v. Williamson Financial Services & Ors.)***, ***1986 (160) ITR 920 (Commissioner of Income Tax, Delhi v. Mahalaxmi Sugar Mills Co. Ltd.)***.

Learned Advocate for the petitioner has referred to an administrative instruction for guidance of income tax officers on matters pertaining to assessment and has submitted that, the income tax officer ought to have guided the assessee with regard to the income tax payable.

Learned Advocate for the department has submitted that, the order under Section 143(1) of the Income Tax Act is appealable under Section 246A. He has referred to Section 264(7) and Explanation 1 thereto and has submitted that, the impugned order does not contain any irregularity warranting interference by the writ Court. The petitioner having an alternative of remedy of appeal had chosen not to avail of the same. Therefore, the petitioner not ought to be allowed to contend the grounds as sought to be canvassed herein. He has submitted that, the decision relied on by the petitioner relates regular appeals and that, they have no manner of application to the facts of the present case.

I have considered the rival contentions of the parties and the materials made available on records.

The petitioner is an Indian citizen. He is an income tax assessee. He has filed a return for the assessment year 2011-2012 with the Income Tax authorities. The petitioner claims to be an engineer and to be engaged as such by a foreign company. The petitioner claims that, he has worked as an engineer with the foreign company for 286 days during the assessment year. He has filed income tax return for the assessment year disclosing an income of Rs. 5,63,850/-. He has thereafter received an assessment cum intimation notice under Section 143(1) of the Income Tax Act, 1961. He has applied under Section 264 of the Income Tax Act, 1961 against such intimation under Section 143(1). In course of hearing of the proceedings under Section 264, the petitioner has claimed that, he has received Rs. 27,92,417/- from his employer during the assessment year in question instead of the sum of Rs. 5,63,850/-.

The proceedings under Section 264 of the Income Tax Act, 1961 was disposed of by the impugned order dated September 25, 2013. There are two parts to the impugned order. The first part finds the petitioner's income to be assessable under the Income Tax Act, 1961. It, however, does compute the tax liability. The Second portion relates

to the exemption receivable by the petitioner and notes that, such exemptions have not been claimed by the petitioner. It ultimately allows the assessing officer to take necessary action.

The contention on behalf of the petitioner that, in the present facts, the petitioner is exempt from payment of income tax requires consideration.

Scope of total income is laid down in Section 5 of the Income Tax Act, 1961. Sub-Section (1) deals with income to a person who is resident in India while Sub-Section (2) deals with income of a person who is a non-resident. The petitioner is a non-resident Indian. He is guided by Section 5(2) of the Act of 1961. Section 5(2) of the Act of 1961 is as follows:-

> *"(2) Subject to the provisions of this Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which-*
>
> *(a) is received or is deemed to be received in India in such year by or on behalf of such person; or*
>
> *(b) accrues or arises or is deemed to accrue or arise to him in India during such year.*
>
> *Explanation 1.- Income accruing or arising outside India shall not be deemed to be received I India within the*

meaning of this section by reason only of the fact that it is taken into account in a balance sheet prepared in India.

Explanation 2.- For the removal of doubts, it is hereby declared that income which has been included in the total income of a person on the basis that it has accrued or arisen or is deemed to have accrued or arisen to him shall not again be so included on the basis that it is received or deemed to be received by him in India."

Explanation 1 to Sub-Section 2 states that, income accruing or arising outside India shall not be deemed to be received in India within the meaning of such section by reason only of the fact that it is taken into account in a balance sheet prepared in India. Explanation 2 clarifies that income will not be treated to be received in India solely on the basis that such income was received or deemed to be received in India. Therefore, it has to be found out where the income to the person concerned had accrued. For the purpose of finding out the place of accrual of the income, the place where the services have been rendered becomes material. In fact, the place where the income gave rise is required to be considered to arrive at a finding whether the income was in India or outside India.

In ***Prahlad Vijendra Rao (Supra)*** an income derived by a person working outside India for 225 days has been held not to have accrued in India.

In ***Avtar Singh Wadhwan (Supra)*** it has been held that, the relevant test to be applied to decide whether the income accrued to a non-resident in India or outside is concerned, is to find the place where the services were rendered, in order to consider where the income accrued. The source of the income was not relevant for the purposes of ascertaining whether the income had accrued in India or outside India.

The question whether the petitioner has rendered services in India or not is a question of fact. It is not disputed that the petitioner as a marine engineer had rendered services outside India for the period of 286 days. He has received his remuneration for such work from a foreign company. Consequently, the income received by the petitioner for services rendered outside India has to be considered as income received out of India and treated as such.

There is anomaly in the quantum of income received by the petitioner during the period. In his income tax return he has initially stated that his income to be Rs.5,63,850/- while in the proceedings under Section 264, he claims to have received a sum of Rs. 27,92,417/-.

In view of the finding that, the petitioner has received the remuneration from a foreign company for services rendered outside India, the quantum that he claims to have received, namely, Rs. 27,92,417/- has to be considered as such.

Smt. Phool Lata Somani (supra) has been relied upon on behalf of the petitioner. It has held that, the powers conferred on the Commissioner under Section 264 are very wide. The Commissioner has the discretion to grant or refuse reliefs. There is nothing in Section 264 which places any restriction on the Commissioner's revisional power to grant relief to the assessee in a case where the assessee detects mistake on account of which he was over assessed after the assessment was completed.

Circular Bearing No. 14 (XL-35) dated April 11, 1995 prescribes as follows:-

> *"(3) Officers of the Department must not take advantage of ignorance of an assessee as to his rights. It is one of their duties to assist a taxpayer in every reasonable way, particularly, in the matter of claiming and securing reliefs and in this regard the Officers should take the initiative in guiding a taxpayer where proceedings or other particulars before them indicate that some refund or relief is due to him. This attitude would, in the long run, benefit the department for it would inspire confidence in him that he*

may be sure of getting a square deal from the department. Although, therefore, the responsibility for claiming refunds and reliefs rests with assessee on whom it is imposed by law, officers should –

(a) draw their attention to any refunds or reliefs to which they appear to be clearly entitled but which they have omitted to claim for some reason or other;

(b) freely advise them when approached by them as to their rights and abilities and as to the procedure to be adopted for claiming refunds and reliefs."

In ***Mahalaxmi Sugar Mills Ltd. (supra)*** the Hon'ble Supreme Court has held that, there is a duty cast upon the Income Tax Officer to apply the relevant provisions of the Income Tax Act for the purpose of determining the true figure of the assessee's taxable income and the consequential tax liability. In the event, the assessee fails to claim benefits or a set of, it cannot relieve the income tax officer of his duty to apply the benefits of an appropriate case.

Tapan Kumar Mitra (supra) has held that, a writ petition challenging an order passed under Section 264 of the Act of 1961 on the ground of non-recording of reasons was not maintainable in view of the facts of such case.

Ashok Mondal (supra) is a case where the assessee has assailed the order of assessment under Section 264 without

preferring an appeal. In the facts of the case, it has held that, the writ petition was not maintainable inasmuch as the writ petitioner was seeking to challenge the order of assessment through such a process. The re-opening of the order of assessment through such mechanism was not permitted by the Hon'ble Division Bench.

The impugned order is one under Section 264 of the Act of 1961. The power under Section 264 is wide enough to grant appropriate relief to an assessee. In the impugned order, the Commissioner notes that, the income received by the petitioner is in respect of services rendered for 286 days outside India. The Commissioner exercising powers under Section 264 of the Act of 1961 could have proceeded to grant appropriate relief to the petitioner by setting aside the intimation under Section 143(1) of the Act of 1961 and holding that, such income of the petitioner is not taxable in respect of the relevant assessment year. The Commissioner, however, did not do so. It has remanded the matter to the assessing officer to do the needful.

In view of the discussions above, therefore, the intimation under Section 143(1) of the Act of 1961 dated December 7, 2012 as

well as the order under Section 264 dated September 25, 2013 are set aside.

W.P. No. 369 of 2014 is disposed of. No order as to costs.

[DEBANGSU BASAK, J.]