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Form No. J(2)

IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income Tax)
ORIGINAL SIDE

GA 3745 of 2016
With
ITAT 374 of 2016

SMT. SUMANA BANDYOPADHYAY & ANR.
Versus
THE DEPUTY DIRECTOR OF INCOME TAX,
(INTERNATIONAL TAXATION) 3(1)

BEFORE:
THE HON'BLE JUSTICE ANIRUDDHA BOSE
THE HON'BLE JUSTICE ARINDAM SINHA

Date : 13th July, 2017.

For Appellants: Mr. J.P. Khaitan, Senior Advocate, Mr. R.S. Padjekar, Mr. R.K. Biswas, Mr. P. K. JhunJhunwalla, Mr. S. Rudra

For Respondent: Mr. Debashis Chowdhury, Advocate

ANIRUDDHA BOSE, J.:-

1. The appellants are legal heirs of the original assessee, who passed away intestate on 10th April 2013. The assessee was a marine engineer and the subject of dispute of this appeal is taxability of a substantial portion of his income earned during the previous year relevant to the assessment year 2010-11. The total sum involved is Rs.14,79,598/-, and this was earned by the appellant as salary from two concerns, Great Offshore Limited and Bibby Ship Management (Singapore) Pte. Ltd. The appellant in his return had declared total income of Rs.3,95,099/-. The aforesaid sum was added to his

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disclosed income in scrutiny assessment. Admitted position is that during that year, the assessee had the status of non-resident under Section 6 of the Income Tax Act, 1961. The assessee had received the said sum from his two employers in a Non-Resident (external) bank account, commonly referred to NRE account.

2. The appeal of the assessee against the aforesaid order failed before the Commissioner of Income Tax and the Income Tax Appellate Tribunal also sustained the finding of the Assessing Officer, rejecting contention of the assessee that the said income was exempted, having been received from outside India in foreign currency. The basic reasoning of the Revenue for including the aforesaid sum to income chargeable to tax was that the said sum was received by him in the NRE account directly from his employers and this constituted receipt of the said sum in India. Revenue's stand is that the said sum attracts Section 5(2)(a) of the Act.

3. We had admitted the appeal on 11th July 2017 on the following question:-

> *"Whether on the facts and in the circumstances of the case and in law, income by way of salary which became due and has accrued to the assessee, a non-resident, for services rendered outside India and which is not chargeable to tax*

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in India on the "due" or "accrual" basis, can be said to be chargeable to tax on the "receipt" basis merely because the foreign employers, on the instructions of the assessee, have remitted a part of amount of salary to the assessee's NRE bank account in India?"

4. This judgment is assailed before us by Mr. Khaitan, learned Senior Counsel appearing on behalf of the appellant. His submission is that income of the assessee constituted earning outside India while the assessee was an NRI and mere receipt of the said sum in the assessee's NRE account would not subject it to tax under the 1961 Act. He has relied on a Bench decision of the Karnataka High Court ***Director of Income-tax (International Taxation) Vs. Prahlad Vijendra Rao*** (IT Appeal No. 833 of 2009) on this point. In this appeal, it was observed and held:-

"6.Having heard the learned advocates appearing for the parties and after perusing the orders passed by the authorities and after having given our anxious consideration to the contentions raised, we are of the considered view that there is no substantial question of law involved in this appeal for being formulated and the adjudicated for the following reasons:

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(a) The revenue does not dispute that assessee had worked as a Chief Engineer on the board of a ship bebnging to his employer "M/s. Live Stock Transport & Trading Company, Kuwait and during the relevant period the assesses had stayed outside India for a period of 225 days and the salary that was earned by him was on account of the work discharged by him on board during the said period which is outside the shores of India.

b) The CIT (A) has placed reliance in the case of CIT Vs. Avtar Singh Wadhwan [2001] 247 ITR 260 (Bom) wherein it has been held that salary received by the non resilient marine engineer for services rendered by him on a foreign going Indian ship which mainly remained away from the Indian coast during the relevant accounting year accrued outside India and was not taxable in India. While answering the question of law there under with reference to Section 9(1)(Xii) in the said case it has also been held that the salary which is earned in India will alone be regarded as income arising in India and not

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otherwise. The principles laid down in the said case are squarely applicable to the facts of present case also.

c) The criteria of applying the definition of Section 5(2)(b) would be such income which is earned in India for the services rendered in India and not otherwise.

d) Under section 15 of Act even on accrual basis salary income is taxable i.e., it becomes taxable irrespective of the fact whether it is actually received or not only when services rendered in India it becomes taxable by implication. However, if services are rendered outside India such income would not be taxable in India."

5. As regards the legal position in a similar situation, clarification has been given by the Ministry of Finance on 11th April 2017 under Circular No. 13/2017. This Circular specifies:-

"Subject: Clarification regarding liability to income-tax in India for a non-resident seafarer receiving remuneration in NRE (Non Resident External) account maintained with an Indian Bank.

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Representations have been received in the Board that income by way of salary, received by non-resident seafarers, for services rendered outside India on-board foreign ships, are being subjected to tax in India for the reason that the salary has been received by the seafarer into the NRE bank account maintained in India by the seafarer.

2. The matter has been examined in the Board Section 5(2)(a) of the Income-tax Act provides that only such income of a non-resident shall be subjected to tax in India that is either received or is deemed to be received in India. It is hereby clarified that salary accrued to a non-resident seafarer for services rendered outside India on a foreign ship shall not be included in the total income merely because the said salary has been credited in the NRE account maintained with an Indian bank by the seafarer."

6. We concur with the ratio of the decision of the Karnataka High Court and in our opinion the interpretation be given to sub Section (b) of Section 5(2) of the Act would also apply to Section 5(2)(a) of the Act. The Circular is clarificatory in nature and is applicable for construing

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the aforesaid provision for the relevant assessment year. In our opinion the authorities under the Income Tax Act did not properly apply the provisions of law to the case of the assessee. We are of the view that the Assessing Officer was wrong in adding the aforesaid sum to the income chargeable to tax of the assessee for the relevant assessment year. We accordingly allow the appeal and answer the question framed by us in favour of the assessee.

7. Urgent Photostat certified copy be given to the parties expeditiously, if applied for.

I agree

(Arindam sinha, J.) **(Aniruddha Bose, J.)**