

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 03.03.2015

CORAM

THE HONOURABLE MR. JUSTICE R.SUDHAKAR
AND
THE HONOURABLE MRS. JUSTICE S.VIMALA

T.C.A. NO. 105 OF 2015

Commissioner of Income Tax
Salary V, Chennai.

.. Appellant/Appellant

- Vs -

Rajasekaran Balasubramaniam

.. Respondent/Respondent

Appeal filed under Section 260A of the Income Tax Act against the order dated 17.01.2014 passed by the Income Tax Appellate Tribunal, 'D' Bench, Chennai, made in ITA No.1324/Mds/2013.

Against the order of the Joint Commissioner of Income Tax Salary Range V (i/c) Aayakar Bhavan, New Block, 5th Floor, 121 Mahatma Gandhi Road, Nungambakkam, Chennai-34 dt.28.12.2011 and made in PAN/GIR. No.AJAPB 4310 R.

Against the order of the Commissioner of Income Tax (Appeals) VI, 121 Mahatma Gandhi Road, Chennai-34 dt.28.12.2012 and made in ITA.No.240/11-12.

For Appellant : Mr. M.Swaminathan

JUDGMENT

(DELIVERED BY R.SUDHAKAR, J.)

Aggrieved by the order of the Tribunal in dismissing the appeal filed by it, the Revenue is before this Court by filing this appeal raising the following questions of law :-

"1) Whether on the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in not adjudicating the taxability of the gross total income, when the assessee has not paid any federal tax in USA as evidenced by the W-2 furnished by the assessee for the FY 2008-09?

2) Whether on the facts and circumstances of the case the Income Tax Appellate Tribunal was justified in not adopting the grossing up concept in respect of the assessee's Indian taxes borne by the employer in reference to Section 17 (2) (iv) r/w Section 192 (1B) of the Income Tax Act, 1961?"

2. The facts, in a nutshell, are as hereunder :-

The respondent/assessee is an individual residing and working in India, but receiving salary in US Dollars in USA. The assessee had offered the net salary of Rs.1,22,94,450/= received, after deducting the federal taxes, medical insurance, life insurance, etc., in his return for the assessing year 2009-2010 filed on 27.7.09. The company/employer had, however, withdrawn the amount of Rs.40,13,145/= from the salary of the assessee as "hypothetical tax" to be paid in USA. It is accepted by the Department that in lieu of the amount withdrawn as hypothetical tax, the employer/company paid the tax liability of the assessee in India in a sum of Rs.31,57,915/=. Consequent upon the payment of tax as above in India, there remains certain amount withdrawn by the company of the assessee from the salary, which has not been paid as tax in India, i.e., an amount of Rs.8,55,320/=. The assessing officer held that the assessee has not paid any federal tax in USA as evidenced by the W-2 furnished by the assessee for the financial year 2008-2009 and, therefore, made appropriate additions in the assessment order towards the said amount.

3. Aggrieved by the said order of the assessing officer, the assessee filed appeal before the CIT (Appeals). The CIT (Appeals) held that the hypothetical tax has been brought in to bring in tax equalization between domestic employment and overseas employment and, hence, the hypothetical tax cannot be a subject of addition and allowed the appeal. Aggrieved by the order of the CIT (Appeals), the Revenue preferred appeal before the Tribunal.

3. The Tribunal considered the issue of computation of actual salary, and the same has been set out in detail in para-7 of the Tribunal's order in the following manner :-

"7. The assessee has received in US \$ amount equivalent to INR Rs.1,10,75,021/= as salary on which an amount of Indian Rs.40,12,145/= is withdrawn being "hypothetical tax" payable in US. In lieu for the amount withdrawn as hypothetical tax, the employer company had paid the tax liability of the assessee in India for Rs.31,57,915/=. Thus, the net amount withdrawn by the assessee company from the salary of the assessee is Rs.8,55,230/= (Rs.40,13,145 (-) Rs.31,57,915), thereby the assessee has factually had received salary of Rs.1,02,19,791/= (Rs.1,10,75,021 - Rs.8,55,230). (Emphasis supplied)."

4. The Tribunal also took into consideration the statement of analysis of hypothetical tax as submitted by the representative of the assessee and held in para-8 of its order that there is a difference in tax to the tune of Rs.8,55,320/=. A note has been appended by the authorised representative in the analysis of hypothetical tax stating that under the tax equalization policy, this difference of Indian Rs.8,55,320/= is not eligible to be paid back to the assessee. In this view of the matter, the Tribunal, after coming to the conclusion, the formula as to how salary received for the purpose of tax to be determined, remanded the matter back to the

assessing officer to verify whether on principles the contention put forth by the representative for the assessee is correct. Aggrieved against the said order of the Tribunal, the Revenue is before this Court by filing the present appeal.

5. Mr.Swaminathan, learned standing counsel appearing for the appellant submits that the Double Taxation Agreement between India and the USA enunciates the concept that if income tax has been paid in the country of residence, then rebate will be allowed in the other contracting State. It is further submitted by the learned counsel that the Tribunal failed to note that the assessee has not paid any federal tax in USA as could be seen from the W-2 furnished by the assessee and, therefore, the entire gross salary received by the assessee has to be taxed. It is further submitted that the grossing up concept has not been adopted by the Tribunal. In view of the above infirmities in the order passed by the Tribunal, the order of the Tribunal is liable to be set aside.

6. Heard Mr.Swaminathan, learned standing counsel appearing for the appellant/Revenue and perused the materials available on record.

7. Even at the outset, without any contradiction, it could be stated that the plea of the appellant/Revenue that there is no specific indication as to what is the gross total income of the assessee and, therefore, there is no clarity in the order of the Tribunal, deserves to be rejected. A cursory look at the order of the Tribunal reveals that there is no such confusion in the order of the Tribunal, as portrayed by the learned standing counsel for the appellant/Revenue. The Tribunal, in para-7 of its order, which has been extracted above, has clearly stated that consequent to the withdrawal of hypothetical tax payable in US, certain amount has been paid towards tax liability of the assessee in India. Taking into consideration the amount paid towards salary and deducting the hypothetical tax payable in the US, the Tribunal has determined the salary received after deduction made by the employer towards the hypothetical tax. A cursory look at the above calculation made by the Tribunal would reveal that the computation is just and proper and no clarification is required to be given by the Tribunal, as it is for the assessee to explain as to how this amount should be treated for the purpose of determining the tax.

8. In view of the well considered findings given by the Tribunal, as noted above, this Court finds no error warranting interference with the order passed by the Tribunal and, accordingly, we uphold the order passed by the Tribunal. No question of law, much less substantial question of law arise for consideration in this appeal.

9. In view of the reasons as above, finding no merits, this appeal is accordingly dismissed.

Sd/-
Assistant Registrar

True Copy

Sub Assistant Registrar

To

1. Commissioner of Income Tax
Salary V, Ayakar Bhavan, New Block 5th floor,
Nungambakkam, Chennai.
 2. The Assistant Registrar,
Income Tax Appellate Tribunal
'D' Bench, III Floor, Rajaji Bhavan, Chennai.
 3. The Commissioner of Income Tax (Appeals)
121 Mahatma Gandhi Road, Chennai.
- +1 cc to Mr.M.Swaminathan, Advocate, SR.11721.

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