

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.02.2015

CORAM:

THE HONOURABLE MR.JUSTICE **R.SUDHAKAR**
and
THE HONOURABLE MR.JUSTICE **R.KARUPPIAH**

Tax Case (Appeal) No.101 of 2008

The Commissioner of Income-Tax
Trichy

.. Appellant

versus

Shri.N.Sundararaman
2, Ganapathy Colony,
Tiruchirapalli - 620 005.

.. Respondent

PRAYER: Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 as against the order dated 27.09.2005 made in I..T.A..No.2106/Mds/2003 on the file of the Income Tax Appellate Tribunal, Madras 'D' Bench for the assessment year 1998-1999.

For appellant : Mr.J.Narayanasamy
Standing Counsel for Income Tax

For respondent : Mr.Philip George

J U D G M E N T

(Judgment of the Court was delivered by **R.SUDHAKAR,J.**)
This Tax Case (Appeal), filed by the Revenue as against the order of the Income Tax Appellate Tribunal, was admitted by this Court on the following substantial questions of law:

"1. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the assessee was entitled to the concessional rate of tax under Section 115H when the assessee has not satisfied the procedural and substantive requirements under Chapter XII A of the Income Tax Act?

2. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the assessee was eligible under Section 54F in respect of purchase of property held in the name of his wife?"

2. The brief facts of the case are as follows:

The assessee filed his return of income for the assessment year 1998-99 admitting taxable income of Rs.21,19,890/-. The income thus returned consisted of interest accrued on/received from bank deposits. Hence, the assessee computed the tax due at the concessional rate of 20% as per the provisions of Section 115-E read with Section 115-H of the Income Tax Act. During the scrutiny assessment, the Assessing Officer after clubbing the income of the

assessee's wife and father-in-law, determined the taxable income. In doing so, the Assessing Officer followed the assessment for the assessment year 1993-94.

3. Aggrieved by the said order of the Assessing Officer, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals), who upheld the action of the Assessing Officer by adding the income of the assessee's wife, but deleted the addition of income of the assessee's father-in-law.

4. As against the said order of the Commissioner of Income Tax (Appeals), the assessee preferred further appeal before the Income Tax Appellate Tribunal. The Tribunal, by relying upon its own decision pertaining to the same assessee for the assessment years 1993-94 to 1997-98, allowed the appeal in favour of the assessee.

5. Being aggrieved by the order of the Tribunal, the Revenue is before this Court.

6. Heard learned Standing Counsel appearing for the Revenue

and the learned counsel appearing for the assessee and perused the materials placed before this Court.

7. It is fairly submitted by both the learned counsel appearing for the assessee and the learned Standing Counsel appearing for the Revenue that the second question of law admitted by this Court was wrongly framed, since the said question of law was not the issue before the Tribunal.

8. In view of the above submission, it is not necessary to answer the second question of law admitted by this Court, which does not call for any consideration.

9. With regard to the first substantial question of law, both the learned Standing Counsel appearing for the Revenue and the learned counsel appearing for the assessee, fairly submitted that the first substantial question of law was already decided by this Court in favour of the assessee in respect of the very same assessee for the assessment years 1994-95 to 1996-97 in T.C.(A)Nos.1053 to 1056 of 2004 dated 07.02.2012.

10. In T.C.(A)Nos.1053 to 1056 of 2004 (Commissioner of Income Tax Vs. N.Sundarraman), this Court, by order dated 07.02.2012, while dealing with the issue whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the assessee was entitled to the concessional rate of tax under section 115H when the assessee has not satisfied the procedural and substantive requirements under Chapter XIIA of the Income Tax Act, which is an identical issue in the present appeal, held as follows:

"7. As far as question of law Nos.4 and 5 are concerned, it is the claim of the assessee that returns were filed based on section 115E of the Act. On the other hand, the Assessing Officer had found that returns were filed under section 115H of the Act and as per the said section, at the time of filing the return, it is incumbent on the part of the assessee to make a declaration in writing to the effect that the provisions of Chapter XII-A shall continue to apply to him in relation to the investment income derived from any foreign exchange asset being an asset of the nature referred to in sub-clause (ii) or sub-clause (iii) or sub-clause (iv) or sub-clause (v) of clause (f) of section 115C of the Act. Inasmuch as the declaration was made much later and not along with the returns, the assessee was not entitled to the benefit of tax exemption as per Chapter XII-A and therefore, on the strength of the

declaration that he is a Resident, he is liable to pay tax as applicable in case of regular assessment. There is no dispute that the assessee was working in UNICEF and he had been earning salary and had been remitting the same in India in foreign exchange, which amount had been invested mainly in bank deposits. From the records, it is seen that the respondent/assessee had been a 'Non-Resident' for 12 years prior to his return to India. He has been in India only for 323 days during the previous seven years preceding the assessment year 1993-94. Therefore, the Tribunal was of the view that the respondent/assessee falls within the scope of Section 6(6)(a) of the Income Tax Act, 1961. So, the Tribunal held that the status of the assessee is "Not Ordinarily Resident". It is pertinent to note that the assessee in his original return declared his status as "Resident". Therefore, the Assessing Officer denied the benefit. The real status of the assessee cannot be denied merely the assessee made a wrong declaration when he satisfied all the conditions. Therefore, the Tribunal, applying the scope of the provisions of Section 6(6)(a) of the Act, given a categorical finding that the status of the assessee is "Not Ordinarily Resident" during the relevant assessment year and also upto the assessment year 2001-02. Because of the status of the assessee is 'Not ordinarily resident' during the year, the assessee is entitled to the benefit of Section 115 E of the Income Tax Act, 1961. In the present cases, the entire deposit held by the assessee was brought into India in the

form of Foreign Exchange through legal channels as approved by the Reserve Bank of India. The status of the assessee was "Non Resident" upto the assessment year 1992-93. There is no dispute and the assessing officer himself held that the only income of the assess after 12.11.1992 has to be taxed. The relevant provision for our consideration is Section 115 E of the Income Tax Act which grants to the assessee the choice to be taxed at a concessional rate of 20% as against the normal rate. Chapter XII A of the Income Tax Act, 1961 deals with special provisions relating to certain incomes of Non-Residents. The said chapter was inserted by the Finance Act, 1983 with effect from 1 June 1983. The purpose of introduction of this Chapter was with a view to encouraging the flow of foreign exchange remittances into India and investment in India by "non-resident Indians". It deals with special provisions of the taxation of the following categories of income derived by non-resident Indians.

(a) investment income and

(b) long-term capital gains.

Section 115 E of the Act deals with tax on investment income and long-term capital gains. The Section reads as follows:-

"115 E . Tax on investment income and long term capital gains – Where the total income of an assessee, being a non-resident Indian, includes -

(a) any income from investment or income from long-term capital gains of an asset other than a specified

asset ;

(b) income by way of long-term capital gains,
the tax payable by him shall be the aggregate of -

(i) the amount of income-tax calculated on the income in respect of investment income referred to in clause (a), if any, included in the total income, at the rate of twenty per cent ;

(ii) the amount of income-tax calculated on the income by way of long-term capital gains referred to in clause (b), if any, included in the total income, at the rate of ten per cent ; and

(iii) the amount of income-tax with which he would have been chargeable had his total income been reduced by the amount of income referred to in clause (a) and (b)."

8. From the reading of the above, it is clear that the assessee has to be a "Non-Resident". The word "Non-Resident" is defined in Section 115 C (e) of the Act. It means an individual, being a citizen of India or a person of Indian origin who is not a "resident". Therefore, the Tribunal applied the above definition and has come to the conclusion that the assessee status is only "Not Ordinarily Resident". Therefore, the Tribunal held that the assessee is not a resident and entitled to the benefit of Section 115 E of the Act. In this case, there is no dispute regarding the interest earned on the various deposits in the Bank, which is specified under Section 115 E of the Act and the assessee is subject to 20% of taxation. So, the argument

of the Revenue that requirement of filing of the declaration does not arise since that is not the condition for getting the benefit. Therefore, the Tribunal correctly held that the assessee had no obligation to file any declaration under Section 115 H or 115 E of the Act. Therefore, the Tribunal had correctly held that the assessee was not obligated to file any such declaration until the assessment year 2002-03. In respect of the nature of investment, the Tribunal also held in detail in paragraph 28 and has come to a conclusion that the subsequent redesignation of the NRE accounts into NRNR accounts have been made only from out of the convertible Foreign Exchange lying to the credit of the assessee in his various accounts which had been opened with the inflow of the original Foreign exchange transferred to India as approved by the Reserve Bank of India. Under these circumstances, the assessee must be a Non-Resident Indian. This question was considered by the Assessing Officer, who had gone by the declaration of the assessee made in terms of section 115H of the Act and consequently, impliedly, negated the claim of tax benefit under section 115E of the Act. This question was considered by the Tribunal, which held that merely because a declaration was made by the assessee due to ignorance of law, it would not nullify the entitlement of a Non-Resident Indian. Factually, the Tribunal found that the assessee, at the time of filing the returns, was a "Non-Resident Indian and hence, the assessee would be entitled to file returns under section 115E of the Act. That apart,

in the wake of the provisions of section 115E that he is a Non-Resident Indian and the income derived is from the investment in a bank, the claim of the assessee could be considered only under section 115E of the Act. Though the assessee had filed returns claiming benefit under section 115E read with section 115H of the Act, keeping in mind the factual scenario, the Tribunal had correctly held that the assessee is a Non-Resident Indian and merely because there is a wrong description in the returns that he is a Resident, it would not alter the status of the assessee that he is a Non-Resident Indian for the assessment years in question. On the basis of the above factual finding, the Tribunal allowed the appeals."

11. Following the above-said decision of this Court in respect of the very same assessee for the assessment years 1994-95 to 1996-97, the first question of law is answered in favour of the assessee and against the Revenue. Accordingly, this Tax Case (Appeal) stands dismissed. No costs.

Index:Yes/No
Internet: Yes / No

(R.S.,J.) (R.K.,J.)
17.02.2015

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To

1. The Income Tax Appellate Tribunal, Madras 'D' Bench.
2. The Commissioner of Income Tax (Appeals), Tiruchirappalli.
3. The Assistant Commissioner of Income Tax, Company Circle-I,
Tiruchirapalli.

**R.SUDHAKAR,J.
AND**

R.KARUPPIAH,J.

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