

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH**

I.T.T.A. Nos.102, 107, 112, 134 and 151 of 2004

Between:

J.Aditya Rao

..Appellant

And

The Assistant Commissioner of Income Tax, Hyderabad

..Respondent

JUDGMENT PRONOUNCED ON: 22nd November, 2017

THE HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY

AND

THE HON'BLE SRI JUSTICE T.AMARNATH GOUD

1. Whether Reporters of local
Newspapers may be allowed : No
to see the Judgments?

2. Whether the copies of
judgment may be marked to : Yes
Law Reporters/Journals?

3. Whether their Ladyship/Lordship
wish to see fair copy of the : Yes
Judgment?

C.V.NAGARJUNA REDDY, J

T.AMARNATH GOUD, J

*** THE HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY**
AND
THE HON'BLE SRI JUSTICE T.AMARNATH GOUD

+ I.T.T.A. Nos.102, 107, 112, 134 and 151 of 2004

% 22.11.2017

J.Aditya Rao

..Appellant

Vs.

\$ The Assistant Commissioner of Income Tax, Hyderabad

..Respondent

! Counsel for the appellant: Mr.Challa Gunaranjan for Mr.B.Ravindra

Counsel for respondent: Mr.J.V.Prasad,
Standing Counsel for the Income Tax Department

<Gist :

>Head Note:

? Cases referred:

1. (2011) 198 Taxman 518 (Uttarakhand) (FB)
2. (2015) 56 Taxmann.com 190 (Delhi)
3. (2016) 389 ITR 501 (SC)
4. 2001 Volume 252 ITR page 1
5. (1996) 89 Taxman 536 (Punjab & Haryana)
6. (2015) 56 Taxmann.com 72 (Punjab & Haryana)
7. (1993) 200 ITR 697 (Bombay)
8. (2013) 219 Taxman 1 (Allahabad)
9. (1991) 56 Taxman 190 (A.P.)
10. (2011) 200 Taxman 297 (Gujarat)
11. (2011) 196 Taxman 104 (Bombay)
12. (2007) 164 Taxman 61 (Delhi)
13. (2011) 339 ITR 37 (Calcutta)
14. (1976) 102 ITR 281 (SC)

THE HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY

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I.T.T.A. Nos.102, 107, 112, 134 and 151 of 2004

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Between:

J.Aditya Rao

..Appellant

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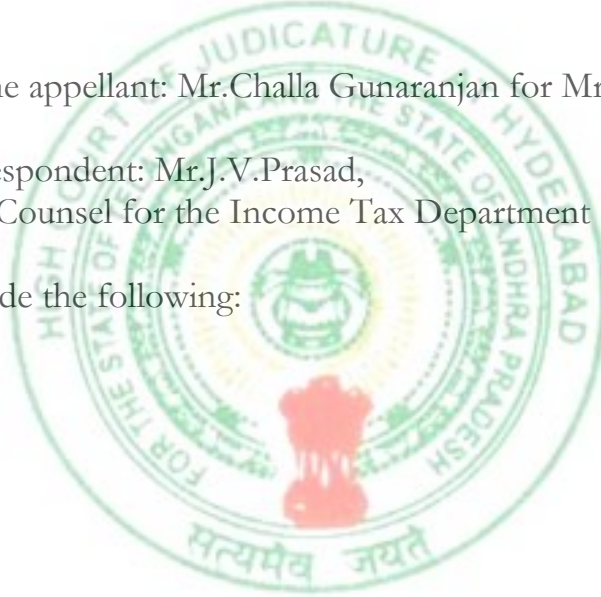
The Assistant Commissioner of Income Tax, Hyderabad

..Respondent

Counsel for the appellant: Mr.Challa Gunaranjan for Mr.B.Ravindra

Counsel for respondent: Mr.J.V.Prasad,
Standing Counsel for the Income Tax Department

The Court made the following:



COMMON JUDGMENT: (Per the Hon'ble Sri Justice C.V.Nagarjuna Reddy)

This batch of appeals pertains to the assessment years 1992-93 to 1996-97. They are filed against common order of the Income Tax Appellate Tribunal, Hyderabad Bench 'A' (for short 'the Tribunal').

2. The facts, in brief, leading to the filing of these appeals are as under.

The appellant (hereinafter referred to as 'the assessee') was a pilot employed by the Indian Airlines. He was assessed to income tax at Hyderabad. His income was, accordingly, assessed for the assessment years 1992-93 to 1996-97. However, at the relevant point of time, the assessee was employed in Mumbai and in connection therewith, he was residing at that place. The Income Tax Officer, Ward 11(3), Mumbai, issued notice, dated 22.03.2001, to the assessee under Section 148 of the Income Tax Act, 1961 (for short 'the Act') proposing to reassess his income. The assessee sent his reply, dated 26.04.2001, stating that as he was assessed at Hyderabad, he is submitting returns to the Assessing Officer at Hyderabad i.e., the Assistant Commissioner of Income Tax (ACIT), Ward/Circle 2(2), Hyderabad. Evidently, on the said ground, no separate returns were filed at Mumbai by the assessee in response to the aforesaid notice issued under Section 148 of the Act. Thereafter, a further letter/notice was issued by the ACIT, Circle 27(1), Mumbai, on 27.12.2001 stating that the assessee filed his returns in Mumbai. A reply to the said letter/notice was sent by the assessee on 07.01.2002 denying the filing of such returns. A few months thereafter, the ACIT, Circle 5(1), Hyderabad, issued separate notices in *pro forma*,

dated 12.02.2002, to the assessee purportedly under Section 143(2) of the Act for the aforementioned assessment years and in connection therewith, the assessee was required to attend the office of the Assessing Officer on the date specified therein. Accordingly, the assessee attended the office along with his representation on the merits on the points raised by the Assessing Officer at Hyderabad. After considering the submissions made by the assessee/his representation, the Assessing Officer/ACIT at Hyderabad passed orders under Section 143(3) read with Section 147 of the Act on 18.03.2002. By these orders, the Assessing Officer included certain allowances under the taxable income of the assessee and accordingly, he imposed additional tax as well as interest thereon under Section 234B(1) of the Act. Assailing these orders, the assessee filed separate appeals to the Commissioner of Income Tax (Appeals)-V, Hyderabad. The assessee challenged the assessment orders on three grounds *viz.*, i) that the Income Tax Officer, Ward 11(3), Mumbai had no jurisdiction to issue notice under Section 148 of the Act; ii) that the quantum of allowances included under the taxable income was not correct; and iii) that charging of interest is not sustainable. The Commissioner (Appeals) rejected all these three grounds by his common order passed on 18.12.2002. The assessee reiterated all the above three grounds in the further appeals filed by him before the Tribunal, which, by its common order, confirmed the order of the Commissioner (Appeals).

3. During the hearing, Mr.Challa Gunaranjan, learned counsel representing Mr.B.Ravindra, learned counsel for the appellant-assessee,

has reiterated the grounds raised before both the Appellate *fora*. In addition to the said grounds, the learned counsel has also submitted that the Assessing Officer at Hyderabad has not followed the mandatory procedure prescribed under Section 127(2)(a) of the Act. The learned counsel has further argued that while the respondent failed to show that there was valid transfer, even after such transfer, no fresh notice under Section 148 of the Act was issued by the Assessing Officer at Hyderabad and that therefore, the entire proceedings initiated under Sections 147 and 148 of the Act were vitiated by the procedural illegalities and jurisdictional defects. In support of his submissions, the learned counsel has placed reliance on the judgments of the Uttarakhand High Court in **Director of Income-tax, International Taxation, Delhi-II vs. Maersk Co.Ltd.**¹, of the Delhi High Court in **Director of Income-tax, International Taxation vs. GE Packaged Power Inc.**² and of the Supreme Court in **Ian Peter Morris vs. Assistant Commissioner of Income-tax**³.

4. Mr.J.V.Prasad, learned standing counsel for the Income Tax Department appearing for the respondent, has opposed the above submissions and argued that though the assessee may not have filed his returns at Mumbai, as he was working within the territorial jurisdiction of the Assessing Officer at Mumbai and receiving remuneration, the said Assessing Officer has every jurisdiction to initiate proceedings under Section 148 of the Act. In support of his submissions, the learned

¹ (2011) 198 Taxman 518 (Uttarakhand) (FB)

² (2015) 56 Taxmann.com 190 (Delhi)

³ (2016) 389 ITR 501 (SC)

standing counsel has referred to and relied upon Sections 120 and 124 of the Act. As regards the objection with regard to the transfer of the case from Mumbai to Hyderabad, the learned standing counsel has submitted that the assessee has not only not raised this issue of transfer without notice before the Assessing Officer as well as the two Appellate *fora*, but also he has appeared before the Assessing Officer at Hyderabad after such transfer and availed the opportunity of putting-forth his objections during the hearings and therefore, he cannot raise this objection for the first time in these appeals before this Court. The learned standing counsel has also sought to support levy of interest based on the judgment of the Supreme Court in **Commissioner of Income-Tax vs. Anjum M.H.Ghaswala and others**⁴.

5. We have carefully considered the submissions of the learned counsel for both the parties with reference to the record.

6. ***In Re*** first submission - Jurisdiction of the Assessing Officer at Mumbai to initiate proceedings under Sections 147 and 148 of the Act

Section 2(7) A of the Act defined the 'Assessing Officer' as under:

“Assessing Officer” means the Assistant Commissioner or Deputy Commissioner or Assistant Director or Deputy Director or the Income-tax Officer who is vested with the relevant jurisdiction by virtue of directions or orders issued under Sub-Section (1) or Sub-Section (2) of Section 120 or any other provision of this Act, and the Additional Commissioner or Additional Director or Joint Commissioner or Joint Director who is directed under clause (b) of Sub-Section (4) of that Section to exercise or perform all or any of the powers and functions conferred on, or assigned to, an Assessing Officer under this Act.

⁴ 2001 Volume 252 ITR page 1

Section 120 of the Act deals with the jurisdiction of the Income Tax Authorities. Sub-Sections (2) and (3) thereof read as under:

“(2) The directions of the Board under Sub-Section (1) may authorize any other income-tax authority to issue orders in writing for the exercise of the powers and performance of the functions by all or any of the other income-tax authorities who are subordinate to it.

(3) In issuing the directions or orders referred to in Sub-Sections (1) and (2), the Board or other income-tax authority authorized by its may have regard to any one or more of the following criteria, namely:-

- (a) territorial area;
- (b) persons or classes of persons;
- (c) income or classes of income; and
- (d) cases or classes of cases.”

Section 124 of the Act envisages the jurisdiction of the Assessing Officers. Sub-Sections (1) and (2) thereof read as follows:

“(1) Where by virtue of any direction or order issued under Sub-Section (1) or Sub-Section (2) of Section 120, the Assessing Officer has been vested with jurisdiction over any area, within the limits of such area, he shall have jurisdiction.-

- (a) in respect of any person carrying on a business or profession, if the place at which he carries on his business or profession is situate within the area, or where his business or profession is carried on in more places than one, if the principal place of his business or profession is situate within the area, and
- (b) in respect of any other person residing within the area.

(2) Where a question arises under this Section as to whether an Assessing Officer has jurisdiction to assess any person, the question shall be determined by the Director General or the Chief Commissioner or the Commissioner; or where the question is one relating to areas within the jurisdiction of different Directors General or Chief Commissioners or Commissioners concerned or, if they are not in agreement, by the Board or by such Director General or Chief Commissioner or Commissioner as the Board may, by notification in the Official Gazette, specify.”

7. At the relevant point of time, when notice under Section 148 of the Act was issued by the Assessing Officer at Mumbai, the assessee was, admittedly, employed in Mumbai and residing thereat. It is not the

pleaded case of the assessee that no notification was issued by the Competent Authority under Section 120(2) and (3) of the Act vesting the jurisdiction on the Assessing Officers at Mumbai over the persons residing in Mumbai. In the absence of such plea, it is reasonable to presume that such a notification existed empowering the Assessing Officers in Mumbai to deal with the persons, such as the assessee in the present case. Both the Appellate *fora* have, indeed, proceeded on that premise in holding that the Assessing Officer at Mumbai was conferred with the jurisdiction to exercise powers under Sections 147 and 148 of the Act. Even before this Court, the assessee has not raised a specific plea that no such notification was issued conferring the territorial jurisdiction on the Assessing Officer at Mumbai for issuing such notices. The only premise on which the assessee has questioned the jurisdiction of the Assessing Officer at Mumbai was that as he has not filed returns and was not assessed at Mumbai, the Assessing Officer concerned at Mumbai had no jurisdiction. This plea, in our opinion, is wholly without any merit. The jurisdiction of an Assessing Officer does not depend upon the fact whether a person had filed his returns or not. It depends upon the territorial area, the person or classes of persons, income or classes of income and cases or classes of cases, with reference to which the jurisdiction is conferred on the Competent Authority concerned as per Section 120(3) read with Section 124 of the Act. In this view of the matter, we do not find any merit in this submission of the assessee.

8. ***In Re*** second submission - Whether transfer of the case on the ground of purported non-compliance of Section 127(2)(a) of the Act, is bad?

No doubt, Clause (a) of Sub-Section (2) of Section 127 of the Act envisages an opportunity of being heard before a case is transferred from one city to another city, from one locality to another locality or from one place to another place. Admittedly, the assessee has not raised this objection after the Assessing Officer at Hyderabad issued notice for appearance. On the contrary, he appeared before the Assessing Officer at Hyderabad and put-forth his objections on merits regarding the reassessment. Even in the two appeals filed by him before the two Appellate *fora*, the assessee has never raised this objection.

9. The learned counsel for the assessee has submitted that as the ground of failure of issue of notice is a jurisdictional one, it could be raised at any stage. The learned counsel has submitted that before passing an order of transfer, notice to the assessee is mandatory and in support of this submission, he has relied upon the judgments in **Lt.Col.Paramjit Singh vs. Commissioner of Income-tax⁵, Piyush Shelters India (P) Ltd. vs. Commissioner of Income-tax, Gurgaon⁶, Devidas vs. Union of India⁷, Commissioner of Income-tax (Noida) vs. Deepak Gupta⁸, Vijayasanthi Investments (P) Ltd., vs. Chief Commissioner of Income-tax⁹, Madhu Khurana vs. Commissioner**

⁵ (1996) 89 Taxman 536 (Punjab & Haryana)

⁶ (2015) 56 Taxmann.com 72 (Punjab & Haryana)

⁷ (1993) 200 ITR 697 (Bombay)

⁸ (2013) 219 Taxman 1 (Allahabad)

⁹ (1991) 56 Taxman 190 (A.P.)

of Income-tax¹⁰, **Chaitanya vs. Commissioner of Income-tax**¹¹, **Commissioner of Income Tax vs. Ganga Dhar Aggarwal**¹² and **Smt.Smriti Dedia vs. Union of India**¹³. The learned counsel has also submitted that before passing an order of transfer, recording of reasons is mandatory under Section 127 of the Act and to buttress the same, he has placed reliance on the judgment of the Supreme Court in **Ajantha Industries vs. Central Board of Direct Taxes**¹⁴.

10. Admittedly, the assessee has not raised the objections regarding failure to issue notice and non-recording of the reasons before passing the order of transfer either before the Original Authority or before the two Appellate *fora*. The question that needs to be considered is whether on the facts of the present appeals, these aspects are relevant or not. With regard to non-recording of the reasons, it is not known whether the transfer order contained any reasons or not, because the assessee has not put this aspect in issue before any of the two Appellate *fora*. None of the judgments on which reliance has been placed by the assessee dealt with a situation where this aspect was raised for the first time in appeals before the Courts which rendered the said judgments. Similarly, the effect of failure of the assessee to raise the objection of non-issue of notice before passing the order of transfer, either before the Assessing Officer or the two Appellate *fora* did not fall for consideration of the Courts which rendered the judgments cited by the assessee. While the

¹⁰ (2011) 200 Taxman 297 (Gujarat)

¹¹ (2011) 196 Taxman 104 (Bombay)

¹² (2007) 164 Taxman 61 (Delhi)

¹³ (2011) 339 ITR 37 (Calcutta)

¹⁴ (1976) 102 ITR 281 (SC)

very initiation of proceedings and issue of notices under Sections 147 and 148 of the Act constitute a jurisdictional issue, which could be raised by the aggrieved party at any point of time and at any stage, the objections regarding non-recording of reasons and non-issue of notice before passing the order of transfer would not go to the root of the matter enabling the aggrieved party to raise these issues for the first time before the High Court not having raised earlier. The reason for this is that these aspects raise mixed questions of fact and law. Unless the assessee had raised these issues before the lower *fora*, the facts relevant thereto would not come on record. Therefore, the assessee, having not raised the objections with respect thereto before any lower *fora*, is not entitled to raise them for the first time in these appeals before this Court. Even otherwise, the assessee, having appeared before the Assessing Officer, Hyderabad and invited a decision on merits without raising such objections and also not having raised these objections before both the Appellate *fora*, we are afraid, he cannot be permitted to raise them for the first time in these appeals before this Court. There is another perspective from which this issue is required to be examined. In our opinion, both the requirements of prior notice and recording of the reasons before passing the order of transfer were envisaged to enable the party likely to be affected by such transfer to submit his objections. If the assessee had any such sustainable objection, he is expected to have raised the same before the Assessing Officer at Hyderabad after the transfer of the case. From the fact that the assessee has not raised any such objection would clearly show that he had no grievance against the

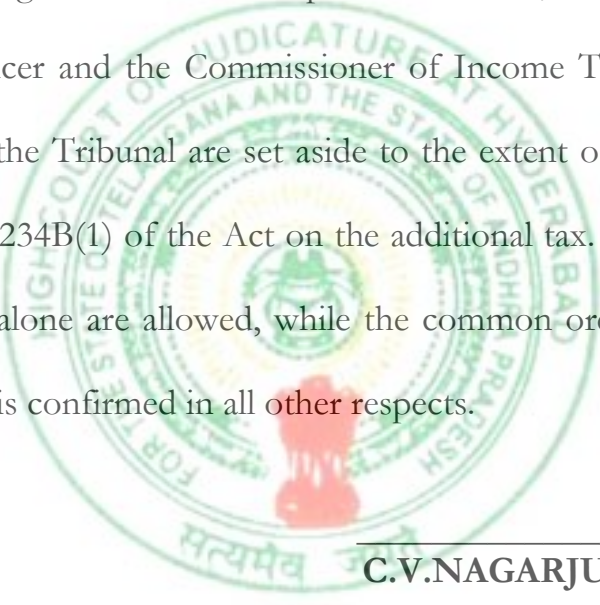
transfer as such. Indeed, the assessee objected to the jurisdiction exercised by the Assessing Officer at Mumbai on the ground that he was being assessed at Hyderabad. Transfer of the case to Hyderabad is obviously in tune with his objection, which appears to be the reason why the assessee has not raised any objection on the transfer. The assessee has also not pleaded any prejudice on account of transfer or purported absence of reasons for such transfer. For the aforementioned reasons, we reject this submission of the assessee as well.

11. The issue as to whether the assessee, who is a salaried employee, is liable to pay advance tax, is no longer *res integra*. A Full Bench of the Uttarakhand High Court in **Maersk Co.Ltd** (1 supra) elaborately discussed this aspect and held that an assessee, whose income tax is liable to be deducted at source, is not liable to pay advance tax under Section 208 of the Act and consequently, he is not liable to pay interest under Section 234B(1) thereof. A similar view was taken by the Delhi High Court in **GE Packaged Power Inc.** (2 supra). In a recent judgment in **Ian Peter Morris** (3 supra), this issue is conclusively adjudicated by the Supreme Court. Paragraph 4 of the said judgment, which contains the ratio, reads as under:

“A perusal of the relevant provisions of Chapter VII of the Act (Part A, B, C and F of Chapter VII) would go to show that against salary a deduction, at the requisite rate at which income tax is to be paid by the person entitled to receive the salary, is required to be made by the employer failing which the employer is liable to pay simple interest thereon. The provisions relating to payment of advance tax is contained in Part ‘C’ and interest thereon in Part ‘F’ of Chapter VII of the

Act. In cases where receipt is by way of salary, deductions under Section 192 of the Act is required to be made. No question of payment of advance tax under Part 'C' of Chapter VII of the Act can arise in cases of receipt by way of 'salary'. If that is so, Part 'F' of Chapter VII dealing with interest chargeable in certain cases (Section 234B Interest for defaults in payment of advance tax and Section 234C Interest for deferment of advance tax) would have no application to the present situation in view of the finality that has to be attached to the decision that what was received by the appellant assessee under the Non-Compete Agreement was by way of salary."

12. In the light of the above position in law, the orders of the Assessing Officer and the Commissioner of Income Tax (Appeals) as confirmed by the Tribunal are set aside to the extent of levy of interest under Section 234B(1) of the Act on the additional tax. These Appeals to this extent alone are allowed, while the common order impugned in these Appeals is confirmed in all other respects.


C.V.NAGARJUNA REDDY, J

T.AMARNATH GOUD, J

22nd November, 2017

Note: L.R. copies to be marked.

(B/o)
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