IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :09.01.2018

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.No.17238 to 17241 of 2017

C.Nedumudikilli ... Petitioner in all W.Ps

Vs.

The Principal Commissioner of Income Tax,
Central 1
46, Nungambakkam High Road,
Chennai 600 034. ... Respondent in all W.Ps.

COMMON PRAYER:Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus calling for the records of the respondent Principal Commissioner of Income Tax, Central 1, Chennai in his file C.No.1511/C.1/2016-17 for the assessment year 2001-02, 2002-03, 2003-04, 2004-05 and quash the impugned orders dated 27.03.2017 under Section 264 of the Income Tax Act, 1961, and consequently direct the respondent Principal Commissioner of Income Tax to condone the delay in filing the revision petitions under Section 264, entirely and deal with the same on merits with consequential directions in accordance with law.

For Petitioner in all W.Ps : Mr.T.N.Seetharaman

For Respondents in all W.Ps : Mr.A.P.Srinivas &
Mr.A.N.R.Jayaprathap
Standing Counsel for Income Tax

O R D E R

Heard Mr.T.N.Seetharaman, learned counsel for the petitioner and Mr.A.P.Srinivas, learned Senior Standing counsel appearing on behalf of the respondents.

2. The writ petitioner has filed this writ petition challenging an order passed by the respondent under Section 264 of the Income Tax Act, 1961 (the Act). The petition filed by the petitioner under the said provision has been rejected not on merits but on the ground that it is barred by limitation and unexplained delay. Therefore, the Court is called upon to test the correctness of the order (as to correctness of the impugned

order) as to whether the respondent was justified in rejecting the petitions as being barred by limitation. To examine these issues, the following facts are essential:

3. Search and seizure operation under Section 132 of the Act was carried out in the residence of the petitioner on 11.10.2006. As a consequence thereof, notice under Section 153 (A) of the Act dated 10.03.2008 was issued requiring the petitioner to file a return of income within a period of fifteen days. In response thereto, the petitioner has filed his return of income on 22.07.2008, admitting an income of Rs.1,45,000/- (Rupees One Lakh Forty Five Thousand only), claiming himself to be a resident for the assessment year 2001-02 to 2004-05. Subsequently, notice under Section 143(2) of the Act was served and the petitioner's authorized representative appeared and filed details which were called for during the course of assessment. The petitioner filed another return of income on 25.11.2008, admitting a total income of Rs.58,64,292/-. Based on the details furnished by the petitioner and the answers given to the queries raised, the assessing officer framed the assessment by order dated 29.12.2008. Admittedly, the petitioner/assessee did not prefer any appeal as against the assessment order.

4. After about nearly two years, the respondent in exercise of his powers under Section 263 of the Act sought to revise the assessment and passed an order dated 30.03.2012 for all the assessment years. It was pointed out that during the course of assessment, the petitioner responded to the queries of the assessing officer on the claim of foreign remittance and filed return dated 25.11.2008, admitting foreign income of Rs.54,80,652/- and he also made a claim of having earned income from abroad which was subjected to taxation by the Canada Revenue Agency and claimed tax credit of Rs.18,95,279/- in respect of income included in the global income brought to tax. The respondent pointed out that the assessing officer had allowed the claim prima facie on the basis of the documentary evidence submitted by the assessee. It was observed that enquiries were made and information was received that the claim of the petitioner having earned income in Canada, on which he has paid tax was false. In response to the Canadian Tax Payment, statement filed by the petitioner, enquiries were made with the Canadian Revenue Agency and certain discrepancies were noted. Therefore, the respondent concluded that no credence could be given to the claim of foreign Tax Payment made by the assessee and to that extent, the tax credit for such foreign payment given in the assessment order dated 29.12.2008, prima facie appears to be erroneous and prejudicial to the interest of revenue.

5. The petitioner/assessee was required to show cause vide notice dated 18.11.2010 as to why such credit given in the assessment order may not be withdrawn. In response to the same, the petitioner furnished information vide his letter dated 13.01.2011 and also enclosed eight documents, which included the copy of the passport issued by the Canadian Government to the petitioner, the foreign bank account, etc., After taking note of the information furnished by the petitioner, the respondent stated that the said information furnished by the assessee was forwarded to the Director, Foreign Taxation Division, CBDT, New Delhi, with a request that in the light of the fresh information received by the commissioner, the same may be transmitted to the Canada Revenue Agency for necessary verification. Since the verification report was not received and proceedings under Section 263 of the Act was getting time barred by 31.03.2011, the respondent concluded the proceedings by setting aside the finding on and remanding back the said issue to the file of the assessing officer with a direction for fresh consideration in accordance with law. On receipt of the report from the Canada Revenue Agency of such order being passed, the assessing officer took up the matter and passed assessment orders dated 14.12.2011 i.e., after about nine months from the date on which order under Section 263 of the Act was passed by the respondent. With regard to the residential status of the petitioner, the Assessing Officer noted the contention raised by the petitioner that in the return of income filed prior to the date of search and the return filed after the date of search, the status of the petitioner was mistakenly taken as 'resident'. In support of such contention, the petitioner had filed the copies of the passport of the relevant previous year which was forwarded along with the order under Section 263 of the Act passed by the respondent dated 30.03.2011 and once again, the copies of the passport for the relevant year together with the original passport were produced before the Assessing Officer for perusal. The Assessing Officer verified the relevant details regarding the period of stay of the assessee during the assessment year 1996-97 and on the basis of the stay of the assessee in India during the relevant year as well as in the previous year, the assessing officer concluded the status of the petitioner as non-resident. Thus the petitioner's case stood vindicated as the assessing officer accepted the status of the petitioner as non-resident. After about 27 months from the date on which the assessment order was passed i.e., on 14.12.2011, the respondent exercised suo motu powers under Section 263 of the Act, observing that even though the assessee had furnished materials such as passport and details of stay in India during the proceedings before the respondent indicating that he was enjoying non-resident status, held that such issue cannot be considered under Section 263 as the assessee could have come under Section 264 of the Act separately for the said issue. For

this reason, the assessee's claim as a non-resident was rejected and assessed as resident and the Canadian income were held to be taxable in India. Since the status of the assessee was held to be resident, as originally claimed by him and held by the Assessing Officer in the original assessment order dated 29.12.2008, direction was issued to the Assessing Officer to redo the assessment as per the computation given in the order dated 28.03.2014 and work out the tax including appropriate interest.

6. The petitioner being aggrieved by such order preferred an appeal before the Income Tax Appellate Tribunal (ITAT), Chennai. The Tribunal by order dated 25.06.2015 held that the order passed by the Assessing Officer holding the petitioner as a non-resident was passed exceeding his limit and without considering the order passed by the respondent under Section 263 of the Act dated 30.03.2011 and held that the order passed by the Assessing Officer is erroneous and prejudicial to the interest of the revenue and accordingly, the appeal stood dismissed. The petitioner did not file further appeal to this Court as against the order passed by the Tribunal but filed a petition before the respondent under Section 264 of the Act, stating that the petitioner is a Canadian citizen, he has been permanently living in Canada since 1995 and during the financial year 2000-01 (assessment year 2001-02), he had stayed in India for a period of 90 days only and the details were furnished and prayed before the respondent to determine the petitioner's status for the relevant year as non-resident and pass order in the revision petition. This petition filed under Section 264 of the Act has been rejected by the impugned order. As pointed out earlier, the order of rejection passed by the respondent dated 27.03.2017 is not on the merits of the matter, but on the ground that the petition has been filed with undue and very long delay of more than 5 ½ years and therefore cannot be condoned. Since the respondent has not gone into the merits of the matter, this Court is required to see as to whether the petitioner should be non suited on the ground of delay or in other words, it has to consider as to whether the delay is more than 5 ½ years, the reason for rendering such a finding in the impugned order is on account of the limitation prescribed under Section 264 of the Act. The said provision states that in case of any order other than an order to which Section 263 of the Act, applies passed by any authority subordinate to him, the Principal Commissioner or the Commissioner may either on his own motion or an application by the assessee for revision, call for the record of any proceeding under this Act in which any such order has been passed and may make such inquiry to be made and subject to the provisions of this Act and may pass such orders thereon, not being an order prejudicial to the assessee, as he thinks fit. Sub Section 2 of Section 264 of the Act states that the

Commissioner shall not on his own motion, revise any such order under Section 264 of the Act, if the order has been made more than one year previously. Therefore, the delay in filing the petition has been computed from the date on which the original assessment was passed i.e., 29.12.2008. The stand taken in the impugned order has been reiterated in the counter affidavit and emphasized in a very vehement manner by the learned standing counsel for the Revenue.

7. On a reading of Section 264 of the Act, it is clear that the language employed in the said provision gives wide powers to the Commissioner and such powers can be exercised suo motu or an application by the assessee. The power of revision includes the power to call for the records of any provisions under the Act in which, a common order passed, the Commissioner is empowered to make enquiry and cause enquiry to be made subject to the provision thereto, not being an order prejudicial to the assessee. Thus the Statute does not restrict the powers of the Commissioner in any manner to the said effect. The circular was issued by the CBDT as early as 11.04.1995 in Circular No.14 (XL-35) states that 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. Thus, the above circular makes it clear that the officers of the Department cannot take advantage of the ignorance of the assessee and they have to assist the tax payer in every reasonable way, particularly in the matter of claiming and securing relief.

8. The power under Section 264 was explained elaborately in the decision in the case of Sneh Lata Jain V. Commissioner of Income Tax reported in [2004] 140 TAXMAN 156 (J&K) and in the decision in Ramdev Exports v. Commissioner of Income Tax reported in 2001 Vol.251 ITR 873 which was followed by this Court in M/s.Medifield Equipments Corporation Vs. The Commissioner of Income Tax, Chennai VII, in WP.No.13408 of 2010 dated 12.11.2014 and in the case of Vijay Gupta Vs. Commissioner of Income Tax, reported in 2016 386 ITR 643(Delhi), this Court pointed out that the powers of Commissioner conferred under Section 264 of the Act are very wide and the Commissioner is bound to apply his mind to the question as to whether the petitioner was taxable on that income and since Section 264 uses an expression "any order", it would imply that the section does not limit the power to correct the errors committed by the sub

ordinate authorities but could even be exercised, where errors are committed by the assessee. Having noted the powers of the Commissioner under Section 264 of the Act, it has to be seen as to whether the order rejecting the petition on the ground of delay was justified. It is no doubt true that the Commissioner was justified in computing the time limit for entertaining the revision from the date of original assessment order. However, the proceedings which followed thereafter commencing from the suo moto revision done by the Commissioner in 2011, attained finality only in 2015. In fact, after nearly two years, the Commissioner invoked his power under Section 263 of the Act resulting in an order dated 30.03.2011. During the course of proceedings, the Commissioner had accepted additional information furnished by the assessee which was forwarded to the Director, Foreign Taxation Division, CBDT, New Delhi for verification and appropriate report. Ultimately an order could not be passed by the Commissioner on merits as the proceedings under Section 263 of the Act were getting time barred and the matter was remanded to the assessing officer for consideration. Once again, the Commissioner exercised suo motu power under Section 263 of the Act and an order was passed after 27 months by order dated 28.03.2014.

9. The petitioner, being aggrieved, filed an appeal before the ITAT and it took nearly 15 months for the ITAT to take a decision in the matter and ultimately, an order was passed on 25.06.2015 dismissing the petitioner's appeal two months thereafter. The petitioner filed revision petition on 07.09.2015. The learned Senior Standing counsel for the Revenue argued that the petitioner cannot take advantage of the proceeding initiated by the Department under Section 263 of the Act. I am unable to countenance the said submission on account of the fact that in those proceedings, Commissioner accepted the additional materials filed by the petitioner which included his Canadian passport and when the matter went before the Assessing Officer on remand, he took a decision and rectified the status of the petitioner as a non-resident and passed revised assessment order. This was once again called in question by the respondent under Section 263 of the Act and set-aside by order dated 28.03.2014. This order was put to challenge before the Tribunal which was dismissed on 25.06.2015. Therefore, in my considered view, the time taken for prosecuting these matters, some of which, was at the instance of the Department and some at the instance of the petitioner, has to be necessarily excluded while computing limitation for exercise of power under Section 264 of the Act. This is for, more than one reason, firstly, the petitioner cannot be shut out from placing facts before the Commissioner and Section 264 of the Act empowers the Commissioner to cause enquiry and verify the facts. Secondly, if there has been a genuine mistake committed by the assessee,

Statute does not bar the assessee from rectifying his mistake though there might have been some statement made by the petitioner that the canadian income has been taxed in the said country which was found to be false and the stand taken by him that he has received certain Gifts were also found to be false cannot be a bar to ascertain the correct status of the petitioner as to whether during the relevant period that he was a resident or a non-resident. I am of the considered view, the petitioner should not be shut out on technicalities and the facts should not be left unexamined. In Venkatadri Traders Ltd., V. Commissioner of Income Tax and Another reported in 248 ITR 681, the Court while considering the question of condonation of delay by the revisional authority observed as follows:

"While considering the question of condonation, the revisional authority is not to altogether exclude from consideration the merits of the revision petition. If the cause of justice requires that a liberal view be taken, then a liberal view would indeed be warranted while considering the question of condoning the delay. The case of the assessee being that the same receipt has been taxed twice over once by way of accrued interest and for the second time by way of capital gain has not been found to be incorrect even prima facie. In matters where refunds are involved and the assessee's right to such refund is beyond any reasonable doubt, a liberal view of the conditionalities subject to which the relief can be granted is warranted. It is not the policy of the Act to enable the State to collect monies from citizens and retain the same even when the money is not required to be paid as tax. The fact that the payment had been made erroneously cannot by itself be allowed to stand in the way of the relief being granted to the assessee, if relief is permissible by the exercise of a discretionary power vested in the statutory authorities. The discretion so vested is required to be exercised in a manner which would protect and promote the just interest of the assessee. The position of the assessee vis-a-vis the Revenue is not strictly adversarial, although more often than not, that is the manner in which the two parties perceive their role. The Revenue is not to be regarded as interested in scoring points against the assesee, but only in the just enforcement of the provisions of the Act. The discretion of the authority, therefore, on the facts of this case, was required to be exercised by bearing the aforementioned considerations in mind."

10. One more aspect which has to be taken into consideration is with regard to the observations made by the Commissioner while passing the order dated 28.03.2014, wherein the Commissioner himself has stated that the issue pertaining to the status of the petitioner as a resident or a non resident cannot be broached under Section 263 and the assessee could have

come under Section 264 of the Act separately on the issue. Therefore, the Commissioner was satisfied with the issue raised by the petitioner regarding the status was a matter that could be considered under Section 264 of the Act.

11. Thus, for all the above reasons, I am of the considered view that the delay in filing the petition should be computed from the date on which the ITAT dismissed the petition (i.e.,) on 25.06.2015 and if that period is reckoned, revision petition had to be filed within a period of two months from the said date. Therefore, it cannot stated to be either hopelessly time barred and delay remains unexplained. Thus, for the above reasons, the delay in filing the revision petition, if any, requires to be condoned.

12. In the result, the writ petitions are allowed, the impugned orders are set aside and the delay in filing the revision petition is condoned and the matter is remanded to the respondents to take a decision on the petition filed by the petitioner under Section 264 of the Act on merits and in accordance with law, after affording an opportunity of personal hearing to the authorized representative of the petitioner. No costs.

Sd/-
Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

sk

To

The Principal Commissioner of Income Tax,
Central 1
46, Nungambakkam High Road,
Chennai 600 034.

+1cc to Mr.A.P.Srinivas, Advocate, S.R.No.2021
+1cc to Mr.T.N.Seetharaman, Advocate, S.R.No.1572

W.P.No.17238 of 2017

RV(CO)
RRK(15/02/2018)