IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.11.2020

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

W.P. No.28620 of 2019
and
WMP. No.28377 of 2019

P.Suresh Kumar ... Petitioner

Vs

1 Commissioner Of Income Tax,
International Taxation, 4th Floor,
BSNL Building (Tower-1)
No.16, Greams Road, Chennai~6.

2 Income Tax Officer,
Salary Ward VI, Chennai-34.

3 Income Tax Officer,
International Taxation-2(2),
Chennai-34. ....Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to Writ of Certiorari to call for the records of the 1st Respondent herein in F.NO.CIT/IT/CHE/113(264(3)/2016-17 and quash the order dated 28.12.2017 passed therein and further direct the 1st Respondent to entertain and hear the Petition U/S 264 filed by the Petitioner on 1.8.2016 on merits.

For Petitioner : Ms.Vardhini Karthik

For Respondents : Mrs.Hema Muralikrishnan
Senior Standing Counsel

O R D E R

The petitioner is an Non~resident Indian (NRI) and filed returns of income for the Assessment Years (AYs) 2005-06 to 2010-2011 offering income to tax in terms of the provisions of the Income Tax Act, 1961 (in short 'Act'). He is a salaried employee of Tata Consultancy Services (TCS) deputed to TCS, United Kingdom (UK) from July, 2004. From 07.01.2005, he attained the status of NRI and has been assessed in that status subsequently. In the course of the employment, taxes were being deducted at source by the employer and remitted to the treasury at UK and by virtue of his continued employment in India, tax was being deducted at source on the Indian component of the salary as well. According to the petitioner, the salary remitted in INR had also been included in the salary paid to him in UK.

2. Since the petitioner was liable to tax only in UK in line with Article 16 of the Double Taxation Avoidance Agreement (DTAA) between India and UK in terms of which salaries and remuneration derived from employment by a resident in one contracting State was taxable only in that State, he was entitled to a refund of tax paid in India. He thus filed a petition dated 22.08.2011 under Section 154 of the Act before the Income Tax Officer, Salary Ward/R2 seeking such refund on the ground that there was a mistake apparent on the face of the record and his income tax returns offering salary income to tax in India were erroneous. Rectification was sought only in the year 2011 as it was only then, when Form E60 was issued by TCS, that the petitioner came to know that tax had been paid both in India and in UK for the four assessment years in question and that there had been double taxation in respect of the same income. Since the period for rectification of mistake is four years from end of the year to which the return pertained, the return for AY 2006-07 is barred by limitation. The Section 154 petition was filed only in 2011 and is hence beyond time. The Writ Petition insofar as it relates to AY 2006-07, is dismissed on this short point.

3. No action was taken by R2 despite reminders on 21.07.2013 and 10.07.2015. On 23.07.2015, R3, i.e., the Income Tax Officer, International Taxation, wrote to the petitioner conveying that the Assessing Officer had no power to rectify the income returned by the assessee and the only remedy for the assessee was to file revised returns correcting defects, if any, in the original returns of income. On 27.07.2015, R3 once again wrote to the petitioner stating that any relief as per DTAA requires filing of a revised return with a petition for condonation of delay under Section 119(2)(b). R3 also clarified that no condonation could be sought beyond the period of six years from the end of the assessment year to which the petition related.

4. Admittedly the petitioner has not filed revised returns of income. On 12.10.2015, the petitioner filed a petition under Section 119(2)(b) as per the suggestion of R3. Parallely, on 01.08.2016, the petitioner approached R1/the Commissioner of Income Tax (CIT) with a petition seeking revision under Section 264 of the Act. On 26.10.2017, R1 communicated to the

petitioner that since the petition under Section 264 was pending, the petition under Section 119(2)(b) was to be treated as closed.

5. On 26.12.2017, the impugned order came to be passed dismissing the petition under Section 264 on the ground that no case has been made out to justify the substantial delay in filing of the 264 petition.

6.In respect of AY 2010-11, an order under Section 143(1) dated 25.05.2011 has been passed accepting the return, that was revised in terms of Section 154 by granting the refund as sought.

7. As far as AYs 2007-08, 2008-09 and 2009-10 are concerned, Section 154 petitions have been filed on 22.08.2011, within time.

8. As regards the argument of the revenue that the Section 264 petitions are delayed, intimation in terms of Section 143(1) for AY 2007-08 is dated 11.03.2009, AY 2008-09, 19.03.2010 and AY 2009-10 is 14.09.2010 and the Section 264 petitions have been filed on 01.08.2016 after periods of 8 years 192 days, 7 years 192 days and 6 years 19 days respectively.

9. Section 264 provides for revision of an order, within a period of one year from the date on which the order in question was communicated to the assessee or the date on which he otherwise came to know of it, whichever is earlier. It also provides for the condonation of delay of an unlimited period where the CIT is of the view that the filing of petition belatedly is justified. In the present case, the petitioner, challenging the intimations, has filed petitions under Section 154 within time and it is only on 23.07.2015 that R3 has rejected the same, paving the way for the subsequent petitions under Section 264. Thus, there does not appear to have been any delay in the filing of the petitions under Section 264. However, the petitioner has not, despite being specifically directed to, filed revised returns and this, in my view, is fatal to his case.

10. In Goetze (India) Ltd. V. CIT (284 ITR 323), the question that arose for consideration was whether an assessee can be permitted to claim deduction not claimed in the original return. The assessee in that case had omitted to claim deduction in the return of income, but subsequently claimed the same by way of a letter filed before the Assessing Authority in the course of assessment. The Assessing Authority rejected the claim on the ground that it had not emanated from the return of income. In

appeal, the assessee relied upon the judgment of the Supreme Court in the case of National Thermal Power Company Ltd (NTPC). V. CIT (229 ITR 383), wherein the Supreme Court had held that it was always open to an assessee to raise a new ground of appeal even at the stage of second appeal before the Income Tax Appellate Tribunal, provided all facts necessary to challenge that ground were available on record and no new facts needed to be pressed into service.

11. In Goetze (India) (supra), the Supreme Court considered the earlier judgment in NTPC and found a difference insofar as in NTPC, it was the power of the Tribunal to admit an additional ground that had been the subject matter of decision, whereas, in Goetze (India), it was the power of the Assessing Authority to admit a claim of deduction. While not disturbing the ratio of the judgment in NTPC, the Supreme Court in Goetze (India) rejected the claim of the assessee holding that a fresh claim may be made by an assessee only by way of a revised return. In fact, R2 has, in communication dated 23.07.2015, specifically directed the petitioner to file a revised return of Income to seek refund, and this has been ignored.

12. This Writ Petition is dismissed. No costs. Connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

sl

To

1 The Commissioner Of Income Tax,
International Taxation, 4th Floor,
BSNL Building (Tower-1)
No.16, Greams Road,
Chennai-6.

2 The Income Tax Officer,
Salary Ward VI,
Chennai-34.

3 The Income Tax Officer,
International Taxation-2(2), Chennai-34.

+1cc to M/s.Hema Muralikrishnan, Advocate Sr.37738

W.P. No.28620 of 2019
and
WMP. No.28377 of 2019

ad[co]
srg 10/03/2021