

IN THE HIGH COURT OF JUDICATURE AT MADRAS
CORAM:

THE HONOURABLE MR.JUSTICE M.DURAI SWAMY
AND
THE HONOURABLE MRS.JUSTICE T.V.THAMILSELVI

Tax Case (Appeal) No.379 of 2017

Judgment reserved on 27.01.2021	Judgment pronounced on 05.02.2021
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Dr.S.Muthian

.. Appellant

Vs.

Assistant Commissioner of Income Tax
Salary Circle - V, Income Tax Department,
Aayakar Bhavan, Mahatma Gandhi Road,
Nungambakkam, Chennai - 600 034.

.. Respondent

PRAYER : Tax Case Appeal filed under Section 260 A of the Income Tax Act, 1961, against the order of the Income-tax Appellate Tribunal, Chennai Bench "D", dated 16.12.2016 in I.T.A.No.1521/MDs/2015 for assessment year 2010-2011, Appeal against the order dated 15/04/2015 made in ITA.No.334/13-14 on the file of the Commissioner of Income Tax (Appeals) -5, Chennai and Appeal against the order dated 15/03/2012 made in PAN.No.CBSPS6453G on the file of the DCIT/ACIT Salary Circle V, Chennai for the assessment year 2010-11.

For Appellant :M/s.M.Sivathanu

For Respondent :Mr.T.Ravikumar

Senior Standing counsel
for the Revenue

J U D G M E N T

T.V.THAMILSELVI, J.

This appeal, filed by the appellant/assessee under Section 260A of the Income Tax Act, 1961 ('the Act' for brevity), is directed against the order passed by the Income Tax Appellate Tribunal Chennai, "D" Bench ("the Tribunal" for brevity), dated 16.12.2016 in I.T.A.No.1521/MDs/2015 for assessment year 2010-2011.

2. Facts of the case are as follows:

The assessee was employed in Google India Private Limited.

The assessee's gross taxable income for the assessment year 2010-11 was Rs.76,70,698/- comprising of Rs.76,17,979/- under the head salary and Rs.52,323/- under perks and other amenities, and other income of Rs.396/- (resulting in a Returned Income of Rs.75,70,698/-) as stated in the assessee's Income Tax Return. In addition, because of the NOR (Not Ordinarily Resident) status of the assessee, for the said Assessment Year (as defined in Section 6(6) (a) of Income Tax Act), there was also an exempt income of Rs.1,19,49,709/- being the income arising outside India as stated in Section 5(1) (c) of Income Tax Act, viz., USA income on sale of stock options. The issue involved in the appeal is how the aforesaid amount of Rs.1,19,49,709/- (viz., the exempt income) has to be treated. There is an error in Form-16 issued by the assessee's then employer Google India Private limited, as it erroneously included the exempt income of Rs.1,19,49,709/- as part of the taxable income. The said error in Form-16 issued by the then employer must be because of the fact that the employer could not go into the exact residential status of its employee, which involves complicated questions of law viz., interpretation of Section 6(6) (a) and 5(1) (c) of Income Tax Act and hence, as a measure of abundant caution, erroneously deducted income tax for the said exempt income of Rs.1,19,49,709/-. Thus, an excess income tax of Rs.36,92,460/- was erroneously deducted by Google India Private Limited and paid to the Indian Government. Hence, the assessee is entitled for refund of the said excess tax erroneously paid on behalf of the assessee.

3. Accordingly, in the assessee's income tax return for the assessment year 2010-11, the assessee reported the aforesaid income of Rs.1,19,49,709/- under Exempt income because of his USA income and NOR status as per Section 5(1)(c) and Section 6 (6)(a) of Income Tax Act and claimed a refund of Rs.36,92,337/-. Along with the assessee's income tax return filed on 31.07.2010, the assessee enclosed a letter stating the rationale for the said refund claim, and subsequently, on 05.05.2011, after not hearing back from the Assessing Officer, the assessee suo motu sent detailed documents more clearly explaining the rationale behind the refund claim and proving his eligibility for the refund of income tax.

4. It was contended that the return of income for the assessment year 2010-11 filed by the assessee on 30.07.2011 declaring a taxable income of Rs.75,70,698/- was processed under Section 143(1) of Income Tax Act, 1961, on 15.03.2012 determining the total income at Rs.1,95,20,410/- by ignoring/disallowing the exempt income of Rs.1,19,49,709/- claimed by the assessee viz., income arising outside India for a NOR (Not Ordinarily Resident) assessee as per Section 5(1)(c) and Section 6(6) (a) of Income Tax.

5. Aggrieved by the order of Assessing Officer, on 08.07.2012, the assessee filed an appeal before the Commissioner of Income Tax (Appeals) [CIT(A)]-5, Chennai, in I.T.A.No.941/13-14 raising two vital grounds viz., (a) income arising outside India as per Section 5(1)(c) of Income Tax Act and (b) NOR status under Section 6(6)(a) of Income Tax Act. The Commissioner of Income Tax (Appeals), vide order dated 15.04.2015, dismissed the appeal without answering the two vital grounds under Section 5(1)(c) and 6(6)(a) of Income Tax Act. Aggrieved over the order of the Commissioner of Income Tax (Appeals), the assessee preferred an appeal before the Income Tax Appellate Tribunal "D" Bench, Chennai and Tribunal by order dated 16.12.2016, dismissed the appeal and confirmed the order of CIT(A). Challenging the order passed by the Income Tax Appellate Tribunal, the assessee has filed the above appeal.

6. Heard Mr.M.Sivathanu, learned counsel for the appellant and Mr.T.Ravikumar, learned Senior Standing counsel for the Revenue.

7. The above Tax Case Appeal was admitted on the following substantial Questions of law:

(i) Whether the gain on sale of stock options in USA that were given to the Indian employee by M/s.Google Inc., USA amounts to perquisites taxable under the Income Tax Act, 1961 or not?;

(ii) Whether the amounts shown in Form-16 as Tax Deducted at Source on such perquisites would be the exclusive gain made by the Assessee on such stock options issued by the Holding Company in USA is sufficient to hold that it is taxable under the head 'salary' as 'perquisites' with reference to the provisions under Section 5(1) (c) and 6(6) (a) read with Section 17?;

(iii) Whether such tax can be imposed by the Revenue under Section 143(1) of the Act after issuance of Notice under Section 143(2) of the Act?.

8. The learned counsel appearing for the appellant-assessee submitted that the Appellate Tribunal failed to appreciate the documents submitted by the assessee, in order to prove the tax exemption on income derived from selling stock options. Further the learned counsel made reliance on the document in page No.19 of the typed set of papers.

9. On a perusal of the documents, it is seen that it is a worksheet submitted by the assessee along with Form-16. In that worksheet, the assessee claimed that he comes under the NOR (Not Ordinarily Resident) category for the assessment year 2010-11. He also furnished particulars of the days, in which he stayed in India from 1.04.2002 to 31.03.2009. Even as per the said document, the assessee had stayed in India only for 401 days, which is well under the 732 days required for classification as a regular resident.

10. It is also an admitted fact that he was given 5500 stock options, when he joined Google Inc, California, USA, in June 2005. Thereafter, in the year 2008, he left the USA and relocated in India and he further joined Google India Private Limited, an Indian company fully owned by the parent company Google Inc. USA.

11. During the assessment year 2010-11, he sold 900 stock options and still he owns 2100 stock options. Hence, the entire 900 options sold in the assessment year 2010-11, clearly came out of the lot of 4583 options that had already vested before his move to India and all the transactions were initiated and executed through Smith Barney Inc., based in the USA and the proceeds were wired directly to his old account in the USA bank. Thus, the amount of Rs.1,19,49,709/- under "stock options" mentioned in Form-16 pertains to sale of stock options that were granted in the USA while he was working in Google Inc., USA and vested while he was living in the USA. The same were sold through a US-based company and the cash proceedings were directly sent to his old account in the USA bank.

12. Based upon these facts, the counsel for the appellant submitted that as per Section 5(1) of the Income Tax Act, the assessee comes under the category of NOR assessee and is liable to pay tax only on income earned in India. Specifically, Section 5(1) excludes "income which accrues or arises outside India" in the case of Not Ordinarily Resident assessee.

13. 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 115C(e) of the Act. It means an individual, being a citizen of India or a person of Indian Origin who is not a "resident". As per the worksheet submitted by the assessee, he was residing in India from 01.04.2002 to 31.03.2009 (i.e) 7 years. But preceding to the assessment year 2010-11, he had stayed in India only for 401 days. Thus, the learned counsel for the appellant argued that while purchasing the stock option in the year 2005, the assessee was a resident of the USA and out of the income realized in the USA, he

purchased those stock options and hence, it will not come under the income earned in India.

14. The Learned Senior Standing counsel for the Revenue submitted that while calculating the total income of the assessee for the assessment year 2010-11, his employer Google India Private Limited mentioned that the amount of Rs.11,949,709/- comes under the head of stock options shown under part of "perks", thereby, he is liable to pay the part of perks which amounts to income earned by the assessee. But according to the assessee, he acquired asset viz., 'stock' from employer's stock option scheme, when he was serving abroad in parent-company prior to the assessment year 2010-11, when he was non-resident. Without considering this fact his employer erroneously treated the sale proceeds of stock options as 'perquisites' and included that as income in Form-16.

15. The learned counsel for the appellant submitted that immediately the assessee sent a letter dated 05.05.2011 to the Department, claiming for refund of Rs.36,92,337/- which was erroneously deducted by his employer. The said letter has also been enclosed in the typed set of papers at page No.13. The department also sought particulars from the assessee about his NOR status, but instead of appearing before the Commissioner in person, the assessee gave a reply along with particulars of his stay in India from the year 2003 to 2009. The said letter also forms part of the documents and is found at page No.19 of the typed set of papers. However, the department was not satisfied with the reply submitted by the assessee.

16. After various communication between the assessee and the department, though the Commissioner concluded that the exemption claimed by the assessee which was in the form of sale of stock options in the USA, however, Form-16 annexed to the return of income issued by the present employee of the assessee shows that stock option received by the assessee was liable for tax and it was subject to TDS by Google India Private Limited, Bangalore and they have deducted the TDS on the same. That being so, the Assessing Officer, while processing the return under Section 143(1) of the Act included the income from sale of stock options as income of the assessee. Based upon the available record in the form of Form-16, the exemption claimed by the assessee was rejected by the Tribunal.

17. At the time of the arguments, the learned Senior Standing counsel for the department submitted that in spite of several communications, the assessee has not appeared before the Commissioner with particulars to establish that he comes under the category of NOR as under Section 5(1)(c). On a reading of the order of the Tribunal reveals that on the basis of the

written submission made by the assessee as well as particulars found in Form-16 issued by his employer, the authorities negatived the claim of the appellant.

18. The learned counsel for the appellant replied that the assessee sent particulars of his stay at the USA preceding to the assessment year with a copy of passport to prove his residential status, but without appreciating those documents, the Commissioner erroneously concluded that the stock option purchased by the assessee comes under the income earned in India.

19. However, the learned Senior Standing Counsel for Revenue fairly submitted that the assessee may be given one more opportunity to establish his claim before the Assessing Officer.

20. Since the NOR status and the purchase of stock option of the assessee is a mixed question of fact and law, as rightly suggested by the learned Senior Standing Counsel for the department, in the interest of justice, in order to give one more opportunity to the assessee we are of the considered view that the matter can be remitted back to the Assessing Officer. Accordingly, the order passed by the Tribunal is set aside and the matter is remitted back to the Assessing Officer for deciding the matter afresh on merits and in accordance with law. The assessee is given liberty to produce all the relevant documents before Assessing Officer for establishing his claim.

21. With these observation, the appeal is allowed. No cost.

Sd/-
Assistant Registrar (CS.VIII)

/True Copy/

Sub Assistant Registrar

To

1.The Income Tax Appellate Tribunal "D" Bench,
Chennai.

2.The Commissioner of Income Tax (Appeals)-5, Chennai.

3.The Assistant Commissioner of Income Tax,
Salary Circle -V, Chennai.

+1cc to Mr.T.Ravi Kumar, Advocate SR.NO.6363

AKM/26.02.21/ 6P- 5C/

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