A.F.R

RESERVE JUDGMENT

RESERVED ON: 19.11.2016

DELIVERED ON: 19.12.2016

Court No. - 7

Case :- MISC. SINGLE No. - 2555 of 2003

Petitioner :- Dr. Jyoti Vajpayee
Respondent :- Commissioner Of Income Tax-Ii
Counsel for Petitioner :- Shalabh Singh,Anurag Srivastava
Counsel for Respondent :- P. Agarwal,D.D.Chopra,Manish Mishra

Hon'ble Rajan Roy,J.

Heard Shalabh Singh, Advocate for the petitioner and Sri Manish Mishra, Advocate for the Income Tax Department.

The income tax department has not filed any counter affidavit in rebuttal of the averments made in the the writ petition by the assessee, in spite of several opportunities granted since the year 2003.

This is a writ petition filed under Article 226 of the Constitution of India by the petitioner-assessee challenging the order passed by the Commissioner of Income Tax under section 264 of the Income Tax Act 1961 (hereinafter referred as 'Act 1961') rejecting her revision claiming exemption of income in question under section 10(8) of the Act 1961 on the ground that there was no assignment of duties as such in terms of section 10(8) and that under the Agreement between the United States of America and the Indian government there was no specific exemption of salary from tax, therefore, as the prerequisites mentioned in section 10 (8) are not satisfied, the petitioner was held to be disentitled to the claim raised.

The facts of the case, in brief, are that the petitioner who was a Member of the U.P. Provincial Medical Services Cadre in the State of U.P. was offered an appointment by the erstwhile "Association for Voluntary Surgical Contraception (AVSC)" in a project in pursuance

to a project-grant-agreement (dated 30.9.1992) between the President of India and the United State of America acting through the Agency for International Development (AID) for innovations in Family Planning Services, in pursuance to which she applied for leave-without-pay and was granted the same by her employer, whereupon, she accepted the offer of appointment and worked with the AVSC during the relevant assessment years i.e. 1998-99, 1999-00 and 2000-01 as an Associate Trainee for which she was paid remuneration by the AVSC from the grant received through AID meant for the project which was the subject matter of the aforesaid Cooperative Technical Agreement between the two Governments, a fact which is not in dispute. As against the remuneration paid to her for the aforesaid relevant years an amount of Rs.1,60,223.00, Rs. 2,58,921.00 and Rs. 2,91,497.00 (aggregating Rs. 7,10,541.00) was 'deducted at source' at the rate of 10%, by AVSC, for the assessment years 1998-99, 1999-00 and 2000-01, respectively.

The employer was not aware that this income was exempted under section 10(8) of the Income Tax Act applicable in India read with the Agreement referred hereinabove nor was the assessee, consequently, the latter also did not claim any exemption in her income tax return for the aforesaid assessment years nor any revised returns were filed claiming the same. Later on, when the experts in the field and consultants told her that the said income was exempt and that she had a remedy under section 264 of the Income Tax Act, she filed a revision petition before the Commissioner of Income Tax, which, after condonation of delay in filing the same and it being entertained, was dismissed on merits for the reasons already referred hereinabove.

It is against the aforesaid factual background that this writ petition has been filed under Article 226 of the Constitution of India.

It was contended by Shri Shalabh Singh, Learned counsel for the petitioner that the Commissioner, Income Tax who had passed the impugned order had completely misconstrued the provisions of section 10(8) of the Act 1961 and had also misread and misconstrued the specific provisions contained in the relevant agreement exempting the income of the petitioner from taxation thereby entitling her to the benefit under section 10(8) aforesaid. Sri Shalabh Singh relied upon various judgements of the Supreme Court as also of different High Courts including this court in support of his submissions as also in rebuttal of the submissions of the learned counsel for the respondents, of which, those relevant, shall be discussed in the later part of this judgement.

On the contrary, Sri Manish Mishra learned counsel appearing for the Income Tax Department contented that salary was not exempt under the relevant agreement, therefore, the benefit of section 10(8) was not available to her. He further contented that there was no assignment of duties by the Government of U P in terms of the agreement entered into by the Government of United States of America and the Indian government, therefore, for this reason also the provision was not attracted and the Commissioner of Income Tax had rightly declined the claim. In addition to the aforesaid, Shri Manish Mishra, Advocate tried to canvass the point that the petitioner not having raised a claim in her income tax returns filed for the relevant assessment years i.e. 1998-99, 1999-00 and 2000-01 including in the revised income tax return filed for the latter year, it was not open for the petitioner to file fresh evidence before the revisional authority under section 264 in a revision petition which in fact was not maintainable, as, there was no order which could be revised under the said provision. In this regard he relied upon a decision in the case of *M.S. Raju vs. DCIT* reported in *2008 (298) ITR 373 (A.P.)*, to contend that though the Commissioner had been bestowed the power to

summon the records of any proceedings under section 264, the word 'record' here means 'the record which was available before the assessing officer' and not otherwise, therefore, the contention is that fresh documents filed before the revisional authority could not have been filed and could not have been taken into consideration nor could her claim be accepted.

It is not in dispute that the income disclosed for the relevant assessment year was in the form of remuneration from AVSC, as is evident from the revisional order. The veracity of the agreement between the Indian Government and the Government of the United States of America is not in doubt. It is only the application of section 10(8) in the light of the provisions contained in the agreement on record, their meaning and purport, as also, the validity of the reasons mentioned in the impugned order, which are to be considered. Essentially the issue is of interpretation of section 10(8) and the agreement, referred above.

Section 10(8) which forms part of Chapter III of Income Tax Act 1961, is quoted here in below:

> ***"CHAPTER III***
>
> ***INCOMES WHICH DO NOT FORM PART OF TOTAL INCOME***
>
> *Incomes not included in total income.*
>
> *10. In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included-*
>
> *10(1).....*
>
> *10(2)…….*
>
> *10(3).....*
>
> *10(4).....*
>
> *10(5).....*
>
> *10(6).....*
>
> *10(7).....*
>
> *10(8) in the case of an individual who is assigned to duties in India in connection with any co-operative technical assistance programmes and projects in accordance with an*

> *agreement entered into by the Central Government and the Government of a foreign State (the terms whereof provide for the exemption given by this clause)—*
>
> *(a) the remuneration received by him directly or indirectly from the Government of that foreign State for such duties, and*
>
> *(b) any other income of such individual which accrues or arises outside India, and is not deemed to accrue or arise in India, in respect of which such individual is required to pay any income or social security tax to the Government of that foreign State ;"*

On a perusal of the aforesaid provision it is borne out that vide Clause (a) in computing the total income of a previous year of any person, the remuneration received in the case of an individual who is assigned to duties in India in connection with any Cooperative Technical Assistance Programmes and Projects in accordance with an agreement entered into by the Central Government and the Government of a foreign State (the terms whereof provide for the exemption given by this clause), directly or indirectly from the Government of that foreign State for such duties, shall not be included in his total income (for the purposes of taxation under the Act 1961).

It is not in dispute that the Indian Government (Central Government) and the Government of the United States of America entered into an agreement in connection with a Cooperative Technical Assistance Programme and Project, as is evidenced in Annexure-2 to the writ petition, which is a copy of the said agreement. The said agreement was a Project Agreement. Section 2.1 of the Agreement defines the project as the Project, Innovations in Family Planning Services (IFPS), which is further described in Annexure-1, intended to assist the Government of India (GOI) in re-orienting and finalizing its Family Planning Programmes. It sought to bring about reduction in the level of reproductive fertility in the State of Uttar Pradesh (U.P.) by significantly increasing the use of modern contraception. The focus of the project is thereafter mentioned in detail. This agreement

was entered by the Government of the United States acting through the Agency for International Development (AID) with the President of India (Grantee). Thus, the United States of America was acting through AID as its agency/authorized representative.

Section 8.3 of the Agreement reads as under:

> *"8.3 Standard Provisions Annex. A "Project Grant Standard Provisions Annex" (Annex 2) is attached to and forms part of this Agreement. The Parties agree that references to "the Grant" in Annex 2 shall include all goods, services, training, and contractor personnel provided by A.I.D./Washington in support of the Project. Therefore, for example, goods, services, training and contractor personnel financed by the Grant or provided by A.I.D./Washington will be exempt from any taxation, duties or fees imposed under the laws in effect in the territory of the Grantee."*

In Clause 4.3 of Annexure-1 to the Agreement the responsibilities of AID are mentioned as under:

> *"4.3 A.I.D. will be responsible for*
>
> 1. *Establishing a USAID Liaison Office in new Delhi to provide management oversight for USAID and assistance to Project activities;*
> 2. *Providing technical assistance to all Project components as needed and as decided by the Central Steering Committee on the recommendation of the Society;*
> 3. *Providing financial support for the staff of the USAID Liaison Office, and other support to be provided by the Cooperating Agencies;*
> 4. *Appointing USAID representatives to serve on the Steering Committee and the Governing Body;*
> 5. *Funding, with the concurrence of the Steering Committee, a contract with a local management organization to implement the CSM program."*

In Clause 4.2 the responsibilities of the Government of U.P. are mentioned as under":

> *"4.2 The Government of Uttar Pradesh (GOUP) will be responsible for:*
>
> *(a) Ensuring that the A.I.D. funds provided for this Project are additional to the existing level of Expenditure buy the GOUP for Family Welfare and that GOUP expenditures*

for Family Welfare are maintained at the 1990-91 levels or higher;

(b) Appointing GOUP representatives to serve on the Steering Committee;

(c) Facilitating be registration, establishment and functioning of the Society; and

(d) Establishing the Governing Body of the Society in the manner indicated in paragraph 2.3"

In Annexure-2 to the Agreement titled as "Project Grant Standard" referred in Section 8.3 of the Agreement, Section B.4 of the said Annexure reads as under:

"Section B.4 Taxation.

(a)This agreement and the Grant will be free from any taxation or fees imposed under laws in effect in the territory of the Grantee.

(b) To the extent that (1) any contractor, including any consulting firm, any personnel of such contractor financed under the Grant, and any property or transaction relating to such contracts and (2) any commodity procurement transaction financed under the Grant, are not exempt from identifiable taxes, tariffs, duties or other levies imposed under laws in effect in the territory of the Grantee, The Grantee will, as and to the extent provided in and pursuant to Project Implementation Letters, pay or reimburse the same with funds other than those provided under the Grant."

Thus, from the aforesaid, it is evident that an agreement was entered into by the Indian Government with the Government of United States acting through its Agency for International Development (USAID) for Cooperative Technical Assistance Programmes and Projects and under the terms of Agreement vide section 8.3 thereof the term 'grant' included all goods, services, training and contractor personnel provided by AID/ Washington in support of the project. For example all goods, services, training and **contractor personnel financed by the Grant or provided by AID/Washington** were to be exempt from any taxation, duties or fees imposed under laws in effect in the territory of the Grantee i.e. the President of India or Indian Government.

In this context when section B. 4 of the Agreement as contained in Annexure-2 thereof is read, it is borne out that this Agreement and the grant were to be free from any taxation or fees imposed under laws in effect in the territory of the Grantee.

As already stated earlier, the term 'grant' includes 'contractor personnel financed by the grant or provided by AID/ Washington'. Clause (b) of section B. 4 is not relevant for our purposes, as it relates to a situation where the aforesaid Grant is not exempt from identifiable taxes etc. imposed under laws in effect in the territory of the Grantee, and in such an eventuality the Grantee will, as to the extent provided in and pursuant to Project Implementation letters, pay or reimburse the same with funds other than those provided under the Grant. In the present case, the remuneration under such Agreements are exempt under section 10(8) of the Act 1961, therefore, Clause (b) is not applicable and Clause (a) alone would be attracted, if at all.

Annexure-3 to the writ petition is a Cooperative agreement entered into between the AVSC, i.e. the erstwhile employer of the assessee and USAID which mentions that in pursuance to the authority contained in Foreign Assistance Act of 1961, as amended, and the Federal Grant and Cooperative Agreement Act of 1977 the Agency for International Development (AID) grants a sum of $ 18,014,000 to provide support for a programme in Voluntary Surgical Contraception, as morefully described in Attachment-2 entitled "Program Description" and in the proposal of AVSC entitled "Proposal for a follow on Cooperative Agreement between the Agency for International Agreement and the Association for Voluntary Surgical Contraception 1993 to 1998". The cooperative agreement was effective from 24.8.1993 till 23.8.1998, which was subsequently extended to August 2003 as mentioned in the revision petition filed before the Commissioner, a copy of which is annexed as Annexure-6 to the writ petition.

Annexure-4 contains a letter dated 10.5.1997 written by the assessee to her original employer, the Government of U.P., seeking extraordinary leave as she had been offered appointment by AVSC, which was granted on 16th July 1997. Annexure-5 to the writ petition is a letter dated 27.8.1997 from AVSC International offering petitioner an appointment as Training Associate effective September 1, 1997 on a salary at the rate of Rs. 8,40,000/- per annum. Job description as also the conditions of employment and employee-information-summary was attached. As per conditions of employment attached thereto, the engagement was a regular full time position, initial assignment was for one year period, renewable on an annual basis etc. The document relating to job description refer to the assessee's responsibilities and read as under:

> *"RESPONSIBILITIES:*
>
> *The Training Associate will work under the direction of the Senior Program Associate to provide technical assistance in specified areas to AVSC International's activities in India in support of the USAID- funded Innovations in Family Planning Services (IFPS) Project in Uttar Pradesh and other AVSC activities that may be developed. The Program Officer (Training) will also participate in country workplan and project development, project monitoring, reporting and routine coordination with implementing agencies, donors and sister agencies.*
>
> ***Specific Duties include:***
>
> *1. Participate on one or more India Program teams - e.g. Men as Partners, Quality Assurance, Infection Prevention, Counselling, Reproductive Health, Men as Partners, Adolescents.*
> *2. Provide on-site technical assistance related to specific technical areas of specialization/expertise (e.g. no-scalpel vasectomy, infection prevention, counselling).*
> *3. Provide technical inputs in project development, workshops, training and materials development.*

4. Participate in annual workplan and budget planning and project development.
5. Develop and maintain relations and co-ordinate routinely with counterparts at State Innovations in Family Planning Agency (SIFPSA), the State Directorate in U. P. (e.g. CMOs), CAs involved in the IFPS project and implementing counterparts.
6. Attend routine co-ordination meetings and conduct field visits to monitor programs.
7. Other comfortable duties as assigned."

The above quoted provision leaves no doubt that the duties were assigned to the petitioner in relation to programmes and projects of Cooperative Assistance based on the agreement entered into between the Indian Government and the United States of America through AID, therefore, the connection of the assignment of duties to the petitioner in India in connection with the Cooperative Technical Assistance Programme and Project in accordance with an agreement as contemplated in section 10(8) of the Act of 1961 is clearly established and the fact that remuneration was paid to the petitioner in respect of such activities which obviously was from the grant received through USAID was also covered by Clause (a) of sub-section (8) of Section 10 which refers to remuneration received directly or indirectly from the Government of that foreign State for such duties, as being exempt from taxation. In this view of the matter, considering the material which is on record before this court and was also on the records of the revisional authority under Section 264, a fact which has not been denied by the respondents by filing a counter affidavit nor has it been objected to, during the course of arguments, the conclusions arrived at by the revisional authority are difficult to sustain.

To contend that the assessee was not assigned any duties as is required under section 10(8) is based on a misconception of the provisions of section 10(8) and misreading of the documents referred

hereinabove. On a plain and simple reading of Section 10(8) all that is required to be established is that an individual should be assigned to duties in India in connection with the agreement already referred hereinabove and should have received remuneration directly or indirectly from the foreign State for such duties.

Once an offer of appointment was made by AVSC for a project of Cooperative Technical Assistance in pursuance to an agreement entered into between the Indian Government and the Government of United states of America through its authorized representative i.e. A.I.D. which was accepted by the assessee and in pursuance thereof, as is evident from the job description to the offer of appointment, she was to perform duties mentioned therein relating to the said project, it is difficult to comprehend as to how it could be said that she was not assigned to duties in India in connection therewith. The provision nowhere says that the Government of U.P., the original employer, should have assigned such duties to the assessee. It is not open either to add words to the provisions which are not there nor to extract something which exists in the provision. The provision has to be read as it is. The purpose of the provision is to grant exemption from taxation to a remuneration received by an individual who is assigned to duties in India in connection with any Cooperative Technical Assistance Programme and Project in accordance with the agreement already referred hereinabove. In the facts of the case, it cannot be said that the remuneration received by the assessee was not such a remuneration nor that she was not assigned duties in connection with such programmes and projects. The revisional authority has erred on this count by mentioning that what was offered to her was a secondment, which, for the reasons already mentioned hereinabove is clearly a misreading and misconstruction of the provision and its application.

The second reason given by the revisional authority that salary was not exempt under the terms of Agreement, as is necessary under sub-clause (8) of Section 10 of Act 1961, this again is based on a misreading and misunderstanding of the provisions. As already mentioned hereinabove under section 8.3 of the Agreement, contractor personnel financed by the grant or provided by the A.I.D./Washington were to be exempt from any taxation imposed under laws in effect in the territory of the Grantee i.e. the Indian Government. A conjoint reading of this provision with section B. 4 of Annexure-2 to the Agreement wherein the grant was to be free from any taxation or fees imposed under laws in effect in the territory of the Grantee and in view of the definition of 'Grant' contained in section 8.3 of the Agreement which includes services and contractor personnel funded by the Grant or provided by AID/ Washington in support of the project, there can be no manner of doubt that the assessee was exempt from taxation obviously in respect of the remuneration received in connection with the duties assigned to her in India in relation to the aforesaid projects.

The contention of the learned counsel for the department that ‘remuneration’ does not mean salary, has only been made to be rejected. ‘Remuneration’ is a word having wider meaning than ‘Salary’. It includes salary and other kinds of wages which may be paid as *Quid Pro Quo* for the services rendered. This is hardly an issue which requires any detailed elaboration, nevertheless, to set the matter at rest one may refer to the definition of "remuneration" as contained in the Law Lexicon by P. Ramanatha Ayyer, 1987 Edition, which says “remuneration” is wider than “salary”. “Remuneration” means “*Quid Pro Quo*”. Whatever consideration a person gets for giving his services is a 'remuneration' for them. As per Chamber’s 20th Century Dictionary, 'remunerate' means to recompense, to pay for services rendered. Remuneration; recompense; reward; pay. A

reference may also be made to the decision of the Supreme Court in the case of Gestetner Duplicators Pvt. Ltd. vs. C.I.T., (1979) 117 ITR 1 SC, wherein the meaning of the term 'salary' fell for consideration and it was observed as under:

> *"It appears that conceptually "salary" and "wages" connote one and the same thing, namely, remuneration for payment for work done or services rendered but the former expression is generally used in connection with services of a higher or non-manual type while the latter is used in connection with the manual services. In Gordon Vs. Jennings [1882] 51 LJ QB 417; 9 QBD 45 (QB), Grove. J. observed as follows:*
>
> *"Though this word (wages) might be said to include payment for any services, yet, in general, the word 'salary' is used for payment of services of a higher class and 'wages' is confined to the earnings of labourers or artisans."*

Reference may also be made to Section 2(78) of the Companies Act 2013 on which great emphasis was laid by the Counsel for the Department which says that if services are rendered, then the consideration in terms of money received by such person rendering such services will be remuneration and will include perquisites as per Income Tax Act 1961. The said provision far for helping the respondents, goes against them.

Without dwelling any further on this issue, which is quite self evident, this court finds that only two reasons have been mentioned by the revisional authority while rejecting the assessee's revision and for the reasons aforesaid both the reasons are untenable in law and are hereby rejected. This court has no doubt that both the parties to the agreement referred hereinabove intended to exempt the Contractor Personal financed by the Grant or provided by AID, from taxation as was imposable by the Grantee i.e. Government of India and the recitals to the contrary in the impugned order are without any factual and legal basis.

However, this is not all, as, at a later stage in his arguments learned counsel for the department in a last ditch effort to sustain the

impugned order contended that the assessee not having claimed exemptions under section 10(8) of the Act 1961 nor having sought refund under section 297 was foreclosed from doing so by filing a revision petition under section 264, which according to him in any case was not maintainable, as, there was no order, a revision of which could be sought and also that fresh documents could not be filed before the revisional authority which were not there before the assessing officer. These are not the reasons mentioned in the impugned order passed by the revisional authority. In fact, the revisional authority consciously admitted the revision after condoning the delay and dismissed it on merits. All these pleas have been suitably answered by judicial precedents. First and foremost, under Article 265 of the Constitution of India "no tax shall be levied or collected except by the authority of law". Thus, unless and until the income of an assessee is liable to be taxed, it cannot be so taxed under the Act. The Taxing Authority cannot collect or retain tax, that is not authorized. Any retention of tax collected, which is not otherwise payable, would be illegal and unconstitutional. **(**Vijay Gupta v. Commissioner of Income Tax, Delhi, Writ (C) No. 1572 of 2013, decided on 23.3.2016 by Delhi High Court). The Supreme Court of India in C.I.T. v. Shelly Products and anr., 261 I.T.R. 367, held that if the assessee has by mistake or inadvertence or on account of ignorance included in his income any amount which is exempted from payment of income tax or is not income within the contemplation of law, the assessee may bring the same to the notice of the assessing officer which, if satisfied, may grant the assessee necessary relief and refund the tax paid in excess, if any. The Bombay High Court in *Nirmala L Mehta v. A Balasubramaniyam, CIT (2004) 204 ITR 1*, held that there cannot be any estoppel against the statute, specially in view of Article 265 of the Constitution of India. Acquiescence cannot take away from a party the relief that he is entitled to where the tax is levied or collected without authority of law. Reference may also be

made to a circular No. 14 (EXCEL 35) of 1955, dated 11.4.1955 issued by the Central Board of Direct Taxes wherein it has been stated as under:

> *"Offices of the department must not take advantage of ignorance of an assessee has to his rights. It is one of their duties to assist a text 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. Although, therefore, the responsibility of claiming refunds and reliefs rests with the assesses on whom it is imposed by law, officers should-*
>
> *(a) draw the attention to any refund or reliefs to which they appear to be clearly entitled but which they have omitted to claim for some reason or other:*
> *(b) freely advise them when approached by them as to their rights and liabilities and as to the procedure to be adopted for claiming refunds and reliefs."*

As regards the scope of the revisional powers under section 264 of the Income Tax Act, a reference needs to be made to the judgment of this court in *Pt. Shivnath Prasad Sharma v. CIT, (1967) 66 ITR 647 (Allahabad)*, wherein this court considered the question as to whether the assessee can, in a revision, question the taxability of particular amounts offered by him as income for assessment, this court observed as under:

> *" It seems to me, however, that the order of the Commissioner rejecting the previous applications, on the mere ground that the petitioner had shown the income in his return, is erroneous. The Commissioner was bound to apply his mind to the question whether the petitioner was taxable on that income. The Income-tax Officer is entitled under Section 23(1) to make an assessment on the basis of the return if he is satisfied, without requiring the presence of the assessee or the production of evidence in support of the return, that the return is correct and complete. But it may be that the assessee may have committed a mistake in treating a certain receipt as taxable. The mere circumstance that he has shown that receipt as income in*

> *his return does not make him liable to tax thereon. An assessee is liable to tax only upon such receipt as can be included in his total income and is assessable under the Income-tax Act. The law empowers the Income-tax Officer to assess the income of an assessee and determine the tax payable thereon. In doing so, he may proceed on the basis that, where an assessee discloses that a certain sum of money has been deceived by him, the fact of that receipt may be accepted without anything more as constituting an admission on the part of the assessee. That would be an admission as to a state of fact. But whether the receipt can be considered as taxable income is quite another matter, and consideration of that question leads into the realm of law. If the Income-tax Officer assesses an assessee upon a receipt which is not taxable in law,* ***it is always open to the assessee to take the case in appeal or in revision thereafter****. It is then for the Appellate Assistant Commissioner or the Commissioner of Income-tax, as the case may be, to examine the matter and determine whether, although the money has been received by the assessee, it is taxable in law. The assessee is then within his rights in requiring the appellate or the revisional authority to examine the validity of the assessment to tax of a receipt which, though admitted by him, is not taxable in law."*

Reference may also be made to a Division Bench judgment of this court in *OCM Ltd. (London) v. ITO, (1977) 110 ITR 722*, wherein their Lordships following the decision in the case of Pt. Shivnath Prasad Sharma (supra) held as under:

> *"In our opinion, the Commissioner has taken a too narrow view of the scope of the revision under Section*
>
> *264. Though the Income-tax Officer accepted the income as returned by the petitioner and made assessment, its case is that the order of assessment has to be revised in view of the fact that a sum of Rs. 2,30,000 which ought to have been included in the return filed by it was omitted by inadvertence and, consequently, it was deprived of the refund of Rs. 11,500. This aspect of the case has not at all been considered by the Commissioner, ***** ***** ***** In the light of the aforesaid decision of this court, it is clear that the Commissioner should have applied his mind to the petitioner's plea that it had inadvertently omitted to include in its return the amount of interim dividend received by it from M/s. O.C.M. India (Private) Ltd. and that the assessment made by the Income-tax Officer without taking into account that amount of interim dividend, should be revised and that it (the petitioner) should be given the benefit of the refund of the super-tax which was deducted at source before payment of the interim dividend to it. Hence, the*

impugned order of the Commissioner suffers from a manifest error and has to be quashed."

The Gujrat High Court in the case of *C. Parikh and Co. v. CIT, (1980) 122 ITR 160 (Guj.)*, held as under:

"It is clear that under s. 264, the Commissioner is empowered to exercise revisional powers in favour of the assessee. In exercise of this power, the Commissioner may, either of his own motion or on an application by the assessee, call for the record of any proceeding under the Act and pass such order thereon not being an order prejudicial to the assessee, as the thinks fit. Sub-sections (2) and (3) of s. 264 provide for limitation of one year for the exercise of this revisional power, whether suo motu, or at the instance of the assessee. Power is also conferred on the Commissioner to condone delay in case he is satisfied that the assessee was prevented by sufficient cause from making the application within the prescribed period. Sub-section (4) provides that the Commissioner has no power to revise any order under s. 264(1) : (i) while an appeal against the order is pending before the AAC, and (ii) when the order has been subject to an appeal to the Income-tax Appellate Tribunal. Subject to the above limitation, the revisional powers conferred on the Commissioner under s. 264 are very wide. He has the discretion to grant or refuse relief and the power to pass such order in revision as he may think fit. The discretion which the Commissioner has to exercise is undoubtedly to be exercised judicially and not arbitrarily according to his fancy. Therefore, subject to the limitation prescribed in s. 264, the Commissioner in exercise of his revisional power under the said section may pass such order as he thinks fit which is not prejudicial to the assessee. There is nothing in s. 264 which places any restriction on the Commissioner's revisional power to give relief to the assessee in a case where the assessee detracts mistakes on account of which he was over-assessed after the assessment was completed. We do not read any such embargo in the Commissioner's power as read by the Commissioner in the present case. It is open to the Commissioner to entertain even a new ground not urged before the lower authorities while exercising revisional powers. Therefore, though the petitioner had not raised the grounds regarding under-totalling of purchases before the ITO, it was with in the power of the Commissioner of admit such a ground in revision. The Commissioner was also not right in holding that the over-assessment did not arise from the order the assessment. Once the petitioner was able to satisfy that there was a mistake in totalling purchases and that there was under-totalling of purchases to the tune of Rs. 20,000, it is obvious that there was over-assessment. In other words, the assessment of the total income of the assessee is not correctly made in the assessment order and it has resulted in over-assessment. The Commissioner

> *would not be acting de hors the I.T. Act, if he gives relief to the assessee in a case where it is proved to his satisfaction that there is over-assessment, whether such over-assessment is due to a mistake detected by the assessee after completion of assessment or otherwise. In our opinion, the Commissioner has misconstrued the words "subject to the provisions of this Act" in s. 264(1) and read a restriction on his revisional power which does not exist. The Commissioner was, therefore, not right in holding that it was not open to him to give relief to the petitioner on account of the petitioner's own mistake which it detected after the assessment was completed. Once it is found that there was a mistake in making an assessment, the Commissioner had power to correct it under s. 264(1). In our opinion, therefore, the Commissioner was wrong in not giving relief to the petitioner in respect of over-assessment as a result of under-totalling of the purchases to the extent of Rs. 20,000."*

Relying upon the decisions already referred hereinbove the Kerala High Court in the case of *Parikh Brothers v. CIT, 150 ITR 105 (Kerala)*, held that the Commissioner of Income Tax committed an error of law in holding that it is not open to him for the first time to entertain a relief of the kind pleaded by the assessee and in denying jurisdiction. It held that even though a mistake was committed by the assessee and it was detected by him after the order of assessment, and the order of assessment is not erroneous, nonetheless it is open to the assessee to file a revision before the Commissioner under Section 264 of the Act and claim appropriate relief. Thus, the court held that in such cases the Commissioner did have jurisdiction where the assessee having included income for assessment can claim the relief of weighted deduction under Section 35-B of the Act, for the first time, in a petition filed under Section 264 of the Act, however, it held that it was a discretionary jurisdiction.

The High Court of Gujrat in *Digvijay Cement Co. Ltd. v. CIT, (2010) ITR 797*, has held that the power of revision under Section 264 cannot be restricted to such erroneous orders which have become erroneous as a result of some error committed by the Income Tax Officer while passing the orders. Independently of any decision or

absence of any decision on the part of the Income Tax Officer, the order of assessment can be challenged as erroneous. If, for example, some provision was overlooked not only by the assessee, but also by the Income Tax Officer.

In *Smt. Snehlata Jain v. CIT, 192 CTR (JNK) 50*, the High Court of Jammu & Kashmir was faced with a situation where the assessee filed a return of income without claiming exemption under Section 54(f) of the Act, the return was processed under Section 143(1) of the Act, subsequently the mistake came to the notice of the assessee. The assessee filed a revision petition under section 264 of the Act. The Commissioner rejected the contention of the petitioner on the ground that the return filed under Section 139(1) having been accepted by the assessing authority, the revisional powers could not be invoked to allow relief not claimed in the returns. A writ petition was filed by the assessee wherein the Jammu & Kashmir High Court relied upon the judgment already referred hereinabove held as under:

> *"A bare reading of section makes it abundantly clear that the Commissioner has discretion to invoke the revisional jurisdiction. However, once he entertains a revision he has the power to call for the record of any proceedings under this Act and is also entitled to make any inquiry himself or cause any inquiry to be made and pass such order as he thinks fit. The only impediment on the power of the revisional authority is that he will not pass any order prejudicial to the assessee. The respondent No. 1 has much wider power under section 264. It does not circumvent and confine the power of the revisional authority in any manner.....*
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> ***** ***** ***** *Though the assessing authority was not aware of the purchase of the property by the petitioner and proceeded on the basis of the admitted facts disclosed in the return. However, the revisional authority could not be oblivious of its duty to accept the contention of the assessee when the facts were brought to its notice about the capital gain being not chargeable to tax under law. What to say of its duty to advice the assessee the revisional authority rejected the contention of the petitioner only on technical grounds. When the substantive law confers a benefit on the assessee under a statute, it cannot be taken away by the adjudicatory authority on mere technicalities. It is settled proposition of law that no tax can be levied or recovered without authority of law. Article 265 of the Constitution of*

India and section 114 of the State Constitution imposes an embargo on imposition and collection of tax if the same is without authority of law. Admittedly, on the basis of facts disclosed before the revisional authorities and this Court, the petitioner is not liable to tax on the capital gain. Once it is found that the petitioner has no tax liability, the respondents cannot be permitted to levy the tax and collect the same in contravention to article 265 of the Constitution of India, which provides a constitutional safeguard on levy and collection of tax. It is true that this Court is not to act as Court of Appeal while exercising the writ jurisdiction, but at the same time where the admitted facts disclosed non-exercise of jurisdiction by an adjudicatory authority and a citizen is subjected to tax not payable by him, interference by this Court is warranted. The respondent No. 2 is directed to reassess the taxable income of the petitioner, by taking into consideration the benefit available to her under section 54F of the Income-tax Act and pass appropriate order."

The case at hand is quite similar as the case quoted hereinabove, as in the present case also the return was processed under section 143(1) of the Act 1961, thereafter the assessee was advised that the income which had been taxed was in fact exempt under Section 10(8) of the Act, therefore, she filed a revision petition under Section 264 which has been dismissed, although for different reasons, but now before the writ court the same argument is being raised on behalf of the Department, as had been raised before the Jammu & Kashmir High Court.

In view of the above discussion and for the reasons already mentioned in the above quoted judgements the contention of Shri Mishra, as noted hereinabove, have no legal basis and are accordingly rejected.

As far as the contention of Shri Mishra that an intimation under section 143(1) of the Act 1961 is not an order, therefore, not revisable under section 264, is concerned, the same have been suitably answered in the judgements referred hereinabove. In the Delhi High Court judgement in Vijay Gupta's case (supra) this plea was specifically raised, but repelled by observing that the use of the expression 'any order' under section 264 would imply that the section does not limit the power to correct the errors committed by the subordinate authorities, but could even be exercised where the errors are committed by assessees. It would even cover the situations where the assessee, because of an error, has not put forth a legitimate claim at the time of filing the return and the error is subsequently

discovered and is raised for the first time in an application under section 264. The Delhi High Court held that the intimation under Section 143(1) is regarded as an 'order' for the purposes of Section 264 of the Act. Thus, the revisional powers are very wide, as has been held in Vijay Gupta's case (supra), para 36 of which reads as under:

> *36. An assessee is liable to tax only upon such receipt as can be included in his total income and is assessable under the Income-tax Act. There is nothing in s. 264, which places any restriction on the Commissioner's revisional power to give relief to the assessee in a case where the assessee detracts mistakes because of which he was over-assessed after the assessment was completed. Once it is found that there was a mistake in making an assessment, the Commissioner had power to correct it under s. 264(1). When the substantive law confers a benefit on the assessee under a statute, it cannot be taken away by the adjudicatory authority on mere technicalities. It is settled proposition of law that no tax can be levied or recovered without authority of law. Article 265 of the Constitution of India and section 114 of the State Constitution imposes an embargo on imposition and collection of tax if the same is without authority of law."*

For the reasons aforesaid, all the contentions of Sri Manish Mishra, learned counsel for the Department are hereby rejected.

In view of the above, the remuneration paid by the AVSC to the assessee- petitioner was clearly exempt under section 10(8) of the Act 1961 and as the exemption had not been claimed in the income tax return for the assessment year 1998-99, 1999-00 and 2000-01 erroneously and in ignorance of the legal provision, the same is liable to be refunded. The plea raised by Shri Mishra based on Section 297 etc. is nothing but a technicality, which cannot be allowed to come in the way of refund of an amount which otherwise was not taxable under the Act 1961, in view of Article 265 of the Constitution of India, and the reasons mentioned hereinabove as also section 240 of the Act 1961. In this context it is also relevant to mention that the revisional authority has not dismissed the revision petition on the ground that it is not maintainable, therefore, the objections raised in this regard by Sri Mishra are not tenable for this reason also. In fact the revisional authority has consciously condoned the delay in filing the revision and has decided the same on merits, *al beit*, on a

misreading and misconstruction of the provisions of law as also the documents on record.

It is not out of place to mention that in similar circumstances the Commissioner (Appeals) has allowed a similar claim for refund for duties assigned to one Sri B P Singh in connection with the same agreement and the same employer i.e. AVSC. A copy of the judgement passed in the appeal is annexed as Annexure-8 to the writ petition, therefore, for this reason also there was no occasion for the revisional authority to take a different view in the matter.

The order of the Commissioner passed under section 264 is accordingly quashed.

As the petitioner has been litigating since the year 2003 i.e. for past 13 years, there is no justification for remanding the matter back to the revisional authority, as it would only perpetuate her agony, especially as this court has already recorded the reasons hereinabove entitling her to the relief claimed, therefore, the assessing authority or whosoever is competent in this regard is directed to refund the amount of tax deducted from source by the employer from the petitioner's remuneration for the assessment years 1998-99, 1999-00 and 2000-01 with interest at the rate of 6% per annum after modifying the intimation under section 143(1), if necessary.

The writ petition stands allowed in the aforesaid terms.

Order Date :- 19.12.2016
A.Nigam

(Rajan Roy, J)