IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Original Side

Present :- Hon'ble Mr. Justice Md. Nizamuddin

W.P.O. No. 931 of 2007

Tapas Kumar Basak
Vs.
Assistant Director of Income Tax, International Taxation-II & Ors.

For the Petitioner :- Mr. Ananda Sen, Adv.

For the Respondent :- Mr. P.K. Bhowmik, Adv.
Mr. Asok Bhowmik, Adv.

Judgement On :- 16.09.2021

MD. NIZAMUDDIN, J.

Heard Learned Counsel appearing for the parties.

In this Writ Petition petitioner has challenged the impugned order of the Director of Income Tax (International Taxation), Kolkata/respondent no. 1 dated 25th January, 2007 passed under Section 264 of the Income Tax Act, 1961 which arises out of the assessment order passed under Section 147/144 of the Income Tax Act, 1961 treating the assessee/petitioner as "Resident" for having stayed in India for 182 days during the relevant previous year as per Section 6 (1) (a) of the Act and the Assessing Officer brought the entire salary of the petitioner amount to Rs. 12,26,822/- under the tax net as the global income of the resident as taxable while it is the claim of the petitioner that it is not taxable by taking the ground that during the financial year relevant to assessment year 2004-05 he was on foreign water for a total period of 184 days and his residential status should have been taken as "Non-Resident" and salary received by him should have been treated as exempted by relying on

Circular no. 586 of the CBDT dated 28th November, 1990 which is calculable for the crew members.

It appears from the record that in response to the notice under Section 148 of the Income Tax Act no return was filed by the assessee-petitioner and the Assessing Officer had no occasion to issue notice under Section 143 (2) of the Act and he had to complete the assessment under Section 147/144 of the Act.

It appears from the aforesaid assessment order under Section 147/144 of the Act being Annexure - P3 to the Writ Petition that in course of the said assessment proceeding assessee himself had filed a letter dated 27th January, 2005 from the contents of which it appeared that the petitioner's employer has calculated his stay in India for 182 days and had deducted tax at source under Section 192 of the Act. It also appears from the aforesaid assessment order that the Assessing Officer had issued a notice under Section 142 (1) of the Act dated 24th February, 2006 and served the same on the assessee requesting him to furnish the information or explanations which are as follows:

> ***"(i) Whether you filed any return of income in compliance to notice under Section 148 served to you? If yes, furnish proof thereof. If no, explain the reasons thereof.***
>
> ***(ii) In the computation sheet enclosed with the original return of income for the AY 2004-05 submitted on 26.07.04, it was stated that you stayed in India for 182 days during the relevant previous year. In fact, your employers have also certified to that effect to that effect. Please explain as to why you should not be treated as Resident under Section 6 (1) (a) of the Income Tax Act, 1961.***
>
> ***(iii) In the case of an assessee being resident, his global income is liable to tax in India. Show-cause as to why the portion of salary claimed***

exempt on the wrong presumption of being Non-Resident should not be denied and the same be included in the total income.

(iv) Furnish details of your global income received/receivable from whatever source which is liable to income tax in India.

(v) Produce copies of all bank statements for verification."

In response to the aforesaid queries petitioner's representative filed written submission and contended that his reply dated 27th January, 2005 may be treated as reply to notice under Section 142 (1) of the Act and also contended that the said letter should be treated as return to the said notice under Section 148 of the Act and claimed that petitioner has no taxable income apart from what has been declared in his return filed on 26th July, 2004. It is also an admitted position from the petitioner's own documents filed before the authorities that he has stayed in India during the previous year for 182 days for treating him as "Resident" within the meaning of Section 6 (1) (a) read with Section 2 (42) of the Income Tax Act, 1961, the aforesaid Sections are quoted below:

"Section 2 (42). "resident" means a person who is resident in India within the meaning of Section 6."

"Section 6. Residence in India. - For the purposes of this Act,—

(1) An individual is said to be resident in India in any previous year, if he—

(a) is in India in that year for a period or periods amounting in all to one hundred and eighty-two days or more ; or"

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It is also relevant to mention that against the aforesaid assessment order petitioner neither filed any application under Section 154 of the Act for rectification of the assessment order if according to him if it was mistake

apparent from record nor any Appeal before the Commissioner of Income Tax (Appeals) though this order was an Appealable order and the Commissioner of Income Tax (Appeals) has got ample power to consider the facts, evidence and law and the scope of such Appeal is much much wider and his order is further Appealable before the Tribunal and instead of finding Appeal against the aforesaid assessment order before the Commissioner of Income Tax (Appeals) petitioner had chosen to invoke the provision of revision under Section 264 of the Income Tax Act, 1961, scope of which is much narrower than the Appeal and Commissioner of Income Tax under Section 264 of the Act has the power to pass such order which are an order not prejudicial to the assessee if he thinks fit but Explanation-1 under Section 264 of the Act clearly says that an order by the Principal Commissioner or Commissioner of Income Tax declining to interfere with the order proposed to be revised shall not be deemed to be an order prejudicial to the assessee and the same is not Appealable.

Furthermore, petitioner failed to establish his case and could not deny the factual and legal position either before the Assessing Officer or before the Commissioner of Income Tax in the proceeding under Section 264 of the Act that he stayed in India during the relevant financial year for 182 days which is the criteria for treating the assessee-petitioner as “Resident” rather petitioner would contend that he stayed more than 182 days in foreign soil and he should be treated as “Non-Resident” while wordings of Section 6 (1) (a) of the Act says that the staying of assessee for 182 days or more in India is the factor for deciding whether the petitioner is a “Resident” or not and not that the assessee stayed for more than 182 days on the foreign soil.

In support of this calculation of how many days petitioner stayed on foreign soil he wants to rely on a document being the certificates issued by his employer to establish his claim as a “Non-Resident” and this document/certificate petitioner has produced for the first time before this Writ Court which appears at Page – 30 of the Writ Petition and wants this Writ

Court to appreciate this piece of evidence for the purpose of calculation of number of days petitioner stayed on foreign soil while it was neither produced before the Assessing Officer nor before the Commissioner/Revisional Authority which learned Advocate for the petitioner has admitted in course of hearing when query was put to him by this Court. In my considered opinion Writ Court in exercise of its jurisdiction under Article 226 of the Constitution of India should not appreciate and scrutinize this piece of evidence particularly when this document/ evidence was never produced/filed either before the Assessing Officer or before the Commissioner in the proceeding under Section 264 of the Income Tax Act, 1961.

Petitioner in support of his contention has relied on the following two judgments and a Circular which are as follows:

(i) (1977) 2 Supreme Court Cases 777 (State of Kerala –vs- K.T. Shaduli Grocery Dealer Etc.)

(ii) (1999) 4 Supreme Court Cases 599 (UCO Bank, Calcutta – vs- Commissioner of Income Tax, W.B).

(iii) Circular No. 586 dated 28th November, 1990 issued by the Central Board of Direct Taxes (CBDT).

The aforesaid judgments of the Hon'ble Supreme Court has no application in the peculiar facts involved in the case that is that the petitioner himself has claimed in his return as "Resident" secondly, he did not file any reply to the notice under Section 148 of the Income Tax Act, 1961 neither at any point of time he challenged the notice under Section 148 of the Act before this Court nor he has filed any application for rectification under Section154 of the Act for the assessment under Section 147/144 of the Act by which assessee was held as "Resident" nor he filed any Appeal before the Commissioner of Income Tax (Appeals) against the aforesaid assessment order though it was an Appealable and was further Appealable before the Tribunal.

Furthermore the evidence by way of certificate of his employer upon which petitioner wants to rely for his period of stay in question on foreign water was never produced or filed either before the Assessing Officer or before the Commissioner of Income Tax during the impugned proceeding under Section 264 of the Act in which the Commissioner of Income Tax has upheld the order of the assessment under Section 147/144 of the Act treating the petitioner as "Resident" and for the first time petitioner has produced the aforesaid certificate issued by his employer in this writ proceeding and wants this Writ Court to appreciate and consider the aforesaid piece of evidence in exercise of its constitutional writ jurisdiction under Article 226 of the Constitution of India while all these facts are totally absent in the aforesaid decisions/judgments upon which petitioner wants to rely and furthermore in addition to these facts, circulars/notifications upon which petitioner wants to rely is in conflict with Section 6 (1) of the Income Tax Act, 1961 and it is settled principle of law that if there is a conflict between a circular or notification and an Act the Act will prevail.

In view of the factual and legal discussion made above I am not inclined to interfere with the impugned order of the respondent Commissioner of Income Tax dated 25th January, 2007 passed in exercise of his revisional jurisdiction under Section 264 of the Income Tax Act, 1961, confirming the order of assessment under Section 147/144 of the Income Tax Act, 1961 treating the petitioner as "Resident", in exercise of limited scope of judicial review by this Court under constitutional writ jurisdiction under Article 226 of the Constitution of India.

Accordingly this Writ Petition being WPO No. 931 of 2007 is dismissed with no order as to costs.

Urgent certified photocopy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(MD. NIZAMUDDIN, J.)