*   **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: April 22, 2015
Pronounced on: May 27, 2015

\+ ITA 715/2014, C.M. No.19243/2014
\+ ITA 722/2014
\+ ITA 723/2014

COMMISSIONER OF INCOME TAX (C)-I ..... Appellant
Through: Mr. N.P. Sahni, Sr. Standing Counsel with Mr. Nitin Gulati, Jr. Standing Counsel.

versus

SHRI SURESH NANDA ..... Respondent
Through: Mr. Chetan Sharma, Sr. Advocate with Mr. Sandeep Kapur, Mr. Karan Kumar Gogna, Mr. Mayank Datta and Mr. Amit, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.K. GAUBA

MR. JUSTICE R.K. GAUBA

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1. These three appeals under Section 260-A of the Income Tax Act, 1961 (hereinafter referred to as "the Act") arise out of the common order dated 11.04.2014 of Income Tax Appellate Tribunal (hereinafter referred to as "the ITAT") whereby the cross appeals of the respondent (assessee) and the Revenue, for Assessment Years (AY) 2007-08 and 2008-09, against separate orders of Commissioner of Income Tax (Appeals) [CIT(Appeals)] dated 18.03.2013 and 22.05.2013 were decided.

2. The moot issue before the first and second appellate authority in these matters was as to whether the assessee could be treated as a resident Indian for purposes of the Act during AY 2007-08 and 2008-09. Whilst the

Assessing Officer (AO) and CIT(Appeals) treated the assessee as a resident Indian since he was in India, during the said years for periods amounting in all to more than 182 days, the ITAT, by the impugned order, upturned the conclusion reached by the said two authorities and agreed with the assessee that his presence in India for the said period in the two AYs was under compulsion of legal process and, thus, unintentional. ITAT held that the assessee continued to enjoy the status of non-resident and, thus, not amenable to be held accountable under the Income Tax Act for income not earned here.

3. The Revenue, feeling aggrieved, challenges the said conclusion, raising the following as the substantial question of law:-

> "*Whether the ITAT was correct in taking the view that the period for which the assessee was in India involuntarily on account of his passport having been impounded is not to be counted for purposes of Section 6(1)(a) of the Income Tax Act so as to hold him entitled to be a non-resident?*"

4. ITA Nos. 722 and 723 of 2014 pertain to AY 2007-08. The first appeal arises out of the contentions that were urged before the CIT(Appeals) by the assessee in his appeal against the order of the AO while the second appeal relates to the contentions of the Revenue in its cross appeal. ITA No. 715 of 2014, on the other hand, pertains to AY 2008-09.

5. Since the above-mentioned appeals for both the said AYs had converged before the ITAT which heard and decided them through the common order, impugned before us, it is proper to take note of the background facts as culled out therein for present discussion.

6. It has been the case of the Revenue that the Department of Income Tax having received information about involvement of the assessee in

brokering defence deals for Department of Defence Production and Supplies in the Ministry of Defence of the Government of India against government's policy, search operations were carried out under Section 132 of the Act on 28.02.2007 against him by the concerned authorities. It appears from the record that earlier action was taken in the nature of impounding of passport of the assessee on 10.10.2006 to preclude him from leaving India. It is claimed that the searches and seizures resulted in evidence coming to the fore about the assessee having obtained huge amounts of commission from certain foreign entities which money, though received abroad, was brought into India in the form of Foreign Direct Investments (FDI) for being injected into different projects like hotels, real estate, etc. In the wake of the search and seizure action, the case of the assessee was centralized by the Director of Income Tax-II, International Taxation, New Delhi by order under Section 127(2), as per file No. DIT(INTL.TAX.)-II/2007-08/32 dated 26.10.2007.

7. In response to the notice issued, the assessee filed his return for AY 2007-08 on 31.07.2007 declaring his income of ₹8,66,980/-. Notice under Section 143(2) was issued to him on 30.07.2008. Subsequently on 21.04.2007, a notice under Section 142(1) along with questionnaire was issued followed by another notice under Section 143(2) issued on 24.09.2009 and yet another detailed questionnaire on 12.10.2009. Finally, the AO passed the assessment order for AY 2007-08 under Section 143(3) on 30.12.2009.

8. For AY 2008-09, the assessee filed his return on 31.07.2008 declaring the income of ₹81,75,150/-. A notice was issued on 21.11.2008 under Section 143(2). The assessee later filed a revised return on 18.08.2009 now declaring the total income of ₹86,55,160/-. Another notice under Section

143(2) was issued on 29.01.2010 followed by yet another notice under Section 142(1) with detailed questionnaire issued on 13.09.2010. The proceedings culminated in assessment order being framed on 20.12.2010 for AY 2008-09.

9. From the effect summarized by ITAT in (para 2 of) the impugned order, it may be noted that the AO had made additions of the sum of ₹17,94,15,000/- and ₹3,96,87,500/- on account of investment in Claridges Hotel Pvt. Ltd. by Universal Business Solutions Ltd. during AY 2007-08 and AY 2008-09 respectively; the sum of ₹16,98,38,020/- and ₹7,92,19,406/- on account of investment by Palm Technologies in Mauritius Claridges during AY 2007-08 and 2008-09 respectively; ₹7,29,000/- and ₹23,66,190/- on account of unexplained cash found at the time of searches (for AY 2007-08); ₹28,47,533/- on account of investment made in renovation of Sonali Farms (AY 2007-08); ₹5,10,57,115/- on account of deposit in Deutsche Bank, Singapore (AY 2007-08); and ₹8,45,288/- on account of foreign remittance taxable in India (AY 2008-09).

10. Feeling aggrieved, the assessee filed appeals against both assessment orders before the CIT(Appeals). His appeal No. 82/11-12 for AY 2007-08 resulted in order dated 18.03.2013 of CIT(Appeals). Similarly, the appeal No. 121/11-12 respecting AY 2008-09 was decided by CIT(Appeals) by order dated 22.05.2013.

11. As mentioned earlier, the AO had treated the assessee as a resident Indian for the two AYs on account of his presence in India for periods exceeding 182 days, in terms of Section 6(1)(a) of the Income Tax Act. The assessee contended before the CIT(Appeals) that he has been assessed as non-resident consistently since 1985 and his stay in India during the periods

under consideration had exceeded 182 days because of reasons beyond his control since his passport had been impounded by the government agencies rendering him unable to travel from India. The CIT(Appeals) rejected this contention and affirmed the view taken by the AO holding the assessee to be a resident for purposes of the two AYs.

12. The CIT(Appeals), however, deleted some of the additions made by the AO upholding certain others "on protective basis". For clarity, it must be noted here that the additions made on account of investments into Claridges Hotel Pvt. Ltd. by Universal Business Solution Ltd. were deleted as legally unsustainable since there was no evidence available to establish that the money was sourced from the assessee or any entity under his control. The additions on account of investments by Palm Technologies Ltd. to Mauritius, Claridges were upheld "on protective basis" as unexplained investments under Section 69, in the hands of the assessee, with observation that there was "*a backward link between the funds transferred…which have been sourced from entities under the control*" of the assessee but with a rider that the same could be taxed as income tax of the assessee only if a direct link was established, for ascertaining "*real facts*" in which regard directions were given to the AO to pursue the reference made on the subject to governmental authorities in Mauritius, Jersey and British Virgin Island, in terms of Tax Information Exchange Agreements. The challenge to all the other additions noted above, however, failed as CIT(Appeals) found the explanations offered by the assessee to be untenable.

13. It may be added here that for AY 2007-08, the AO had also made addition of ₹1,20,73,114/- on account of possession of jewellery of that

value found in the hands of the assessee's wife. The AO had added the said amount as taxable income of the assessee for the reasons the wife did not have an independent source of income. The CIT(Appeals), however, deleted the said addition on the ground that the asset had been explained ("*for good reasons*") in the case of the assessee's wife.

14. The ITAT, in the impugned order, has discussed at length the facts and circumstances in which the assessee was constrained to be in India for periods more than 182 days, *inter alia*, finding/concluding thus:-

> *43. ...on 10.10.2006 the CBI impounded assessee's Passport suspecting his alleged broker's role in purchase of Barak Missiles from Israel in contravention of defence purchase policies. On assessee's application against illegal impounding of passport, the ld. Special Judge, CBI Court by order dtd, 15.1.2007, directed for release of his passport on the fulfillment of certain conditions. Before assessee could comply with those stringent conditions, the CBI challenged CBI judge's order before Hon'ble Delhi High Court. By order dated 5.2.2007 Hon'ble Delhi High Court reversed this order of Ld Special Judge, CBI. Against the order of Hon'ble Delhi High Court the assessee approached Hon'ble Supreme Court and Hon'ble Supreme Court vide order dated 24.1.2008 ordered for release of passport. Ironically before the passport could be physically released consequent to Supreme Court order, the Passport Authorities again impounded the passport on 25.3.2008 under some other provisions. Against the later order of Pass Port Authorities the assessee again approached Hon'ble Delhi High Court against impounding of passport vide order dated 5th October, 2010 was pleased to order for release of Passport with a condition that assessee will take permission of the Trial Court before seeking to travel abroad.*
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> *44. The assessee then filed application for permission to travel abroad for two months which was dismissed by the Trial Court vide its order dated 25th October, 2010. Against this order, the*

assessee again approached Hon'ble Delhi High Court and Hon'ble Court vide order dated 21.9.2011 directed the Trial Court to permit the assessee to go to London for a period of two weeks on furnishing of security of Rs. 50 crores. ... passport was never handed over to assessee prior to 21-9-2011 order ...

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46. The assessee was fervently raising the issue of his NRI status and praying for release of his passport. It is evident from the specific prayer raised before various courts. ...as is evident from para 6 of the Hon'ble High Court's order which reads as under:-

> ***"It was claimed that in order to maintain his non resident status in accordance with the Income Tax Act, he has to remain out of India for more than 182 days and that continued seizure of his passport jeopardized his NRI status and resulted in irreparable loss. He also alleged that for more than three months since 10.10.2006 he had to postpone visits abroad and reschedule business meetings but such indefinite postponement could not be continued forever."***

47. ...it is very clear that assessee made every legal effort to maintain his past status as non resident and endeavored to defend his legal rights before various legal forums. Had the Passport been released after first order of spl. Judge CBI court, the assessee would have travelled abroad thus maintaining his NRI status, it is only the wrongful impounding of passport which is the cause of preventing the assessee from exercising his lawful right of travelling abroad."

15. Section 6(1)(a) of the Income Tax Act which is at the core of the dispute needs to be noted. It reads as under:-

"*6. **Residence in India**:- For the purposes of this Act,--*
(i) 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"

16. The ITAT, in the initial part of the impugned order, noted that the assessee has been treated as non-resident during the period 1985-2006. It is admitted that his presence in India in the said earlier period has been less than 182 days per assessment year. The assessee's claims that for most of the periods he was away from India, he had been living and working for gain from United Arab Emirates (UAE).

17. It has been an admitted case of the assessee that he had come to India on 28.09.2006. It is undisputed that it was during the visit to India beginning 28.09.2006 that his passport was impounded by CBI (on 10.10.2006). Further, the passport was released pursuant to Court orders, only on 21.09.2011. Thus, the assessee was in India continuously and uninterruptedly from 28.09.2006 to 21.09.2011. This would mean that he was on Indian soil for 185 days during the financial year 2006-07 (corresponding to AY 2007-08) and throughout during financial year 2007-08 (corresponding to AY 2008-09).

18. By above account, a strict interpretation and enforcement of the rule contained in Section 6(1)(a) of the Income Tax Act would render the assessee a resident. The plea raised, however, is that this would not be just or fair nor in consonance with the intention of the legislature.

19. It is trite that plain or literal interpretation of a statutory provision is not to be adopted if it produces manifestly unjust results or absurdly unreasonable consequences which could never have been intended. To obviate injustice flowing from mechanical interpretation and to bring about

rationality, it is permissible, even in the field of taxation, to prefer such construction as results in equity over such literal meaning as is unjust. In taking this view, we draw strength from law laid down by the Supreme Court, *inter alia*, in the cases reported as *CIT v. JH Gotla* (1985) 156 ITR 323 and *CWS (India) Ltd. CIT* (1994) 208 ITR 649 (SC).

20. As is clear from the factual matrix, it has been a conscious decision taken, and choice made, by the assessee to be a non-resident consistently since 1985. It appears that he has been visiting India routinely but was never present in India (till the financial year 2005-06) for more than 182 days. Thus, he consciously did not intend treatment as resident Indian for purposes of Income Tax law. It appears that he has business interests abroad. His choice to be non-resident cannot be faulted. Given the narrative of events wherein he was constrained to continue in India in the course of his visit beginning 28.09.2006, it cannot be contended by the Revenue that he intended to be in India by choice beyond 10.10.2006, the day his passport came to be impounded by CBI.

21. As noted at length by ITAT, the assessee made repeated pleas not only for removal of all restraints against his movement, but more importantly, for release of his passport so that he could go abroad and retain the NRI status he had been enjoying all along. In such fact situation, there can be no doubt whatsoever that his presence in India from 10.10.2006 onwards was not by his own choice or volition till the day (21.09.2011) shackles on his movement were removed upon the passport being restored to him.

22. It must also be noted here that ITAT, the final fact-finding forum for purposes of Income Tax law, has also concluded that the action of the

concerned governmental agencies in impounding of passport was unjustified, illegal and untenable and, therefore, in the nature of illegal restraint. The Revenue does not even remotely challenge the correctness of the said conclusions in these appeals.

23. As observed earlier, the Income Tax Act leaves the choice to the citizen to be in India and be treated as a resident for purposes of taxation or be not in India so as to avail the status of a non-resident. The simple test the muster of which is to be passed is the minimum prescribed period of presence in India in a particular financial year. It naturally follows that the option to be in India, or the period for which an Indian citizen desires to be here is a matter of his discretion. Conversely put, presence in India against the will or without the consent of the citizen, should not ordinarily be counted adverse to his chosen course or interest, particularly if it is brought about under compulsion or, to put it simply, involuntarily. There has to be, in the opinion of this Court, something to show that an individual intended or had the animus of residing in India for the minimum prescribed duration. If the record indicates that – such as for instance omission to take steps to go abroad, the stay can well be treated as disclosing an intention to be a resident Indian. Equally, if the record discloses materials that the stay (to qualify as resident Indian) lacked volition and was compelled by external circumstances beyond the individual's control, she or he cannot be treated as a resident Indian.

24. We do not agree with the contention of the Revenue that Section 6(1)(a) of the Income Tax Act shall be a strictly constructed or that it does not permit exceptions. The case at hand itself is a good example why a literal interpretation of the relevant statutory clause is not commended for

such course might not only lead to unjust, unfair or absurd consequences but also be prone to abuse.

25. While executive action resulted in his passport being unjustifiably impounded, this rendered if impossible for the assessee to leave India. He virtually became an unwilling resident on Indian soil without his consent and against his will. His involuntary stay during the period that followed till the passport was restored under Court's directive, thus, must be excluded for calculating the period under Section 6(1)(a) of Income Tax Act.

26. For the foregoing reasons, we answer the question of law in the affirmative against the Revenue.

27. We must, however, add a caveat here. The conclusion reached by us on the facts and in the circumstances of the case at hand cannot be treated as a thumb rule to the effect that each period of involuntary stay must invariably be excluded from computation for purposes of Section 6(1)(a) of Income Tax Act. The view taken by us in the case of assessee here is in the peculiar facts and circumstances wherein he was inhibited from travelling out of India on account of such action of the law enforcement agencies as was found to be wholly unjustified. Here, it is important to notice that the passport impounding order was invalidated as without authority of law. The finding on whether in a given case an assessee's claim to extended stay being involuntary, has to be fact dependent. For purposes of Section 6(1)(a), each case will have to be examined on its own merits in the light of facts and circumstances leading to "involuntary" stay, if any, in India.

28. Coming to other issues, the ITAT allowed the appeal of the assessee with regard to the addition made on account of deposit in Deutche Bank, Singapore (in AY 2007-08) and foreign remittance (in AY 2008-09), and

rightly so, in the wake of conclusion that the assessee continues to be a non-resident for purpose of the said AYs. It directed the AO to further inquire and verify the facts with regard to the investment made in Sonali Farms and recovery of what is described as unexplained cash (both relevant for AY 2007-08). Since such directions turned more on facts, the result of the appeal before the ITAT in Claridges Hotels Pvt. Ltd., Mauritius Claridges. As noted above, the AO has not gathered any evidence showing nexus between the assessee, on one hand, and the entities from the coffers of which such investments came, on the other. At any rate, ITAT has not interfered with inquiries for which CIT(Appeals) had given certain directions. Addition on account of jewellery, in the given circumstances, was unfair since, as noted by the ITAT, the value of the jewellery was also added in the case of the wife (of the assessee) in whose possession the said asset was discovered.

29. The question of law is answered against the Revenue. Thus, no further question of law arises on the above contentions of the Revenue.

30. Consequently, the appeals are dismissed. Both the parties are left to bear their own cost.

R.K.GAUBA
(JUDGE)

S. RAVINDRA BHAT
(JUDGE)

MAY 27, 2015
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