

(2011) 03 GUJ CK 0066

In the Gujarat High Court

Case No : Special Civil Application No. 3193 of 2001

Chandrakant J. Patel

APPELLANT

Vs

V. N. Srivastava

RESPONDENT

Date of Decision : 18-03-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1), 226
Income Tax Act, 1961 — Section 10(15), 264, 264(1), 6(6)

Citation : (2011) 339 ITR 310

Hon'ble Judges : Harsha Devani, J;H.B. Antani, J

Bench : Division Bench

Advocate : S.N. Soparkar, for the Appellant; M.R. Bhatt with Mrs. Mauna M. Bhatt, for the Respondent

Final Decision : Allowed

Judgement

Ms. Harsha Devani, J.—By this petition under article 226 of the Constitution of India, the petitioner challenged the order dated March 26, 2001, made by the Commissioner of income tax, Baroda, whereby the application filed by the petitioner u/s 264 of the income tax Act, 1961 ("the Act")/ has been rejected.

2. The petitioner, an individual, filed his return of income for the assessment year 1996-97 declaring income of Rs. 7,18,050 wherein the petitioner had offered for tax an amount of Rs. 7,18,050 being an interest on the FCNR deposits. The assessment came to be framed at an income of Rs. 9,52,816. Being aggrieved, the petitioner preferred an appeal before the Commissioner (Appeals) who remanded the matter to the Assessing Officer. During the course of fresh assessment proceedings, the petitioner realised that the interest on the FCNR deposits was exempt u/s 10(15)(iv)(fa) of the Act as the status of the petitioner for the purpose of the Act for the assessment year 1996-97 was "not ordinary resident of India". The petitioner, therefore, vide letter dated January 5, 2000, requested the Assessing Officer to exclude the income from his taxable income. The petitioner also preferred a revision application u/s 264 of the Act to the

respondent for exclusion of the aforesaid income of Rs. 5,35,547 from the assessed income of the petitioner as per the assessment order dated September 8, 1999. Pending the revision, the Assessing Officer framed assessment without referring to the letter filed by the petitioner requesting exclusion of income of Rs. 5,35,547. On October 13, 2000, the petitioner filed a second revision application with the respondent for revising the assessment order dated July 24, 2000, on the ground that the petitioner's request for exclusion of Rs. 5,35,547 was not entertained by the Assessing Officer. However, by the impugned order, the respondent rejected the application filed by the petitioner. Being aggrieved, the petitioner filed the present petition.

3. Mr. S. N. Soparkar, learned senior advocate appearing on behalf of the petitioner, submitted that the petitioner being not ordinarily resident in India, was entitled to exemption of interest on the FCNR deposits under the provisions of section 10(15)(iv)(fa) of the Act. It was submitted that at the relevant time, the petitioner, by mistake, had offered the said amount for tax. However, upon noticing the error committed by him, the petitioner had filed the revision application. Inviting attention to the impugned order, it was submitted that the revisional authority has rejected the application mainly on the ground that the petitioner had himself disclosed the amount as his income which, according to the revisional authority, clearly proved that the petitioner was not entitled to the said benefit. It was submitted that the revisional authority has not applied his mind to the fact as to whether the said income was liable to be taxed under the provisions of the Act and had without examining the merits of the case, rejected the revision application simply on the ground that the petitioner had himself disclosed the said amount as his income.

4. It was submitted that merely because in the original return filed by him the petitioner has shown certain amount to be his income, does not mean that the said error cannot be rectified by the respondent. It was submitted that under the Act, it is only income that is chargeable to tax that can be taxed. The interest on the FCNR deposits not being chargeable to tax as the petitioner was not ordinarily resident in India during the year under consideration; the respondent was not justified in rejecting the application. Reliance was placed upon a decision of this court in the case of S.R. Koshti Vs. Commissioner of Income Tax, , wherein the court has held that regardless of whether the over-assessment is as a result of the assessee's own mistake or otherwise, the Commissioner has the power to correct such an assessment u/s 264(1) of the Act. If the Commissioner refuses to give relief to the assessee, he would be acting de hors the powers under the Act and, therefore, is duty-bound to give relief to an assessee, where due, in accordance with the provisions of the Act. The court had also expressed a word of caution to the effect that the authorities under the Act are under an obligation to act in accordance with law. Tax can be collected only as provided under the Act. If an assessee, under a mistake, misconception or on not being properly instructed, is over-assessed, the authorities under the Act are required to assist him and ensure that only legitimate taxes due are collected.

5. The decision of this court in the case of Ramdev Exports Vs. Commissioner of Income Tax, , was cited for the proposition that it is open to the revisional authority to look into the deductions which might be claimed by the assessee for the first time. In other words, even if the return as submitted by the assessee is accepted by the Assessing Officer and if thereafter the assessee comes to know about some mistake committed, where either he was eligible for more deduction or had paid more tax, he can approach the revisional authority, and in such an event, it is open to the revisional authority to exercise its jurisdiction u/s 264 of the Act.

6. Reliance was also placed on a decision of this court in the case of C. Parikh and Co. Vs. Commissioner of Income Tax, Baroda, , wherein the court has held that there is nothing in section 264 of the Act which places any restriction on the Commissioner's revisional powers to give relief to the assessee in a case where the assessee detects mistakes on account of which he was over-assessed, after the assessment was completed.

7. It was submitted that in the circumstances, the Commissioner was not justified in turning down the petitioner's application on the ground that the petitioner himself had disclosed this amount as his income. It was submitted that in the light of the law laid down by this court in the above referred decisions, the Commissioner has abdicated his duty u/s 264 of the Act in not considering the case of the petitioner on the merits.

8. On the merits of the case, the learned counsel invited attention to the revision petition filed by the petitioner wherein the period of his stay in India and abroad has set out in detail. Attention was also invited to the order dated October 19, 2000, made by the Commissioner (Appeals) in the appeals preferred by the petitioner in relation to the assessment years 1993-94, 1994-95 and 1997-98 wherein the Commissioner (Appeals) had held that the petitioner was entitled to exemption on the deposits in the FCNR accounts for the said assessment years u/s 10(15)(iv)(fa) of the Act. It was submitted that in the present case, the assessment year is 1996-97 which falls within the aforesaid assessment years. It was submitted that when for the preceding as well as subsequent assessment years, the petitioner has been held to be eligible to the benefit of exemption u/s 10(15)(iv)(fa) of the Act, it is not possible that the petitioner would not fulfil the condition of not ordinarily resident in respect of the year under consideration. Reliance was placed upon a decision of the Supreme Court in the case of Pradip J. Mehta Vs. Commissioner of Income Tax, Ahmedabad, , wherein the court has held that a person would become an ordinarily resident only (a) if he had been residing in India in 9 out of 10 preceding years, and (b) he had been in India for at least 730 days in the previous seven years. Inviting attention to the revision application containing the statement of the number of days when the petitioner had stayed in India, it was submitted that it is apparent that the petitioner had not resided in India for a period of nine out of ten preceding years.

9. Opposing the petition, Mr. M. R. Bhatt, learned senior advocate appearing on

behalf of the respondent, invited attention to the averments made in the petition and more particularly, in paragraph 2.2 thereof, wherein the petitioner has asserted that the petitioner is a citizen of India, to submit that the petitioner is a British citizen and as such, the petitioner has made a false assertion on oath and, therefore, the petition is required to be rejected on this ground alone. It was submitted that the present petition has been filed under articles 226, 14 and 19(1)(g) of the Constitution of India. Inviting attention to article 19(1)(g) of the Constitution, it was submitted that the same would be applicable only to the citizens of India and as such, the petitioner is not entitled to file the present petition on the ground of breach of the fundamental rights under article 19(1)(g) of the Constitution of India.

10. On the merits of the case, the learned counsel invited attention to the impugned order of the Commissioner and more particularly to paragraph 4 thereof, to point out that the Commissioner has recorded that on the merits also, the matter was got examined by the Assessing Officer, who had given the actual days of the petitioner's stay in India, which also negatives the claim of the petitioner. It was submitted that as such, it is not as if the Commissioner has not applied his mind to the merits of the case and that it is only after examining the actual days of stay of the petitioner in India that the Commissioner has turned down the application filed by the petitioner.

11. The petitioner has subsequently filed an affidavit dated March 9, 2011, stating that by an inadvertent mistake, he had referred to himself as a citizen of India though he held a British passport, and has tendered unconditional apology for the inadvertent mistake caused due to oversight on his behalf while filing the affidavit for the petition. It is categorically averred that he had no intention of giving an incorrect fact and the error was committed unintentionally. The petitioner has tendered apology for the same and sought permission to correct the error. The learned counsel for the petitioner has also submitted that it was on account of inadvertent error on the part of the concerned advocate who drafted the petition that it was stated in the petition that the petitioner is a citizen of India, since most petitions are filed on behalf of the citizens of India and it is the usual practice to make an averment to that effect in the petition, and that, through oversight, the said mistake which had crept in while drafting the petition had not been corrected by the petitioner. It was submitted that there was no deliberate attempt on part of the petitioner to mislead the court and as such, the objection raised by the respondent as regards the assertion made on oath does not merit acceptance.

12. Having regard to the averments made in the additional affidavit filed by the petitioner as well as considering the fact that generally petitions are filed on behalf of the citizens of India, it may be safely assumed that the said assertion has crept in on account of inadvertent error on the part of the draftsman. In the circumstances, the court is not inclined to dismiss the petition on the ground of having made an incorrect statement on oath.

13. In so far as the contention as regards the maintainability of the petition by the petitioner who is not the citizen of India is concerned, prima facie, the learned counsel for the respondent is justified in voicing the grievance that the petitioner would not be entitled to any relief in respect of breach of a fundamental right under article 19(1)(g) of the Constitution of India. However, the petitioner has also invoked article 14 of the Constitution of India, which is wide enough to cover the grievance voiced in the present petition. In the circumstances, the contention that the present petition is not maintainable at the instance of the petitioner, does not merit acceptance.

14. The facts noted hereinabove show that it is an undisputed position that the income in the nature of interest earned on the FCMR deposits held by a person "not ordinarily resident in India" are exempt u/s 10(15)(iv)(fa) of the Act. In the present case, when the petitioner filed return for the assessment year 1996-97 he had included the interest on FCNR deposits of Rs. 5,35,547 as assessable income. The assessment was, accordingly, framed by the Assessing Officer, including the said interest income as the income of the petitioner. When the petitioner noticed his aforesaid mistake, the petitioner made a revision application u/s 264 of the Act before the Commissioner. The Commissioner, as is apparent from a plain reading of the impugned order, has turned down the application mainly on the ground that it cannot be the petitioner's case that he was not aware of the exemption u/s 10(15)(iv)(fa) of the Act, despite which, he had disclosed the income. According to the Commissioner, the fact that the petitioner had disclosed the said income to be income chargeable to tax, clearly proved that he was not entitled to the benefit of section 10(15)(iv)(fa) of the Act in relation to the said deposits. On the merits of the case, all that is observed by the Commissioner is that the matter was got examined by the Assessing Officer, who had given the actual days of the petitioner's stay in India, which also negatives the claim of the petitioner without any discussion as to what were the number of actual days of the petitioner's stay in India, on account of which the petitioner's claim was required to be negated. It is not stated in the impugned order that the details submitted by the petitioner in the revision application are incorrect, nor has the Commissioner considered the period of stay of the petitioner in India in respect of the preceding assessment years as well as the subsequent assessment years. The main refrain of the Commissioner seems to be that the petitioner himself having filed the return showing the said income to be the assessable income, the petitioner was not entitled to the benefit of exemption u/s 10(15)(iv)(fa) of the Act.

15. This court in the case of S.R. Koshti Vs. Commissioner of Income Tax, , has held that the income tax authorities under the Act are under an obligation to act in accordance with law. Tax can be collected only as provided under the Act, If an assessee, under a mistake, misconception or on not being properly instructed, is over-assessed, the authorities under the Act are required to assist him and ensure that only legitimate taxes due are collected. Under the circumstances, if the petitioner had made a mistake while filing the return, it was for the Assessing

Officer to assist the petitioner by pointing out the said mistake to him and ensuring that he was taxed only in respect of the income which was chargeable to tax. However, that having not been done, once the petitioner had approached the Commissioner u/s 264 of the Act, the Commissioner was required to apply his mind to the facts of the case as to whether the petitioner was entitled to the relief prayed for in the application u/s 264 of the Act. The Commissioner was not justified in dismissing the said application merely on the ground that it was the petitioner who had shown the said income to be his income for the year under consideration.

16. This court in the case of *Ramdev Exports Vs. Commissioner of Income Tax*, has held that it is open to the revisional authority to look into the deductions which might be claimed by the assessee for the first time. It is further held that even if the return as submitted by the assessee is accepted by the Assessing Officer and if thereafter the assessee comes to know about some mistake committed, where either he was eligible for more deduction or had paid more tax, he can approach the revisional authority, and in such an event, it is open to the revisional authority to exercise its jurisdiction u/s 264 of the Act. Similarly, in the case of *C. Parikh and Co. Vs. Commissioner of Income Tax, Baroda*, this court has held that there is no restriction on the Commissioner's revisional powers to give relief to the assessee in a case where the assessee detects mistakes on account of which he was over-assessed, after the assessment was completed. In the light of the principles laid down in the aforesaid decisions, it is apparent that the Commissioner has abdicated his duties in not considering the application of the petitioner on the merits on the ground that the petitioner had himself shown the said income as taxable income in the return filed by him.

17. On the merits of the case as to whether the petitioner was "not ordinarily resident in India", the Commissioner has by a single sentence, observed that the Assessing Officer had given the actual days of the petitioner's stay in India, and has accordingly negated the claim of the petitioner, without entering into any discussion in respect thereof. The apex court in the case of *Pradip J. Mehta Vs. Commissioner of Income Tax, Ahmedabad*, in the context of sub-section (6) of section 6 of the Act has after referring to a circular issued by the Board, held that a person will become ordinarily resident only if (a) he has been residing in India in nine out of ten preceding years; and (b) he has been in India for at least 730 days in the previous seven years. Thus, if either of the aforesaid conditions are not satisfied a person would be "not ordinarily resident" in India. Examining the facts of the present case in the light of the aforesaid legal position, in the memo of the revision application, the petitioner has set out the details of his stay in India, which clearly indicate that the conditions precedent for the petitioner to be said to be resident in India in the year under consideration are not satisfied. From the details given the revision application, it is apparent that though the second condition is satisfied, viz., the petitioner has been in India for at least 730 days in the previous seven years; the first condition, viz., that the petitioner should have been residing in India in nine out of ten preceding years, is clearly

not satisfied. Besides, as is apparent from the order made by the Commissioner (Appeals) in respect of the preceding two years and the subsequent two years, wherein the Commissioner (Appeals) upon appreciation of the evidence on record has, as a matter of fact, found that the petitioner was not ordinarily resident during the said periods. The present assessment year falls between the said assessment years. Hence, it is apparent that the petitioner was "not ordinarily resident" for the year under consideration. The Commissioner was, therefore, not justified in rejecting the application u/s 264 of the Act.

18. For the foregoing reasons, the petition succeeds and is, accordingly, allowed. The impugned order dated March 26, 2001, made by the Commissioner of income tax, Baroda, is hereby quashed and set aside. The respondent is, accordingly, directed to revise the assessment order dated July 24, 2000, by excluding the income of Rs. 5,35,547 being the interest income on the FCNR deposits of the petitioner. Rule is made absolute accordingly with no order as to costs.