

**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**Kolkata Bench, Kolkata**  
**(Bench – “D”)**

**BEFORE SHRI ABY. T. VARKEY, JUDICIAL MEMBER AND**  
**SHRI M. BALAGANESH, ACCOUNTANT MEMBER**

I.T.A. No.1952/Kol/2014  
Assessment year 2007-08

Vivekananda Kar. [PAN : AENPK8173K]	-Vs-	A.D.I.T(I.T)-3(1), Kolkata
(Appellant)		(Respondent)

For the Appellant	Shri Soumitra Choudhury, Advocate
For the Respondent	Shri N. B. Som, JCIT
<b>Date of Hearing</b>	09.06.2017
<b>Date of Pronouncement</b>	07.07.2017

ORDER

Per M. BALAGANESH, AM

This appeal by assessee is arising out of order of CIT(A)-VI, Kolkata vide Appeal No.35/CIT(A)-VI/ADIT(IT)-3(1)/09-10/Kol dated 01.08.2014 against the order of the assessment framed by ADIT(I.T)-3(1), Kolkata under Section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the “Act”) for Assessment Year 2007-08 vide his order dated 23.12.2009.

2. Though the assessee has raised several grounds, we find that the central issue revolves around the determination of residential status of the assessee which

would address the other grounds automatically. Accordingly, we reframe the question raised before us as below:

*Whether the assessee could be construed as a “Resident” in the facts and circumstances of the case?*

3. The brief facts of this issue are that the assessee filed the return of income for the A.Y 2007-08 on 10.08.2007. The assessee derived his income as salary by providing service to one foreign shipping company named as Great Circle Shipping Agency Ltd. and also interest on post office deposits. In the return, the assessee claimed as residential status as “Non-Resident”. The Ld. A.O however on scrutinizing the particulars submitted by the assessee during the course of hearing came to the conclusion that he stayed in India for more than 182 days in the relevant previous year and accordingly determined status of the assessee as “Resident”. Based on this he held that the global income derived by the assessee would be subjected to tax in India and accordingly taxed the salary received by the assessee from Great Circle Shipping Agency (USD 26042) at the rate of Rs.43 per USD) amounting to 11,19,806/- and completed the assessment.

4. Before the Ld. CIT(A) the assessee challenged the validity of the assessment on jurisdiction as well as on merits. The Ld. CIT(A) dismissed the appeal both on merits as well as on the point of jurisdiction raised by the assessee. Aggrieved the assessee is in appeal before us.

5. The Ld. A.R produced the table containing the number of days of stay by the assessee in India, which worked out to 181 days and 20 hours. In his opinion, a day means 24 hours. Accordingly, he argued that since assessee had stayed for less than 182 days in India in the relevant previous year, his status had to be construed as “Non-Resident”, accordingly, the salary received for services rendered outside

India would not be taxable in India. The Ld. A.R also produced the air tickets and other relevant documents to support his contention of having stayed in India only for 181 days and 20 hours. In response to this, the Ld. D.R argued that the assessee had questioned only the validity of jurisdiction of the A.O passing the order on the assessee in view of change of residential status before the Ld. CIT(A). That ground had been duly addressed by the Ld. CIT(A) in detail. As long as assessee has not challenged the same before this Tribunal, he cannot raise this argument by producing documents relied upon by him. He also argued that day remains whole day and departure from India and arrival in India are to be counted as to separate this. In defence, the Ld. AR stated that the assessee had not withdrawn the other grounds before the Ld. CIT(A). He also argued that legal issue which goes to the root of the matter can be raised at any point of time. Reliance in this regard was placed on the decision of Hon'ble Supreme Court in NTPC Ltd. Reported in 229 ITR 383 (supra). He also argued that there is no estoppel against the statute and the department cannot take advantage of the ignorance of the provisions of Income Tax on the part of the assessee.

6. We have heard the rival submissions. We find that the Ld. AO in his assessment order in Page-1, on the face of it, had mentioned the residential status of the assessee as "Non-Resident". Later in the body of the order, he proceeds to treat the assessee as "Resident". We find that the Ld. A.O had not given any finding in his order to shift the status of the assessee from "Non-Resident" to "Resident" by duly examining the number of days stayed by the assessee in India with reference to each and every date in relevant months. In our considered opinion that this finding on the number of days of stay in India would be relevant and crucial for the determination of residential status of the assessee and determination of income thereon. Hence, in the interest of justice and fair play we deem it fit and

appropriate to set aside the issues raised before us to the file of the Ld. A.O for de novo adjudication. The Ld. A.O is directed to reframe the assessment afresh in accordance with law. Needless to mention that the assessee be given reasonable opportunity to being heard. Accordingly, the reframed question as above and the grounds of assessee are allowed for statistical purposes.

7. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the Court on 07.07.2017.

Sd/-

[Aby. T. Varkey]  
Judicial Member

Sd/-

[M. Balaganesh]  
Accountant Member

Dated : 07.07.2017  
{RS SPS}

Copy of the order forwarded to:

1. Appellant/Assessee – Mr. Vivekananda Kar, BG-107, Sector-II, Salt Lake City, Kolkata 700 091..
2. Revenue/Respondent- A.D.I.T(I.T.)-3(1), Kolkata.
3. CIT(A)- Kolkata
4. CIT – , Kolkata
5. CIT(DR), Kolkata Benches, Kolkata

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By Order

Senior Private Secretary  
Head of Office, DDO, Kolkata Benches, Kolkata.

