IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN
BEFORE S/SHRI CHANDRA POOJARI, AM & GEORGE GEORGE K., JM

I.T.A. Nos.147-150/Coch/2019
Assessment Years : 2006-07-2010-11

Dr. Balachandran Nair, M-88, Asha Deepam, PTP Nagar, Trivandrum [PAN:ABUPN 9358F]	**Vs.**	The Assistant Commissioner of Income-tax, Circle-1(1), Trivandrum.
(Revenue-Appellant)		**(Assessee-Respondent)**

Assessee by	Shri G. Surendranath Rao,CA
Revenue by	Smt. A.S. Bindhu, Sr. DR

Date of hearing	25/09/2019
Date of pronouncement	27/09/2019

O R D E R

Per CHANDRA POOJARI, AM:

These appeals by the assessee are directed against the order of the Pr. CIT, Trivandrum dated 11/12/2018 passed u/s. 263 of the I.T. Act and pertain to the assessment years 2006-07 to 2010-11.

2. The assessee has raised the following grounds of appeal:

1. The order of the Principal Commissioner of Income Tax is against law and facts.

2. The Principal Commissioner of Income Tax has erred in concluding that the AO had completed the assessment without verification and application of mind. The AO had detailed reasoning as to why the interest on FCNR-B deposits is not assessable in the hands of the appellant. The AO had in fact obtained a statement from the Manager of State Bank of India to ascertain the facts and

after ascertaining the legal and factual aspects had rightly concluded that the interest on FCNR-B deposits was not assessable in the hands of the appellant. The deposit belonged to Dr Asha, the daughter of the appellant and the appellant had only survivor rights in the deposit. He had no operational rights . The Principal Commissioner of Income Tax should have appreciated that the applicability of FEMA was to be looked into the Reserve Bank of India and not by the Income Tax department . The NRE status of the deposit would only affect the taxability of the interest in the hands of the depositor who in this case was the daughter of the appellant and not the appellant who had only survivor benefits. Even if for arguments' sake it is accepted that the AO had not applied her mind in this particular issue, there was no error in the order as under no circumstances could the interest accruing the daughter of the appellant could be included in the hands of the appellant irrespective of the NRE status of the deposit.

3. The issue of taxability of interest on FCNR-B deposits held by the daughter of the appellant had already been considered by the Commissioner (Appeals) and hence the Principal Commissioner of Income Tax, had no jurisdiction to revise this issue as the matter had already merged with the order of the Commissioner of Appeals. As per s. 263(1) the power of the Principal Commissioner of Income Tax to revise an assessment u/s 263 would extend only to such matters as had not considered and decided in appeal by the Commissioner (appeals).

4. The AO has to exercise the powers of assessment judiciously and shall not complete an assessment as directed by any superior including the Principal Commissioner of Income Tax. The learned

'rincipal Commissioner of Income Tax has no authority to direct the AO to complete the assessment in a particular manner. In a proceedings u/s 263 he can at best explain the position of law in the given facts of the case and direct the AO to complete the assessment as per the provisions of law. The order of the Principal CIT directing the AO to tax the interest amount in the hands of the appellant is not sustainable.

3. The facts of the case are that the PCIT on perusal of the records, vide submission dated 20.06.2017, the Assessing Officer was seen intimated by the assessee, that the assesses was a non-resident at the time of FCNR-B and NR1 SB accounts were opened by Ms Asha B Nair. At the time of the assessee becoming resident, i.e., in the period relevant to the Assessment Year 2003-04, the SBI, NRI Branch ought to have deleted the assessee's name from the FCNR-B account or

converted the account into a resident account at the option of the Account Holders. But as the assessee was entitled to joint FCNR(B) accounts with his non-resident daughter Smt Asha B Nair during the F.Y, 2004-05, the assessee's intention was clear that he wanted to continue as a joint account holder. The PCIT referred to the following directions of the FEMA notification by Reserve Bank of India in FEMA 5/2000-RB dated 03/05/2000 (Para 9 of Schedule 2 of the FEMA circular) are relevant in this behalf:

> *"Joint account in the name of two or more non-resident individuals may be opened provided all the account holders are* persons *of Indian Nationality or Origin. When one of the joint* account *holders* become resident, *the authorised dealer may either delete his name* and *allow the account to continue* as *a NRE* account *or redesignate the account* as a resident account, at the *option of the account holders. Opening of these accounts by a non-resident jointly with a resident is not permissible".*

3.1 The PCIT observed that while giving effect to the Hon'ble ITAT's direction, the additions made vide order u/s 143(3) r.w.s. 147 had been deleted from the total income by accepting the details furnished by State Bank of India (NRI Branch), Thiruvananthapuram affirming that resident individual can be made joint to FCNR(B)/NRI SB account in former or (survivor) mode operation as per RBI notification RBI/201M2/174, A.P(DIR series) Circular No.13 dated 15.09.2011 and therefore, there is no tax liability on interest earned for any of the account holders. But the notification is seen issued on 15.09.2011, which is not retrospectively applicable to assessments relating to F.Y. prior to 2011-12. The circular stating that *"NRI* may *be permitted to open NRE/FCNR(B)__account with their resident close relative* " would apply only from F.Y.2011-12 which would imply that there would be no tax liability on interest earned for any account holder including the assessee in

respect of the period from F.Y.2011-12 onwards. The PCIT found that the details furnished by the banks while giving effect to the ITAT's direction also averred that the above notification dated 15.09.2011, NRIs were not permitted to entitle joint FCNR(B)/RNE account with resident. Hence, the following schematic courses of action should have been taken for the period prior to the F.Y. 2011-12.

The Authorised Dealer (SBI) should have

i) Redesignated the NRE account as a resident account

ii) Delete the name of the assessee in the NRE account.

It was observed that in both the scenarios, only the primary account holder of the FCNR-B & NRI SB account Smt Asha B Nair had the liability to be taxed. In both the cases, the above scenario had not been followed by the State Bank of India, as in the prevailing situation, account would remain an NRE account and the assessee being the joint account holder in "former or survivor' mode of operation, would also be liable to be assessed on any interest accruals. The State Bank of India ought to have resorted to the first scenario in which case Dr Asha B Nair will be assessed in respect of the interest accruals and the assessee would only be involved as a Survivor. According to the PCIT, since the assessee became a resident in the F.Y.2002-03, i.e. prior to F.Y. 2011-12 when the Circular dated 15.09.2011 was not applicable, the FEMA rules stood clearly violated since the joint account was continued to be maintained with the assessee's NRI daughter, and for that reason there would be tax liability on the interest earned. The Assessing officer should have ascertained the applicability of taxation of interest earned as above in the Financial Year prior to 2011-12, which was not done. In consequence, the assessment

proceedings completed for the Assessment Years need to be redone by assessing the interest accruals in the hands the assessee. Since the assessing officer failed to consider the aspects as discussed above while passing the assessment order u/s 143(3) r.w.s. 254, to such extent, the completed assessment proceedings dated 11.05.2017 for the relevant assessment years is erroneous and prejudicial to the interest of the revenue. Therefore, the PCIT invoked the provisions of section 263 Income Tax Act, requiring the assessee to file his objections / reply by 08.02.2018. In response to the proposal for revision u/s 263 of the Income Tax Act 1961, the Authorised Representative of the assessee contended that the Assessing Officer had already considered the issue of taxability of interest on FCNR(B) and NRI accounts and that as per Section 263(1) "where any order passed by the Assessing Officer has been the subject matter of any appeal, the power of the Commissioner of Income tax would extent only to such matters as had not been considered and decided in appeal. According to the PCIT, the ITAT had only admitted additional evidences and hence restored the matter to the Assessing Officer. After considering the evidences, the Assessing Officer had passed orders u/s 143(3) r.w.s. 254 on 11.05.2017 and since there was a mistake in the Assessment Order, the PCIT considered this order as erroneous and prejudicial to the interest of the revenue.

3.2 The PCIT also examined the assessment records of the assessee and found that the assessment was completed by the Assessing Officer without due verification and application of mind in the manner it ought to be, resulting in an order erroneous and prejudicial to interests of revenue. The PCIT relied on the judgments

of the Gauhati High Court in the case of CITVs. Jawahar Bhattacharjee (2012) 341 ITR 434 (Gau.)(FB) and the High Court of Delhi in the case of Toyoto Motor Corporation 306 ITR 49 wherein it was held that "*The order passed by the Assessing Officer should be a self-contained order giving the relevant facts and reasons for coming to the conclusion based on those facts and law."* Thus, the PCIT set aside the assessment order with a direction to the Assessing Officer to verify, re-quantify and tax the interest amounts accrued which were wrongly not taxed in the earlier assessment order after giving appropriate opportunity of being.

4. Against this, the assessee is in appeal before us. The ld. AR submitted that the assessment was originally completed u/s 143(3) read with section 147 on 17.04.2015. At the time of completion of the original assessment, the Assessing Officer, inter-alia, made an addition of Rs. 4,13,134/- being the interest on FCNR(B) account and NRE Savings Bank account, maintained with State Bank of India, NRI Branch, Trivandrum. The CIT(A) confirmed the above addition made by the AO. The assessee thereafter filed further appeal before the Income Tax Tribunal and the Tribunal vide their order dated 5th September 2016 set aside the assessment to the file of the Assessing Officer for consideration of some additional evidences which the assessee had obtained subsequent to the completion of the original assessment. Based on the order of the Tribunal, a fresh order was passed by the Assessing Authority on 16.05.2017. While passing the fresh assessment order, the AO summoned the Bank Officials and after elaborately discussing the matter, in the assessment order, deleted the interest of Rs. 4,13,1347- made in the original

assessment order. It was submitted that during the proceedings u/s. 263, it was urged before the Commissioner, that the matter relating to the taxability of interest on FCNR(B) account and NRE SB account in the name of the daughter of the assessee with State Bank of India , NRI Branch , Trivandrum, of which the assessee was a joint holder on "Former or survivor " basis was already considered and decided by the Commissioner (Appeals) and thereafter, a second appeal was filed before the Tribunal. Though the Commissioner had noted in his order u/s 263, the objections raised on the jurisdiction under section 263 of a matter already considered and decided in appeal, it was submitted that the CIT failed to give a clear finding on this point and proceeded to set aside the order of the Assessing officer u/s. 263. It was submitted that as per Explanation (1) clause (c) of section 263, where any order passed by the AO had been the subject matter of any appeal, the power of the Commissioner would extend to such matters as has not been considered and decided in such appeal. The matter of taxability of interest on FCNR(B) and NRE SB account with State Bank of India , NRE Branch, was already subject matter of an appeal before the Commissioner(Appeals) which was considered and decided by him and hence, the jurisdiction of the Commissioner, does not extend to this matter as per the above explanation.

4.1 The Ld. AR relied on the judgment of the Supreme court in the case of CIT vs. Alagendran Finance Ltd. (293 ITR 1) (SC) and also the decision of the Chandigarh Bench of the Tribunal in the case of Haryana State Co-operative Supply And Marketing Federation Ltd. vs. Deputy CIT (274 ITR (AT) 167). It was submitted that

it is now well settled that the powers of the Commissioner under s.263 extends only to such matters as had not been considered and decided in the order passed in appeal. It was submitted that the subject matter of the appeal before the Commissioner (Appeals) consisted of taxing the interest on FCNR-B and NRE SB accounts with NRI branch of SBI, Trivandrum, in the hands of the assessee and the Commissioner (Appeals) had considered and given his findings in his appellate order. Hence, it was contended that this particular matter has already been merged in the order of the Commissioner (Appeals) and in view of explanation (c) to s.263(1), the Commissioner would not have any jurisdiction to invoke the provisions of s.263 to revise the order on this matter. The Ld. AR relied on the third member decision of the Agra Tribunal in the case of SK Jain Vs Commissioner of Income Tax (127 ITD 217)(Agra) which was based on the decision of the Supreme court in the case of CIT vs. Shri Arbuda Mills Ltd (231 ITR 50)(SC).

4.2 It was submitted that the PCIT had himself in his order mentioned as follows:

"- - - The *Authorised Dealer (SBI) should have*

i) Redesignated the NRE account as a resident account

ii) Delete the name of the assessee in the NRE account.

In both the scenarios, only the primary account holder of the FCNR-B and NRI SB account has the liability to be taxed.

In both the above scenario had not been followed by State Bank of India, as is the prevailing situation the account would remain an NRE account and the

assessee being the joint account holder in "former or survivor " mode of operation would also be liable to be assessed on any interest accruals. ---".

Thus, it was submitted that the Commissioner had in one part of the order correctly concluded that the even on re-designation of the NRE account as a resident account or on deletion of the name of the assessee as joint holder, the interest on the accounts would be taxable only in the hands of the primary holder of the account - i.e the daughter of the assessee. It was submitted that the learned CIT had however without giving any reason or without elaboration held in the next part of the order that by not re-designating the account or not deleting the name of the assessee from the account as joint holder, the interest would be taxable in the hands of the assessee and this conclusion of the Commissioner without any reasoning, is without any basis. According to the Ld. AR, he should have known that, if the account is an NRE account the interest accruals are exempt u/s 10(15)(iv)(fa). If the account is not an NRE or is redesignated as a resident account the interest would be taxable and such interest would be taxed in the hands of the owner or primary account holder. The mere re-designation of the account does not change the ownership of the deposit and the interest is always taxable in the hands of the primary account holder. Thus, it was submitted that the order of the Commissioner is without any basis and is not sustainable.

4.3 The Ld. DR strongly relied on the order of PCIT cited supra.

5. We have heard the rival submissions and perused the record. Section 263 of the Income-tax Act seeks to remove the prejudice caused to the revenue by the erroneous order passed by the Assessing Officer. It empowers the Commissioner to initiate suo moto proceedings either where the Assessing Officer takes a wrong decision without considering the materials available on record or he takes a decision without making an enquiry into the matters, where such inquiry was prima facie warranted. The Commissioner is well within his powers to treat an order as erroneous on the ground that the Assessing Officer should have made further inquiries before accepting the wrong claims made by the assessee. The Assessing Officer cannot remain passive in the face of a claim, which calls for further enquiry to know the genuineness of it. In other words, he must carry out investigation where the facts of the case so require and also decide the matter judiciously on the basis of materials collected by him as also those produced by the assessee before him. The Assessing Officer was statutorily required to make the assessment under Section 143(3) after scrutiny and not in a summary manner as contemplated by Sub-section (1) of Section 143. The Assessing Officer is therefore, required to act fairly while accepting or rejecting the claim of the assessee in cases of scrutiny assessments. The Assessing Officer should protect the interests of the revenue and to see that no one dodged the revenue and escaped without paying the legitimate tax. The Assessing Officer is not expected to put blinkers on his eyes and mechanically accept what the assessee claims before him. It is his duty to ascertain the truth of the facts stated and the genuineness of the claims made in the return. The order passed by the Assessing Officer becomes erroneous when an enquiry has

not been made before accepting the genuineness of the claim which resulted in loss of revenue.

5.1 In the present case. there was a joint FCNR(B) Bank account with the assessee's non-resident daughter with State Bank of India, NRI Branch. The parties concerned with the Bank Account had not changed it as per notification by Reserve Bank of India in FEMA 5/2000-RB dated 03/05/2000 (Para 9 of Schedule 2 of the FEMA circular) which reads as follows:

> *"Joint account in the name of two or more non-resident individuals may be opened provided all the account holders are* persons *of Indian Nationality or Origin. When one of the joint* account *holders* become resident, *the authorised dealer may either delete his name* and *allow the account to continue* as *a NRE* account *or redesignate the account* as a resident account, at the *option of the account holders. Opening of these accounts by a non-resident jointly with a resident is not permissible".*

Being so, resident in India cannot have FCNR(B) bank accounts jointly with non-resident which was relaxed by the Reserve Bank of India vide notification RBI/201M2/174, A.P(DIR series) Circular No.13 dated 15.09.2011 which was not retrospectively applicable to assessments relating to F.Y. prior to 2011-12. Hence, in our opinion, the PCIT is justified in giving direction to the Assessing Officer to verify, re-quantify and tax the interest amounts accrued which were wrongly not taxed in the earlier assessment order after giving appropriate opportunity of being heard. However, the Assessing Officer shall determine in whose hands the interest income is to be assessed and decide the same independently without being influenced by the directions of PCIT. Thus, the grounds of appeals of the assessee are dismissed.

6. In the result, the appeals of the assessee are dismissed.

Order pronounced in the open court on 27th September, 2019.

sd/-	sd/-
(GEORGE GEORGE K.)	(CHANDRA POOJARI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Place: Kochi
Dated: 27th September, 2019
GJ
Copy to:
1. Dr. Balachandran Nair, M-88, Asha Deepam, PTP Nagar, Trivandrum.
2. The Assistant Commissioner of Income-tax, Circle-1(1), Trivandrum.
3. The Pr. Commissioner of Income-tax, Trivandrum.
4. D.R., I.T.A.T., Cochin Bench, Cochin.
5. Guard File.

By Order

(ASSISTANT REGISTRAR)
I.T.A.T., Cochin