

आयकर अपीलीय अधिकरण
मुंबई पीठ "ई", मुंबई पीठ
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री गगन गोयल, लेखाकार सदस्य के समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "E", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER
आअसं. 965/मुं/2020 (नि.व.1999-2000)
ITA NO.965/MUM/2020 (A.Y.1999-2000)

Dy. Commissioner of Income Tax,
Central Circle – 6(4), Mumbai,
Room No.1925, 19th Floor,
Air India Building, Nariman Point,
Mumbai 400 021.

..... अपीलार्थी/Appellant

बनाम Vs.

Shri Suryakant C. Suchak,
231, Krishna, 32-A Cross, 7th Block,
Jaynagar, Bangalore – 560 070.
PAN:APJPS-8359-A

..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : Smt. Esther Ninghauvung Hanghal
प्रतिवादी द्वारा/Respondent by : Shri Dilip Thakkar
सुनवाई की तिथि/ Date of hearing : 10/01/2023
घोषणा की तिथि/ Date of pronouncement : 06/04/2023

आदेश/ORDER

PER VIKAS AWASTHY, JM:

This appeal by the Revenue is directed against the order of Commissioner of Income Tax (Appeals)-54, Mumbai [in short 'the CIT(A)'] dated 26/11/2019, for Assessment Year 1999-2000.

2. The Revenue in its appeal has assailed the order of CIT(A) on following grounds:

i. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in allowing assessee's appeal by ignoring the intention of the Legislature behind amendment of sub-section (1) of Section 149, thereby inserting clause (c) under Section 149(1) of the Income-tax Act, 1961 by the Finance Act, 2012 and Explanation below Section 149, which clarifies that the provisions of sub-sections (1) & (3) as amended by the Finance Act, 2012 shall also be applicable for any assessment year beginning on or before the 1st day of April, 2012".

ii. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating the relevant facts of the case in respect of addition made on account of undisclosed foreign assets / investments".

3. Smt. Esther Ninghauvung Hanghal representing the Department submitted that during the course of search action u/s. 132 of the Income Tax Act, 1961 [in short 'the Act'] in the case of Dilip J. Thakkar on 10/08/2011, it was found that the assessee has invested GBP 15,00,000/- in State Bank of India, Resurgent India Bonds(RIB) in October 1998 i.e. relevant to Assessment Year 1999-2000. Consequent to search, the assessment for Assessment Year 1999-2000 in the case of assessee was reopened. One of the reason for reopening assessment was that the source of investment in RIB was not disclosed. During assessment the Assessing Officer found that investment in RIB was routed through Natwest London to camouflage source of funds. Thus, the Assessing Officer made addition of Rs.11.50 crores (after conversion of GBP to INR @Rs.76.68) u/s. 69 of the Act.

Against the assessment order dated 30/03/2016 passed u/s. 143(3) r.w.s. 147 of the Act, the assessee filed appeal before the CIT(A). Before the CIT(A), the assessee inter-alia assailed validity of notice issued u/s. 148 of the Act. The CIT(A) without traveling to merits of the issue, allowed appeal of the assessee solely on the ground that the notice issued u/s. 148 of the Act is time

barred. The Id. Departmental Representative pointed that the CIT(A) while examining limitation for issuance of notice u/s. 148 of the Act failed to take note of Explanation to section 149 of the Act. The Explanation makes it clear that provisions of sub-section (1) and (3) of section 149 of the Act amended by the Finance Act, 2012 shall be applicable to assessment years on or before 01/4/2012. In the present case notice u/s. 148 of the Act issued on 18/03/2015 was within the time specified in section 149(1)(c) of the Act (i.e. sixteen years from the end of relevant assessment year), as applicable to the assessment year under appeal. The Id. Departmental Representative prayed for reversing the findings of CIT(A) and upholding validity of notice issued u/s. 148 of the Act and the assessment order.

4. Per contra, Shri Dilip Thakkar appearing on behalf of the assessee submits that the assessee is a non-resident. Investments were made in Resurgent India Bonds(RIBs), issued by State Bank of India in India. The Department had issued notice u/s. 148 by invoking provisions of section 149(1)(c) of the Act. The notice is time barred as per the provisions of Section 149(1) of the Act as applicable to the impugned Assessment Year. The Id. Authorized Representative further submitted that the Assessing Officer has erred in coming to conclusion that the asset is located outside India. As pointed earlier, the bonds were issued in India by State Bank of India, therefore, the provisions of section 149(1)(c) of the Act are not attracted. The Id. Authorized Representative for the assessee submitted that in any case, income from bonds is exempt from tax, therefore, the assessee is not liable to pay tax on the maturity amount of bonds. In support of his submissions the Id. Authorized Representative for the assessee placed reliance on the following decisions:

- (1) DCIT vs. Smt. Devel D. Thakkur in ITAT No. 974/MUM/2020 for A.Y 1999-2000 & ITA No. 968/MUM/2020 for A.Y 2004-06, decided on 23/11/2022;
- (2) DCIT vs. Indira D. Thakur in ITA No. 969/MUM/2020 for A.Y 1999-2000, decided on 14/02/2022;
- (3) DCIT vs. Shri Biswanath Goradia A.Y 2001-02, 2002-03 & 2005-06 in ITA No. 1672 to 1674/KOL/2018 & ITA No. 1861 & 1862/KOL/2018; and
- (4) Brahm Datt vs. Asstt. CIT, 100 taxmann.com 324 (Delhi).

4.1. On merits of the addition, the Id. Authorized Representative submitted that the Assessing Officer has erred in coming to the conclusion that real beneficiary of Suchak Family Trust is Dilip J. Thakkar. The findings of the Assessing Officer are contrary to the facts and documents on record. He referred to communication dated 23/3/2015 (at page 1 of paper book Vol.-I) from Swiss Federal Tax Administration clarifying that neither Dilip J Thakkar nor his wife Indira Dilip Thakar are beneficiaries of Chaganlal Suchak Family Trust. The Department without any cogent evidence is trying to link Dilip J. Thakkar with the Trust of Suchak family. He further asserted that merely for the reason that the assessee in application for RIB in column of local address has mentioned the address of Dilip J Thakkar would not in any manner lead to a conclusion that Dilip J Thakkar is the real beneficiary of RIB maturity amount.

5. Controverting the submissions made on behalf of the assessee, the Id. Departmental Representative submits that the addition has been made in respect of source of investment in bonds and not income from the investment in India. The Id. Departmental Representative further pointed that as per the assessment order the assessee is a resident. No findings have been given by the CIT(A) on residential status of the assessee though a ground was raised by the assessee before the First Appellate Authority. She pointed that in the case of Dilip J. Thakkar, 135 taxmann.com, 208 (Mum-Trib), identical issue was

raised by the Department in its appeal, the Tribunal after examining the Explanation and provisions of section 149(1) and (3) of the Act upheld the validity of notice issued u/s. 148 of the Act and the assessment made consequent thereto.

6. We have heard the submissions made by rival sides and have examined the orders of authorities below. The Revenue in appeal has assailed the findings of CIT(A) holding that the notice issued u/s. 148 of the Act was barred by limitation. For the assessment year 1999-2000 the Assessing Officer issued notice u/s. 148 of the Act on 18/03/2015. The case of the Revenue is that as per the provisions of section 149(1)(c) of the Act (as were applicable to the impugned assessment year), the Assessing Officer could issue notice u/s.148 of the Act within 16 years from the end of relevant assessment year in respect of any asset located outside India, chargeable to tax that has escaped assessment. The CIT(A) has held that provisions of section 149(1)(c) of the Act were inserted w.e.f. 01/07/2012, hence, the assessment year under appeal i.e. 1999-2000 would not fall within the ambit of amended provisions. The CIT(A) in support of his findings placed reliance on the decision of Hon'ble Delhi High Court in the case of Brahm Datt vs. Asstt. CIT (supra). One of the contentions of Revenue is that the Hon'ble Delhi High Court has failed to consider the Explanation to Section 149 of the Act i.e the provisions of sub-section (1) and (3) as amended by the Finance Act, 2012 shall be applicable to assessment years prior to 1st April, 2012.

7. We find that the Hon'ble Delhi High Court has examined the provisions of section 149 as they were applicable to the assessment year 1998-99. The Hon'ble High Court also considered amendments to the section from time to

time viz. amendment by the Finance Act, 1987, Finance Act, 2001 and the provisions inserted to section 149 by the Finance Act, 2012. The Hon'ble Delhi High Court after examining the provisions of section 149 and subsequent amendments held that assessment for 1998-99 could not be reopened beyond 31/03/2005 in terms of provisions of section 149 of the Act as applicable to the relevant time. In other words, the Hon'ble High Court held that the assessment could not have been reopened beyond a period of six years. On retrospective applicability of the amendment, the Hon'ble Delhi High Court observed:-

"16. It has been said that "the government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's affairs on the basis of this knowledge" (Ref. FA Hayek, "Road to Serfdom", 1944). In this case, the interpretation proposed by the revenue has the potential of arming its authorities to re-open settled matters, in respect of issues where the citizen could genuinely be sanguine and had no obligation of the kind which the Revenue seeks to impose by the present amendment. All the more significant, is the fact that absent a clear indication, every statute is presumed to be prospective. The revenue had sought to contend that the amendment (to Section 149) is merely procedural and no one has a vested right to procedure; and that procedural amendments can be given effect any time, even in ongoing proceedings.

17. This court is of the opinion that there is no merit in the revenue's contention. In Prithvi Cotton Mills Ltd. v. Broach Borough Municipality [1971] 79 ITR 136 (SC), examined the validity of the retrospective amendment of a statute in light of Article 19(1)(g) of the Constitution of India, i.e. a fundamental right to practice any profession, or to carry on any occupation, trade or business. The court said:

"In testing whether a retrospective imposition of a tax operates so harshly as to violate fundamental rights under article 19(1)(g), the factors considered relevant include the context in which retroactivity was contemplated such as whether the law is one of validation of taxing statute struck-down by courts for certain defects; the period of such retroactivity, and the decree and extent of any unforeseen or unforeseeable financial burden imposed for the past period etc."

18. In Govinddas v. ITO [1976] 103 ITR 123 the Supreme Court held that Section 171 (6) of the Income Tax Act was prospective and inapplicable for any assessment year prior to 1st April, 1962, the date on which the Act came into force and observed that:

"11. Now it is a well settled rule of interpretation hallowed by time and sanctified by judicial decisions that, unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an existing right or create a new obligation or impose a new liability otherwise than as regards matters of procedure. The general rule as stated by Halsbury in Vol. 36 of the Laws of England (3rd Edn.) and reiterated in several decisions of this Court as well as English courts is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or of evidence are prima facie prospectively and retrospective operation should not be given to a statute so as to affect, alter or destroy an existing right or create a new liability or obligation unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only."

In CIT v. Scindia Steam Navigation Co. Ltd [1961] 42 ITR 589, it was held that as the liability to pay tax is computed according to the law in force at the beginning of the assessment year, i.e., the first day of April, any change in law upsetting the position and imposing tax liability after that date, even if made during the currency of the assessment year, unless specifically made retrospective, does not apply to the assessment for that year. These principles were reiterated in CIT v. Vatika Township (P.) Ltd [2014] 49 taxmann.com 249/227 Taxman 121/367 ITR 466 (SC)."

Thus, the Hon'ble High Court rejected the contention of Department on retrospective applicability of the provisions of Section 149 of the Act as amended by the Finance Act, 2012. It is pertinent to mention that the SLP filed by the Revenue against the judgement in the case of Brahm Datt vs. Asstt. CIT(supra) was dismissed by the Hon'ble Supreme Court of India vide order dated 05/07/2019.

8. The Hon'ble Supreme Court of India in the case of J.P. Jani, Income Tax Officer vs. Induprasad Devshanker Bhatt, 72 ITR 595 has held that the amendment to enlarge time for reopening assessment cannot be applied retrospectively so as to open a completed assessment for which the time period for reopening under pre amended provisions has elapsed. The relevant extract of the judgement reads as under:

*"It is admitted in this case that the right of the Income-tax Officer to reopen the assessment for the year 1947-48 was barred under the old Act before the new Act came into force. In our opinion it is not permissible to construe sections 297(2)(d)(ii) of the new Act as reviving the right of the Income-tax Officer to reopen the assessment which was already barred under the old Act. The reason is that such a construction of section 297(2)(d)(ii) would be tantamount to giving of retrospective operation to that section which is not warranted either by the express language of the section or by necessary implication. The principle is based on the well-known rule of interpretation that, unless the terms of the statute expressly so provide or unless there is a necessary implication, retrospective operation should not be given to the statute so as to affect, alter or destroy any right already acquired or to revive any remedy already lost by efflux of time. On behalf of the appellants reference was made to the opening phrase "where in respect of any assessment year after the year ending on the 31st day of March, 1940" occurring in section 297(2)(d)(ii) of the new Act, but these general words cannot take in their sweep all assessment years subsequent to the year ending on 31st March, 1940, without regard to the question whether the right to reopen the assessment in respect of any assessment year was or was not barred under the repealed Act. We consider that the language of the new section must be read as applicable only to those cases where the right of the Income-tax Officer to reopen the assessment was not barred under the repealed section. In our view the new statute does not disclose in express terms or by necessary implication that there was a revival of the right of the Income-tax Officer to reopen an assessment which was already barred under the old Act. This view is borne out by the decision of this court in *S. S. Gadgil v. Lal & Co.* [1964] 53 ITR 231, 240 (SC). In that case, a notice was issued against the assessee as an agent of a non-resident on 27th March, 1957, and that notice related to the assessment year 1954-55. Under clause (iii) of the proviso to section 34(1), as it stood prior to its amendment by the Finance Act, 1956, a notice of assessment or reassessment could not be issued against a person deemed to be an agent of a non-resident after the expiry of one year from the end of the year of assessment. The right to commence a proceeding for assessment against the assessee as agent of a nonresident for the assessment year 1954-55, therefore, ended on 31st March, 1956, under the new Act before its amendment in 1956. This provision was, however, amended by the Finance Act, 1956, and under the amended provision the period of limitation was extended to two years from the end of the assessment year. The amendment was made on 8th September, 1958, but was given effect to from 1st April, 1956. Since the time within which notice could be issued against a person deemed to be an agent of a non-resident was extended to two years from the end of the assessment year, it was contended on behalf of the Income-tax Officer that the notice issued by him was within the terms of the amended provision and was, therefore, a valid notice. Now the notice issued on 27th March, 1957, was clearly within a period of two years from the end of the assessment year 1954-55 and if the amended provision applied, the notice would be a valid notice. It was, however, held by this court that the notice was not a valid notice inasmuch as the right of the Income-tax Officer to reopen the assessment of the assessee under the unamended provision became barred on 31st*

March, 1956, and the amended provision did not operate against him so as to authorise the Income-tax Officer to commence proceedings for reopening the assessment of the assessee in a case where, before the amended provision came into force, the proceedings had become barred under the unamended provision.”

[Emphasized by us]

Thus, the Hon'ble Apex Court has clarified that an amendment that has the effect of extending time for reopening assessment cannot be used as a tool to empower the Assessing officer to reopen assessment which otherwise has become time barred under the pre-amended provisions. In the case of Braham Datt (supra), the Hon'ble High Court referred to the decision in the case of K.M. Sharma vs. Income Tax Officer, 254 ITR 772(SC) and held that amendment to section 149 by the Finance Act, 2012, that extends limitation for reopening assessment to sixteen years, could not be resorted for reopening proceedings concluded before amendment became effective.

9. The Revenue has placed reliance on the decision of Co-ordinate Bench in the case of Dilip J. Thakkar (supra). Following the judicial discipline we place reliance on the decision of Hon'ble Delhi High Court. The assessee has placed reliance on various decisions of the Co-ordinate Bench, wherein on similar set of facts the Tribunal has dismissed the appeal of Revenue. In facts of the case and the decision rendered in the case of Brahm Datt vs. Asstt. CIT(supra), we find no infirmity in the impugned order. Consequently, the impugned order is upheld and appeal of the Revenue is dismissed.

10. Before parting we would also like to deal with the contention of the Id. Departmental Representative on residential status of the assessee. She has submitted that the assessee is a resident. To support her contention, she referred to the assessment order. A perusal of the assessment order shows

that in the cause title, the status of assessee has been mentioned as 'Resident'. The aforesaid argument made by Id. Departmental Representative and the status recorded by the assessing officer is contrary to the facts on record. The case of Revenue is that the assessee has invested in State Bank of India RIB. The assessee has placed on record terms of offer of the said bonds offered by State Bank of India. A perusal of the same shows that only Non-Resident individuals of Indian nationality or Non-Resident Indian (NRI), Overseas Corporate Bodies (OCBs) and Banks acting in fiduciary capacity on behalf of OCBs/NRI can apply for RIB. The assessee has filed an affidavit (at page 3 to 5 of the paper book-1) stating that he is an NRI and is residing outside India since long. The investment in RIB by the assessee has been accepted by the Department. The assessee is an 'Individual'. The assessee could not have invested in RIB unless he qualifies the primary condition of being an NRI individual. Thus, the objection raised by Id. Departmental Representative sans merit, hence, rejected.

11. In the result, appeal by the Revenue is dismissed.

Order pronounced in the open court on Thursday the 06th day of April, 2023.

Sd./-

(GAGAN GOYAL)

लेखाकार सदस्य/ACCOUNTANT MEMBER

मुंबई/ Mumbai, दिनांक/Dated: 06/04/2023

Vm, Sr. PS(O/S)

Sd./-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. The PCIT
- 4.. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
5. गार्ड फाइल/Guard file.

BY ORDER,

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(Dy./Asstt.Registrar),ITAT, Mumbai