

**IN THE INCOME TAX APPELLATE TRIBUNAL, KOLKATA 'D' BENCH,
KOLKATA**

**Before Shri M.Balaganesh, Accountant Member and
Shri S.S. Viswanethra Ravi, Judicial Member**

I.T.A. No. 819/KOL/ 2015
Assessment Year: 2009-10

Samir Kumar Ghosh
Nitya Nanda Nagar (E),
Bokultala, Danesh Saik Lane,
Howrah-711109.
PAN: ACWPG 4074C.

Appellant

-Vs.-

I.T.O Ward 16(4), Kolkata
Kolkata.

Respondent

Appearances by:
Shri Miraj D.Shah, Ld.AR for the assessee
None appeared on behalf of revenue

Date of hearing : 13-10-2016
Date of pronouncement : 18 -11-2016

Shri. S.S.VISWANETHRA RAVI

This appeal by the Assessee is against the orders dt: 18-03-2015 passed by the Commissioner of Income Tax-(Appeals), Kolkata for the assessment year 2009-2010.

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2. None appeared on behalf of the Revenue. Therefore, we dispose of the appeal on merit after hearing the Ld. AR of the assessee and perusing the material available on record.

3. In this appeal, the assessee has raised the following grounds of appeal:-

1. That on the facts and in the circumstances of the case, the Ld. CIT (Appeals) was not justified and grossly erred in confirming the order passed by the A.O., which is bad in law and against the principles of Equity and Jurisprudence.

2. That on the facts and in the circumstances of the case, the Ld. CIT (Appeals) was not justified and grossly erred in confirming the order passed by the A.O. is against principles of Law.

3. That on the facts and in the circumstances of the case, the Ld. CIT (Appeals) erred in confirming the order of the A.O.

4. That the appellant craves leave to add, to amend, modify, rescind, supplement or alter any of the Grounds stated here-in-above, either before or at the time of hearing of this appeal.

4. Brief facts of the case are that the assessee is an individual and works abroad. The Assessee filed his return of income on 17-09-2009 declaring total income at Rs.4,81,399/-, whereas total income was determined at Rs.24,88,400/- vide intimation u/s. 143(1) of the Act dated 13-01-2011.

5. Thereafter, the assessee filed a rectification petition dated 07-03-2011 u/s. 154 of the Act before AO, stating that he is a Non-Resident Indian and the salary earned by him outside India for the year under consideration was not taxable as per the provisions of Indian Income-tax Act, along with the evidences of proof showing his departures and arrivals i.e that, according to him, he departed from India on 22-02-2008 and arrived in India on 19-04-2008; again departed from Indian on 12-09-2008 and arrived in India on 16-01-2009 and again departed from India on 18-02-2009 and arrived in

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India on 29-03-2009 and accordingly based on computation of days thereon confirming his stay in India for the year under consideration, his status would remain as Non-Resident even though in the Return form. Status has been erroneously ticked as Resident.

6. The AO determined the residential status of the Assessee as resident of India as he stayed in India for more than 182 days as contemplated in section 6(1)(a) of the Act as under:

(i)	April 2008	- 12 days
(ii)	May2008	- 31 days
(iii)	June 2008	- 30 days
(iv)	July 2008	- 31 days
(v)	August 2008	- 31 days
(vi)	September2008	- 12 days
(vii)	January 2009	- 16 days
(viii)	February 2009	- 18 days
(ix)	March2009	- 3 days

Total		-184 days

7. The AO calculated the days of stay in India by the Assessee as indicated above. According to him, an individual is said to be resident in India in any previous year for a period or periods of one hundred and eighty two days or more in view of the section 6(1)(a) of the Act. The AO found that the assessee was in India 184 days during the FY 2008-09 and is a Resident and dismissed the rectification petition as filed u/s. 154 of the Act claiming the status as Non Resident and held the income of assessee is liable to be taxed u/s. 6(5) of the Act.

8. Aggrieved by such order of the AO, the assessee preferred an appeal before the CIT(A) by submitting as under and the relevant portions of which is reproduced hereunder:

The appellant's submission, in brief, is that "The assessee has Income from salary amounting to Rs.20,07,000/- which was earned by him by way of employment outside India. In the return of income, filed by the assessee, due to an inadvertent error, the assessee manually filed the return of income as Resident, but in computation of income filed with the income tax department, the entire Income from salary was claimed as non-taxable, in view of the provisions of section 6 of the Income-tax Act, 1961 treating the status of assessee being Non-Resident. He has also relied upon section 9 of General Clause Act, 1987 and the decisions in the following cases to state that either the date of departure or the date of arrival in India has to be ignored while computing period of staying in India."

9. The CIT-A after considering the submissions of assessee has disposed of the case by observing as under and the relevant portions of which is reproduced hereunder:

"4. I have considered the facts of the case of the appellant's submission. It is not disputed by the appellant that he had mentioned his residential status in the return of Income as resident. However, income of Rs.20,07,000/- received as salary from ASP Ship Management (India) Pvt, Ltd. was not included in the total income claiming "NRI" status in the computation of income enclosed with the return of income. The return was processed on 13.01.2011 after including the aforesaid salary in the total income as residential status was declared as "resident" in the relevant place in the return of income at Rs.24,88,400. The appellant filed a petition for rectification of mistake apparent from record in the said intimation dated 13.01.2011 stating that the appellant was a non-resident during the year and the salary earned outside India was not taxable under the Act. The AO rejected the request for rectification in his letter dated 09.05.2011 calculating the period of stay during the previous year of the appellant in India as 184 days. As the period of stay in India exceeded 182 days, he held that the appellant was resident in India within the meaning of the provisions of Section 6(1)(a) of the Act. Hence, there was no mistake apparent from record in the intimation u/s.143(1) of the Act issued on 13.01.2011, according to the AO, and the salary earned outside India had been rightly included in the total income for the purposes of the Act.

*Admittedly, the appellant had mentioned his status as resident in the return of income and, therefore, the same was inconsistent with the appellant's declaration in the computation of income that he was non-resident based on which his income from salary earned outside India would not have been taxable in India, In view of the inconsistency between the two pieces of information contained in the same return of income, the AO was acting within the parameters of the provisions of Section 143(1) of the Act to make the adjustment of addition of salary to the total income in view of the incorrect claim apparent from the information in the return. Thus, there was no mistake in the computation of income in the intimation u/s.143(1) of the Act which can be considered to be apparent from record. As regards the appellant's claim that he was in India for a period of less than 182 days, **his claim that both the date of departure and the date of arrival cannot be considered for the computation of the period of staying in India is not free from debate**, In the decision of Hon'ble ITAT, Mumbai in the case of ITO VS. Fausta C. Cordeiro (ITA Nos. 4933 & 4934/Mum/2011) it was observed that "arrival date is to be excluded in counting particularly when the appellant always come late night in India after doing his duty on rig". It is clear that whether the appellant arrived in India or departed from India late in night can be determined only after appraising the relevant pieces of evidence carefully and would involve long drawn out process of verification and reasoning. It is another matter that it is not clear from the details furnished by the appellant in the form of copy of his passport as to whether he departed or arrived late in the night. Further, the decisions cited by the appellant would have to be considered in the light of unique facts of those cases. Thus, it cannot be said from the information furnished in the return of income, for sure, that the appellant was not a resident in India during the relevant previous year. In absence of any such clinching information in the return of income and in the light of his own admission that he was a resident in India during the previous year, 'the correct course of action while determining the income u/s.143(1) of the Act was to compute the total income after including the salary declared in the return of income as earned outside India. That being the correct manner of computation of income u/ s.143(1) of the Act in the case of the appellant, there was no mistake apparent from record in the relevant intimation. The Hon'ble Supreme Court in the case of CIT v Hero Cycles (P) Ltd. 228 ITR 463 has held that rectification u/s. 154 can only be made when glaring mistake of fact or law has been committed by the officer passing the order and it becomes apparent from record and rectification is not possible if the question is debatable. Hence, it is held that the AO was right in rejecting the appellant's application for rectification. Therefore, the first four grounds of appeal are rejected."*

10. Aggrieved by such order of the CIT-A now the assessee is in appeal before us by raising the above mentioned grounds of appeal. The Ld AR

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submits that the AO was wrong in calculating the both the days of arrival and departure of the Assessee. The Ld. AR argued that Sec 9 of the General clauses Act explains that both the date of departure and the date of arrival cannot be considered for the computation of the period of staying in India and relied on the decision of Bangalore Tribunal in the case of Manoj Kumar Reddy vs ITO reported in 34 SOT 180 (Bang), which was also later upheld by the Hon'ble Karnataka High Court.

11. Heard Ld.AR of the assessee and on careful perusal of the material available on record, the only question remains for our consideration is as to whether the CIT-A is justified in confirming the status of Assessee as Resident basing on the stay put in India of 184 days as determined by the AO. As pointed by the Ld.AR that both the dates of departure and arrival cannot be considered for the computation of the period of staying and made reference thereon to Sec 9 of General clauses Act, in this regard, we may refer to the same.

Commencement and termination of time

9. (1) *In any [Central Act] or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time to use the word "from", and, for the purpose of including the last in a series of days or any other period of time, to use the word "to".*

(2) *This section applies also to all ²[Central Acts] made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887.*

12. Sec 9 of the General clauses Act explains commencement and termination of time, that if a word uses "from", then, first day in a series of days shall be excluded, like wise if the word uses "to" day in last series is to be included. For the purpose of computation in accordance with the Section 9

above, let us examine dates of departure and arrival. The Assessee departed from India on 22-02-2008 and arrived in India on 19-04-2008 and, therefore, the date of departure has to be excluded and such date can not be considered as stay in India. Likewise, again, the assessee departed from India on 12-09-2008 and arrived on 16-01-2009 and accordingly 12-09-2008 need to be excluded and such date cannot be considered as stay in India. The Assessee departed from India on 18-02-2009 and arrived on 29-03-2009 and the date on which the Assessee departed from India need to be excluded i.e 18-02-2009 in calculating the days of stay put in India. Therefore, in pursuance of the provision as contemplated in Section 9 of General clauses Act the stay of assessee in India shall be 182 days by excluding the days as discussed above as against the AO as determined by him at 184 days. To support our view, in this regard, we may refer to the the decision of Bangalore Tribunal in the case of Manoj Kumar Reddy vs ITO reported in 34 SOT 180 (Bang), the relevant portions of which are reproduced herein below:

3.20 *The second alternate contention of the learned Authorised Representative is that the assessee arrived in India on 31st Jan., 2005 at 4 a.m. According to the learned Authorised Representative, the fraction of a day is not to be counted while determining the period. For this proposition, the learned Authorised Representative has relied on the decision of the Hon'ble Delhi High Court in the case of Praveen Kumar vs. Sunder Singh Makkar (sic). The learned Authorised Representative, therefore, contended that if 31st Jan., 2005 is excluded then the appellant's stay in India from 1st April, 2005 to 31st March, 2005 is only 59 days and, therefore, the appellant becomes non-resident.*

3.21 *On the other hand, the learned Departmental Representative submitted that there is no provision under the Act that fraction of a day is to be excluded. Sec. 6(1)(c) provides that he should be in India for a period or period amounting in all to 60 days or more in that year. In case, the fraction of a day is to be ignored when a person who is coming to India on different occasions during the previous year then such fraction of day, i.e., day of arrival and day of departure will have to be excluded. This is not the case and the intention of the legislature when it has provided the period or periods amounting in all to 60 days or more.*

3.22 *We have heard both the parties. The Hon'ble Delhi High Court in the case of Praveen Kumar (supra) had an occasion to consider as to whether the suit*

was filed in time. In that case, deed of performance was stipulated as 30th July, 2002. In case the deed of performance was to be excluded then the limitation will commence from the next date, i.e., 31st July, 2005. The Hon'ble Delhi High Court referred to s. 9 of the General Clauses Act. If the word 'from' is used then the first day in a series of days will stand excluded and if the word 'to' is used, then it will include the last day in a series of days or any other period of time. The Hon'ble Delhi High Court at para 28 observed as under :

"It is well-known maxim that the law disregards fractions. By the calendar the day commenced at midnight and most nations reckon in the same manner. The English do it in this manner. We too have adopted the same. In the space of a day all the twenty four hours are usually reckoned, the law generally rejecting all fractions of a day, in order to avoid disputes. If anything is to be done within a certain time of, from, or after the doing or occurrence of something else, the day on which the first act or occurrence takes place is to be excluded from computation. [Williams vs. Burgess (1840) 113 E.R. 955] unless the contrary appears from the context. [Hare vs. Gocher (1962) 2 Q.B. 641]. The ordinary rule is that where a certain number of days are specified they are to be reckoned exclusive of one of the days and inclusive of the other (R.V. Turner, supra p. 359)."

13. Further, as pointed by the Ld.AR regarding the mistake as caused by the AO in counting days of stay of assessee in his order as passed u/sec 154 of the Act, for this purpose the Ld.AR placed on record the statement of residential status of Assessee in India at page 17 of paper book. He pointed out mistakes at item no-(i) of para-6 above where the AO counted the days of stay in April 2008 as 12 days instead of 11 days. Accordingly, we hold the days of stay of assessee in India for the month of April 2009 as 11 days.

14. Likewise, for item no-(vii), the AO counted the days of stay in the month of January, 2009 at 16 days instead of 15 days. According to AO, the Assessee arrived in India on 16-01-2009. The Ld.AR argued that if the date of arrival is excluded and the days of stay would be 15 days. We find there is a mistake by the AO in determining the days of stay for the month of

January, 2009 as 16 days instead of 15 days, accordingly we hold that the period of stay for the month of January, 2009 are 15 days.

15. Another mistake as raised by the Ld.AR at item (ix) of para-6 regarding the March, 2009. According to AO the Assessee arrived on 29-03-2009 and determined at 03 days (29-03-2009, 30-03-2009 and 31-09-2009). In our opinion, it is incorrect. As rightly pointed by the Ld.AR the counting of days for the month of March, 2009 are 02 days as placed at page no-17 of paper book. We find there is a mistake by the AO in determining the days of stay for the month of March, 2009 as 03 days instead of 02 days, accordingly we hold that the period of stay for the month of March, 2009 are 02 days

16. Therefore, we set aside the order of AO and as confirmed by the CIT-A. We hold that the Assessee is a Non-Resident of India as he stayed in India for less than 182 days as contemplated in section 6(1)(a) of the Act, by excluding the aforesaid days as against 184 as determined by the AO, i.e dates of departure from India on 22-02-2008 and 18-02-2009 totaling to 02 days and such dates can not be considered as stay in India in pursuance of the provision as contemplated in Section 9 of General clauses Act. Regarding the mistakes in computing the days as discussed in para's hereinabove for the months April, 2008, January, 2009 and March, 2009, putting altogether which stands at 05 days, thus, the Assessee is entitled to claim his salary earned out side India as non-taxable. Accordingly, grounds raised by the Assessee are allowed.

17. In the result, the appeal of the Assessee is allowed.

Order pronounced in the open Court on 18th November, 2016.

Sd/-
M.Balaganesh
Accountant Member

Sd/-
S.S. Viswanethra Ravi
Judicial Member

Copies to :

**PP/SPS

(1) Appellant/Assessee: Shri Samir Kumar Ghosh, Nitya Nanda Nagar(E), Bokultala, Danesh Saik Lane, Howrah-711109.

(2) Department/Respondent: The Income Tax Officer, W 16(4), Kolkata

(3) Commissioner of Income-tax (Appeals)

(4) Commissioner of Income Tax, Kolkata

(5) The Departmental Representative

(6) Guard File

By order
Assistant Registrar,
Income Tax Appellate Tribunal
Kolkata