IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "B", NEW DELHI

BEFORE SHRI. AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

I.T.A. No.5965/DEL/2015
Assessment Year:2011-12

Pramod Kumar Sapra C/o K.L. Aneja, Advocate Flat No.92-C, Block B, Pocket W New Delhi	v.	Income Tax Officer Ward-3 Panipat
TAN/PAN:ACPS3417N		
(Appellant)		(Respondent)

Appellant by:	Shri K.L. Aneja, Advocate		
Respondent by:	Shri Rachna Singh, CIT (DR)		
Date of hearing:	27	09	2017
Date of pronouncement:	30	10	2017

O R D E R

PER AMIT SHUKLA, J.M.:

The aforesaid appeal has been filed by the assessee against impugned order dated 29/9/2015, passed by the Pr. Commissioner of Income Tax, Karnal under section 263 of the Income Tax Act, 1961, for assessment year 2011-12.

2. In various grounds of appeal, the assessee has challenged the action of the Pr. CIT in setting aside the assessment order to make afresh assessment after examining the issue of claim of deduction of salary earned by the assessee on his employment on deputation to foreign country.

3. The brief facts as culled out from the records before us are that, the assessee is an individual who is employed with M/s Reliance Industries Ltd., Mumbai. The assessee was deputed to Iraq, w.e.f. 16/4/2010 and during his stay in Iraq on deputation, he has earned salary income of Rs.43,68,905/-, out of which salary amount of Rs.40,04,830/- has been claimed as exempt on the ground that assessee's stay in Iraq was for more than 182 days. The return of income in India was filed at an income of Rs.98,520/- after claiming exemption of aforesaid amount of salary income. Such a return of income was subjected to scrutiny and accordingly, assessment order was passed under section 143(3), vide order dated 11/2/2014, whereby the returned income filed by the assessee including the claim of deduction of salary was accepted.

4. Later on, on perusal/ examination of record, the Pr. CIT in his revisionary jurisdiction under section 263 noticed that assessee has reduced his salary income earned on deputation to abroad at Rs.40,04,830/- which, according to him, was not permissible according to provisions of section 5(2), which provides that total income of non-resident includes all income received or accrued from whatever source derived in India is taxable in India. He observed that the Assessing Officer has not examined the issue of deduction of such huge quantum of salary and, therefore, the impugned assessment order is prima-facie erroneous in so far as prejudicial to the interest of the Revenue. In response to the show cause notice, detailed submissions were made before the Ld. Pr. CIT stating that the assessee has derived salary while on deputation in Iraq and the same has been claimed as non-taxable, because assessee for the purpose of the

Income Tax Act was not resident of India in terms of section 6. However, on this issue, the Pr. CIT observed that applicability of section 6(1) would be decided by the Assessing Officer only after considering the relevant provisions and facts and relevant case laws on this issue. Since the Assessing Officer has not made any proper enquiry, therefore, such an order is not only erroneous but also prejudicial to the interest of the Revenue. He, after considering the entire submissions made by the assessee, held that provisions of section 5 clearly provides that income received by the assessee in India has to be taxed in India and it is not the case that the assessee has claimed that he has paid taxes in foreign country and, therefore, credit of tax should be given to him. Accordingly, the order has been set aside to make afresh to examine the issue of deduction.

5. Before us, the ld. counsel for the assessee, submitted that the Assessing Officer in the course of the rectification proceedings u/s 154 initiated after assessment proceedings has specifically raised this issue of claim of deduction of salary amounting to Rs.40,04,830/- for which assessee has filed a reply, the copy of which is appearing at pages 23 to 25 of the paper book. Such a reply is also now part of assessment record. The assessee has also given a chart not only before the Assessing Officer but also before the ld. Pr. CIT highlighting the number of days assessee stayed out of India, which was around 203 days and thus it exceeded the threshold limit of 182 days. Whence the salary has been given to the assessee on foreign deputation being employed for work being carried out in foreign country, salary received cannot be taxed in India even if salary has been credited to the bank account of the assessee in India. He further

submitted that once all these facts and submissions were made before the Pr. CIT, then it was incumbent upon him to examine all these facts and cannot set aside the issue on the ground that no proper enquiry has been done by the Assessing Officer. Thus, he submitted that not only the impugned order is incorrect in law but also that salary income received by the assessee itself is not taxable.

6. On the other hand, the Ld. CIT D.R., submitted that the Ld. Pr. CIT from the examination of record prima-facie found that the assessment order is not only deficient but also erroneous and prejudicial to the interest of the Revenue. From a bare perusal of the assessment order, it can be seen that it has been passed in a very summarily manner without discussing either applicability of section 5(2) or section 6. In support of her various contentions as to what is meant by expression "erroneous and prejudicial to the interest of the Revenue" as enshrined in section 263, she has referred and relied upon catena of decisions, for which she has filed a separate synopsis. Thus, her entire focus of argument has been that the Assessing Officer has not made any adequate or proper enquiry to examine such a huge claim of deduction of salary amount and, therefore, in terms of *Explanation 2* inserted in section 263 by Finance Act 2015 which clearly postulates that inadequate enquiry by the Assessing Officer will render the assessment order deemed to be erroneous and prejudicial to the interest of the Revenue and such an *Explanation* has to be treated as retrospective. She further submitted that here in this case not only salary has been credited in India but also the TDS has been deducted by the employer and, therefore, this basic fact is sufficient enough to carry out some prima-facie investigation

or enquiry by the Assessing Officer to examine such claim and in the absence of discharge of primary onus which cast upon the AO under the law, renders the assessment order not only erroneous but also prejudicial to the interest of revenue which cannot be sustained and the same has rightly been set aside by the Ld. Pr. CIT to the file of the Assessing Officer for proper and afresh examination.

7. We have heard the rival submissions; perused the relevant material referred to before us and also the finding given in the impugned order. The sole basis/ reason for exercising jurisdiction under section 263 by the Ld. Pr. CIT is that, the claim of deduction of salary amounting to Rs.40,04,830/- has not been properly examined by the Assessing Officer while allowing the said deduction. The assessee, who is employed with M/s Reliance Industries Limited, was deputed as Country Manager to Kurdistan, Iraq, w.e.f 16/4/2010 for the purpose of his employment in Iraq he has received salary. In the annual return of income filed in India on 14/7/2011, assessee has claimed exemption of salary earned outside India amounting to Rs.40,04,830/- out of total salary received at Rs.43,68,905/-. The said return though has been filed in the status of "**non-resident**", however, from the perusal of the assessment order, it is seen that the Assessing Officer has framed the assessment in the status of "**resident**". Be it that as may be, from the material facts which have been placed before the Ld. Pr. CIT and also before the Assessing Officer during rectification proceedings u/s 154, post assessment proceedings, it is seen that the assessee has given entire details of number of days for which assessee had stayed outside India which has been computed at 203 days.

Even if we accept the contention of the ld. CIT D.R. and also finding of the Ld. Pr. CIT that this issue has not been examined in detail or no proper enquiry has been conducted, then at the very threshold, one has to see, whether such a salary received under an employment outside India, the period of which has exceeded more than 182 days, can be taxed under the provisions of Income-tax Act or not. The order can be held to be erroneous in the absence of any proper enquiry at the stage of assessment proceeding, though examined subsequently by the AO which is also part of assessment record, but certainly one has to see that, whether it is prejudicial to the interest of the Revenue or not. Once before the Ld. Pr. CIT assessee has clearly brought on record that assessee's stay outside India was more than threshold limit of 182 days as prescribed under the provisions of section 6, then the Ld. Pr. CIT should have atleast considered the same and given his findings accordingly. The major thrust of the Ld. CIT D.R. as well as the Ld. Pr. CIT in his impugned order is that, *firstly* salary has been received in India as it has been credited in the bank account of the assessee in India; and *secondly,* such salary income credited to the bank account of assessee in India is deemed to be income received in India and, therefore, the same is chargeable to tax under the scope of total income under section 5. Section 5 only defines the scope of total income whereby all the income of a person from whatever source is received or accrued or deemed to be received or deemed to be accrued in India shall be taxable under the provisions of this Act. However, section 6 provides scope and ambit of taxability of an individual who can be reckoned as resident in India. Sub-section (1) of section 6 clearly provides that an individual is said to be resident in India in any previous year for the purpose of this Act

if he is an India in that year for a period of or periods amounting in all to one hundred and eighty-two days or more; or having within the four years preceding that year been in India for a period or periods amounting in all to three hundred and sixty-five days or more, is in India for a period or periods amounting in all to sixty days or more in that year. So far as the second criterion of four years as given in clause (c) of sub-section (1) of section 6, the same is not applicable here. For the purpose of present case, only criterion, which is to be seen, is whether the assessee can be said to be resident in India in terms of clause (a) which clearly stipulates that assessee should have been resident in India for a period of 182 days or more. If the assessee in the previous year has not stayed in India for more than 182 days, then ostensibly such an income cannot be taxed in the hands of the assessee individually as a resident of India. The assessee before the Pr. CIT and also before the Assessing Officer has given the following details of number of days which assessee has stayed outside India:-

"No. of days assessee stayed out of India i.e. in Kurdistan, Iraq.

Date of leaving India	***Date of reporting to India***	***No. of days stayed out of India***
26/04/2010	*25/05/2010*	*30*
02/06/2010	*29/06/2010*	*21*
14/07/2010	*09/08/2010*	*27*
25/08/2010	*17/09/2010*	*24*

11/10/2010	*15/11/2010*	*35*
11/12/2010	*11/01/2011*	*32*
06/02/2011	*08/03/2011*	*31*
28/03/2011	*31/03/2011*	*03*
Total days stayed out of India		***203***

8. This factum has not been disputed either by the Assessing Officer or by the Ld. Pr. CIT before whom these facts were brought on record. Thus, the assessee in terms of section 6 clearly cannot be held to be resident in India in the relevant previous year. So far as the observation that since the salary income has been received in India, i.e., it has been credited in the bank account of the assessee in India and also TDS has been deducted by the employer, this fact cannot be a determinative of the taxability of resident or non-resident in terms of provisions of the Act. What is relevant is, whether the income can be said to be received or deemed to be received in India. Sub-section (2) of section 5 merely provides that total income of any previous year of a non-resident includes all income from whatever source which is received or deemed to be received in India in such year or accrues or arises or is deemed to accrue or arise to him in India during such year. This sub-section only provides that if the income of the non-resident has been received or accrued in India or deemed to be received or accrued in India, the same shall be treated as total income of that person of that previous year. The said section does not envisages that the income received by a non-resident for services rendered outside India can be reckoned

as part of total income in India. Here in this case, it is not the case that the assessee has received or deemed to have received any income in India because salary which has been received by the assessee is during his employment in Iraq as a Country Manager for the activities carried out in Iraq. No such income has been received by the assessee for carrying out any activity in India or source of income is from India which could be reckoned as income received or accrued in India. Thus, in terms of sub-section (1) of section 6, salary income of the assessee for the previous year cannot be held to be taxable because he was not resident in India, as admittedly he was outside India for more than 182 days. Accordingly, salary of the assessee cannot be taxed in India and the same has rightly been claimed as deduction in the return of income. Thus, on merits we hold that the assessment order passed by the Assessing Officer is not prejudicial to the interest of the Revenue, *albeit* can be reckoned as erroneous in the absence of any proper enquiry. It is trite law that revisionary jurisdiction under section 263 on an assessment order can only be exercised once the said order is found to be erroneous insofar as it is prejudicial to the interest of the Revenue, i.e., both the conditions should fulfill simultaneously and this has been held so by the Hon'ble Supreme Court, which has been referred and relied upon by the ld. CIT D.R., in the case of **Malabar Industrial Co. Ltd. Vs. CIT reported in [2000] 243 ITR 83 (SC**), which principle has been reiterated later on not only by the Hon'ble Supreme Court but also by several High Courts. Thus, even if one of the limbs of said expression used in section 263 is missing, then ostensibly the assessment order cannot be set aside within the scope of revision u/s 263. Hence, on merits

we quash the order of the Ld. Pr. CIT and uphold the allowability of deduction of salary as claimed by the assessee.

9. In the result, appeal of the assessee is allowed.

Order pronounced in the open Court on 30th October, 2017.

Sd/-	Sd/-
[WASEEM AHMED]	**[AMIT SHUKLA]**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

DATED:30th October, 2017

JJ:2310

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