Remittance of funds by NR to India out of incomes accrued outside India aren't taxable in India

Summary – The Hyderabad ITAT in a recent case of Madhusudan Rao, (the Assessee) held that Provision of section 5 does not permit taxation of amounts remitted to India from sources outside India which are not incomes under provisions of Act

Facts

- The assessee, NRI, had filed his return mainly disclosing salary income in the capacity as Chairman of a company.
- The Assessing Officer noticed that assessee had shown an amount as credit to the capital account under the head 'NRI A/c' and applied the fund towards shares, gifts to relatives and personal expenses.
- On being show caused, the assessee explained that the said amount had been transferred from Barclays Bank, Mauritius into NRI A/c, of assessee from the amount of loan obtained by him from a company outside India (Vitrual). He also filed confirmation from said company.
- The Assessing Officer noticed that assessee was a single shareholder of said company and he came to the conclusion that said company was nothing but an alter ego of assessee and, therefore, funds transferred to the bank account of assessee in Mauritius, did not explain the source of funds in the hands of assessee and treated it as income of assessee under section 68/69/69A/69C.
- The Commissioner (Appeals) had directed assessee to furnish further evidence with reference to the creditworthiness of the said company and on examination, the Commissioner (Appeals) held that the assessee had satisfactorily explained as to how the said amount had reached his hands and held that the same was not liable to Indian income tax and held since the identity of the Virtual, its creditworthiness and the genuineness of the impugned transactions were proved, in view of the provisions of section 5(2)(b) read with Board Circular No. 5 dated 20-2-1969, the addition made by the Assessing Officer under section 68/69/69A/69C was not in order.
- On appeal:

Held

- First of all it cannot be understood how the Assessing Officer can consider inward remittance of moneys into NRI A/c of a non-resident Indian as his unexplained income. Assessee in the course of assessment proceedings furnished enough evidences in support of inward remittance of funds including a certificate from a company (Virtual) about the source of funds being loan. If the Assessing Officer has any doubt about the said company in Mauritius, he cannot reject the genuineness of the said company without making necessary enquiries either through the internal mechanism of foreign tax division of CBDT or by any other means. Just because the certificate furnished does not have any seal, the same cannot be rejected outrightly. However, the matter did

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not end there. Assessing Officer took pains to verify from the internet and also from the website of the SEBI and came to the conclusion that the said company is one of the group companies of assessee listed as persons constituting group under Monopolies and Restrictive Trade Practices Act, 1969 and further noticed from the red herring prospectus of a company, wherein this company was shown as single shareholder company of assessee as on 29-7-2006. This means the existence of the company is accepted by the authorities, not only by SEBI and other statutory authorities but even by the Assessing Officer. Now, how the revenue could raise ground on existence of the above company and about the identity of the company when Assessing Officer himself acknowledged the same in the assessment order.

- Coming to the issue of creditworthiness, assessee's explanation is that the amounts were transferred from his own bank account in Mauritius to the NRI account in India. Therefore, the immediate source of funds is his own account from Mauritius which is not disputed. If funds are received into Mauritius account, then that becomes source of the source which cannot be examined by Assessing Officer, unless there is any incriminating evidence. Except presumptions and allegations, virtually there is no evidence against assessee that these funds are his own incomes from India or 'round trip' funds of assessee as alleged.
- Coming to the issue of creditworthiness of the abovesaid company, there is no dispute with reference to the funds. It has its own funds and Commissioner (Appeals) took pains to examine and hold that it is creditworthy. Nothing was brought on record to counter the findings of Commissioner (Appeals), except contending that the order of the Commissioner (Appeals) is not correct. Therefore, the ground regarding creditworthiness of the company does not require any consideration.
- Therefore, on the facts of the case, it is to be admitted that assessee having its own funds abroad has remitted the amount to India and this inward remittance cannot be considered as unaccounted income of assessee.
- The assessee being a non-resident invoking the provisions of sections 68 and 69 has its own limitations. Even though the credits are to be examined under section 68 and 69, 69A or 69C, *prima facie* these sections are not applicable in the case of assessee as the assessee has merely transferred his own money from his account in Bank, Mauritius to NRI A/c held in India. Therefore, the question of unexplained credit will not come. The said amount does not represent any investment. The money being transferred from his own foreign bank a/c to his own NRI A/c in India will not be treated as unexplained money. Section 69C will not attract as no expenditure is involved.
- Reference to the Board circular by Assessing Officer is also not correct as the same was extracted and was discussed in detail by the Commissioner (Appeals). One cannot quote out the context to take a different meaning of the general circular issued by the Board. Commissioner (Appeals) having examined that the principles laid down by the Board circular are clearly applicable to the facts of the case. There was no merit in revenue's contention unless it is established that assessee earned income in India or received in India. Provision of section 5 does not permit taxation of amounts remitted to India from sources outside India which are not incomes under the provisions of the Act.

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- The Tribunal in *Dy. CIT* v. *Finlay Corporation Ltd.* [2003] 86 ITD 626 (Delhi), has held that money being received outside India cannot be taxed under section 5(2) unless it is proved that such money is relatable to the income accrued or arising in India and therefore, the same cannot be taxed under section 68 merely on the ground that the assessee fails to prove the genuineness and source of such cash credit. It was further held that, the provisions of section 68 or 69 would be applicable in the case of non-resident only with reference to those amounts whose origin of source can be located in India. Therefore, the provisions of section 68 or 69, have limited application in the case of non-resident.
- Section 5(2) is not applicable as the amount received is received from assessee's own account outside India and no income has accrued or arisen in India. These funds were also received through banking channels with necessary statutory approvals. Therefore, assessee has proved the sources of receipts and discharged the onus. It is the revenue which failed in proving that this amount is unexplained income of assessee. In view of this, it is held that the order of the Commissioner (Appeals) was upheld.

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