Employee wasn't liable to interest for advance tax default if employer failed to deduct TDS on salaried income

Summary – The High Court of Andhra Pradesh in a recent case of J. Aditya Rao., (the Assessee) held that Jurisdiction of an Assessing Officer does not depend upon fact whether a person has filed his return or not rather it depends upon territorial area, person or classes of persons, income or classes of income and cases or classes of cases, reference to which jurisdiction is conferred on competent authority as per section 120(3), read with section 124

Objections regarding non-recording of reasons and non-issue of notice before passing order of transfer of assessee's case raise a mixed question of facts and law and, since they do not go to root of matter, said objections could not be raised for first time before High Court

An assessee, whose tax is liable to be deducted at source, is not liable to pay advance tax under section 208 and consequently, he is not liable to pay interest under section 234B(1) thereon

Facts

- The assessee was a pilot employed by the Indian Airlines. He was assessed to tax at Hyderabad. However, at the relevant point of time, the assessee was employed in Mumbai and in connection therewith, he was residing at that place. The ITO, Ward 11(3), Mumbai, issued notice to the assessee under section 148 proposing to reassess his income.
- The assessee sent his reply, stating that as he was assessed at Hyderabad, he was submitting returns to the Assessing Officer at Hyderabad. Evidently, on the said ground, no separate returns were filed at Mumbai by the assessee in response to the aforesaid notice issued under section 148.
- Thereafter, a further letter/notice was issued by the ACIT, Mumbai, stating that the assessee filed his returns in Mumbai. A reply to the said letter/notice was sent by the assessee on denying the filing of such returns. A few months thereafter, the ACIT, Hyderabad, issued separate notices in pro forma, to the assessee purportedly under section 143(2) for the relevant assessment years and in connection therewith, the assessee was required to attend the office of the Assessing Officer on the date specified therein.
- Accordingly, the assessee attended the office along with his representation on the merits on the points raised by the Assessing Officer at Hyderabad. After considering the submissions made by the assessee, the Assessing Officer /ACIT at Hyderabad passed orders under section 143(3) read with section 147. By said orders, the Assessing Officer included certain allowances under the taxable income of the assessee and accordingly, he imposed additional tax as well as interest thereon under section 234B(1).
- The assessee challenged the assessment orders on three grounds *viz*., (i) that the Income Tax Officer, Ward 11(3), Mumbai had no jurisdiction to issue notice under section 148; (ii) that the

quantum of allowances included under the taxable income was not correct; and (iii) that charging of interest was not sustainable. The Commissioner (Appeals) rejected all the grounds raised by assessee.

- The Tribunal, confirmed the order of the Commissioner (Appeals).
- On appeal:

Held

- At the relevant point of time, when notice under section 148 was issued by the Assessing Officer at Mumbai, the assessee was admittedly employed in Mumbai and residing thereat. It is not the pleaded case of the assessee that no notification was issued by the Competent Authority under section 120(2) and (3) of the Act vesting the jurisdiction on the Assessing Officers at Mumbai over the persons residing in Mumbai. In the absence of such plea, it is reasonable to presume that such a notification existed empowering the Assessing Officers in Mumbai to deal with the persons, such as the assessee in the present case. Both the appellate authorities, indeed, proceeded on that premise in holding that the Assessing Officer at Mumbai was conferred with the jurisdiction to exercise powers under sections 147 and 148 of the Act. Even before this Court, the assessee has not raised a specific plea that no such notification was issued conferring the territorial jurisdiction on the Assessing Officer at Mumbai for issuing such notices.
- The only premise on which the assessee has questioned the jurisdiction of the Assessing Officer at Mumbai was that as he has not filed returns and was not assessed at Mumbai, the Assessing Officer concerned at Mumbai had no jurisdiction. This plea, is wholly without any merit. The jurisdiction of an Assessing Officer does not depend upon the fact whether a person had filed his returns or not rather it depends upon the territorial area, the person or classes of persons, income or classes of income and cases or classes of cases, reference to which the jurisdiction is conferred on the Competent Authority concerned as per section 120(3) read with section 124 of the Act. In this view of the matter, there is no merit in the submission of the assessee.
- In re second submission - Whether transfer of the case on the ground of purported non-compliance of section 127(2)(a), is bad?
- No doubt, Clause (a) of Sub-Section (2) of section 127 envisages an opportunity of being heard before a case is transferred from one city to another city, from one locality to another locality or from one place to another place. Admittedly, the assessee has not raised this objection after the Assessing Officer at Hyderabad issued notice for appearance. On the contrary, he appeared before the Assessing Officer at Hyderabad and put forth his objections on merits regarding the reassessment. Even in the two appeals filed by him before the two Appellate fora, the assessee has never raised this objection.
- The assessee has submitted that as the ground of failure of issue of notice is a jurisdictional one, it could be raised at any stage. The assessee submitted that before passing an order of transfer, notice to the assessee is mandatory.

- The assessee has also submitted that before passing an order of transfer, recording of reasons is mandatory under section 127 of the Act.
- Admittedly, the assessee has not raised the objections regarding failure to issue notice and non-recording of the reasons before passing the order of transfer either before the Original Authority or before the two Appellate fora. The question that needs to be considered is whether on the facts of the present appeals, these aspects are relevant or not. With regard to non-recording of the reasons, it is not known whether the transfer order contained any reasons or not, because the assessee has not put this aspect in issue before any of the two Appellate fora.
- Similarly, the effect of failure of the assessee to raise the objection of non-issue of notice before passing the order of transfer, either before the Assessing Officer or the two Appellate fora did not fall for consideration of the Courts which rendered the judgments relied upon by the assessee. While the very initiation of proceedings and issue of notices under sections 147 and 148 constitute a jurisdictional issue, which could be raised by the aggrieved party at any point of time and at any stage, the objections regarding non-recording of reasons and non-issue of notice before passing the order of transfer would not go to the root of the matter enabling the aggrieved party to raise these issues for the first time before the High Court not having raised earlier.
- The reason for this is that these aspects raise mixed questions of fact and law. Unless the assessee had raised these issues before the lower fora, the facts relevant thereto would not come on record. Therefore, the assessee, having not raised the objections with respect thereto before any lower fora, is not entitled to raise them for the first time in these appeals before this Court. Even otherwise, the assessee, having appeared before the Assessing Officer, Hyderabad and invited a decision on merits without raising such objections and also not having raised these objections before both the Appellate fora, cannot be permitted to raise them for the first time in these appeals before this Court.
- There is another perspective from which this issue is required to be examined. Both the requirements of prior notice and recording of the reasons before passing the order of transfer were envisaged to enable the party likely to be affected by such transfer to submit his objections. If the assessee had any such sustainable objection, he is expected to have raised the same before the Assessing Officer at Hyderabad after the transfer of the case. From the fact that the assessee has not raised any such objection would clearly show that he had no grievance against the transfer as such. Indeed, the assessee objected to the jurisdiction exercised by the Assessing Officer at Mumbai on the ground that he was being assessed at Hyderabad. Transfer of the case to Hyderabad is obviously in tune with his objection, which appears to be the reason why the assessee has not raised any objection on the transfer. The assessee has also not pleaded any prejudice on account of transfer or purported absence of reasons for such transfer. For the aforementioned reasons, this submission of the assessee is rejected as well.
- The issue as to whether the assessee, who is a salaried employee, is liable to pay advance tax, is no longer *res integra*. A Full Bench of the High Court in *DIT (International Taxation)* v. *Maersk Co. Ltd*.

[2011] 10 taxmann.com 269/198 Taxman 518/334 ITR 79 (Uttarakhand) held that an assessee, whose tax is liable to be deducted at source, is not liable to pay advance tax under section 208 and consequently, he is not liable to pay interest under section 234B(1) thereof.

- In the light of the above position in law, the orders of the Assessing Officer and the Commissioner (Appeals) as confirmed by the Tribunal are set aside to the extent of levy of interest under section 234B(1) on the additional tax. The appeal to this extent alone is allowed, while the common order impugned in the appeal is confirmed in all other respects.