

SUREME COURT OF INDIA

Commissioner of Income-Tax, West Bengal

Vs.

B.K. Dhote

(J Shah and V Ramaswami JJ.)

10.04.1967

JUDGMENT

SHAH, J.

1. In 1936 the assessee, B. K. Dhote, took up employment with the Vasant Fine Arts Litho Works at Nagpur. In November, 1943, the assessee migrated to the territory of H. E. H. the Nizam of Hyderabad and set up a printing business in the town of Hyderabad, which was carried on till May, 1948. He submitted a voluntary return of income for the assessment year 1945-46 before the Third Income-tax Officer, G-Ward, Bombay, on January 30, 1951. The Income-tax Officer accepted the claim of the assessee that he was a non-resident during the previous year relevant to assessment year 1945-46 and assessed him accordingly. In November, 1951, the assessee commenced trading in Calcutta in the Province of West Bengal. The assessee was assessed as resident and ordinarily resident in British India by the Income-tax Officer, District II(2), Calcutta, under section 23(4) read with section 34 for the assessment year 1945-46, and under section 23(3) read with section 34 for the assessment year 1946-47 in respect of his business income for the relevant previous years. The Appellate Assistant Commissioner reversed the orders passed by the Income-tax Officer.

2. The Income-tax Officer appealed to the Income-tax Appellate Tribunal. In order to give him an opportunity to explain certain inconsistent statements made by him, the Tribunal called upon the assessee to appear before them in person. The Tribunal recorded the statement of the assessee. The Tribunal was of the view that the assessee's statements were "discrepant and highly contradictory" and no reliance could be placed on his version about the reasons for his visits to British India during the two previous years. On a consideration of the evidence in the light of his statement made before them, the Tribunal held that the assessee failed to prove that his visits to British India in the previous two years were occasional or casual. The Tribunal accordingly reversed the order passed by the Appellate Assistant Commissioner and restored the order of the Income-tax Officer assessing the assessee as resident and ordinarily resident in British India.

3. The Tribunal drew up a statement of the case and submitted the following questions for the opinion of the High Court :

"(1) Whether the Tribunal's order is vitiated in law by the Tribunal casting the onus on the assessee

to prove that he did not satisfy the requirements of section 4(a) of the Income-tax Act, instead of casting the onus on the department to prove that every essential ingredient to make the assessee resident was satisfied in the present case ?

(2) Is there any evidence and/or material upon which the Tribunal could hold that the assessee was a resident in British India during the relevant previous year ?

(3) Does an occasional or casual visit in connection with the assessee's business make the assessee resident within the purview of section 4A(a) (iii) ?"

4. The High Court recorded answers to the first two questions in the negative, and declined to answer the third question. The Commissioner of Income-tax has appealed against the decision of the High Court on the second question. There is no appeal before us by the assessee against the answer to the first question.

5. Section 4A(a) (iii) of the Income-tax Act, 1922, in the relevant years of assessment read as follows;

"For the purposes of this Act –

(a) any individual is resident in British India in any year if he - ...

(iii) having within the four years preceding that year been in British India for a period of or for periods amounting in all to three hundred and sixty-five days or more, is in British India for any time in that year otherwise than on an occasional or casual visit."

5. A person may be treated as resident in British India under section 4A if he was during the four years preceding the previous year in British India for a period in the aggregate of not less than three hundred and sixty-five days and that he was for some time in British India in the relevant previous year, otherwise than on visits occasional or casual. The onus of proving that the assessee was in British India during the four year preceding the previous year for a period or periods in the aggregate of not less than three hundred and sixty-five days, and in the relevant previous year at any time, lay upon the department. But if these two conditions were established or admitted the onus lay upon the assessee to prove that his visits in the previous year were occasional or casual.

6. It is common ground that for nearly seven years before November, 1943, the assessee was residing at Nagpur in British India. The first condition was therefore established. The assessee admitted in his correspondence with the Income-tax Officer, and also before the Tribunal, that he had visited British India in the two previous years, but he pleaded that his visits were "occasional or casual". The Tribunal had to determine the truth of that plea.

7. The assessee addressed a letter to the Income-tax Officer on February 14, 1955, regarding his assessment for the year 1945-46 stating :

"... In the year under assessment I had never been to British India and, hence, I do not come under the jurisdiction of the Indian Income- tax Act in the said year as I had no income in India at that time.

... Please also note that during the year in question I made no remittance to India and, hence, your query as to whether the remittance relates to a remittance of capital or remittance of profit does not arise."

8. On November 5, 1956, the assessee submitted an affidavit stating that "during the period of my departure from India I had only few casual visits in British India which did not exceed seven days in any year and that I had never any dwelling place in India during that period." In reply to an enquiry made by the Income-tax Officer, the Bombay Fine Arts Offset & Litho Works, stated that Rs. 10,000 were sent by the assessee from Hyderabad by draft on March 12, 1945. There was also evidence before the Income-tax Officer that an amount of Rs. 12,000 was delivered in cash on February 6, 1946, to Indo-Europa Trading Company, Bombay, in satisfaction of a trading liability of the assessee. The assessee had also written a letter on March 21, 1956, in respect of the assessment year 1946-47 that during the account year commencing April 1, 1945, he had not visited any place in British India "at any time".

9. In his statement before the Tribunal the assessee admitted that he had in his letter dated November 5, 1956, stated that, after his departure from British India, he had paid a few visits to British India which did not exceed seven days in any year. He, however, stated that he had visited British India "once or twice" and during his stay he was not in British India for more than two or three days on any single occasion. He admitted that he had visited Nagpur for two days in 1945, to attend the wedding of his brother and that he had again visited Nagpur in November-December, 1946, because of his mother's illness. He denied that he had visited Bombay in connection with his business. He admitted that an amount of Rs. 12,000 was sent in cash to Indo-Europa Trading Company in connection with the purchase of machinery, but he claimed that the money was sent with his cashier, Patwardhan. Called upon to state whether he had any evidence to show how the money was sent to Indo-Europa Trading Company, the assessee asserted that he had no business transactions in Bombay in the year 1946. The Tribunal in its order observed :

"We have had the advantage of having had the assessee before us examined by the departmental representative with regard to the assessee's contention that his visits to the taxable territory during the accounting years were casual. In this we had the advantage of noting the demeanour of the assessee while he was answering the questions. We are sorry to say that we were not very much satisfied with the way he was giving answers to the questions put both departmental representative and by us and we are constrained to say that the assessee was not speaking the truth."

10. After referring to the oral and documentary evidence, the Tribunal concluded :

"From the version of the assessee's doing business in Hyderabad to the extent he has admittedly done, we hold that the assessee's visits to the taxable territories were for his business and for some business in British India."

11. Proof of a visit or visits in the relevant previous years to the taxable territory coupled with evidence of being in the taxable territory for three hundred and sixty-five days in the aggregate during the last four years preceding that previous year is not decisive of the status of the assessee as a resident in the previous year. It is open to the assessee still to prove that his visit or visits in the previous year were occasional or casual. In determining whether the visits are occasional or casual, the Tribunal has to consider the presence of the assessee in the taxable territory in relation to the object of the visit which must, in each case, be gathered from the circumstances in which the

assessee paid the visit, and his conduct. Accidental presence in or a visit for a social purpose to the taxable territory may be regarded as occasional or casual, but a visit in connection with the business carried on by the assessee may not normally be regarded as occasional or casual.

12. The assessee carried on the trade of a printer in Hyderabad. He had in connection with that trade to deal with business houses in Bombay; this was admitted by the assessee. He had made remittances to Bombay in both the years - the first remittance was by a bank draft and the second in cash. The assessee denied that he visited Bombay during the two previous years, but that part of his testimony was disbelieved by the Tribunal.

13. Mr. Chatterjee contended that the assessee had claimed that an amount of Rs. 12,000 sent to Indo-Europa Trading Company, Bombay, though sent in cash, was delivered by Patwardhan, the assessee's cashier, and that the Tribunal should have examined Patwardhan, as a witness. But no request was made by the assessee to examine Patwardhan. The assessee merely stated that the Tribunal "can call" Patwardhan and "can question him". The assessee did not produce his books of account, not even his bank pass books. In connection with the remittance of Rs. 10,000 and Rs. 12,000 in the two years, no correspondence was produced by the assessee. The Tribunal, on a consideration of statements made by him, the other evidence, and his conduct, came to the conclusion that the visits of the assessee were in connection with his business, and not social visits as claimed by him. It cannot be said that the Tribunal recorded its conclusion on no evidence or on irrelevant considerations or acted on conjectures or surmises.

14. We are, therefore, unable to agree with the answer to the second question recorded by the High Court. The answer recorded by the High Court on the second question will be discharged and an answer in the affirmative will be recorded on that question.

15. The third question has not been answered by the High Court, and it need not be answered by us. The scope of the question is, having regard to the order of the Tribunal, obscure. If the visit of an assessee to the taxable territory is occasional or casual, obviously he is not a resident. If the question is intended to open an enquiry whether the visits of an assessee to the taxable territory in connection with his business may in certain circumstances be regarded as occasional or casual, we do not think it arises out of the order of the Tribunal and we do not propose to enter upon that enquiry. The third question does not arise out of the order of the Tribunal; it does not relate to the facts of the case, and is again abstract and hypothetical.

16. The appeals are therefore allowed. The order passed by the High Court is set aside. The Commissioner will be entitled to his costs in these appeals. One hearing fee.

17. Appeals allowed.