M/S. Moosa S. Madha and Azam S. Madha

Vs

The Commissioner of Income Tax, West Bengal, Calcutta

Civil Appeal No. 491 of 1970

(K.S. Hegde, P. Jagmohan Reddy, H.R. Khanna JJ)

06.02.1973

JUDGMENT

HEGDE, J. -

1. This is an appeal by certificate. It arises from the decision of the High Court of Calcutta in reference under Section 66(1) of the Income Tax Act, 1922 (to be hereinafter referred to as the Act). It relates to the assessee's income tax assessment for the assessment year 1948-49, the relevant accounting year being the calendar year 1947.

2. The material facts as could be gathered from the statement of case submitted by the Tribunal are as follows.

3. The assessee, one S. C. Madha (since deceased) appears to have migrated with his father to Burma in about the year 1901. They were originally the residents of the village Variav in the erstwhile State of Baroda. In Burma the assessee carried on business in soap and umbrella. It is seen that he was a successful businessman. The assessee's father died in 1936 and thereafter, the business was carried on by a partnership consisting of the assessee and his sons. The assessee had ancestral property in Variav. He purchased a plot of land in Bombay in 1942. After the bombing of Burma in 1942, the assessee came over to India and remained in India till 1946. He returned to Burma in February 1946. Under instructions from the partnership firm, the firm's bankers, the National Bank of India Limited, Rangoon, remitted to Calcutta in the year 1946 a sum of Rs. 5 lakhs, and the same was credited to the assessee's account. Again on October 26, 1947, a further sum of Rs. 2 lakhs was transferred by the bankers of the partnership to the National Bank of India Ltd., Calcutta and credited in the name of the assessee. Out of the total amount of Rs. 7 lakhs remitted from Rangoon, Rs. 5 lakhs was utilised by the assessee for the purchase of two properties in Calcutta; one in the year 1948 and the other in the year 1949. On April 8, 1953, the assessee filed a voluntary disclosure petition before the Income Tax Department at Calcutta and followed up the same with nine voluntary returns for the assessment years 1944-45 to 1952-53, disclosing certain incomes from the properties in India as well as from his business in Burma during those assessment years. As those returns were not filed within time the Income Tax Officer took proceedings under Section 34(i)(a) of the Act for the assessment years 1947-48 and 1948-49. The Income Tax Officer assessed the assessee in the status of a 'resident' but 'not ordinarily resident' on a total income of Rs. 6,24,478 for the assessment year 1947-48 and Rs. 3,55,214 for the assessment year 1948-49. In determining assessee's residential status in these two assessment years the Income Tax Officer relied on the facts stated by the assessee in his voluntary disclosure statements as well as on the affidavit filed by him. He also took into consideration the fact that the assessee had purchased a property in Bombay in the year 1942 and the further fact that in the years 1948 and 1949 he had purchased two premises in

Calcutta.

4. Aggrieved by the order of the Income Tax Officer the assessee went up in appeal to the Assistant Appellate Commissioner. The Assistant Appellate Commissioner remanded the case back to the Income Tax Officer for the reason that on the materials collected by the Income Tax Officer, he was unable to come to any firm conclusion. Thereafter the Income Tax Officer held further enquiries and reached the very conclusion which he had reached earlier. On appeal the Assistant Appellate Commissioner confirmed the order of the Income Tax Officer. On a further appeal, the Tribunal came to the conclusion that the assessment of the assessee for the assessment year 1947-48 was unsustainable and it accordingly set aside that order but it affirmed the assessee's assessment for the assessment year 1948-49.

5. The Tribunal came to the conclusion that the assessee was a 'resident' but 'not ordinarily resident' in India during the calendar year 1947. It further came to the conclusion that the amounts remitted from Rangoon to Calcutta were remitted by the assessee for his use in India. It also held that the amounts remitted formed part of the assessee's accrued profits.

6. Aggrieved by the decision of the Tribunal the assessee moved the Tribunal to submit two questions of law to the High Court of Calcutta under Section 66(1). The Tribunal accepted that prayer and submitted the following two question to the High Court of Calcutta -

(i) On the facts and in the circumstance of the case, was there any material or evidence for the Tribunal to hold that the assessee was a resident but not ordinarily resident in the taxable territories for the assessment year 1948-49 ?

(ii) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the amount of Rs. 2 lakhs had been remitted to the taxable territories by the assessee during the accounting year out of his accrued profits of earlier years ?

7. The High Court answered both those questions in favour of the Revenue. Hence this appeal.

8. For deciding the question whether the assessee was a 'resident' in India but 'not ordinarily resident' in India in the calendar year 1947, we must first examine the scope of Section 4-A(a)(iii). That section reads :

> "For the purposes of this Act -
>
> (a) any individual is resident in the taxable territories in any year if he -
>
> #(i) .....(ii) .....##
>
> (iii) having within the four years preceding that year been in the taxable territories for a period of or for periods amounting in all to three hundred and sixty-five days or more, is in the taxable territories for any time in that year otherwise then on an occasional or casual visit;
>
> #(iv) ....."##

9. To determine whether this provision applies to the facts of the present case we must find out -

(1) Whether during the first of January, 1943 to 31st of December, 1946 the assessee was in India for a period of three hundred and sixty-five days or more;

(2) Whether the assessee was in India at any time between the first of January, 1947 to 31st December, 1947; and

(3) Whether the presence of the assessee in India in 1947 was not an occasional or casual visit.

10. So far as the first two ingredients are concerned there is no dispute. It is admitted that the assessee was in India during the years 1943-46 for a period of more then three hundred and sixty-five days. It is also admitted that he was in India for a period of two months in the year 1947. Therefore, the only question that requires to be decided is whether his visit to India in 1947 was occasional or casual. The burden of proving this point is undoubtedly on the assessee. The Department cannot be expected to prove a negative. The assessee knows best why he stayed in India for a period of two months in 1947. This question is no more res integra. In Commissioner of Income Tax v. West Bengal v. B. K. Dhote ((1967) 66 ITR 457 (SC.), this Court ruled that in order that the assessee may be treated as resident in British India under Section 4-A(a)(iii) of the Act the onus of proving that the assessee was in British India during the four years preceding the previous year for a period of or for period amounting in all to three hundred and sixty-five days and in the relevant previous year at any time, lies upon the Department. But if these two conditions are established or admitted, the onus lies upon the assessee to prove that his visits in the previous year were occasional or casual. In the present case it may be noted that the Income Tax Officer, the Assistant Appellate Commissioner, the Tribunal as well as the High Court have come to the conclusion that the assessee failed to prove that his visit to India in 1947 was casual or occasional. This is essentially a finding of fact. Hence the only point that calls for decision is whether the finding reached by the Tribunal is unsupported by any evidence. We have earlier stated the legal position. The burden of proving that the assessee's visit to India in 1947 was occasional or casual is on the assessee. According to the Tribunal the assessee had not discharged that burden. The assessee had produced no evidence whatsoever to prove that his visit during the year in question was occasional or casual. Worst still is, in the affidavit filed by him before the Department he merely stated that he visited India for a period of two months in 1947 but did not state the reason for visiting India nor did he state that his visit was occasional or casual. In the face of this affidavit it is idle for the assessee to contend that the Tribunal came to an erroneous conclusion in holding that he did not discharge the burden of proving that his visit to India in 1947 was occasional or casual.

11. The sole circumstance on which Mr. Goswami, the learned counsel for the appellant, relied on was that the assessee has no business in India. The fact that the assessee had no business in India during the period of his stay of two months in India does not discharge the onus which is placed on the assessee to show that his visit to India was occasional or casual.

12. For the reasons mentioned above we agree with the High Court in the answer given to the first question.

13. Now turning to the second question, admittedly the assessee had no business in India. He had not explained why in the year 1947, Rs. two lakhs were remitted from Burma to India. It is seen from the evidence on record that the assessee did purchase a house in Calcutta in 1948. The assessee contended before the Tribunal as well as before the High Court that the money transferred from Burma to India was his capital asset and not income earned from business in Burma. This was a matter which the assessee had to prove. He has failed to prove the same. Even though the Income

Tax Officer gave him several opportunities to produce his Account Books to establish his case that the money remitted to India did not represent his business income, he failed to produce his Account Books. It was contended by Mr. Goswami that he produced certified photostat copies of his accounts before the Tribunal and the Tribunal erred in not considering those documents. In the first place it must be noted the assessee has no satisfactory explanation for not producing his account books before the Income Tax Officer as well as the Assistant Appellate Commissioner. Photostat copies have very little evidentiary value. Further it is seen from the order of the Tribunal that there is no reference to the photostat copies in that order. It does not appear from that order that any reliance was placed on those documents before the Tribunal. The complaint that the Tribunal ignored those documents without good reasons does not appear to have been made in the application filed by assessee under Section 66(1). The statement of case submitted by the Tribunal does not refer to that fact. Admittedly the assessee did not take up any question regarding those documents. Hence the High Court is fully justified in not considering those documents. In our opinion the Tribunal was right in its conclusion that the remittance of Rs. two lakhs from Burma to India during the year 1947 is not proved to be the capital asset of the assessee. Hence, there is no reason to interfere with that finding of the Tribunal. In this respect also we are fully in agreement with the High Court. For the reason mentioned above this appeal fails and the same is dismissed with costs.

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