SUPREME COURT OF INDIA

Pradip J.Mehta

Vs.

Commissioner of Income Tax

C.A.No.4291 of 2002

(Ashok Bhan and Dalveer Bhandari,JJ.)

11.04.2008

JUDGMENT

Ashok Bhan, J.

1. Assessee is the appellant herein.

2. In this appeal the assessee has challenged the final judgment and order dated 3rd May, 2002 passed by the High Court of Gujarat in ITR No. 7 of 1988. The High Court has disposed of the Reference upholding the view taken by the Income Tax Appellate Tribunal, Ahmedabad Bench-A (for short "the Tribunal") that the status of the assessee for the assessment year 1982-83 was not that of "not ordinarily resident". The High Court also recorded that the Tribunal has not committed any error in interpreting the provisions of Section 6(6) of the Income Tax Act, 1961 (for short "1961 Act").

3. Brief facts of the case culminating into filing of the present appeal, are as under:

4. The assessee was appointed as Marine Engineer by Wallem Shipping Management Ltd., Hong Kong on 5th October, 1976 and, during the course of his employment, he was posted to work on high seas and paid abroad for many years. The assessee while filing his return for the assessment year 1982-83 (for short "relevant year") claimed the status of "not ordinarily resident in India" as defined in Section 6(6)(a) of the 1961 Act and to exclude income accruing outside India under Section 5(1)(c) of the 1961 Act, which provides that in the case of a person not ordinarily resident in India within the meaning of sub-section (6) of Section 6, the income which accrues or arises to him outside India shall not be so included in his total income.

5. Relevant portion of Sections 5 and 6 of 1961 Act is quoted as under: "Section 5 - Scope of total income

> “(1) Subject to the provisions of this Act, the total income of any previous year of a person who is a resident includes all income from whatever source derived which

(a)

(b)

(c) accrues or arises to him outside India during such year:

Provided that, in the case of a person not ordinarily resident in India within the meaning of sub-section (6) of section 6 the income which accrues or arises to him outside India shall not be so included unless it is derived from a business controlled in or a profession set up in India."

"Section 6 - Residence in India For the purposes of this Act,-

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[(6)A person is said to be "not ordinarily resident" in India in any previous year if such person is-

(a) an individual who has not been resident in India in nine out of the ten previous years preceding that year, or has not during the seven previous years preceding that year been in India for a period of, or periods amounting in all to, seven hundred and thirty days or more ; or ."

6. As the assessee was not resident in India in 9 out of 10 previous years preceding that year (which is finding of fact), he claimed the status of "not ordinarily resident" for the relevant year.

7. The Assessing Officer by his Order dated 3rd September, 1984 refused to grant the assessee the status of "not ordinarily resident" for the relevant year, on the ground that the assessee was a non-resident in India for only 3 years during the last 10 years and during the past 7 years he had stayed in India for more than 730 days. The Assessing Officer found that the assessee had resided in India for the period which is shown below, in the last nine previous years:

Sr. No.	financial Year	Stay in India
(1)	1980-81	91
(2)	1979-80	62
(3)	1978-79	272
(4)	1977-78	50
(5)	1976-77	197
(6)	1975-76	365
(7)	1974-75	365
(8)	1973-74	365

(9)	1972-73	365

8. The Assessing Officer further found that in view of the provisions of Section 6(6)(a) of the 1961 Act, the assessee was required to fulfil either of the following two conditions to claim the status of "not ordinarily resident":

> "(1) in nine out of ten previous years, he should not be resident in India, or
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> (2) he should not have stayed in India for a period of seven hundred thirty days or more during the last seven previous years."
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> The Assessing Officer came to the conclusion that, during the last 9 previous years, the assessee was non-resident for only three years and during the last seven previous years, he had stayed in India for a period of 1,402 days. It was held that the status claimed by the assessee of 'not ordinarily resident' was not acceptable.

9. Assessee being aggrieved by the order of the Assessing Officer, filed an appeal before the CIT (Appeals), who, by his order dated 13th of August, 1985 while concurring with the view taken by the Assessing Officer, dismissed the appeal. Further appeal filed by the assessee before the Tribunal was also dismissed on 24th of July, 1987.

10. The assessee thereafter filed an Application before the Tribunal under Section 256(1) of the 1961 Act (as it existed at the relevant time) seeking following two questions of law to be referred to the jurisdictional High Court for its opinion:

> "(1) Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the status of the assessee for the year in question was not that of 'resident but not ordinarily resident' as claimed by him?
>
> (2) Whether the Tribunal has erred in law in interpreting provisions of section 6 of the Act while holding that the assessee's case did not fall within the purview of section 6(6) of the Act as claimed by him in view of undisputed position of his status in relation to preceding ten years?"

11. Accordingly, the aforesaid two questions were referred to the High Court for its opinion. The High Court by the impugned judgment and order upheld the orders impugned before it and answered the reference in favour of the Revenue and against the assessee.

12. The High Court refused to grant the status of "not ordinarily resident" as contemplated under Section 6(6)(a) of the 1961 Act by observing thus:

> "12. The short contention raised for the assessee was that section 6(6)(a) was applicable to this assessee who must be treated to be 'not ordinarily resident' in India,

because, he was resident in India in eight out of ten years preceding the previous year 1981-82 and not nine out of ten years. In other words, he would be an individual who is 'not ordinarily resident' in India even if for all the remaining eight years he is a resident in India within the meaning of section 6(1) of the Act. Only if the assessee, has been resident in India for nine out of ten years, he will be ordinarily resident in India, otherwise he will be 'not ordinarily resident' in India. This contention though appearing to be attractive at first blush, is not at all warranted by the provisions of section 6(6)(a) of the Act. Section 6(6) does not define 'ordinarily resident in India' but describes 'not ordinarily resident' in India. It resorts to the concept of 'resident in India' for which criteria is laid down in section 6(1)of the Act. On its plain construction clause (a) of section 6(6) would mean that if an individual has in all the nine out of ten previous years preceding the relevant previous year not been resident in India as contemplated by section 6(1), he is a person who is 'not ordinarily resident' in India. To say that an individual who has been resident in India for eight years out of ten preceding years should be treated as 'not ordinarily resident' in India, does not stand to reason and such contention flies in the face of the clear provision of clause (a) of section 6(6) which contemplates the period of nine years out of ten preceding years of not being a resident in India before an individual could be said to be 'not ordinarily resident' in India, which position will entitle such person to claim exemption under section 5(1)(c) of the Act in respect of his foreign income. An individual who has not been resident in India, within the meaning of section 6(1), for less than nine out of ten preceding years does not satisfy that statutory criteria laid down for treating such individual as a person who can be said to be 'not ordinarily resident' in India, as defined by section 6(6). A resident of India who goes abroad and is not a resident in India for two years during the preceding period of ten years will therefore, not satisfy the said condition of not being a resident of India for nine out of ten years."

13. It may be mentioned here that the Assessee had cited the following judgments before the High Court to support his claim:

" (A) The decision of the Patna High Court in *C.N. Townsend v. CIT*[1] for the proposition that, if any of the conditions mentioned in clauses (a), (b) or (c) of section 6(1) of the 1961 Act is fulfilled, the assessee will be a 'resident' within the meaning of the 1961 Act and if he comes within the mischief of either of the two conditions mentioned in section 6(6)(a), he will be treated as 'not ordinarily resident'. In that case, the assessee came to India in April, 1964, and continued to stay in India till the end of March, 1965, and therefore, it was held that he clearly fulfilled the condition laid down in sub-section (6)(1)(a) of the 1961 Act and as such, was a 'resident in India' during the previous year in question. It was held that the assessee, however, could not be treated as 'ordinarily resident' in India as he fell within the first condition in section 6(6)(a) namely, that he was not resident in India in nine out of ten previous years preceding the year 1964-65 even though he did not come within the mischief of the second condition.

(B) The decision of the Authority for Advance Rulings, In re Advance Ruling A. No. P-5 of 1995 [(1997) 223 ITR 379 (AAR)], to point out that the said authority while construing the meaning of the expression 'resident but not ordinarily resident', held that the correct construction of Section 6(6)(a) of the 1961 Act was that, a person would become `ordinarily resident' only if (a) he has been "resident" in nine out of ten preceding previous years; and (b) has been in India for at least 730 days in the seven preceding previous years and that, he will be treated as resident but not ordinarily resident if either of these condition is not fulfilled.

(C) The decision of the Bombay High Court in *Manibhai S. Patel v. CIT*[3] for the proposition that, in order, that an individual is `not ordinarily resident' in the taxable territories, he should satisfy one of the two conditions laid down in Section 4B(a) of the Indian Income Tax Act, 1922 (which corresponded to Section 6(6)(a) of the 1961 Act). It was held that, under Section 4B(a), what was required to be considered was the assessee's residence in the 'taxable territories' and not his residence outside the 'taxable territories'. If the assessee had been in the 'taxable territories' for more than two years in the preceding seven years, then he does not satisfy the second condition laid down in Section 4B(a) and would, therefore, not be 'not ordinarily resident' in the taxable territories. In that case, the assessee was living in Africa for four years out of the preceding seven years and he was in the 'taxable territories' for about three years and the question was whether he was 'not ordinarily resident' in 'taxable territories' under the second part of Section 4B(a). It was held that, he did not satisfy the second condition.

(D) The decision of the Travancore-Cochin High Court in *P.B.I. Bava v. CIT*[3] to point out that, in the context of section 4B(a) of the Indian Income Tax Act, 1922, the High Court had held that a person was not ordinarily resident in any year unless he satisfies both of the conditions of the said provision which make a person ordinarily resident, namely, (i) the condition that he must have been resident, in nine out of ten years preceding that year, and (ii) the condition that he must have been, here for periods of more than two years during the seven years preceding that year. It was held that a person is 'not ordinarily resident' in India in the previous year if he has not been 'resident' in nine out of the ten years preceding that year; he need not establish that he was 'not resident' in nine out of the ten years. It was observed that 'not resident' and 'not ordinarily resident' are not positive concepts but only the converse of 'resident' and 'ordinarily resident' and a category of persons 'not resident and not ordinarily resident' is impossible to imagine and unknown to the Act.

14. The aforesaid decisions cited by the assessee have been noted by the High Court. The High Court answered the reference in favour of the revenue and against the assessee, without either agreeing or disagreeing with the view taken by the various High Courts and the Authority for Advance Ruling, which is presided over by a retired Judge of the Supreme Court.

15. Section 6(6)(a) of the 1961 Act corresponds to and is pari materia with Section 4B of the Income Tax Act, 1922 (for short "1922 Act"). Section 4B of 1922 Act reads thus:

> "4B. Ordinary Residence For the purpose of this Act (a) an individual is `not ordinarily resident' in British India in any year if he has not been resident in British India in nine out of the ten years preceding that year or if he has not during the seven years preceding that year been in British India for a period of, or for periods amounting in all to, more than two years."

16. The proposed definition of "resident" and "not ordinarily resident" was enacted by the British Rulers, i.e., the officers of the Indian Civil Services and those in armed forces serving in India, who were absent from India on furlough for a year out of every four years so that they could be treated as "not ordinarily resident" and avoid tax on income in their home country, notwithstanding continuous stay and service in India.

17. The High Court of Travancore and Cochin in PBI Bava v. CIT [supra] while interpreting Section 6(a) of the Travancore Income Tax Act, corresponding to Section 4B(a) of the 1922 Act, relying upon the speech of Sir James Grigg during the assembly debates on Section 4B, where he had said:

> "a man is not ordinarily resident unless he satisfies both of those conditions amount to saying that he must have been resident in nine out of ten years and he must have been here for substantial periods in the preceding seven years." and the notes embodied in the Travancore Income Tax Rules:"An individual is ordinarily resident in Travancore if he has been resident as defined above in 9 out of 10 years preceding that year and has been in Travancore for periods amounting in all to more than 2 years during the 7 years preceding that year".
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> held that:
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> "The clause no doubt is a model of ambiguous and obscure drafting" as observed by Sir Jamshedji Kanga in his "Law and Practice of Income-tax" (p.362) but the basic outlines are clear enough to support the conclusion reached by the Appellate Assistant Commissioner of Income-tax, Trivandrum. His approach was right when he said :"In my opinion, the only direct way of deciding whether the appellant was 'not ordinarily resident' in the relevant years is to formulate and answer the direct question, 'Has the appellant been resident in Travancore in 9 out of such 10 years?' This question permits of only one answer and that answer is an emphatic 'No'. When such is the answer to the question, how can I help treating the appellant as 'not ordinarily resident'? The answer which the Income-tax Officer seeks to get can be obtained only if the question could be framed as 'Has the appellant been not resident (or non-resident) in Travancore in 9 out of such 10 years?' But this is not the direct question but very indirect and roundabout and is, in my opinion, quite inappropriate."

18. The Bombay High Court in Manibhai S. Patel v. Commissioner of Income Tax [supra], held:"...the Legislature is primarily concerned with the residence of the assessee in the taxable territories, and in order that an assessee should be "not ordinarily resident" in the taxable territories what has got to be considered is his residence in the taxable territories..."

19. The Patna High Court in C.N. Townsend v. CIT, Bihar [supra] where the assessee came to India in April, 1964 and continued to stay in India till the end of the March 1965, held:

> "he clearly fulfilled the conditions laid down in Sub-section (1)(a) of Section 6 of the Act and as such he has been rightly held to be a "resident" in India during the previous year in question. The assessee, however, could not be treated as "ordinarily resident" in India as he came within the mischief of the first condition laid down in Sub-section (6)(a) of Section 6, namely, that he was not resident in India in nine out of the ten previous years preceding the year 1964-65, though he did not come within the mischief of the second condition."

20. In the decision of the Authority for Advance Ruling In re Advance Ruling A. No. P-5 of 1995 [supra), it was held:

> " It seems correct to construe the definition as providing that a person will become resident and ordinarily resident only if (a) he has been "resident" in nine out of the ten proceeding previous years, and (b) has been in India for at least 730 days in the seven preceding previous years and that he will be treated as resident but not ordinarily resident if either of these conditions is not fulfilled"

21. The Income Tax Act of 1922 was replaced by the Income Tax Act of 1961. The Law Commission of India has recommended the total abolition of the provisions of ection 4B of the 1922 Act defining "ordinary residence" of the taxable entities. The Income-tax Bill, 1961 (Bill No. 27 of 1961) did not contain any such provision. On the legislative anvil, it was felt necessary to keep the provisions of Section 4B of the 1922 Act in tact and, therefore, Section 6(6) had to be enacted in the 1961 Act. Referred to Chaturvedi & Pithisaria's Income Tax Law, Fifth Edition, Volume I, 1998 page 565.

22. Further, in the same book the departmental circular being C.I.T., W.B.'S Circular letter No. J/28320/4A/10/5/58-59, dated Calcutta, the 5th December, 1962, addressed to the Secretary, Indian Chamber of Commerce, Calcutta, has been cited, which states as under:

> "I am directed to refer to the correspondence resting with the Ministry of Finance (Department of Revenue) letter No. 4/22/61-IT(AT), dated 25th November, 1961, and to state that the Department's view has all along been that an individual is "not ordinarily resident" unless he satisfies both the conditions in section 4B(a), i.e., --
>
> (i) he must have been a resident in nine out of ten preceding years; and
> (ii) he must have been in India for more than two years in the preceding seven years.

Thus, a person will be "resident and ordinarily resident" if both these conditions are satisfied but he will be "resident but not ordinarily resident" if either of those conditions is not satisfied."

23. It may be noted here that the Parliament has amended Section 6(6) of the 1961 Act by Finance Act 2003 w.e.f. 1st April, 2004, which reads as under:

"Section 6

(6) A person is said to be "not ordinarily resident" in India in any previous year if such person is-(a) an individual who has not been resident in India in nine out of the ten previous years preceding that year, or has not during the seven previous years preceding that year been in India for a period of, or periods amounting in all to, seven hundred and thirty days or more; or

"

However, the said amendment will not be applicable to the present case as the notes on clauses of the Finance Bill, 2003 provide that the said amendment will have effect only from 1st April, 2004."

24. Although the judgments referred to above, were cited at the bar in the High Court, which were taken note of by the learned Judges of the Bench of the High Court, but without either recording its agreement or dissent answered the two questions referred to it in favour of the Revenue. Judicial decorum, propriety and discipline required that the High Court should, especially in the event of its contra view or dissent, have discussed the aforesaid judgments of the different High Courts and recorded its own reasons for its contra view. We quite see the fact that the judgments given by a High Court are not binding on the other High Court(s), but all the same, they have persuasive value. Another High Court would be within its right to differ with the view taken by the other High Courts but, in all fairness, the High Court should record its dissent with reasons therefor. The judgment of the other High Court, though not binding, have persuasive value which should be taken note of and dissented from by recording its own reasons.

25. Otherwise also, we find ourselves in agreement with the view taken by the three High Courts, namely, the Patna High Court in *C.N. Townsend v. CIT, Bihar [supra],* the *Bombay High Court in Manibhai S. Patel v. Commissioner of Income Tax [supra] and the High Court of Travancore and Cochin in PBI Bava v. CIT [supra].*

26. The Law Commission of India had recommended that the provisions of Section 4B of 1922 Act defining "ordinary residence" of the taxable entities be deleted but the suggestion was not accepted by the Legislature. Rather, on the legislative anvil, it was felt necessary to keep Section 4B of 1922 Act in tact and, accordingly, Section 6(6), which corresponds to and is pari materia with Section 4B of 1922 Act, was enacted in 1961 Act. This shows the legislative will. It can be presumed that the legislature was in the know of the various

judgments given by the different High Courts interpreting Section 4B but still the legislature chose to enact Section 6(6) in the 1961 Act, in its wisdom, the legislature felt necessary to keep the provisions of 4B of 1922 Act in tact. It shows that the legislature accepted the interpretation put by the various High Courts prior to enactment of 1961 Act. It is only in the year 2003 that the Legislature amended Section 6(6) of the 1961 Act, which came into effect from 1st April, 2004.

27. It is well settled that when two interpretations are possible, then invariably, the Court would adopt the interpretation which is in favour of the tax payer and against the Revenue. Reference may be made to the decision in *Sneh Enterprises v. Commissioner of Customs, New Delhi*[4] of this Court wherein, inter alia, it was observed as under:

"While dealing with a taxing provision, the principle of "Strict Interpretation" should be applied. The Court shall not interpret the statutory provision in such a manner which would create an additional fiscal burden on a person. It would never be done by invoking the provisions of another Act, which are not attracted. It is also trite that while two interpretations are possible, the Court ordinarily would interpret the provisions in favour of a tax-payer and against the Revenue."

28. This Court in a catena of decisions, has held that the circulars issued by the Department are binding on the Department. See*: K.P. Varghese v. ITO*[5] *UCO Bank v. CIT, W.B.*[6] *Collector of Central Excise Vadodra v. Dhiren Chemical Industries*[7] etc. In all these cases it has been held that the circulars issued under the Income Tax Act or Central Excise Act are binding on the Department. It may be noted that in the circulars issued by the Commissioner of West Bengal, reference has been made to the correspondence resting with the Ministry of Finance (Department of Revenue) letter No. 4/22/61-IT(AT), dated 25th November, 1961, wherein it is stated that the department's view has all along been that an individual is "not ordinarily resident" unless he satisfies both the conditions in Section 4B(a), i.e., (i) he must have been a resident in nine out of ten preceding years; and (ii) he must have been in India for more than two years in the preceding seven years. In the present case, the Circular issued by the Board in which the opinion of the Central Government the Ministry of Finance (Department of Revenue) letter No. 4/22/61-IT(AT), dated 25th November, 1961 has been noted, the interpretation similar to the one put by the various High Courts on Section 4B has been accepted to be the correct position.

29. In these circumstances, a person will become an ordinarily resident only if (a) he has been residing in nine out of ten preceding years; and (b) he has been in India for at least 730 days in the previous seven years.

30. Accordingly, this appeal is accepted. The order passed by the High Court and the Authorities below are set aside. It is held that the High Court in the impugned judgment has erred in its interpretation of Section 6(6) of the Act and the view taken by Patna High Court, Bombay High Court and Travancore-Cochin High Court has laid down the correct law. The two questions of law referred to above are answered in favour of the assessee and against the revenue. No costs.

Judgment Referred.

[1](1974) 97 ITR 0185 (Pat)
[2](1953) 23 ITR 0027 (Bom)
[3](1955) 27 ITR 0463 (Trav. & Coch)
[4](2006) 7 SCC 0714
[5](1981) 4 SCC 0173
[6](1999) 4 SCC 0599
[7](2002) 2 SCC 0127