

Capt. A.L. Fernandes Vs. Ito

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Court : Mumbai

Decided On : Dec-19-2001

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Appeal No. : ITA No. 5562/Bom/1989 19 December 2001 A.Y. 1983-84

Appellant : Capt. A.L. Fernandes

Respondent : ito

Advocate for Pet/Ap. : M.K. Patil, *for the Assessee* Manohar Chudji & A.K. Tiwari, *for the Revenue*

Judgement :

ORDER

M.K. Chaturvedi, J.M.

15th Dec., 1994

This appeal by the assessee is directed against the order of the Commissioner (Appeals)-XXII, Bombay (Mrs. Shobha Majumdar), and pertains to the assessment year 1983-84.

2. The solitary dispute neatly identified by Shri V.H. Patil, is crystallized here as under :

'Whether, on the facts and in the circumstances of the case, the amount of salary received by the assessee from Mogul Lines Ltd. for rendering services on the board of a ship, when the ship was floating outside the territorial water of India, can be considered as salary received for rendering services outside India?

How it is to be treated for the tax purposes?'

3. The assessee is an employee of the Mogul Lines Ltd., a Government of India undertaking. He was holding the rank of Master. He rendered services on the ship 'Lok Nayak' from 1-5-1982 to 9-9-1982 and on 'Lok Vinay' from 15-10-1982 to 31-3-1983. On these dates abovenamed ships were floating outside the territorial water of India. It is mentioned on the certificate dated 27-7-1983, issued by the Mogul Lines Ltd. that during this period, the assessee rendered services outside India. On 31-9-1983, the assessee filed its return of income in the status as 'Resident'. Subsequently, the return was revised and the status was taken as non-resident. The amount of salary as reflected in the original return was consequently reduced on the ground that the, assessee had rendered services outside India from 1-5-1982 to 9-9-1982, and from 15-10-1982 to 13-3-1982. The assessing officer held that the claim of the assessee was not tenable since the employer of the assessee M/s. The Mogul Lines Ltd. was a Central Government undertaking. The contract of the employment was entered in India. The services had been rendered by the assessee in accordance with the terms of employment. The final settlement of accounts regarding the payment had also been settled in India. The assessee was on board of an Indian vessel flying the Indian flag and, therefore, according to him, the payment deemed to be accrued and arising in India. On this factual backdrop the entire salary income was held exigible to tax in India. The order of the assessing officer was confirmed by the Commissioner (Appeals).

4. Shri V.H. Patil, the learned counsel for the assessee, appeared before us. It was vehemently argued that the theory, that the ship bearing the National flag of the State, is for the purpose of jurisdiction be treated as if it is the floating island of that state, has undergone many changes and now this fiction had been rejected by modern authorities and by court decisions. Our attention was invited on page 107 of the book by the title 'Basic Concepts of International Law' by Charles S. Rhyne,

CLB Publishers, 1971 Edition.

5. Keeping in view, the changes in International Law and considering the practical aspect of the matter, the Central Board of Direct Taxes has also adopted a pragmatic view. In Circular No. 526, dated 28-11-1990, it is clarified that the term 'Indian' as defined in section 2(25A) of the Income Tax Act, 1961, does not extend to Indian ships operating beyond Indian territorial waters. Our attention was also invited on the CBDT Circular No. 356, dated 17-3-1983 (published at (1983) 37 CTR (St) 1) wherein similar view was taken.

6. Shri Patil took us through some Tribunal decisions in order to demonstrate that on this aspect there was a cleavage of judicial opinion. In the case of Capt. A.L. Kapoor, I.T.A. No. 3241/Bom/84, dated 25-3-1988, the Tribunal dismissed the assessee's appeal, following the floating island theory. In the case of Shri Avtar Singh Wadhwan, ITA No. 5140/Bom/1982, dated 11-8-1986, the Tribunal decided the issue in favour of the assessee following the CBDT Circular No. 356, dated 17-3-1983 (1983) 142 ITR 117).

7. Coming to the applicability of the decision of the Gujarat High Court rendered in the case of CIT v. S. G. Pgnatale : [1980]124ITR391(Guj) , Sri Patil submitted that the effect of this decision has been nullified as a result of the insertion of Explanation to section 9(1)(ii) by the Finance Act, 1983, with retrospective effect from 1-4-1979.

8. Shri Manohar Chudji, the learned Departmental Representative, appeared before us. It was contended that the ship bearing national flag of the state is for the purposes of jurisdiction treated as if it were territory of that state on the principle that it is virtually a floating island. This theory still holds good in the International Law. The learned Departmental Representative further submitted that in the famous 'Law of the Flag' case of National Maritime Union and McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 937, 83 Sup. Ct. 877. 9 L.Ed. 2d 767 (1963), the Supreme Court of the United States, upheld the 4000 year old rule of International Law that the law of the flag governs in matters relating to seamen on board a ship. In this background, it was argued that the Tribunal took a correct view in the case of Capt. A.L. Kapoor (supra) and the issue

in the present case may be decided accordingly.

9. It was further submitted that the words occurring in section 9(1)(ii), 'earned in India', ought to be interpreted as 'arising or accruing in India'. So long as the liability to pay the amount under the head 'Salaries' arises in India, section 9(1)(ii) can be invoked. For this proposition, the learned Departmental Representative relied on the case of CIT v. S.G. Pgnatale (supra). It was stated that in the instant case the contract of employment was in India.

The final settlement of account was also made in India. Therefore, the ruling of the Gujarat High Court can be applied in the facts of the present case.

10. We have heard the rival submissions in the light of the materials placed before us and precedents relied upon. We have noted that the Tribunal in some of the cases followed the law of the flag theory and treated the ship as a floating island. Following quotation from 'Introduction to International Law' by J. G. Starke (8th Edition) is relevant in the matter :

'For the purpose of territorial jurisdiction, besides actual territory, it has been customary to assimilate the following to state territory

(a)

(b) A ship bearing the national flag of the state wishing to exercise jurisdiction.

(c)

(at P. 264)

'Floating Island-A ship bearing the national flag of a state is for purposes of jurisdiction treated as if it were territory of that state, on the principle that it is virtually a 'floating island'. (at p.266).

11. Mr. Charles S. Rhyne discussed the issue in his book at page 107. It was observed by the learned author that states have some jurisdiction over both public and private vessels within their own waters. For many years it was held by the fiction of extra territoriality, that a merchant ship was 'part of the territory of the

country whose flag it flies', but this fiction has been rejected by modern authorities and by court decisions. Claims to jurisdiction over foreign vessels, when within the waters of a given state, have varied. According to United States practice, private merchant ships are subject to the jurisdiction of the United States only when they disturb the 'public peace', acts involving the 'internal order of the vessel', are under the jurisdiction of the State whose flag the ship flies. France, on the other hand, assumes jurisdiction only when a certain act adversely affects a person other than those belonging to the ship. A British law provides that all acts committed within a marine league are subject to British jurisdiction.

12. In the case of *Regina v. Anderson* (Cox's Criminal Cases 198), it was decided by the court of Criminal Appeal of Great Britain in 1868, that an individual may be subject to the State of which he is a citizen, the state in whose port the offence was committed, and the State which flies the flag of the vessel on which the act was committed.

13. From the aforesaid discussion, it appears that the law has undergone change on this aspect. The floating island theory though remained alive even after the flux of 4000 years, but the undercurrent of the theory passed through many vicissitudes. Correct profile of law emerges only when things are decided in consonance with the principles of justice. Law is not a brooding omnipotence in the sky, but a pragmatic instrument of social order. It is an operational art controlling economic life, and interpretative effort must be imbued with the statutory purpose. The mariners of Indian origin who worked on the foreign ship got favoured tax treatment in view of the floating island theory. Those who worked on the ships belonging to their own country had difficulty in obtaining the tax concessions. Mariners working on foreign ships while in high seas were treated as rendering service in a foreign country, whereas the mariners rendering service on Indian ships while in high sea were treated as rendering service in India. This caused disparity in the tax treatment.

14. The Central Board of Direct Taxes made a clarification to remove such disparity. We reproduce the relevant Central Board of Direct Taxes circular :

'Clarification regarding liability to income-tax in India and deduction of tax at source of members of the crew of foreign-going Indian ship.

1. A person resident in India in any year is liable to pay tax in India on his global income. A non-resident, on the other hand, is charged to tax in India only on income which is received or is deemed to be received in India or which accrues or arises or is deemed to accrue or arise to him in India. Thus, in the case of a non-resident, income which accrues or arise outside India and is also received outside India is not subjected to tax in India.

2. After the amendment made in section 6 of the Income Tax Act, 1961 by the Finance Act, 1990 with effect from 1-4-1990, an Indian citizen who is a member of the crew of an Indian ship as defined in clause (18) of section 3 of the Merchant Shipping Act, 1958, is regarded as a resident in India only if he is in India for 182 days or more during the relevant year irrespective of the extent of his stay in India in earlier years. For this purpose, it is necessary to note that the term 'India' as defined in section 2(25A) of the Income Tax Act, 1961, does not extend to Indian ships operating beyond Indian territorial waters. However, if he is outside India and comes on a visit to India in any year, and leaves India otherwise than as a member of the crew of an Indian ship, he will be regarded as a resident in India if his stay in India during that year is for 150 days or more if during the 4 years preceding that year he has been in India for 365 days or more.

3. Thus, generally, Indian members of the crew of foreign-going Indian ship would be non-resident in India if they are on board such ship outside the territorial waters of India for 182 days or more during any year. Accordingly, such seamen will be charged to tax in India only in respect of earnings received in India or the earnings for the period when, they are working within the Indian waters on coastal ships, etc.

4. Under section 192 of the Income Tax Act, persons responsible for paying salary and other incomes chargeable under Income Tax Act under the head 'Salaries' are required to deduct income-tax from such income at the time of payment. For this purpose, the amount of tax to be deducted is computed at the average rate of income-tax arrived at by applying the rates in force for the financial year in which

the payment is made on the estimated income of the persons to whom salary is paid. Since, as explained above, in the case of members of crew of foreign-going Indian ships, who are not likely to be in India for a period or periods exceeding 182 days in a year, income which accrues or arises outside India and is also received outside India is not liable to tax in India, the shipping companies and other persons responsible for paying salary to such members of crew may take these factors into account while computing the amount to be deducted as tax and deduct only so much of tax as would be chargeable on the estimated income liable to tax in India. If the shipping company or other person responsible for paying to such members of crew subsequently finds that any person who was earlier considered as not likely to be resident in India and deduction of tax at source was made on that basis is not likely to be resident in India, the shipping company or the other person responsible for making the payment, may increase the deduction so as to adjust the deficiency arising out of an earlier short-deduction or non-deduction during the same financial year.'

15. In view of the above, the Indian members of the crew of foreign-going Indian ship would be non-resident in India if they rendered services on the board of such ship outside the territorial waters of India for 182 days or more during that year. The circular of Central Board of Direct Taxes, therefore, mitigated the hardship and removed the disparity.

16. Coming now to the applicability of section 9(1)(ii), we find that the controversy is now set at rest by the insertion of Explanation. The relevant portion of the section is reproduced here as under :

'9. Income deemed to accrue or arise in India(1) The following income shall be deemed to accrue or arise in India :

(i)

(ii) income which falls under the head 'Salaries', if it is earned in India.

Explanation : For the removal of doubts, it is hereby declared that income of the nature referred to in this clause payable for service rendered in India shall be

regarded as income earned in India.'

This Explanation was inserted by the Finance Act, 1983 (11 of 1983) with retrospective effect from 1-4-1979.

This Explanation deals with the declaratory law. Therefore, it falls within the ken of Totidam Verbis (retroactive legislation). It declares that income chargeable under the head 'Salaries' payable for services rendered in India shall only be regarded as income earned in India. If the services are rendered outside India, the Explanation stipulates that the same shall not be considered as income earned in India. Therefore, the effect of the decision in S.G. Pgnatale (supra) has been nullified as a result of the insertion of this Explanation.

17. Reading the law as clarified in Explanation to section 9(1)(ii) in unison with the circular issued by Central Board of Direct Taxes, it is clear that the amount of salary in question which was received by the assessee for rendering services on the board of ship, while the ship was floating outside the territorial water of India, is not taxable in the facts of the present case.

18. In the result, appeal of the assessee stands allowed.

G.E. Veerabhadrappe, A.M.

17th Jan., 1995

I have gone through the order proposed by the learned Judicial Member. As I am not in a position to agree with the conclusions reached by him, I proceed to dissent in the following manner.

2. The facts of the case are clearly brought out in the order of the learned JM. At the cost of repetition, it may be stated that the assessee is an employee of The Mogul Line Ltd., a Government of India undertaking. He was engaged to utilise his services on the ships which were floating in the outside territorial water of India during the relevant previous year. The certificate issued by The Mogul Line Ltd. certifies that the assessee has rendered such services outside India. On that basis, it was claimed that the assessee is a non-resident and, therefore, the

income that accrued to the assessee in respect of the services rendered outside India is not includible in his total income. The learned Judicial Member has clearly brought out on record the various arguments taken by the parties and accepted the, assessee's contention. In taking that view, reference is extensively made to 'Introduction to International Law' by J.G. Starke (Eighth Edition) and also the circular issued by the CBDT bearing No. 526E and the provisions of section 9(1)(ii) are also discussed.

3. In my opinion, there is no dispute between us as regards the residential status of the assessee. The assessee, in our view, is 'non-resident' as his stay in India does not satisfy the test laid down for determining the residential status under section 6 of the Income Tax Act, 1961. In my opinion, the reference to the International Law and the circular issued by the Central Board of Direct Taxes is limited only for the purpose of determining the residential status of the assessee. Section 4 of the Income Tax Act creates a charge on the total income of the previous year. Section 5 determines the scope of total income. Such total income varies with the factor of residential status of the assessee. The scope of total income, according to section 5, is as follows :

'5. (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) is received or is deemed to be received in India in such year by or on behalf of such person; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year; or

(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.

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

(a) is received or is deemed to be received in India in such year by or on behalf of such person; or

(b) accrues or arises or is deemed to accrue to him in India during such year.

Explanation 1 : Income accruing or arising outside India shall not be deemed to be received in India within the meaning of this section by reason only of the fact that it is taken into account in a balance sheet prepared in India.

Explanation 2 : For the removal of doubts, it is hereby declared that income which has been included in the total income of a person on the basis that it has accrued or arisen or is deemed to have accrued or arisen to him shall not again be so included on the basis that it is received or deemed to be received by him in India.'

It would be clear from the above section that the income of a non-resident includes all income which

(a) is received or deemed to be received in India; or

(b) accrues or arises or is deemed to accrue or arise in India.

The charge on the basis of receipt in India applies to residents as well as nonresidents. It gains significance, however, only in relation to non-resident for, if a non-resident were to be charged on accrual or arisal basis, such portion of his income as accrues or arises abroad will be exempted from charge. If the income is received in India, it should be included in the total income irrespective of where the income accrues or arises. The expression 'received in India' does not find elaboration in the Income Tax Act except as the extension or inclusion of 'the income deemed to be received', which is dealt by section 7 of the Income Tax Act, 1961. In the case before us, the assessee has received the salary in India and, therefore, it should have been included in the total income of the assessee. I think, from the discussions made by the two revenue authorities in their orders and from

the facts of the case, there is no dispute on this aspect of the matter that the income is received in India. The receipt of salary is in India by or on behalf of the assessee. Now I come to the aspect of accrual or arising of income. 'Accrue' means arise or spring as a natural growth or result, to come by way of increase (Webster's Dictionary). 'Arise' means coming into existence or notice or presenting itself. The two words together mean to become a present and enforceable right' and 'to become a present right of demand'. In the facts of this case, the contract of employment of the assessee was with the Mogul Line Ltd., a Government of India undertaking. The contract of employment was entered in India. The rights arising out of such contract of employment are enforceable in India. Therefore, in my view, looked from this angle, the salary paid by The Mogul Line Ltd. accrued and arose to the assessee in India. Therefore, I am of the view, although the assessee is a non-resident, the salary that accrued or arose to him in India is includible in the total income. Now coming to the Circular No. 526E, dated 28-11-1990, of the Central Board of Direct Taxes, it is only in connection with the determination of the residential status of the person and has nothing to do with the determination of the scope of total income and was issued in the context of section 192 of the Income Tax Act, which deals with deduction of tax at source. In my view, the scope of the circular should not be stretched so as to exclude the taxability of income which falls within the ambit of section 5 of the Income Tax Act, 1961. Now I may examine the issue from the angle of the amendments to section 9(1)(ii) of the Act. Section 9(1)(ii) is reproduced as under :

'Income deemed to accrue or arise in India

9(1) The following income shall be deemed to accrue or arise in India :

(i)

(ii) income which falls under the head 'Salaries', if it is earned in India.

Explanation : For the removal of doubts, it is hereby declared that income of the nature referred to in this clause payable for service rendered in India shall be regarded as income earned in India.'

It may be mentioned that section 9 deals with the income that has accrued or arisen out of India but, by fiction of law, is deemed to accrue or arise in India. According to the aforesaid provision, income which falls under the head 'Salaries' is deemed to accrue or arise in India if it is earned in India. The earning test in relation to salary, according to me, determines the locality, of the source of income under the head 'Salaries'. Under general law, the locality of the source of income from employment is either-

(a) the place where the contract is made; or

(b) the place where the payment for the employment is to be made.

The remuneration, which is a payment for services rendered, arises from the contract of employment and the place where the contract is made determines the locality of the source. In CIT v. S.G. Pagnatale : [1980]124ITR391(Guj) , the Gujarat High Court was concerned with an assessee who was an employee of a French company and whose services were rendered in India, The salary was paid outside India by the French company. Although the services were rendered in India, the Gujarat High Court took a view that the salary was not earned in India. In other words, a very strict interpretation was given to the words 'earned in India'. The amendments were made by the Finance Act, 1983, with effect from 1-4-1979, by inserting an Explanation to declare that the salary payable for services rendered in India shall always be regarded as income earned in India. The Explanation concerns with the services rendered in India and does not concern itself with the services rendered outside India. In other words, the Explanation does not deal with the payment of 'salaries' in India for the services rendered outside India. Therefore, in my view, the Explanation to section 9(1)(ii) does not bring about a change in relation to salaries paid in India for services outside India. In my view, the Explanation was inserted to overcome the effect of the decision of Gujarat High Court (cited supra), which was again concerned with the payment of salaries outside India for the services rendered in India. In my view, the scope of the Explanation should not be extended to cover up the cases that are not dealt by it. The Explanation will only clarify a doubt that may exist in respect of services rendered in India but it does not bring any change as regards the services

rendered outside India. Even if the services are rendered outside India, the income can still accrue or arise or be received in India. In the case before us, all these three events have happened in India and, therefore, the income is clearly includible, in the total income of the assessee. I am, therefore, of the opinion that the appeal of the assessee should be dismissed.

Reference under section 255(4) of the IT Act, 1961

31st Jan., 1995

We, the Members of the Bombay Bench of the Tribunal, have differed in the order to be passed in ITA No. 5562/Bom/1989, in the case of Capt. A.L. Fernandes v. ITO, Ward 11(4), Bombay, involving assessment year 1983-84.

We are of the opinion that the following point of difference is required to be referred to the Third Member :

'Whether, on the facts and in the circumstances of the case, the amount of salary received by the assessee from The Mogul Line Ltd., for rendering services on the board of a ship, when the ship was floating outside the territorial water of India, is includible in the total income of the assessee.

We direct the Registry to put up the file before the Hon'ble President.

R.V. Easwar, J.M. (T.M.)

17th Sep., 2001

The Hon'ble President has nominated me to resolve the difference of opinion between the learned Members and the following question has been referred under section 255(4) :

'Whether, on the facts and in the circumstances of the case, the amount of salary received by the assessee from The Mogul Line Ltd. for rendering services on the board of a ship, when the ship was floating outside the territorial water of India, is includible in the total income of the assessee ?'

2. The assessee is an employee of The Mogal Lines Ltd., a Government of India shipping undertaking. He was holding the rank of Master. He rendered services on board, the ship Lok Nayak from 1-5-1982 to 19-9-1982, and on board, Lok Vinay from 15-10-1982 to 31-3-1983. During this period, the ships were floating outside the territorial waters of India. As per the certificate issued by Mogal Lines on 27-7-1983, during the aforesaid period, the assessee had rendered services outside India.

3. In the return filed by the assessee, the status was claimed as that of 'resident' but subsequently, a revised return was filed showing the status as non-resident. Consequently, the salary income received from Mogal Lines was reduced to exclude the salary. The assessing officer, however, took the view that the assessee's employer was a Central Government undertaking that the contract of employment was entered into in India, that the services were rendered by the assessee in accordance with the terms of employment, that the final settlement of accounts regarding the payment had also taken place in India, that the assessee had rendered services on Board an Indian vessel carrying the flag of India and, therefore---the payment of salary has to be deemed to have accrued or arisen in India. The entire salary income was, therefore, brought to tax.

4. On appeal, the Commissioner (Appeals) following the order of the Tribunal Bombay Bench in the case of Captain A.L. Kapoor (ITA No. 3241/(Bom)/1984, dated 25-3-1988, held that the salary income was rightly brought to tax.

5. The assessee carried the matter in appeal before the Tribunal. The learned Judicial Member (JM) held that the ship cannot be considered as a floating island under the International Law since the floating island theory had undergone a change, and, therefore, it cannot be considered that the assessee had rendered services in India. Thereafter, he referred to section 9(A)(ii) and held that as per the Explanation to the said clause, which is clarificatory, the salary payable for services rendered in India shall be regarded as income earned in India. As a corollary, he held that if the services were rendered outside India, the salary shall not be considered as income earned in India. He accordingly held that since the services were rendered by the assessee outside India on board the ships when

they were outside the territorial waters of India, the services must be held to have been rendered outside and, therefore, the salary was not taxable. Accordingly, he allowed the assessee's appeal.

6. On the other hand, the learned Accountant Member (AM) took the view a in the case of a non-resident under section 5(2)(a) of the Act, any income which is received in India is taxable in the hands of the non-resident and since the salary has been received in India, irrespective of where it had accrued or arisen, the same was taxable in the assessee's hands. Thereafter, the learned A proceeded to examine whether the salary can be said to have accrued or arise in India so that it can be decided whether section 5(2)(b) is attracted or not. According to him, the general law was that the locality of the source of income from employment is either (a) the place where the contract is made, or (b) the place where the payment for the employment is to be made. In the present case, the contract of employment was entered into in India. The rights arising out of the contract are enforceable in India. Accordingly, the learned Accountant Member held that the salary paid by Mogal Lines accrued or arose to the assessee in India. In his view, the provisions of section 9(1)(ii) read with the Explanation did not affect the controversy in the present case. According to him, the Explanation was inserted by the Finance Act, 1983, with effect from 1-4-1979, to nullify the effect of the judgment of the Gujarat High Court in the case of CIT v. S.G. Pagnatale : [1980]124ITR391(Guj) , wherein it was held that an employee of a French company, who rendered services in India, was not taxable in respect of the salary which was paid outside India, because the salary was not earned in India. According to the learned AM, the Explanation is concerned with the services rendered in India and does not concern itself with services rendered outside India. In other words, the Explanation does not deal with the payment of salaries in India, for the services rendered outside India. In this view of the matter, the learned Accountant Member held that section 9(1)(ii) read with the Explanation did not apply to the present case. In his view, as already noted, the income accrued or arose in India and that position is not affected by the fact that the services were rendered outside India. He, therefore, held that the salary was includible in the assessment and accordingly dismissed the assessee's appeal.

7. The appeal was posted before me from time to time. It was adjourned at the request of the learned counsel for the assessee, but subsequently he informed me that he has no further instructions in the matter and sought to withdraw from the case. Accordingly, the appeal was heard in the absence of the assessee and is being disposed of on the basis of the record and after hearing the learned Departmental Representative.

8. In my opinion, the salary is includible in the assessment under section 5(2)(a) of the Act, which says that any income received by a non-resident in India is taxable in India. There is a clear finding in the order of the learned Accountant Member, that there is no dispute that the salary was received in India. This should put an end to the controversy. I may add, that the learned AM has not disputed the correctness of the learned Judicial Member's finding that under International Law, the floating island theory has undergone a change and it is no longer correct to regard the Indian ships as floating islands. Therefore, the position accepted by the learned members is that the services were rendered outside India, the ship not being considered as part of India. However, since the salary was received in India, it was rightly held taxable in India under section 5(2)(a). I agree with the learned Accountant Member in this respect.

9. But since the learned Members have also proceeded to decide the question of accrual of the salary in terms of section 9(1)(ii) read with the Explanation. It is only fair that I should advert to the same. In my opinion, the view taken by the learned Accountant Member with regard to the section is the more acceptable one. This section deems certain incomes to accrue or arise in India. Salary income is deemed to accrue or arise in India if it is earned in India. The Explanation says that the salary income which is payable for services rendered in India shall be regarded as income earned in India. Consequently, the salary income earned in India is to be deemed to have accrued or arisen in India. The rendering of services in India has been considered sufficient to hold that the salary has been earned in India, with the result that if the salary is earned in India, then it is deemed to accrue or arise in India. As rightly pointed out by the learned Accountant Member, the Explanation comes into play only if the services are rendered by the assessee in India. Only then, it can be said that the assessee had earned the salary in India.

and only then the salary can be deemed to accrue or arise in India. The Explanation does not concern itself with a case where the assessee renders services outside India, as in the present case, where the assessee has rendered services aboard the Indian ships while they were outside the territorial waters of India. The services were thus rendered by the assessee outside India, since the ships can no longer be considered as floating island. There is, therefore, no question of deeming the salary received by the assessee as having accrued or arisen in India. The effect of the Explanation is that it is no longer open to an assessee to say that though he rendered services in India, since the contract of employment was entered into outside India, the salary cannot be said to have accrued or arisen in India. In such a case, the Explanation deems the salary as having accrued or arisen in India, notwithstanding that the contract of employment was entered into outside India. In the case of Pgnatale (supra), the Gujarat High Court was concerned with an assessee who was an employee of a French company and whose services were rendered in India. The salary was paid outside India. The High Court took the view that the salary was not earned in India, merely because services were rendered in India. This strict interpretation has been nullified by the insertion of the Explanation to section 9(1)(ii). From the Explanation, it is not permissible to infer the corollary viz., that in all cases where services are rendered outside India, the salary cannot be deemed to accrue or arise in India. The Explanation, as already noticed deals with a different situation and the learned Accountant Member in my view is right in saying that its scope should not be extended to cases which are not contemplated by it.

10. One more aspect in the present case will have to be noticed. The learned AM has rightly applied the first part of section 5(2)(b). He has held that since the contract of employment has been entered into in India and since all rights flowing therefrom are also enforceable in India, the salary must be held to have accrued or arisen to the assessee in India. He has not, therefore considered it necessary to address the question as to whether the salary can be deemed to accrue to the assessee in India. Section 9(1) provides for certain situations where the income may be 'deemed' to accrue or arise in India. The later part of section 5(2)(b) and section 9(1) can be resorted to only when the income is not normally to be considered as having accrued or arisen to the assessee in India. These provisions

can be resorted to only to find out whether the law has provided for deeming the income in question as having accrued or arisen in India. The deeming provisions cannot be looked into when under general principles, the income has accrued or arisen to the assessee in India. My humble understanding of the order of the learned AM is that, in his view, the salary received by the assessee has accrued or arisen to the assessee in India, for the reasons given by him with which I fully agree and it is, therefore, not necessary to examine the question whether the salary is also deemed to accrue or arise to the assessee by applying section 9(1) and the Explanation thereto. This approach, in my humble opinion, is the proper approach to the controversy.

11. In the result, I agree with the learned Accountant Member that the salary received by the assessee in India is taxable under section 5(2)(a) on receipt basis and also as having accrued or arisen to him in India under section 5(2)(b). Section 9(1)(ii) read with Explanation thereto is not relevant for the controversy. I, therefore, answer the question referred to me in the affirmative and agree with the view expressed by the learned Accountant Member that the appeal should be dismissed.

12. The matter will now go before the Bench for passing appropriate orders.

M.K. Chaturvedi, V.P.

19th Dec., 2001

In conformity with the opinion of the majority of the Members of the Tribunal who have heard this case, including those who first heard it, for the reasons stated in the order we adjudicate the issue apropos the point of difference in favour of the revenue and against the assessee.

2. In the result, appeal of the assessee stands dismissed.