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Court : Income Tax Appellate Tribunal ITAT Kolkata

Decided On : Jan-21-2003

Reported in : (2004)88ITD404(Kol.)

Judge : M Sarkar, C Sethi

Appellant : Debapriya Guha

Respondent : Acit

Judgement :

1. The present appeal filed by the assessee for A.Y. 1989-90 is directed against the order dated 20-6-2001 passed by the CIT(A) in the matter of an order of assessment made under Section 144/147 of I.T.Act, 1961.

2. Gr. No. 1 is directed against the order of CIT(A) in upholding the action of the A.O. in initiating the proceedings under Section 147 of the Act for the year under consideration. With respect to this ground of appeal the A.O. had seen that the return of income filed by the assessee for A.Y. under consideration was beyond the statutory period prescribed under Section 139 of the Act inasmuch as the return of income was filed on 22-8-91, though as per the provisions of Section 139(4) of the Act as amended and substituted w.e.f. 1-4-89, the assessee was allowed to file the return of income at any time before the expiry of one year from the end of the relevant assessment year, being expired on 31-3-91 for the year under consideration. It was further seen by the A.O. that the assessee had earned from Univan Ship Management Ltd. US $ 11,071 equivalent to Indian currency for

Rs. 1,60,384/- as revealed from the computation of income filed by the assessee with time barred return of income. It was further noticed that the said amount was earned for his services with the shipping company from 19-7-88 to 9-12-88, that is, for his stay outside India for 143 days. It was also seen by the A.O. that the assessee had been in India for 222 days and, therefore, he was definitely a resident in India for which his global income is taxable. Thus for the reasons (i) that his original return was not valid and (ii) that the claim of exemption of income earned form Univan Ship Management Ltd. was not proper and allowable the income had escaped assessment in the opinion of the A.O.Having obtained the previous approval of Addl. CIT, Range-6, Kolkata, notice under Section 148 was issued by the A.O. On an appeal the CIT(A) confirmed the initiation of proceedings under Section 147. Hence the assessee is an appeal.

3. Having considered the rival contentions of both the parties and having gone through the orders of the authorities below and on perusal of the provisions of law as contained in Section 147 of the Act, we are of the considered opinion that the A.O. had reason to believe that the income had escaped assessment clothing him the power to issue notice under Section 148 of the Act. It is also found that the A.O. has obtained previous approval of Addl. CIT as required under the law. The Ld. counsel for the assessee is not able to point out any substantive material or the fact so as to render the initiation of proceedings under Section 147 of the Act as invalid and without jurisdiction. In fact, no substantive argument has been putforward by the Ld. counsel for the assessee on this issue. Even in the written submission filed by the assessee before this Tribunal, there is nothing stated on this issue. We, therefore, find no merit in this ground of appeal raised by the assessee which is accordingly decided against the assessee. The order of the CIT(A) upholding the proceedings under Section 147 as valid is, therefore, confirmed.

4. Gr. Nos. 2 to 6 revolve around the issue related to the determination of the assessee's status as resident.

5. The Ld. counsel for the assessee has submitted that the provision of Sub-section (6) of Section 6 of the I.T. Act has been ignored/mis-

applied/misunderstood by the A.O. in determining the actual residential status of the assessee and the Ld. CIT(A) has also erred in interpreting the said provision against the assessee by confirming the residential status of the assessee as resident during the year under consideration. It was further argued that the A.O. has misdirected himself by charging tax on income accrued or arisen to the assessee out of India inasmuch as the said income is out of the scope of the total income of the assessee as the actual residential status of the assessee should be treated as "Not ordinarily resident". It was further submitted that the salary income earned by the assessee from M/s.

Univan Ship Management Ltd. is accrued and received outside India in foreign currency and as such this income is not to be included in the total income of the assessee inasmuch as the assessee is "not ordinarily resident" in India in the relevant year corresponding to the assessment year under consideration. It was contended by the Ld.

counsel for the assessee that the correct interpretation of Sub-section (6) of Section 6 would be that a person, to be a "not ordinary resident", should not be a resident in nine out of the ten previous years preceding that year or in other words, the person should be a non-resident in at least two out of the 10 previous year preceding that year, to be a "not ordinarily resident" in India. The interpretation that a person, to be a not ordinarily resident, should be a non-resident in nine out of the ten previous years preceding that (SIC) or should have not been resident in India in all nine out of the ten previous years preceding that year is wrong interpretation of Sub-section (6) of Section 6 of the Act. In support of his contention the Ld. counsel has placed reliance on the commentaries of some learned authors and on an article written by Sri S.R. Das, Advocate and Sri Jitesh Sonee, Chartered Accountant, Published in Bharat's Tax & Corporate Reference, Vol. Part dated 10th October, 2002.

6. The Ld. D.R., on the other hand, supported the orders of the authorities below and reiterated the reasons relied on by the authorities below.

7. We have considered the rival contentions of both the parties and have deliberated upon the relevant provisions as contained in Sub-section (6) of Section

6 of the Act. We have also deliberated upon the judicial decisions cited in this context. Sub-section (6) of Section 6 of the Act, as it operated at the relevant time and which falls for our consideration, reads as under:- "(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 to all to, seven hundred and thirty days or more; or 8. Section 6(1) of the Act provided two separate grounds in Clauses (a) and (c), on any one of which, an individual should be said to be resident in India. An individual who is in India in any previous year for a total period of 182 days or more will be considered to be resident in India in that previous year for the purposes of I.T. Act, as provided under Section 6(1)(a) of the Act. Under Clause (c) of Section 6(1) if an individual has been for a total period of 365 days or more in four years preceding the previous year, in India and has been for 60 days or more, in India during the previous years, he would for the purpose of the Act be said to be resident in India in that previous year.

9. On reading the provisions as contained in Sub-section (6) of Section 6 of the Act, it is seen that a person is said to be "not ordinarily resident" in India in any previous year if such person has not been resident in India in nine out of the ten previous years preceding that year implying thereby that a person should be a non-resident in nine out of the ten previous years preceding that year. In other words, a person, to be a "not ordinary resident" can at best be a resident only in one year (and not more than that) out of ten previous years preceding that year.

10. To decide the issue in hand, the scope of total income as defined under Section 5 of the Act is to be kept in mind. Section 5 of the Act defines the scope of total income with reference to the different residential status of the assessee, viz. (1) Residents and ordinarily residents, (2) Residents but not ordinarily residents; and (3) Non-residents. The provisions of Section 5 are reproduced below for ready reference: 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 Provided that, in the case of a person no 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 or arise 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." 11. On reading the provisions of Section 5 of the Act it is clear that - (1) income received or deemed to be received in India by or on behalf of the assessee and (ii) income which accrues or arises or is deemed to accrue or arise to him in India is to be included in the chargeable total income of all the three categories of the assessee in the same manner. The difference is only in case of income which accrues or arises to the assessee outside India which, in the case of resident and ordinarily resident assessees is includible in all situations; in the case of residents but not ordinarily residents is includible only in case if it is derived from a business controlled in India or a profession set up in India; and in the case of non-residents is not includible at all. In other words, the incidence of tax on the income accruing or arising outside India in both the cases of "non-resident" and "resident but not ordinarily resident" is in the same manner except with only a difference that in case of "resident but not ordinarily resident", the income which accrues on arises to him outside India is includible in his chargeable total income if the said income

is derived from a business controlled in India or a profession set up in India. It can, therefore, be seen that in the case of "resident but not ordinarily resident" having no income derived from a business controlled in India or a profession set up in India, the income which accrues or arises to him outside India is not includible as in the case of non-resident. It is, therefore, seen that "Non resident" and "Resident but not ordinarily resident" have been given similar benefit of the exemption of income which accrues or arises to him outside India unless the case of "Resident but not ordinarily resident" is of having an income derived from a business controlled in or profession set up in India. The fact of giving similar benefit of the exemption of income which accrues or arises outside India to non-Resident and as well as to "Resident but not ordinarily resident" unless the said income is derived by "resident but not ordinarily resident" from a business controlled in or a profession set up in India and at the same time not giving the same benefit to Resident clearly shows that a person to be a "Resident but not ordinarily resident" and then to get the benefit of exemption of income which accrues or arises to him outside India unless it is derived from a business controlled in or a profession set up in India, he should not be a resident in nine out of the ten previous years preceding that year, or, in other words, he should be a non-resident in nine cut of the ten previous years preceding that year.

The exemption of not including the income which accrues or arises to a person outside India is available to "not ordinarily resident" and not to "ordinarily resident" again goes to show that a person should not have been resident in India in all 9 out of ten previous years preceding that year to avail the benefit of exemption as provided in Section 5(1)(c) of the Act. It is not the intention of the legislature to give this exemption to a person who has been a resident in India in more than one year out of the ten previous years preceding that year so as to treat him "not ordinarily resident" inasmuch as the "Resident" in India is always chargeable to tax of the income which arises or accrues to him outside India during such year. The interpretation that a person should not be a resident in all 9 out of the 10 previous years preceding that year in order to be a "not ordinarily resident" is a correct interpretation of Sub-section (6) of Section 6 of the Act.

Therefore, keeping in mind the object and scope of the entire Income-tax Act and particularly the provisions defining the scope of total income as defined Under Section 5 of the Act and in the light of the discussion made above, we are of the considered view that the correct interpretation of Sub-section (6) of Section 6 of the Act is that a person, to be a not ordinarily resident, should not be a resident in all nine out of the ten previous years preceding that year or in other words should be a non resident in nine out of the ten previous year preceding that year. The contention of the Ld. counsel for the assessee giving an interpretation that a person, to be a not ordinarily resident, should be a non-resident in at least two out of the ten previous year preceding that year, which is based on the commentaries and the articles relied on by the assessee, is not of any substance.

12. Our above views have recently been fortified by the Hon'ble Gujarat High Court in the case of Pradeep J. Mehta v. CIT (2002) 256 ITR 647 wherein the Hon'ble Gujarat Court concluded as follows: "In order that an individual is not an ordinarily resident, he should satisfy one of the two conditions laid down in Section 6(6)(a) of the Act, the first condition is that he should not be resident in India in all the nine out of ten years preceding the accounting year and the second condition is that he should not have during the several years preceding that year, been in India for a total period of seven hundred and thirty or more days." 13. On perusal of the CIT(A)'s order we find that the assessee has submitted the break-up of his stay in India from the financial year 1978-79 to 1987-88 in the following manner:Financial Year Stay in India Status 1978-79 160 days N.R.1979-80 365 " Resident 1980-81 365 " Resident 1981-82 117 " - 245 N.R.1983-84 220 " - 145 Resident 1984-85 365 " Resident 1985-86 365 " Resident 1986-87 365 " Resident 1987-88 365 " Resident On perusal of the break-up submitted by the assessee it is clear that the assessee was a resident in 7 out of 10 previous years though in order to be a non ordinarily resident he should not have been resident in 9 out of 10 previous years. In other words he should be a non-resident in 9 out of 10 previous years. In the instant case the condition or criteria as provided in Section 6(6) is not satisfied inasmuch as the assessee was resident in 7 out of the 10 previous years and only non-resident in 3 out of the 10 previous years. We, therefore, find no reason to interfere with the order of the CIT(A) which is reproduced below: "6. I have gone through the above submission of the appellant

and I have examined the provisions of Section 6(6) of the Act. To qualify for the status of "Resident but not ordinary resident" the appellant has to fulfil the following as under:- (i) He must not be a resident in India in 9 out the ten previous year preceding the assessment year, (ii) He should not be in India for a period of 730 days or more during the 7 (seven) previous years preceding the assessment year.

In other words, according to the interpretation of (i) above, a person should be non-resident in 9 (nine) out of 10 previous year.

From the submissions as made by the appellant above, he was a non-resident in 3 out of the ten previous years (1978-79, 1980-81 and 1981-82). Thus, he failed to fulfil the condition as mentioned in (1) above. Similarly, for the financial years 1981-82 to 1987-88, the appellant's stay in India was more than 730 days as can be found from the figures. The appellant does not fulfil the conditions mentioned in (ii) above. In view of the above, it is seen that the appellant does not fulfil the condition of resident but not ordinary resident as mentioned in Section 6(6) of the I.T. Act. Therefore, the appellant is a resident for the previous year. In view of the above analysis, I find that the A.O. was justified in considering the status of the appellant as 'Resident' thereby subjecting the appellant's overseas income of Rs. 1,60,384/- to taxation herein India. The A.O.'s action is, therefore, justified and does not warrant any interference from my sides. The issue at (b) above is decided against the appellant and in favour of the A.O."

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