(1974) 04 PAT CK 0005

In the Patna High Court

Case No : Tax Case No. 51 of 1970

C.N. Townsend APPELLANT

Vs

Commissioner of Income Tax RESPONDENT

Date of Decision : 02-04-1974

Acts Referred:
Income Tax Act, 1961 — Section 256(1), 6(1), 6(6)(a)

Citation : (1974) 97 ITR 185

Hon'ble Judges : S.N.P. Singh, J;S.K. Jha, J

Bench : Division Bench

Advocate : Rameshwar Prasad No. 2, for the Appellant; Shambu Sharan, for the Respondent

Judgement

S.N.P. Singh, J.—At the instance of the assessee this reference u/s 256(1) of the Income Tax Act, 1961, has been made by the Income Tax Appellate Tribunal, Patna Bench, Patna, for decision of the following questions of law :

"(1) Whether, in the facts and circumstances of the case, the assessee''s status was of '' resident'' or ''resident but not ordinarily resident''?

(2) Whether conditions specified for becoming resident are each individually sufficient or each individually necessary but none of them individually sufficient ?"

2. The assessment year under reference is 1965-66 and the previous year is the financial year 1964-65. The assessee was in India from January 1961, till December, 1963. After that period he went abroad and came back to India some time in the month of April, 1964. Thereafter, he continued to stay in India till the end of March, 1965, For the assessment year 1965-66 the assessee''s status was taken as "non-resident" by the Income Tax Officer. On appeal filed by the assessee, the Appellate Assistant Commissioner rectified the mistake and held that the status of the assessee was that of a "resident" but "not ordinarily resident". The assessee preferred an appeal before the Income Tax Appellate Tribunal and it was urged on his behalf that he was not only "resident" but also

"ordinarily resident". Reliance was placed on behalf of the assessee on the fact that he was in India for a period of more than three years from January, 1961, to March, 1965. The Tribunal rejected the contention raised on behalf of the assessee and held that:

"The new Section 6(6) which is different from the old section lays down three conditions which have all to be satisfied before a person becomes a resident and ordinarily resident. Each one of the rules are individually necessary, but none of them individually sufficient.

To put it in another way, working on the distinction of not ordinarily resident, each of these conditions, individually, are sufficient to make him * not ordinarily resident''. If the assessee does not satisfy all these conditions, then he is not ''ordinarily resident''."

3. The Tribunal agreeing with the finding of the Appellate Assistant Commissioner held that the assessee was " resident" but "not ordinarily resident" and dismissed the appeal. The assessee, thereafter, moved the Tribunal for making a reference u/s 256(1) of the Income Tax Act, 1961, and the Tribunal thereupon stated a case and made a reference to this court on the two questions of law.

4. As provided u/s 6(1) of the Income Tax Act, 1961, an individual is said to be resident in India in any previous year, if he-

"(a) is in India in that year for a period or periods amounting in all to one hundred and eighty-two days or more ; or

(b) maintains or causes to be maintained for him a dwelling place in India for a period or periods amounting in all to one hundred and eighty-two days or more in that year and has been in India for thirty days or more in that year; or

(c) having within the four years preceding that year been in India for a period or periods amounting in all to three hundred and sixty-five days or more, is in India for a period or periods amounting in all to sixty days or more in that year."

5. It is clear from the above provisions that if any of the conditions mentioned in Clause (a), (b) or (c) is fulfilled, the assessee will be a "resident" within the meaning of the Act. An individual may be a "resident" in India within the meaning of Section 6(1) of the Act but in order that he may be treated as an "ordinarily resident" in India, he must not come within the mischief of Sub-section (6)(a) of Section 6. Sub-section (6)(a) of Section 6 reads as follows :

"(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......."

6. It is clear from the above provisions that a person though a "resident" in India within the meaning of Section 6(1) of the Act may yet be not "ordinarily resident". In order that such a person may be treated as "ordinarily resident", he must not come within the mischief of subsection (6)(a) of Section 6.

7. Sub-section (6)(a) of Section 6 lays down broadly two conditions (not three conditions as stated by the Tribunal) under which a person is to be treated as "not ordinarily resident" in India in any previous year. The first condition is that if an individual, who has not been resident in India in nine out of the ten previous years preceding the previous year for which he is to be assessed, he will be treated as "not ordinarily resident". The second condition is that if an individual has not during the seven previous years preceding the previous year for which he is to be assessed been in India for a period of or periods amounting in all to seven hundred and thirty days or more, he will be treated as "not ordinarily resident". On a plain reading of the sub-section it is clear that if an individual comes within the mischief of either of the two conditions he will be treated as "not ordinarily resident". In other words, in order that an individual may be treated as "ordinarily resident" in India in any previous year, he must not come within the mischief of either of the two conditions.

8. As the assessee came to India in April, 1964, and continued to stay in India till the end of March, 1965, 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.

9. For the foregoing reasons it must, therefore, be held that on the facts and in the circumstances of the case the assessee''s status was that of "resident " but "not ordinarily resident".

10. The second question which has been framed by the Tribunal is somewhat ambiguous and for the sake of clarity I reframe the second question in these words:

"Whether an individual who is disqualified to be treated as ''ordinarily resident'' under one of the conditions specified in Sub-section (6)(a) of Section 6 but is not disqualified under the other condition can be treated as '' ordinarily resident'' ?"

11. For the reasons which I have already stated, the obvious answer must be in the negative.

12. Accordingly, I answer both the questions against the assessee and in favour of the department. The parties are directed to bear their own costs of this reference.

S.K. Jha, J.

13. I agree.