

(2010) 12 KL CK 0191
In the High Court Of Kerala
Case No : Income Tax A. No. 1489 of 2009

Commissioner of Income Tax

APPELLANT

Vs

Abdul Razzak

RESPONDENT

Date of Decision : 13-12-2010

Acts Referred:

Income Tax Act, 1961 — Section 6(1)
Merchant Shipping Act, 1958 — Section 3

Citation : (2011) 241 CTR 485 : (2011) 1 KLT 919 : (2011) 198 TAXMAN 1

Hon'ble Judges : C.N. Ramachandran Nair, J;B.P. Ray, J

Bench : Division Bench

Advocate : P.K. Raveendranatha Menon and Jose Joseph, for the Appellant; K.B. Mohammed Kutty and K.M. Firoz, for the Respondent

Final Decision : Dismissed

Judgement

C.N. Ramachandran Nair, J.—The short question that arises for our decision in the appeal filed by the Revenue is whether the Commissioner of Income Tax (Appeals) and the Income Tax Appellate Tribunal were justified in declaring the status of the Respondent Assessee as a "nonresident" for the assessment year 1989-1990.

2. We have heard learned senior counsel Shri. P.K.R. Menon appearing for the Appellant Revenue and learned senior counsel Dr. Shri. K.B. Mohammed Kutty appearing for the Respondent assessee.

3. The Assessee's residential status for assessment arose for the assessment year 1989-90 in the course of completion of block assessment for the period 1989-90 to 1999-2000. While filing return, the Assessee claimed his residential status as "nonresident" for the assessment years 1989-90 and 1990-91, and for all the remaining years, he mentioned his status as "not ordinarily resident". The Assessee admitted in the course of enquiry that he had gone abroad and took up business there, or in other words, he had not gone there to take up employment under any employer. The Assessing Officer therefore held that since the Assessee

went abroad for the first time on 24/09/1988 and though he was in India for only 177 days, he will be covered by Section 6(1)(c) of the Income Tax Act (hereinafter referred to as the Act for short), which declares a person as a resident in India for any assessment year, if he was in India in the previous year for 60 days or more and was in India for 365 days or more in the 4 years immediately preceding that previous year. Since the Assessee went abroad on 24.9.1988 and was in India for 177 days in the previous year and was in India for more than 365 days in the 4 years preceding to that year, the Assessing Officer declared the Assessee's status as "resident" for the assessment year 1989-90. Even though, the Assessee sought exception under explanation (a) to Section 6(1)(c) contending that since he had gone abroad to take up employment in the previous year in order to become a resident under the said explanation, he should have stayed in India for not less than 182 days in that year, this claim of the Assessee was turned down by the Assessing Officer for the simple reason that "employment outside India" covered by the explanation does not include "doing business", by oneself. In other words, the Assessing Officer was of the view that the Assessee will be entitled to the benefit of explanation (a) to Section 6(1)(c) of the Act only if such Assessee went abroad in the previous year to take up employment and not for doing business. Even though the Assessing Officer completed the assessment for the assessment year 1989-90 assigning the status of "resident" to the Respondent Assessee bringing into tax in India his global income, in the appeal filed by the Assessee, the CIT (Appeals) held that going abroad for doing business also is covered by explanation (a) to Section 6(1)(c) of the Act in as much as employment referred to in the above explanation takes in self employment also. On second appeals filed by the Respondent Assessee and the Revenue, the Tribunal confirmed the order of the CIT (Appeals), against which this appeal is filed.

4. In order to decide the question, the scope of explanation (a) to Section 6(1)(c) of the Act has to be examined, which reads as follows:

6. For the purpose of this Act:

(1) 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)...

(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.

[Explanation. - In the case of an individual:

(a) being a citizen of India, who leaves India in any previous year [as a member of the crew of an Indian ship as defined in Clause (18) of Section 3 of the Merchant Shipping Act, 1958 (44 of 1958), or for the purposes of employment

outside India, the provisions of sub-clause (c) shall apply in relation to that year as if for the words "sixty days", occurring therein, the words "one hundred and eighty-two days" had been substituted;)

There is no controversy on facts in as much as the Assessee was in India for only 177 days in the previous year relevant for the assessment year 1989-90, and unless it is established that explanation (a) to Sub-clause (c) of Section 6(1) of the Act is not available to the Assessee, he cannot be treated as a resident in India for the purpose of assessing his global income including the business income earned abroad during the previous year. Obviously explanation (a) is an exception to Section 6(1)(c) of the Act, under which 60 days residence referred to in Clause (c) is substituted to 182 days if the Assessee went abroad in the previous year for the purpose of employment. Admittedly, the Assessee went abroad on 24.9.1988 only to take up business there. If the business undertaken and carried on by the Assessee in the previous year abroad amounts to employment within the meaning of explanation (a) to Section 6(1)(c) of the Act, then the Assessee is entitled to the status of non-resident declared by the C.I.T. (Appeals), which is confirmed by the Tribunal.

5. The contention of the learned senior counsel appearing for the Revenue is that employment necessarily involves employer-employee relationship with terms of employment and only under an employer a person can be employed. Learned senior counsel appearing for the Assessee, on the other hand, contended that employment in the context of Explanation (a) includes self employment, and taking up and continue business is also employment for the purpose of the above explanation.

6. During hearing, learned senior counsel for the Revenue has relied on the decision of the Supreme Court in *Lakshminarayan Ram Gopal and Son Ltd. Vs. The Government of Hyderabad*, . We do not think the decision is applicable to the facts of this case. Learned senior counsel for the Assessee has relied on the Memorandum explaining the provisions of the Finance Bill introducing the explanation, contained in 134 ITR 137 [Para 35-of the Finance Bill], which reads as follows:

(iii) It is proposed to provide that where an individual who is a citizen of India leaves India in any year for the purposes of employment outside India, he will not be treated as resident in India in that year unless he has been in India in that year for 182 days or more. The effect of this amendment will be that the "test" of residence in (c) above will stand modified to this extent in such cases

Similarly the Central Board of Direct Taxes issued Circular No.346 dated 30.6.1982, which reads as follows:-

7.3. With a view to avoiding hardship in the case of Indian citizens, who are employed or engaged in other avocations outside India, the Finance Act has made the following modifications in the tests of residence in India:

(i)...

(ii)...

(iii) Where an individual who is a citizen of India leaves India in any year for the purposes of employment outside India, he will not be treated as resident in India in that year unless he has been in India in that year for 182 days or more. The effect of this amendment will be that the test of residence in (c) above will stand modified to that extent in such cases.

7. What is clear from the above is that no technical meaning is intended for the word "employment" used in the Explanation. In our view, going abroad for the purpose of employment only means that the visit and stay abroad should not be for other purposes such as a tourist, or for medical treatment or for studies or the like. Going abroad for the purpose of employment therefore means going abroad to take up employment or any avocation as referred to in the Circular, which takes in self employment like business or profession.

So much so, in our view, taking up own business by the Assessee abroad satisfies the condition of going abroad for the purpose of employment covered by Explanation (a) to Section 6(1)(c) of the Act. Therefore, we hold that the Tribunal has rightly held that for the purpose of the explanation, employment includes self employment like business or profession taken up by the Assessee abroad.

We therefore dismiss the appeal filed by the Revenue.