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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ITA 1362/2010

THE COMMISSIONER OF INCOME TAX-XVI ..... Appellant
Through: Ms. Rashmi Chopra, Advocate

versus

KARAN BIHARI THAPAR ..... Respondent
Through: None

WITH

\+ ITA 1363 /2010

THE COMMISSIONER OF INCOME TAX-XVI ..... Appellant
Through: Ms. Rashmi Chopra, Advocate

versus

KARAN BIHARI THAPAR ..... Respondent
Through: None

% Date of Decision: 14th September, 2010

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE MANMOHAN

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

MANMOHAN, J:

1. The present appeals have been filed under Section 260A of the Income Tax Act,1961 (hereinafter referred to as "Act") challenging the common order dated 30th June, 2009 passed by the Income Tax Appellate Tribunal (in short "Tribunal") in ITAs No. 2106 and 2107/Del/2008 for the Assessment Years 1998-1999 and 1999-2000.

2. The brief facts of the two cases are that the Assessing Officer (in short, "AO") during the course of assessment proceedings noticed that the respondent-assessee had not offered his income from abroad for the purposes of taxation for the assessment years 1998-1999 and 1999-2000. The AO further noticed that respondent-assessee had claimed the residential status as 'Resident but not ordinarily resident'. The AO did not accept the explanation offered by the respondent-assessee in reply to notice under Section 148 of the Act, and held respondent-assessee's residential status as 'Resident and ordinarily resident'. Consequently, AO made additions by bringing his global income under the net of taxation.

3. Respondent-assessee preferred an appeal before the Commissioner of Income Tax (Appeals) [in short, "CIT(A)"] wherein the CIT(A) deleted the additions by holding the residential status of respondent-assessee as 'Resident and not ordinarily resident'.

4. Revenue appealed against the said order of CIT(A) but the Tribunal dismissed the revenue's appeal. Hence, the present appeal.

5. Ms. Rashmi Chopra, learned counsel for the Revenue submitted that the Tribunal had erred in law and on merits in deleting the additions made by the AO by holding the residential status of respondent-assessee as 'Resident and not ordinarily resident'. Ms. Rashmi Chopra further submitted that amendment to Section 6(6) of the Act by the Finance Act, 2003, w.e.f., 01st April, 2004 is retrospective in nature.

6. We have heard the submissions of learned counsel for the Revenue and perused the file. The pre and post amended Section 6(6) of the Act reads as under:-

> *"Section 6(6) (Pre-amended):*
>
> *A person is said to "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*
>
> *(b) a Hindu Undivided family whose manager 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"*
>
> *"Section 6(6) (Post-amendment):*
>
> *A person is said to "not ordinarily resident" in India in any previous year if such person is—*
>
> *(a) an individual who has been a non-resident in India in nine out of the ten previous years preceding that year, or has during the seven previous years preceding that year been in India for a period of, or periods amounting in all to, seven hundred and twenty-nine days or less; or*

(b) a Hindu Undivided family whose manager has been a non-resident in India in nine out of the ten previous years preceding that year, or has during the seven previous years preceding that year been in India for a period of, or periods amounting in all to, seven hundred and twenty-nine days or less."

7. The situation prior to the amendment to the said Section in 2004 was crystalised by the Authority for Advance Ruling in its decision in ***Advance Ruling A. No. P-5of 1995, In Re, (1997) 223 ITR 379***, wherein it has been held as under :-

> *"Section 6(6) is somewhat ambiguous in its wording. It can be read either as the definition of a person who can be treated as "ordinarily resident" in India or as the definition of a person who should be treated as "resident but not ordinarily resident". The ambiguity arises as a result of the use of the double negative used in the sub-section. The two interpretations possible are :*
>
> > *(1) An individual is resident and ordinarily resident in any previous year only if:*
> >
> > > *(a) He has been a "resident" (as per Section 6(1)) in nine out of ten previous years preceding that year; and*
> > >
> > > *(b) He has been in India for period or periods amounting in all to 730 days or more during the seven years preceding that year.*
> >
> > *(2) An individual, though resident, is not ordinarily resident; in any previous year-*
> >
> > > *(a) Either where he has not been resident, ie., has been a non-resident in nine out of ten previous years preceding that previous year;*
> > >
> > > *(b) Or where he has not been in India (ie., has been absent from India) for 730 days or more during the seven previous years preceding that year.*

It will be seen that, if we apply the first of the above two interpretations, the applicant will be resident but not ordinarily resident for the assessment years 1996-97 to 2004-05 as he will have been a "resident" in eight and less number of preceding previous years although his physical stay in India would have exceeded 730 days by the end of the previous year relevant for the assessment year 1998-99. However, if the second of the tests is applied he will be a resident and ordinarily resident only for the assessment years 1996-97 and 1997-98.

It is curious that this difficulty in the interpretation of a basic provision of the Act has not been directly resolved even though the income-tax legislation in this country is about to celebrate its platinum jubilee-the provisons of Section 6(6) of the Act having been re-enacted materially on the same lines as Section 4B of the Indian Income-tax Act, 1922. The first interpretation given above is in accordance with the speech of the Finance Member in the Central Legislative Assembly while introducing the relevant amendment Bill, has been adopted by a circular of the Central Board of Direct Taxes dated December 5, 1962, and also seems to have been broadly accepted, although the alternative view has been touched upon in some judicial dicta: See the discussion in Kanga and Palkivala on the "Law and Practice of Income-tax (8th edition), pages 247-248 and Sampath Iyengar's Law of Income-tax (9th edition), pages 869-872" and the cases cited therein. 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 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 conditions is not fulfilled. The applicant is therefore, right when he says that he will be having the status of a resident but not ordinarily resident for the assessment years 1996-97 to 2004-05. It is on this assumption that his questions have to be answered and the answers are restricted to the assessment years in respect of which he will be a resident but not ordinarily resident mentioned above."

(emphasis supplied)

8. The above section was amended by the Finance, Act 2003, w.e.f 1st April , 2004. After the amendment, the first interpretation as given above by Authority for Advance Ruling has made way for the second

interpretation in determining the residential status of an asses Therefore, even though the Department's Circular No. 7 of 2003 which explains the new section, states that the amendment was made in order to remove doubts about the interpretation of the section and it is clarificatory in nature, nevertheless, it has been made applicable only from 1st April,2004. We do not see how the amendment could be held to be clarificatory, as the residential status of an assessee determines the assessee's tax burden. Therefore, the amendment can be held only as substantive in nature and cannot be given retrospective effect. In fact, the Tribunal in this context has rightly observed as under :-

> *"5. ……..All these factors have been observed by Lucknow Bench of the Tribunal in the case of Abhay Pratap Singh Sengar vs. ITO, 108 ITD 8 holding as under:-*
>
> > *15. Though in the notes on clauses it has been mentioned that the proposed amendment is clarificatory in nature, but the amendment has been made applicable in relation to the assessment year 2004-05 and subsequent years which is evident from Finance Bill, 2003 introducing this amendment (2003) 260 ITR 41 (St). It is a substantive provision inasmuch as it determines the tax liability of a person and therefore, it cannot be said to be a procedural section. Moreover, the definition of resident is entirely different from non-resident. Therefore, once in the substituted section the concept of non-resident has been brought into in place of resident, it cannot be said that it is clarificatory in nature. The scope of total income of an assessee is decided with reference to residential status. Consequently, the tax effect of the assessee's total income is decided with reference to the residential status. By virtue of this section the assessee acquired a vested right in the form of reduced total income.*
> >
> > *In regard to statutes dealing with substantive rights, I may refer to the decision of the Hon'ble Supreme Court in the case of Keshavan Madhava Menon vs. State of Bombay, AIR 1951 SC 128 wherein it has been held that a cardinal principle of construction of*

statutes is that every statute is prima facie prospective operation. This rule is applicable where the object of the statute is to affect vested rights (e.g. in the present case by amendment, a person who hitherto was to be assessed as 'resident but not ordinarily resident' will be assessed as 'resident and ordinarily resident' thereby increasing his scope of total income and consequently tax liability) or to impose new burdens or to impair existing obligations. In the words of Lord Balnesburg, "provisions which touch a right in existence at thepassing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment". Therefore, merely because in notes on clauses it has been mentioned that it is clarificatory in nature, it cannot be said that the substituted section is clarificatory in nature. In the present case, since it is not disputed that the assessee was not resident in India in 9 out of 10 years preceding the assessment year in question, the assessee had rightly claimed its status as of "resident and not ordinarily resident" in assessment year 2003-04. The interpretation given by the ld. CIT(A) based on notes on clauses cannot be accepted.

16. The ld. CIT(A)'s observations that the interpretation placed by Tribunal in Ram Sagar Chaudhari's case will create anomalous position is purely based on conjectures inasmuch as the basic cannon of taxing statutes is of strict interpretation. If the language of section is clear and unambiguous then the same cannot be interpreted in a manner so as to subscribe an altogether different meaning to that piece of legislation. Courts are not to take into consideration the consequences that would follow. Courts are not to fill in the gaps in legislation. A matter which should have been, but has not been provided for in a statute cannot be supplied by courts, as to do so will be legislation and not construction. In the present case not mentioning of non resident in Section 6(6)(a) is a case of casus omissus which has been corrected by Finance Act, 2003. I may further observe that aid to Notes on clauses can be had only in case of some ambiguity in the section and not otherwise."

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6. We have heard the rival contentions and perused the material on record. As the facts emerge, it has not been disputed that prior to 1.4.2004, there existed ambiguity in

> *Section 6(6). The Lucknow Bench in the above referred case has considered all these aspects and followed similar claim of the assessee. Following this judgment of Hon'ble Supreme Court in the case of Pradip J. Mehta (supra), we hold that CIT(A) has rightly considered the status of the assessee as 'Resident but not Ordinary Resident' in the years in question, his orders are upheld."*

9. Consequently, it is the pre-amended section which has to apply in the case of respondent-assessee. Moreover, from the facts of the present case, it is established that the respondent-assessee was not a resident for three out of ten previous years preceding the assessment years 1998-1999 and 1999-2000. Accordingly, the additions were rightly deleted by the two authorities below.

10. Thus, the present appeals, being bereft of merit, are dismissed *in limine.*

MANMOHAN, J

CHIEF JUSTICE

SEPTEMBER 14, 2010
Ms/rn