

(1996) 09 KL CK 0048

High Court Of Kerala

Case No: Income-tax Reference No"s. 109, 113 and 114 of 1992

Commissioner of Income Tax

APPELLANT

Vs

K. Ramullan

RESPONDENT

Date of Decision: Sept. 10, 1996**Acts Referred:**

- Foreign Exchange Regulation Act, 1973 - Section 2
- Income Tax Act, 1961 - Section 10(4A)
- Wealth Tax Act, 1957 - Section 6

Citation: (1997) 226 ITR 264 : (1997) 92 TAXMAN 122**Hon'ble Judges:** V.V. Kamat, J; K. Narayana Kurup, J**Bench:** Division Bench**Advocate:** P.K.R. Menon and N.R.K. Nair, for the Appellant; T.M. Sreedharan, for the Respondent

Judgement

V.V. Kamat, J.

Out of these three references, all relating to the assessment year 1983-84, the first one (income tax Reference No. 109 of 1992) arises out of the proceedings under the Income Tax Act, 1961. The other two (income tax References Nos. 113 and 114 of 1992) arise out of the proceedings under the Wealth-tax Act, 1957, relating to the years 1983-84 and 1984-85.

2. There is no dispute that the questions expecting our answer will determine the fate of all these three references.

3. Reading the questions in both these references, the question for consideration and the consequent decision get circumscribed within a narrow compass. The question to be answered is whether the assessee would have to be understood as "a person resident outside India", as a result of which in the computation of the income or wealth, money standing to his credit in a Non-resident (External) Account in any bank in India could be included or not. Similar would be the question on the

strength of the extension of logic as to whether such money would be includible as wealth under the Wealth-tax Act. After hearing the submissions of learned senior counsel for the Revenue and also of learned counsel for the assessee in these proceedings, answers to the question would be found in a narrow compass.

4. For the sake of completion of this judgment, the questions are reproduced hereinafter :

" Income Tax Reference No, 109 of 1992 :

1. Whether, on the facts and in the circumstances of the case,

(i) should not the Tribunal have considered the question adverting only to Section 10(4A) of the Income Tax Act, Section 2(q) of the Foreign Exchange Regulation Act and relevant provisions of the Income Tax Act without adverting at all to Section 2(p) of the Foreign Exchange Regulation Act ?

(ii) the assessee who was in India from June 13, 1982, to March 31, 1983, in the previous year relevant to the assessment year 1983-84 and the assessee, therefore, being a "resident but not ordinarily resident" is entitled to the benefit of exemption since the same is available to the nonresident as defined under the Income Tax Act ?

(iii) the assessee who does not satisfy the test of being a "nonresident" under the Income Tax Act does qualify for the exemption ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal is right in law in holding that the assessee is entitled to exemption of the interest earned on the deposits in Non-resident (External) Account in terms of Section 10(4A) of the Income Tax Act, 1961 ?"

5. Income Tax References Nos. 113 and 114 of 1992 :

" 1. Whether, on the facts and in the circumstances of the case, the Tribunal is right in posing the question :

"the point at issue is whether the appellant is a non-resident within the meaning of Section 2(q) read with paragraphs (c) and (d) of Sub-clause (iii) of Section 2(p) of the Foreign Exchange Regulation Act, 1973" as above and is not the above question wrongly posed and wrongly considered by the Tribunal ?

2. Whether, on the facts and in the circumstances of the case, should not the Tribunal have considered the question only u/s 6 of the Wealth-tax Act read with the relevant provisions of the Income Tax Act and Section 2(q) of the Foreign Exchange Regulation Act ?

3. Whether, on the facts and in the circumstances of the case, the Tribunal is justified at all in considering the question in the light of Section 2(p) of the Foreign Exchange Regulation Act, 1973 ?

4. Whether, on the facts and in the circumstances of the case,

(i) the assessee is a person not resident in India ?

(ii) the sum of Rs. 13,54,060 is to be "excluded for the valuation date of March 31, 1983" ?

(iii) the sum of Rs. 13,54,060 is entitled to be excluded from the total wealth of the assessee ?"

6. In the proceedings under the Income Tax Act, 1961, the question relates to the earning of interest at Rs. 46,104 standing to the credit of the assessee in a Non-resident (External) Account, whereas in Income Tax References Nos. 113 and 114 of 1992 dealing with the assessment years 1983-84 and 1984-85, respectively, the amounts are Rs. 13,54,060 (in Income Tax Reference No. 113 of 1992) and Rs. 16,32,592 (in Income Tax Reference No. 114 of 1992). It is necessary to note that the respective valuation dates are March 31, 1983, and March 31, 1984, with regard to the assessment years in question.

7. The undisputed factual matrix takes us to the assessee who is a person of Indian origin settled in Malaysia and gradually acquiring Malaysian citizenship. The assessee has interests in India in the form of agricultural lands, house property and investments in banks on proprietary aspects. He has further interest in India because his wife and children are residents of India. Further, the assessee, for the purpose of the Income Tax Act and, consequently, the Wealth-tax Act, has the status of a resident, but not an ordinary resident.

8. On the strength of the Non-resident (External) Account, the assessee contended for a claim for non-inclusion in the total income under the provisions of Section 10(4A) of the Income Tax Act. In these proceedings, the trial authority treated the assessee as a resident in India, as a person satisfying the requirements that during the previous year, he was in India living with his wife and children.

9. The appellate authority considered the question to confirm the order of the trial authority. The Income Tax Appellate Tribunal considered these proceedings and with regard to the question arising out of Income Tax proceedings, decided it by the judgment dated October 24, 1990. With regard to the assessment years 1983-84 and 1984-85 arising out of wealth-tax proceedings, the Income Tax Appellate Tribunal, Cochin Bench, considered the question by separate judgments of the same date (October 24, 1990).

10. In view of the position that the three proceedings relate to the common question of a legal character, the three proceedings are being considered and decided by this common judgment. Learned counsel are more than clear that our decision in the Income Tax proceedings would govern the fate of the proceedings under the Wealth-tax Act. Therefore, we will refer to the statutory provisions of the Income Tax Act, 1961, especially the provisions of Section 10 thereof as sought to be

amended by the Finance Act, 1982, with effect from April 1, 1982, because the substitution of Clause (4A) by the above Finance Act would undisputedly govern the situation.

11. Again, for the satisfaction of this judgment, the said governing position of Section 10(4A) is reproduced hereinbelow :

" 10. Incomes not included in total income. -- In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included-

(4A) in the case of a person resident outside India, any income from interest on moneys standing to his credit in a Non-resident (External) Account in any bank in India in accordance with the Foreign Exchange Regulation Act, 1973 (46 of 1973), and any rules made thereunder.

Explanation. -- In this clause, "person resident outside India" shall have the meaning assigned to it in Clause (q) of Section 2 of the Foreign Exchange Regulation Act, 1973 (46 of 1973)."

12. A bare reading of the statutory provision would show that its applicability is dependent on a situation as to whether a person is resident outside India. The statutory provision of the Explanation thereto would take us to understand what is statutorily meant by "a person resident outside India". This would take us to consider the provisions of Section 2(p) of the Foreign Exchange Regulation Act, 1973 (46 of 1973), which requires reproduction :

" 2. (p) "person resident in India" means -

(i) a citizen of India who has, at any time after the 25th day of March, 1947, been staying in India, but does not include a citizen of India who has gone out of, or stays outside India, in either case -

(a) for or on taking up employment outside India, or

(b) for carrying on outside India a business or vocation outside India, or

(c) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period ;

(ii) a citizen of India, who having ceased by virtue of paragraph (a) or paragraph (b) or paragraph (c) of Sub-clause (i) to be resident in India, returns to, or stays in India, in either case -

(a) for or on taking up employment in India, or

(b) for carrying on in India a business or vocation in India, or

(c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period ;

(iii) a person, not being a citizen of India, who has come to, or stays in, India, in either case -

(a) for or on taking up employment in India, or

(b) for carrying on in India a business or vocation in India, or

(c) for staying with his or her spouse, such spouse being a person resident in India, or

(d) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period ;

(iv) a citizen of India, who, not having stayed in India at any time after the 25th day of March, 1947, comes to India for any of the purposes referred to in paragraphs (a), (b) and (c) of Sub-clause (iii) or for the purpose and in the circumstances referred to in paragraph (d) of that Sub-clause or having come to India stays in India for any such purpose and in such circumstances.

Explanation. -- A person, who has, by reason only of paragraph (a) or paragraph (b) or paragraph (d) of Sub-clause (iii) been resident in India, shall, during any period in which he is outside India, be deemed to be not resident in India."

13. A bare reference to Clause (p)(iii)(c) would show that a person who is not a citizen of India, but has come to or stays in India for staying with his or her spouse, such spouse being a person resident in India would have to be regarded and understood as a person resident in India. This position is also applicable to such a person who is not a citizen of India coming to India for any other purpose indicating his intention to stay for an uncertain period. For all these years, as we get from the statement of case, the assessee had proprietary interest as well as family interest in India.

14. Along with this, if the statutory provisions of Section 2(q) of the Foreign Exchange Regulation Act, 1973, are taken into consideration, "a person resident outside India" would have to be understood as a person who is not a resident in India.

15. Therefore, what follows would be a situation that the assessee would have to be understood as a person resident in India and even then, the assessee would not get the benefit of the Non-resident (External) Account. This is apart from the clear and unambiguous statutory provision that Section 10(4A) would be applicable to a person who is resident outside India which is not the factual position floating from the statement of case.

16. With regard to the questions, we feel that answer to question No. 2 in Income Tax Reference No. 109 of 1992 would be more than satisfactory as it would answer all other questions in the other references. Accordingly, we answer question No. 1 in Income Tax Reference No. 109 of 1992 as unnecessary. We answer question No. 2 in Income Tax Reference No. 109 of 1992 in the negative, in favour of the Revenue and

against the assessee. We answer question No. 1 in Income Tax References Nos. 113 and 114 of 1992 in the negative, in favour of the Revenue and against the assessee. Answers to questions Nos. 2, 3 and 4 in Income Tax References Nos. 113 and 114 of 1992 are unnecessary in view of answer to question No. 1 in Income Tax References Nos. 113 and 114 of 1992 is of a consequential character (sic).

17. A copy of this judgment, under the seal of the court and the signature of the Registrar, shall be forwarded to the Income Tax Appellate Tribunal, Cochin Bench, as required by law.