(1994) 73 TAXMAN 503

Calcutta High Court

Case No: IT Reference No. 59 of 1987

Commissioner of Income Tax		APPELLANT
	Vs	
Sandeep Kumar Mahansaria		RESPONDENT

Date of Decision: Aug. 7, 1990

Acts Referred:

- Income Tax Act, 1922 - Section 4(1)(a)(ii)
- Income Tax Act, 1961 - Section 256(2), 6(1), 6(1)(a), 6(1)(b)

Citation: (1994) 73 TAXMAN 503

Hon'ble Judges: Bhagabati Prasad Banerjee, J; Ajit K. Sengupta, J

Bench: Division Bench

Advocate: A.C. Moitra and Sunil Mukherjee, for the Appellant;

Judgement

Ajit K. Sengupta, J.
In this reference u/s 256(2) of the income tax Act, 1961 ("the Act") for the assessment year 1979-80 the following question has been referred to this Court:

Whether, on the facts and in the circumstances of the case, the Tribunal was justified in treating the status of the assessee as not "resident and ordinarily resident" during the assessment year 1979-80?

The question which calls for determination in this case is whether the assessee was resident and ordinarily resident in the previous year relevant to the assessment year in question. Shortly stated, the facts are that the assessee was assessed in the status of individual.

The ITO held that the assessee was resident and ordinarily resident. The assessee went in appeal before the AAC who upheld the order of the ITO and dismissed the appeal of the assessee on this point. The assessee then came up in second appeal before the

Tribunal. It was contended before the Tribunal that the assessee was minor and he used to stay with his relations during his visit to India and that the flat which was contracted to be purchased on his behalf was not legally transferred to him though its possession was given to him since registered sale deed was not executed in his favour. It was contended before the Tribunal that on the basis of taking possession of the flat of which the assessee was not legal owner and even otherwise it could not be said that the assessee was maintaining any dwelling house in India. The Tribunal held that the status of the assessee was not "resident and ordinarily resident" during the assessment year.

2. From the facts found by the Tribunal it would appear that in the original return of income the assessee claimed its residential status as resident but in the revised return it was shown as a non-resident. He had been in India in nine out of the ten previous years preceding the instant year. His stay in India during 9 years from the accounting period 1970-71 to the accounting period 1978-79 was 723 days. His stay in India during the assessment year in question was for 64 days. During the assessment year 1975-76, the assessee was resident within the meaning of clause (c) of section 6(1) of the Act. During the assessment year 1976-77, the assessee was non-resident. During the assessment years 1977-78 and 1978-79, the assessee was resident within the meaning of clause (b) of section 6(1) as he was maintaining a flat for dwelling in India. The assessee had contracted to purchase a flat at Calcutta and had advanced certain amount therefor and had taken possession of the said flat pursuant thereto prior to the assessment year 1977-78.

3. Section 6(1) lays down the tests to be applied for finding out whether an individual is a resident in India during the relevant previous year. The tests of residence provided in section 6(1) are not cumulative but alternative. Each of the two tests requires the personal presence of the assessee in India for the stated period in course of the accounting year. u/s 6(1)(a) if an individual stays in India for at least 182 days in the aggregate in course of the relevant accounting year, he will be regarded as a resident irrespective of any other consideration, but in this case that test has not been fulfilled. u/s 6(1)(b), a person would be regarded as a resident in India if two conditions are fulfilled: firstly, he maintains or causes to be maintained a dwelling place in India for a period amounting in all to at least 182 days in the accounting year and subsequently he has been in India for at least 30 days in that year.

4. The Tribunal was of the view that the assessee being a minor was residing with the relations and, accordingly, it cannot be said that the dwelling place for him was maintained and so far as the flat which was purchased by the assessee is concerned the Tribunal was of the view that since the assessee did not become the legal owner, it cannot be said that he maintained a dwelling place for him.

5. It has been laid down by the Supreme Court in Commissioner of Income Tax, Madras Vs. K.S. Ratnaswamy, that the concept of a home in India maintained or caused to be maintained by the assessee is the essence of the test of residence. The Supreme Court

observed as follows:

At the outset it may be pointed out that the section uses the expression ''dwelling place'', a flexible expression, but the expression must be construed according to the object and intent of the particular legislation in which it has been used. Primarily, the expression means ''residence'', ''abode'' or ''home'' where an individual is supposed usually to live and sleep and since the expression has been used in a taxing statute in the context of a provision which lays down a technical test of territorial connection amounting to residence, the concept of an abode or home would be implicit in it. In other words, it must be a house or a portion thereof which could be regarded as an abode or home of the assessee in the taxable territories. In our view, this aspect of the matter has been rightly emphasized by the Bombay High Court in Fulabhai Khodabhai''s case [1957] 31 ITR 771, 776, 777 where Chief Justice Chagla has observed thus:

When we look at the language used by the Legislature, it is clear that what is sought to be emphasized is that there must be not only a residence or a house for the assessee in the taxable territories, but there must be a home.

The connotation of a dwelling place is undoubtedly different from a mere residence or a mere house in which one finds oneself for a temporary or short period. A dwelling place connotes a sense of permanency, a sense of attachment, a sense of surroundings, which would permit a person to say that this house is his home. Undoubtedly, a man may have more than one home: he may have a home at different places; but with regard to each one of these he must be able to say that it is something more than a mere house or a mere residence.

Similar view was expressed by Mr. Justice, Rowlatt in Pickles v. Foulsham [1923] 9 TC 261 (KB), where the question whether the assessee was a resident in England for the purpose of payment of income tax had to be decided on general principles in the absence of any statutory provision in the English statute with regard to residence as we have in our taxing statute. At page 275 of the report the learned Judge observed thus: (pp. 275-76)

A man, I suppose, may keep a house for his wife and come there merely as a visitor; he may keep a house for his mother, and, when he can get away, always go there to see her; but it may be that it is his mother''s house, even if he is paying for it, and he is going there as a visitor. He keeps the house for his wife and children; it may be that he is going there as going home; it may be that that is the centre really of his life, that he keeps many belongings there, and so on, and his time in Africa is really, in truth, a period of enforced absence from what is truly his residence. Now it may be one, or it may be the other.

In other words, the test which the learned Judge laid down was that when you go to a house you should be really going home, then you are going to a dwelling house whether maintained by you or by someone else, and a house may be your home whether it

belongs to you or belongs to someone else. In other words, with regard to the house where he goes and lives, he must be able to say that it is his abode or home. It is, therefore, not possible to accept the contention of learned counsel for the revenue that it is erroneous to introduce the concept of home or abode into the section.

Secondly, the section uses two expressions: "he maintains a dwelling place" and "he has maintained for him a dwelling place". The latter expression obviously means he causes to be maintained for him a dwelling place. This is clear from the fact that the relevant provision in the 1961 Act has now been altered and it says: "he causes to be maintained for him" and in the Notes on Clauses to the concerned Bill it has been explained that the words "has maintained" in section 4A(a)(ii) have been replaced in the draft by the words "causes to be maintained", which express the intention better. Now, in either of these expressions the volition on the part of the assessee in the maintenance of the dwelling place emerges very clearly; whether he maintains it or he causes it to be maintained, the maintenance of the dwelling place must be at his instance, behest or request and when it is maintained by someone else other than the assessee, it must be for the assessee or for his benefit.... (p. 223)

In that case the Supreme Court held that the assessee was not resident because that though the assessee could be said to have had a share in the joint family house with a consequent right to occupy the same, it could not be said that the said family house was maintained by Ganesa as the karta of the family as a dwelling place for the assessee or for his benefit nor was it maintained by him at the instance of the assessee. Moreover, his stay in the family house has been found to be as a guest enjoying the hospitality of his kith and kin rather than as an inhabitant of his abode or home.

6. In other words, the question that has to be considered is whether on the facts found by the Tribunal the assessee maintained or caused to be maintained a flat or not of his own.

7. In Ramjibhai Hansjibhai Patel Vs. Income Tax Officer, Special Circle, Ahmedabad, which was referred to in K.S. Ratnaswamy"s case (supra), the Gujarat High Court was of the view that to have the status of an individual as "resident" under the Act, it is not necessary that the dwelling place must be maintained by him or for him as an individual. If he is a member of a HUF and that family has maintained a dwelling place for him and other members of the family, the requirements of the section in this behalf could be said to be satisfied. It was also held that the vital fact to determine in order to decide whether a case falls u/s 4(1)(a)(ii) of the Indian income tax Act, 1922, or not is not, the ownership of property but the right of the assessee to reside in a building which was ready and fit for occupation and was intended to be used by him as his own.

In this case as we have already indicated that the assessee purchased a flat for him. He obtained the possession of the flat but the conveyance was not registered. It is true that unless a conveyance is registered, the transferee does not get the title of the property but as soon as he gets the possession thereof, there is no further impediment to such flat

being used as a dwelling place of the concerned individual. He has all the rights pertaining to ownership excepting that he cannot transfer a better title than he has in possession and he enjoys all his rights.

8. In Madgul Udyog Vs. Commissioner of Income Tax, , this Court held that the term ''ownership'' is not merely a word of technical legal meaning but should be misinterpreted in its broadest possible meaning. Broadly ''ownership'' rests in one who has dominion on the property which is the subject of ownership. In any event ownership is not the criterion to determine whether a person maintained or caused to be maintained a dwelling unit.

9. For the reasons aforesaid, we are of the view that the Tribunal was not right in holding that simply because the flat in question was not transferred by a registered deed of conveyance to the assessee, he was not maintaining a dwelling house for himself. The question in this reference is, therefore, answered in the negative and in favour of the revenue. There will be no order as to costs.

Banerjee, J.

I agree.