V. V. R. N. M. SUBBAYYA CHETTIAR

v.

COMMISSIONER OF INCOME-TAX, MADRAS.

1950

Dec. 21.

[SAIYID FAZL ALI, MUKHERJEA and CHANDRASEKHARA AIYAR JJ.]

Indian Income-tax Act (XI of 1922), s. 4A (b)—Hindu undivided family—Residence—Tests—Occasional visits to India and attending to family affairs there, effect of—Burden of proof—"Control and management", "situated", "wholly" and "affairs", meanings of.

The words used in s. 4A (b) show : (i) that, normally a Hindu undivided family will be taken to be resident in the taxable territories, but such a presumption will not apply if the case can be brought under the second part of the provision, (ii) the word "affairs" means affairs which are relevant for the purpose of the Income-tax Act and which have some relation to income, (iii) the question whether the case falls within the exception depends on whether the seat of the direction and control of the affairs of the family is inside or outside British India, and (iv) the onus of proving facts which would bring his case within the exception which is provided by the latter part is on the assessee.

The expression "control and management" in s. 4A (b) of the Income-tax Act signifies the controlling and directive power, the "head and brain" as it is sometimes called; "situated" implies the functioning of such power at a particular place with some degree of permanence; and "wholly" seems to recognise the possibility of the seat of such power being divided between two distinct and separate places and that a Hindu undivided family may have more than one residence in the same way as a corporation may have.

The *karta* of a Hindu undivided family lived with his wife and children and carried on business in Ceylon, which had become their place of domicile. He owned some immoveable property and had a house and investments in British India. In the year of account he visited British India and stayed there for periods amounting in all to 101 days and during his stay started two firms in British India, personally attended to a litigation relating to the family lands, and appeared before the Income-tax authorities in proceedings relating to assessment of the income of the family :

Held, that these facts were not necessarily conclusive to establish the existence of a centre of control and management of the affairs of the family in British India, but they were by no means irrelevant to the matter in issue, and inasmuch as the assessee had not discharged the onus which lay upon him under the law by producing all the material evidence which he was called upon to produce to show that normally and as a matter of

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course the affairs in India were also being controlled from Colombo, the normal presumption under the first part of s. 4A (b) must be given effect to and the assessee must be treated as a resident in British India during the year in question. It was however open to the assessee to prove in future years by proper evidence that the seat of control and management of the affairs of the family was wholly outside British India.

De.Beere v. *Howe* (5 Tax Cas. 198), *Swedish Central Railway Co. Ltd.* v. *Thompson* (9 Tax Cas. 373) referred to.

APPELLATE JURISDICTION: Civil Appeal No. XXXVIII of 1949.

Appeal from a Judgment of the High Court of Judicature at Madras (Gentle C. J. and Patanjali Sastri J.) dated August 22, 1947, in a reference under section 66 (1) of the Indian Income-tax Act made by the Income-tax Appellate Tribunal (Ref. No. 25 of 1946).

K. Rajah Aiyar (*K. Srinivasan*, with him) for the appellant.

M. C. Setalvad (*G. N. Joshi*, with him) for the respondent.

1950. December 21. The Judgment of the Court was delivered by

Fazl Ali J.

FAZL ALI J. - This is an appeal from a judgment of the High Court of Judicature at Madras on a reference made to it under section 66 (1) of the Indian Income-tax Act by the Income-tax Appellate Tribunal in connection with the assessment of the appellant to income-tax for the year 1942-43. The question of law referred to the High Court was as follows:—

"Whether in the circumstances of the case, the assessee (a Hindu undivided family) is 'resident' in British India under section 4A (b) of the Income-tax Act."

The circumstances of the case may be briefly stated as follows. The appellant is the *karta* of a joint Hindu family and has been living in Ceylon with his wife, son and three daughters, and they are stated to be domiciled in that country. He carries on business in Colombo under the name and style of the General Trading Corporation, and he owns a house, some immoveable property and investments in British India.

He has also shares in two firms situated at Vijayapuram and Nagapatnam in British India. In the year of account, 1941-42, which is the basis of the present assessment, the appellant is said to have visited British India on seven occasions and the total period of his stay in British India was 101 days. What he did during this period is summarized in the judgment of one of the learned Judges of the High Court in these words:—

"During such stays, he personally attended to a litigation relating to the family lands both in the trial Court and in the Court of appeal. He was also attending the income tax proceedings relating to the assessment of the family income, appearing before the income-tax authorities at Karaikudi and Madras. On one of these occasions, he obtained an extension of time for payment of the tax after interviewing the authority concerned....."

The other facts relied upon by the income-tax authorities were that he did not produce the file of correspondence with the business in Colombo so as to help them in determining whether the management and control of the business was situated in Colombo and he had started two partnership businesses in India on 25th February, 1942, and remained in India for some time after the commencement of those businesses.

Upon the facts so stated, the Income-tax Officer and the Assistant Commissioner of Income-tax held that the appellant was a resident within the meaning of section 4A (b) of the Income-tax Act, and was therefore liable to be assessed in respect of his foreign income. The Income-tax Appellate Tribunal however came to a different conclusion and held that in the circumstances of the case it could not be held that any act of management or control was exercised by the appellant during his stay in British India and therefore he was not liable to assessment in respect of his income outside British India. This view was not accepted by a Bench of the Madras High Court consisting of the learned Chief Justice and Patanjali Sastri J. They held that the Tribunal had misdirected itself in determining the

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question of the " residence " of the appellant's family and that on the facts proved the control and management of the affairs of the family cannot be held to have been wholly situated outside British India, with the result that the family must be deemed to be resident in British India within the meaning of section 4A (b) of the Income-tax Act. In this appeal, the appellant has questioned the correctness of the High Court's decision :—

Section 4A (b) runs thus :—

" For the purposes of this Act—

A Hindu undivided family, firm or other association of persons is resident in British India unless the control and management of its affairs is situated wholly without British India."

It will be noticed that section 4A deals with " residence ", in the taxable territories, of (a) individuals, (b) a Hindu undivided family, firm or other association of persons, and (c) a company. In each of these cases, certain tests have been laid down, and the test with which we are concerned is that laid down in section 4A (b). This provision appears to be based very largely on the rule which has been applied in England to cases of corporations, in regard to which the law was stated thus by Lord Loreburn in *De Beers* v. *Howe*(1).

" A company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business.....The decision of Chief Baron Kelly and Baron Huddleston in *The Calcutta Jute Mills* v. *Nicholson* and *The Cesena Sulphur Company* v. *Nicholson*(2), now thirty years ago, involved the principle that a company resides for purposes of income-tax where its real business is carried on. Those decisions have been acted upon ever since. I regard that as the true rule, and the real business is carried on where the central management and control actually abides."

It is clear that what is said in section 4A (b) of the Income-tax Act is what Lord Loreburn intended to

(1) 5 Tax Cas. 198. (2) (1876) 1 Ex. D. 428.

convey by the words " where the central management and control actually abides."

The principles which are now well-established in England and which will be found to have been very clearly enunciated in *Swedish Central Railway Company Limited* v. *Thompson*(1), which is one of the leading cases on the subject, are :—

(1) that the conception of residence in the case of a fictitious " person ", such as a company, is as artificial as the company itself, and the locality of the residence can only be determined by analogy, by asking where is the head and seat and directing power of the affairs of the company. What these words mean have been explained by Patanjali Sastri J. with very great clarity in the following passage where he deals with the meaning of section 4A (b) of the Income-tax Act :—

" Control and management " signifies, in the present context, the controlling and directive power, "the head and brain" as it is sometimes called, and " situated " implies the functioning of such power at a particular place with some degree of permanence, while "wholly" would seem to recognize the possibility of the seat of such power being divided between two distinct and separated places."

As a general rule, the control and management of a business remains in the hand of a person or a group of persons, and the question to be asked is wherefrom the person or group of persons controls or directs the business.

(2) Mere activity by the company in a place does not create residence, with the result that a company may be "residing" in one place and doing a great deal of business in another.

(3) The central management and control of a company may be divided, and it may keep house and do business in more than one place, and, if so, it may have more than one residence.

(4) In case of dual residence, it is necessary to show that the company performs some of the vital organic

(1) 9 Tax Cas. 273.

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functions incidental to its existence as such in both the places, so that in fact there are two centres of management.

It appears to us that these principles have to be kept in view in properly construing section 4A(b) of the Act. The words used in this provision clearly show firstly, that, normally, a Hindu undivided family will be taken to be resident in the taxable territories, but such a presumption will not apply if the case can be brought under the second part of the provision. Secondly, we take it that the word "affairs" must mean affairs which are relevant for the purpose of the Income-tax Act and which have some relation to income. Thirdly, in order to bring the case under the exception, we have to ask whether the seat of the direction and control of the affairs of the family is inside or outside British India. Lastly, the word "wholly" suggests that a Hindu undivided family may have more than one "residence" in the same way as a corporation may have.

The question which now arises is what is the result of the application of these principles to this case, and whether it can be held that the central control and management of the affairs of the assessee's family has been shown to be divided in this case.

It seems to us that the mere fact that the assessee has a house at Kanadukathan, where his mother lives, cannot constitute that place the seat of control and management of the affairs of the family. Nor are we inclined in the circumstances of the present case to attach much importance to the fact that the assessee had to stay in British India for 101 days in a particular year. He was undoubtedly interested in the litigation with regard to his family property as well as in the income-tax proceedings, and by merely coming out to India to take part in them, he cannot be said to have shifted the seat of management and control of the affairs of his family, or to have started a second centre for such control and management. The same remark must apply to the starting of two partnership businesses, as mere "activity" cannot be the test of residence.

It seems to us that the learned Judges of the High Court have taken rather a narrow view of the meaning of section 4A(b), because they seem to have proceeded on the assumption that merely because the assessee attended to some of the affairs of his family during his visit to British India in the particular year, he brought himself within the ambit of the rule. On the other hand, it seems to us that the more correct approach to the case was made by the Appellate Assistant Commissioner of Income-tax in the following passage which occurs in his order dated the 24th February, 1944:—

"During a major portion of the accounting period (year ending 12th April, 1942) the appellant was controlling the businesses in Burma and Saigon and there is no evidence that such control was exercised only from Colombo. No correspondence or other evidence was produced which would show that any instructions were issued from Colombo as regards the management of the affairs in British India especially as it was an unauthorized clerk who was looking after such affairs. The presumption therefore is that whenever he came to British India the appellant was looking after these affairs himself and exercising control by issuing instructions.....It has been admitted that there are affairs of the family in British India. Has it been definitely established in this case that the control and management of such affairs has been only in Colombo? I have to hold it has not been established for the reasons already stated by me."

There can be no doubt that the onus of proving facts *which* would bring his case within the exception, which is provided by the latter part of section 4A(b), was on the assessee. The appellant was called upon to adduce evidence to show that the control and management of the affairs of the family was situated wholly outside the taxable territories, but the correspondence to which the Assistant Commissioner of Income-tax refers and other material evidence which might have shown that normally and as a matter of course the affairs in India were also being controlled from Colombo were not produced. The position therefore is this. On the one

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hand, we have the fact that the head and *karta* of the assessee's family who controls and manages its affairs permanently lives in Colombo and the family is domiciled in Ceylon. On the other hand, we have certain acts done by the *karta* himself in British India, which, though not conclusive by themselves to establish the existence of more than one centre of control for the affairs of the family, are by no means irrelevant to the matter in issue and therefore cannot be completely ruled out of consideration in determining it. In these circumstances, and in the absence of the material evidence to which reference has been made, the finding of the Assistant Commissioner, that the onus of proving such facts as would bring his case within the exception had not been discharged by the assessee and the normal presumption must be given effect to, appears to us to be a legitimate conclusion. In this view, the appeal must be dismissed with costs, but we should like to observe that as this case has to be decided mainly with reference to the question of onus of proof, the decision in this appeal must be confined to the year of assessment to which this case relates, and it would be open to the appellant to show in future years by proper evidence that the seat of control and management of the affairs of the family is wholly outside British India.

Mukherjea J. MUKHERJEA J.—I agree with my learned brother, Fazl Ali J., both in his reasoning and in his conclusion.

Chandrasekhara Aiyar J. CHANDRASEKHARA AIYAR J.—I concur in the judgment of my learned brother, Fazl Ali J.

Appeal dismissed.

Agent for the appellant : *M. S. K. Sastri.*

Agent for the respondent : *P. A. Mehta.*