INCOME-TAX REFERENCE

Before Mr. M. C. Chagla, Chief Justice, and Mr. Justice Tendolkar

1952 Oct. 6

MANIBHAI S. PATEL, APPLICANT *v.* THE COMMISSIONER OF INCOME TAX, BOMBAY, RESPONDENT.*

Indian Income Tax Act (XI of 1922), ss. 4, 4A and 4B—Not ordinarily resident in any year—Meaning of—Assessee's residence in taxable territories for more than two years' 'during the seven years preceding that year'—His residence outside taxable territories also for more than two years during that period—Whether assessee not ordinarily resident within the meaning of s. 4B.

The assessee was in the taxable territories for about three years out of the seven years preceding the calender year 1944 and was outside the taxable territories for 4 years. He claimed exemption under s. 4 of the Indian Income Tax Act, 1922, as a person 'not ordinarily resident, within the taxable territories within the meaning of s. 4B of the Act. On the question whether the assessee was 'not ordinarily resident' in 1944 within the meaning of s. 4B.

Held, that in construing s. 4B the Court is concerned only with the period of the assessee's residence in the taxable territories during the seven years preceding that year and not the period of his residence outside the taxable territories.

Held, therefore, that the assessee was not 'not ordinarily resident' within the meaning of s. 4B as he was in the taxable territories for more than two years during the seven years preceding that year.

This reference related to the assessment made on Manibhai S. Patel (Applicant) for the assessment year 1945-46, the accounting year being the Calendar year 1944. During that year a sum of £. 1,67,391 accrued to him as profits in South Africa and he claimed exemption in respect of that sum under second proviso to s. 4 (*1*) of the Indian Income Tax Act 1922 as he was 'not ordinarily resident' within the meaning of s. 4B. It was found by the Income Tax Appellate Tribunal that the Assessee was in British India in the years 1934, 1935, 1936, 1938, 1939, 1941, 1942, and 1943. He was "resident in British India" as defined in s. 4A (*a*) (*i*) of the Act in the year 1934, 1935, 1941, 1942, 1943, and 1944 and he was not "resident in British India" in the years 1936-1940. It was admitted by the assessee that he was except for about a couple of months in 1941 in British India throughout the years 1941, 1942 and 1943. The Tribunal negatived the assessee's contention that he was "not ordinarily resident" and held that he was not entitled to claim exemption in respect of the profits accrued to him in South Africa in that

* Income-Tax Ref. No. 50 of 1951.

year. At the instance of the assessee the following question was referred to the High Court.

"Whether in the year of account, that is to say, calender year 1944, the assessee was "not ordinarily resident."

The reference was heard.

R. J. Kolah for the applicant.

Sir N. P. Engineer with *G. N. Joshi*, for the respondent.

CHAGLA C. J. The assessment year we are concerned with in this reference is the year 1945-46 and the accounting year is the calendar year 1944, and the question that arises for our determination is whether the assessee was "not ordinarily resident" within the taxable territories during these years. It has been found by the Taxing authorities that the assessee was a resident in the taxable territories during the calendar year 1944, and the reason why this question has got to be considered is because the assessee has claimed a certain exemption under the second proviso to s. 4 and that proviso lays down that in the case of a person not ordinarily resident in the taxable territories, income, profits and gains which accrue or arise to him without the taxable territories shall not be so included unless they are derived from a business controlled in or a profession or vocation set up in India or unless they are brought into or received in the taxable territories by him during such year. The contention of the assessee was that certain profits and gains which accrued to him in Africa did not form part of his total income for the purposes of taxation under s. 4 of the Act. Section 4A defines "residence" in the taxable territories and it is by reason of that section that the assessee has been held to be a resident in the calendar year 1944. Then we come to s. 4B and that section provides:

"(*a*) an individual is 'not ordinarily resident' in the taxable territories in any year if he has not been resident in the taxable territories in nine out of the ten years preceding that year or if he has not during the seven years preceding that year been in the taxable territories for a period of, or for periods amounting in all to, more than two years."

The contention of the assessee is that he is 'not ordinarily resident' within the meaning of this sub-section.

Now, in order that an individual is 'not ordinarily resident' he should satisfy one of the two conditions laid down in s. 4B (*a*). The first condition is that he should be not resident in the taxable territories in nine out of the ten years preceding the accounting year, and the second condition is that he should not have during the seven years preceding that year been in the

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taxable territories for a period of, or for periods amounting in all to, more than two years. In the case we are considering it has been found as a fact by the Tribunal that the assessee was not residing in the taxable territories in nine out of the ten years preceding the year in question and therefore the attempt of the assessee has been to fall under the second part of s. 4B (*a*), and his contention is that although he does not satisfy the first condition he satisfies the second condition. The facts found on this part of the case are that the assessee was living in Africa for four years out of the seven years and he was in the taxable territories for about three years, and the very ingenious argument submitted before us by Mr. Kolah is that if we literally construe the section his client has not been in the taxable territories for a period more than two years. Mr. Kolah says that he may have been in the taxable territories for a period of more than two years, but he has also been outside the taxable territories for a period more than two years and therefore the second condition is satisfied.

In order to give a proper construction to s. 4B we must consider what is the concept which is being dealt with and considered by the Legislature in this section. In s. 4A the Legislature has dealt with the concept of residence and in s. 4B the Legislature is dealing with the concept of ordinary residence. Therefore the Legislature is primarily concerned with the residence of the assessee in the taxable territories, and in order that an assessee should be 'not ordinarily resident' in the taxable territories what has got to be considered is his residence in the taxable territories, and the Legislature has provided that if an assessee resides in the taxable territories for more than two years then he is not 'not ordinarily resident' in the taxable territories, or, in other words, if an assessee does not reside in the taxable territories for more than two years he is entitled to the exemption which 'not ordinarily resident' gives to him. In this particular case it is clear that he was in the taxable territories for more than two years. Mr. Kolah says that from one point of view he was not in the taxable territories for more than two years. But the only aspect we are concerned with in construing s. 4B is, what was the period of his residence during the seven years in the taxable territories? Was his residence more or less than two years out of these seven years? On these facts it is clear that the assessee resided in the taxable territories for more than two years. Therefore it would not be true to say that he did not reside in the taxable

territories for more than two years. Mr. Kolah says that it is possible on the facts of this case for the assessee not to be resident in the taxable territories for more than two years and also to be resident in the taxable territories for more than two years. But we are not concerned with the residence of the assessee in Africa. We are concerned with his residence in the taxable territories, and if he has resided in the taxable territories for more than two years then he does not satisfy the second condition laid down in s. 4B of the Act. Therefore the Tribunal was right when it took the view that the assessee was not "not ordinarily resident" in the taxable territories in the year 1944.

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We therefore answer the question in the negative. Notice of motion taken out by the assessee dismissed. Assessee to pay the costs of the reference and of the notice of motion.

Attorneys for appellant: *Daphtary Ferreira & Diwan.*

Attorneys for respondent: *N. K. Petigara.*

Answer accordingly.

P. M. P.

INCOME-TAX REFERENCE

Before Mr. M. C. Chagla, Chief Justice, and Mr. Justice Tendolkar.

A. MOOSA AND SONS, APPLICANTS *v.* THE COMMISSIONER OF INCOME-TAX, BOMBAY, RESPONDENT.*

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Indian Income-Tax Act (XI of 1922), ss. 13 proviso, 66 (2)—Computation of profits on such basis as the Income-Tax Officer may determine —Profits so ascertained must most approximate to truth—Power of Court to consider on reference whether method adopted was wrong.

From Assessee's books of accounts profits in respect of part of sales effected by the assessee in the assessment year could be ascertained but as to the balance of sales it was impossible to ascertain from the books what profits were realised by the assessee. The Tribunal applied a flat rate of 18 per cent on all the sales. On the question of legality of applying a flat rate even to sales in respect of which profits could be ascertained from the books of account,

Held, that the discretion vested the Income Tax Officer under proviso to s. 13 of the Indian Income Tax Act, 1922, to compute profits in such manner as he determines cannot be exercised arbitrarily or capriciously or dishonestly; it must be exercised in such manner as would enable him to ascertain the profits most approximating to the truth.

* Income-tax Ref. No. 7 of 1952.