

B.B. Iranee (Legal Representative Of ... vs Commissioner Of Income-Tax, Bombay ... on 14 December, 1965

Equivalent citations: [1966]60ITR437(SC), AIRONLINE 1965 SC 9

Bench: J.C. Shah, K. Subba Rao

JUDGMENT

Subba Rao, J.

1. This appeal by special leave is directed against the judgment of the High Court of Judicature at Bombay in Income-tax Reference No. 27 of 1959.

2. The assessee, B. R. Iranee, the proprietor of Messrs. C. M. Karranjia & Co., was carrying on business of export and import in Hong Kong. In March, 1941, he started a similar business in Bombay. He came to Bombay on June 29, 1941, from Hong Kong leaving an employee to look after his business there. During the year ending with December 31, 1946, he was a resident but not ordinarily resident of India within the meaning of the provisions of the Indian Income-tax Act. He was controlling the affairs of the Hong Kong business from Bombay during that year. But during the course of that year he went to Hong Kong on June 9, 1946, and returned to Bombay in September, 1946. For the assessment year business at Rs. 1,00,000, included the same in his assessment and assessed income-tax thereon. The assessee contended that the profits of the Hong Kong business from India and that, in any event, the losses suffered by him in respect of the Hong Kong business in 1941 should be set off against the said profits. The Income-tax Officer, by his order dated March 28, 1952, rejected the contentions of the assessee. On appeal, the Appellate Assistant Commissioner agreed with him. On a further appeal, the Income-tax Appellate Tribunal came to the same conclusion. At the instance of the legal representative of the assessee, the Tribunal, by its order dated March 6, 1959, referred the following question of law to the High Court :

"Whether, on the facts and in the circumstances of the case the income of the assessee from the Hong Kong branch should be apportioned either on a time basis or in any other manner for the purpose of inclusion of the total income of the assessee."

3. Further, at the instance of the assessee, the High Court directed the Tribunal to refer the following question :

"Whether, on the facts and in the circumstances of the case, the Tribunal erred in law or misdirected itself in rejecting the assessee's claim to set off the alleged losses of 1941 of Hong Kong business against the income of the assessment year."

4. The High Court answered both the questions in favour of the revenue and against the assessee. Hence, the present appeal.

5. Mr. S. P. Mehta, learned counsel for the appellant, raised before us the following two contentions : (1) the business in Hong Kong was controlled from India during the accounting year for 8 months only and, therefore proportionate profits attributable to the rest of the year were not exigible to tax; and (2) the loss suffered by the assessee in his business in Hong Kong during the period 1941 to 1945 was ascertained only after the termination of the Second World War in 1946 and, therefore, the loss must be deemed to have been incurred by the assessee only during the accounting year.

6. To appreciate the first point, it is necessary to read the relevant part of section 4 of the Indian Income-tax Act, 1922, hereinafter called Act. It reads :

"4. (1) Subject to the provisions of this Act, the total income of any previous year of any person includes all income, profits and gains from whatever source derived which -.....

(a) if such person is resident in the taxable territories during such year, -....

(b) accrue or arise to him without the taxable territories during such year, or...

(c) if such person is not resident in the taxable territories during such year, accrue or arise or are deemed to accrue or arise to him in the taxable territories during such year : ...

Provided further 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."

7. Under the proviso, if a person is resident but not ordinarily resident in India, the income accrued to him without the taxable territories can only be included in his taxable income if it is derived from a business controlled in India. The condition that has to be fulfilled before the proviso can be invoked is that a person not ordinarily resident in India shall have controlled the business carried on by him outside India. As the control of the business is the condition for its application, it is argued that only so much of the income as accrues or arises to him without the taxable territories attributable to the period of such control is liable to tax. There appears to be some plausibility in this argument. But, this appeal does not call for an expression of a final opinion thereon, for both the Tribunal and the High Court held as a fact that the business was controlled during the entire accounting year from India. The Tribunal in its order dated October 5, 1956, held, on a consideration of the entire material placed before it, that the business was controlled from India. Adverting to the arguments of the learned counsel for the assessee before the Tribunal that the assessee's control extended only to a period of eight months out of twelve months, the Tribunal held that the business was controlled in India and that the assessee went out to Hong Kong only for a preliminary survey. The High Court

also came to the same conclusion and accepted the finding of the Tribunal. It said :

"In our opinion, mere temporary absence of a proprietor of a business from the headquarters of the business in British India cannot by itself have the effect of removing the control of the business from British India to the place where the proprietor has gone. It may be a relevant piece of evidence but not conclusive. In addition to it there should be other evidence either direct or circumstantial to establish that fact. There does not appear to be any other piece of evidence on which reliance has been placed by the assessee. It is, therefore, difficult to accept the contention of the assessee, which had been raised before the Tribunal."

8. It also pointed out that the Tribunal had also found as a fact that the business was controlled from India throughout the year. On the said finding no question of apportionment of the income of the accounting year for the purpose of taxation would arise.

9. There are no merits in the second contention either. On a direction issued by the High Court, the Tribunal referred the following question to the High Court :

"Whether, on the facts and in the circumstances of the case, the Tribunal erred in law or misdirected itself in rejecting the assessee's claim to set off the alleged losses of 1941 of Hong Kong business against the income of the assessment year ?"

10. It will be noticed at once that the question does not relate to the losses incurred in the year 1946, but only those incurred in the year 1941. The question ex facie does not comprehend the losses incurred in 1946 or ascertained during that year. The High Court, therefore, rightly held that the question framed by it was confined to the losses of the year 1941. But on an assumption not warranted by the question, the learned judges of the High Court, in deference to the arguments advanced by the counsel appearing before them, proceeded to consider the argument now raised before us and came to the conclusion that the said losses could not be held to have been sustained in the year 1946. In our view, it was not open to the High Court to answer the question not referred to it by the Tribunal. The Tribunal's order also shows that no such contention was raised before it; nor did the Tribunal deal with it. Though, in the application under section 66(2) of the Act for directing the Tribunal to refer to the High Court questions of law, one of the questions referred to earlier losses ascertained in 1946 and though the facts to sustain the said question were narrated in the affidavit in support of the petition, the High Court did not direct the Tribunal to refer the said question, presumably because no such question arose on the order of the Tribunal. In the circumstances, we cannot permit the appellant to raise a question which is entirely different from the question propounded for the decision of the High Court.

11. No other question was raised before us. In the result, the appeal fails and is dismissed with costs.

12. Appeal dismissed.