In Re: Cyril Eugene Pereira vs Unknown on 19 May, 1999

Equivalent citations: [1999]239ITR650(AAR)

RULINGS A.A.R. No. 385 of 1997 Decided On: 19.05.1999 Appellants: In Re: Cyril Eugene Pereira Vs. Respondent:

Hon'ble Judges:

Suhas C. Sen, J. (Chairman), Subhash C. Jain and Mohini Bhussry, Members Counsels:

B. Swarup, C.I.T. and H. Srinivasulu, Joint Commissioner of Income-tax appeared in person For Appellant/Petitioner/Plaintiff: S.B. Vasmate, C.A. Subject: Direct Taxation Acts/Rules/Orders:

Income Tax Act, 1961 - Sections 90, 90(1), 91 and 245S(2); Companies (Profits) Surtax Act, 1964 - Section 24A Cases Referred:

London County Council v. Attorney-General, 1900 4 TC 265; Devabhaktuni Durga Prasad, AAR No. 357 of 1997; Dr. Rajnikant R. Bhatt v. CIT, [1996] 222 ITR 562; Hotel Balaji v. State of Andhra Pradesh, AIR 1993 SC 1048, 1056, [1992] 2 Scale 924; Distributors (Baroda) P. Ltd. v. Union of India, [1985] 155 ITR 120, 124 (SC); In Re: Mohsinally Alimohammed Rafik, [1995] 213 ITR 317 (AAR) RULING S.C. Sen, J. (Chairman)

1. An application has been filed by Mr. Cyril Eugene Pereira on October 23, 1997, seeking advance ruling on the following questions :

Question No. 1 : On the facts and in the circumstances of the case, and having regard to the fact that-

(a) the applicant's stay in India in a year is less than 182 days, and the stay in four preceding years is less than 365 days hence, he is non-resident in India under section 6 of the Income-tax Act, 1961 ; and

(b) he has a permanent home available to him in the UAE as well as in India ;

(c) having regard to the fact that his 'centre of vital interest' cannot be determined, but ;

(d) having regard to the fact that he has (due to his employment) his habitual abode in the UAE ;

whether the applicant would be regarded as a resident of UAE in terms of Article 4 of the Double Taxation Avoidance Treaty entered into by India with United Arab Emirates ?

Question No. 2 : On the facts and in the circumstances of the case, whether the applicant would be entitled to be taxed at the lower rate of tax as per Article 10--para. 2(b) and Article 11--para. 2(b) of the said Double Taxation Avoidance Treaty -

(a) at the rate of 15 per cent., oh gross dividend income, arising in India (for dividend income prior to July 1, 1997) and

(b) at the rate of 12.5 per cent., on gross interest income on investment accruing and arising in India to the applicant from the investments made in debentures and bonds of Indian companies or any other interest income on loans/advances made out of his moneys from his Non-Resident External Account ?

Question No. 3 : Whether on the facts and in the circumstances of the case and having regard to the fact that the applicant is a resident of UAE in terms of Article 4 of the said Double Taxation Avoidance Treaty, gains arising on sale/transfer of his movable properties would be taxable only in the UAE and not in India as per Article 13-para. 3 of the said DTA ?

2. The applicant claims to be an individual who is not a resident of India and is permanently residing in Abu Dhabi, UAE, since 1977. The applicant has annexed a copy of the employment agreement dated February 5, 1980, from which it appears that Abu Dhabi Gas Industries Limited has appointed the applicant originally for a period of two years. One of the terms of the agreement was that "the company shall provide free furnished accommodation in accordance with the company approved policy". The case of the applicant is that this agreement has been extended from time to time. During the previous year, i.e, 1997-98, the applicant's stay in India was for 112 days only. During the four preceding financial years, the total stay of the applicant in India was 175 days. Hence, he is not a resident under Section 6(1)(a) or 6(1)(c) of the Income-tax Act.

3. The applicant's family consists of his wife and three children. They used to stay with the applicant in UAE from 1988 to 1994. The wife and the children, however, returned to India for better education of the children. The family members now reside in India and go for a vaction to Abu Dhabi every year for an approximate period of two months a year.

4. The applicant owns two flats in Mumbai. The costs of these flats are stated to be Rs. 1,62,500 and Rs. 8,25,000, respectively. The year of purchase or the present market value of the flats has not been disclosed. In addition to the above, the applicant is stated to have purchased certain shares and debentures in various Indian companies and units of mutual funds with the permission of the Reserve Bank of India. The cost of these shares and debentures, etc., is stated to be Rs. 10,23,000. Here again, the market value of the shares and the debentures has not been stated. Deposits in FCNR and NRNR accounts in the Indian banks are stated to be Rs. 4.05 lakhs and Rs. 7.54 lakhs, respectively. As against this, the balance in Abu Dhabi bank is approximately Rs. 15 lakhs. He also owns a motor car which is worth about Rs. 3 lakhs.

5. It has further been stated by the applicant that his Indian investments have been made out of his NRI accounts and that tax at 20 per cent. has been deducted on the dividend and interest income received on the shares and debentures, respectively.

6. The applicant has an annual salary income of Rs. 12 lakhs in the UAE. A copy of the employment agreement of the applicant with Abu Dhabi Gas Industries Limited has also been filed. As against this, the total annual income in India received in the shape of interest, dividend and income from mutual funds is stated to be approximately Rs. 75,000.

7. The applicant claims relief under various provisions of the Double Taxation Avoidance Agreement between India and the United Arab Emirates. Section 4 of the Income-tax Act imposes a (charge of) tax on the total income of a person for any assessment year at the rate that may be prescribed by any Central Act. "Total income" will have to be computed in accordance with the provisions of Section 5 of the Income-tax Act. There is a difference between the total income of a person who is a resident and a person who is a non-resident. Broadly stated, the total income of a person who is a resident will include all income from whatever source derived which is received or deemed to be received in India in such tax year by or on behalf of such person and also any income which accrues or arises to him outside India during such year. Sub-section (2) of Section 5 deals with the computation of total income of a non-resident. It lays down that the total income of a non-resident will include all income from whatever source derived which is received or is deemed to be received in India in such year by or on behalf of such person or which accrues or arises or is deemed to accrue or arise to him in India during such year. There is a concept of persons "not ordinarily resident".

8. Section 6 defines residence in India for the purposes of the Income-tax as under :

> "6. (1) An individual is said to be resident in India in any previous years, if he-
>
> (a) is in India in that year for a period or periods amounting in all to one hundred and eighty-two days or more ; or
>
> (b) [omitted by the Finance Act, 1982 with effect from 1st April, 1983].
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> (c) having within the four years preceding that year been in India for a period or periods amounting in all to three hundred and sixty-five days or more, is in India for a period or periods amounting in all to sixty days or more in that year. . . ."

9. Section 9 lays down various types of income which shall be deemed to accrue or arise in India and includes :

> "9. (1)(iv) a dividend paid by an Indian company outside India ; (v) income by way of interest payable by-
>
> (a) the Government ; or

(b) a person who is a resident, except where the interest is payable in respect of any debt incurred, or moneys borrowed and used, for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India ; or

(c) a person who is a non-resident, where the interest is payable in respect of any debt incurred, or moneys borrowed and used, for the purposes of a business or profession carried on by such person in India."

10. There is no dispute that under the Income-tax Act, the applicant's income from dividend and interest accruing or arising in India and gain by transfer of property in India will be liable to tax in India, even though the applicant at the material time was non-resident within the meaning of section 6 of the Act. The applicant's case, however, is that by virtue of the provision of the Double Taxation Avoidance Agreement [Double Taxation Avoidance Agreement Treaty entered into by India with the UAE], the dividend and interest income of the assessee can only be taxed at 15 per cent. on gross dividend and at 12.5 per cent. on gross interest according to the provisions of the Double Taxation Avoidance Agreement entered into between India and the UAE.

11. At the outset, it may be noted that the Double Taxation Avoidance Agreement was entered into by the Government of India by virtue of the authority given by Section 90 of the Income-tax Act. Article 265 of the Constitution lays down that no tax shall be levied or collected except in accordance with law. Tax imposed by any Central Act cannot be reduced or waived or modified by the Government unless and only in so far as it is authorised by the statute. Moreover, modification of a rate of tax imposed by the statute can be made by the Government only to the extent empowered by the statute.

12. Section 90 of the Income-tax Act enables the Central Government to enter into an agreement with foreign countries for granting relief in respect of income which has suffered income-tax both under the Indian law and the laws of the foreign country. The provisions of Section 90 are as under ;

"90. (1) The Central Government may enter into an agreement with the Government of any country outside India-

(a) for the granting of relief in respect of income on which have been paid both income-tax under this Act and income-tax in that country, or

(b) for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country, or

(c) for exchange of information for the prevention of evasion or avoidance of income-tax chargeable under this Act or under the corresponding law in force in that country, or investigation of cases of such evasion or avoidance, or

> (d) for recovery of income-tax under this Act and under the corresponding law in force in that country, and may, by notification in the Official Gazette, make such provisions as may be necessary for implementing the agreement. (2) Where the Central Government has entered into an agreement with the Government of any country outside India under Sub-section (1) for granting relief of tax, or, as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee."

13. Under Clause (a) of Section 90(1), relief can be granted only if tax has been paid both under the Income-tax Act as well as income-tax law of the foreign country. Under Clause (a), relief can be granted in case of actual imposition of double taxation. Clause (b) of Section 90(1) provides for avoidance of double taxation. Power under this section can be exercised where income is liable to be taxed under the Income-tax Act as well as under the "corresponding law in force in that country". If any income is taxable under the Income-tax Act but is not liable to be taxed under any corresponding law in force in a foreign country, no question of avoidance of double taxation arises. The Central Government is not empowered by Section 90 to enter into an agreement in respect of income which is taxed only in India and not in the foreign country.

14. The Companies (Profits) Surtax Act, 1964 (described as the "Surtax Act"), imposes a surtax on companies on their excess profits which is calculated in the manner laid down in that Act. The charge of tax under Section 4 is on a company and not on an individual or any other entity like partnership, Hindu undivided family or any association of persons. Section 24A of the Act is similar to Section 90 of the Income-tax Act and empowers the Central Government to enter into an agreement with the Government of any country outside India for the following purposes ;

(a) for the granting of relief in respect of chargeable profits on which have been paid both surtax under this Act and tax of a similar character or income-tax on such profits in that country, or

(b) for the avoidance of double taxation of chargeable profits under this Act and under any law relating to the taxation of income or profits in force in that country, or

(c) for exchange of information for the prevention of evasion or avoidance of surtax chargeable under this Act or the tax chargeable under the corresponding law in force in that country or investigation of cases of such evasion or avoidance, or

(d) for recovery of tax under this Act and under any law relating to the taxation of income or profits in force in that country.

15. The Central Government under Section 24A is only empowered to grant relief by an agreement with a foreign country in respect of chargeable profits "on which have been paid both surtax under this Act and tax of a similar character or income-tax on such profits in that country." Therefore, no relief can be granted under Clause (a) of Section 24A except in cases where surtax has actually been paid on chargeable profits in the two contracting countries. Clause (b) also deals with the situation

where chargeable profits are liable to be taxed twice under the Indian Act and also under the corresponding tax law in the contracting country according to the law in force in that country. Clause (c) speaks of exchange of information for the prevention of evasion or avoidance of surtax or the tax chargeable under the corresponding law in force in that contracting country or investigation of such evasion. Lastly, in Clause (d), the object is to recover tax under the Surtax Act and under the corresponding law in force in that contracting country. The important thing to note is that relief can be granted by agreement under Clause (a) where both surtax and a corresponding tax have been paid and not otherwise. Clauses (b), (c) and (d) deal with situations where there is a law in force corresponding to the Surtax Act in the foreign country.

16. The two important things in Section 24A which are to be noted in these clauses are :

> (1) It only empowers the Government to enter into an agreement for granting of relief in a case where there is actual payment of surtax in both the countries ; or (2) for the avoidance of double taxation of chargeable profits under the Surtax Act and the corresponding law in force in the foreign country.

17. An agreement can also be made for the purpose of prevention of evasion or avoidance of surtax in India and the corresponding tax payable under the law in force in the contracting State and also for recovery of tax under the Indian Acts and any corresponding law relating to the taxation of income or profits in force in the foreign country.

18. The Indian Constitution does not empower the Central Government to levy or collect tax except in accordance with the law enacted by the Legislature. Section 24A of the Surtax Act and Section 91 of the Income-tax Act have permitted the Central Government to reduce the burden of taxes levied by Parliament in certain specified situations. This power can only be exercised for the purpose for which it has been given. It cannot be used for any other purpose. Neither Section 24A of the Surtax Act nor Section 91 of the Income-tax Act empowers the Central Government to enter into any agreement to grant relief to a taxpayer from the taxes levied by the aforesaid two Acts even where no tax is payable by the taxpayer in a foreign country under a corresponding law in force. The Central Government cannot lawfully waive or reduce any tax imposed by Parliament except to the extent and in the manner permitted by the taxing statute. The Central Government has no power either to levy or to withdraw any tax on its own. It is permitted by the statute to grant relief to a taxpayer by an agreement with a foreign country where his income has been subjected to tax both in the foreign country and India. This power can be exercised only for avoidance of double taxation of the same income under the Income-tax Act or the Surtax Act and the corresponding laws in force in the foreign country.

19. This matter can be viewed from the angle of the taxpayer. Liability to pay tax both in India and the foreign country entitles a taxpayer to claim relief under the rules laid down in the Double Taxation Avoidance Agreement. If a taxpayer pays tax or is liable to pay tax under the laws in force in one country alone, he cannot claim any relief from a non-existent burden of double taxation under the Double Taxation Avoidance Agreement. The Double Taxation Avoidance Agreement is meant only for the benefit of taxpayers who are liable to pay tax twice on the same income.

20. Here, we have an Agreement entered into between the Government of the Republic of India and the Government of the UAE for the avoidance of double taxation with respect to tax on income and also on capital in exercise of power given by Section 90 of the Income-tax Act, 1961 , and Section 24A of the Surtax Act.

21. In order to construe this Agreement, we shall have to see whether the income which is taxable in India under the Income-tax Act is also taxable under the tax laws of the UAE. It appears from a copy of the law produced before us that the only tax imposed in the UAE is on the income of certain corporate bodies. The individuals are not taxed at all. There is no tax on dividends, interest or capital gains of an individual. There is no dispute that under the Income-tax Act, the applicant's income from dividend, interest and capital gain accruing or arising in India will be liable to tax in India even though the applicant at the material time was non-resident within the meaning of Section 6 of the Act. The applicant's case, however, is that even though he is not liable to pay any tax in the UAE, by virtue of the provisions of the Double Taxation Avoidance Agreement, the dividend and interest income of the assessee can only be taxed at 15 per cent. on gross dividend and at 12.5 per cent. on gross interest. Capital gain made by the applicant will also be immune from tax in India.

22. There is no law in force in Dubai making the applicant's income liable to tax. Whether the income is earned in India or in the UAE, is of no consequence. The applicant is not liable to pay any tax thereon under the laws of the UAE. Therefore, no question of granting relief to the applicant from double taxation can arise. The applicant cannot get any relief on account of double taxation unless there is a corresponding tax law in force in the UAE in respect of his income which is taxable in India.

23. The contention of the applicant is that even though he is not liable to pay income-tax in Dubai, relief is available by virtue of the Double Taxation Avoidance Agreement in respect of these incomes also, the provisions of the Double Taxation Avoidance Agreement must be given effect to, even if these are in conflict with the specific provisions of the Income-tax Act.

24. We have earlier noted in this judgment that the power to enter into double taxation avoidance agreements conferred upon the Government by Section 90 is limited to cases where the income is liable to be taxed in India and also under the corresponding law in force in other Contracting States. In the instant case, no tax is payable by an individual under the tax laws prevailing in the UAE. Therefore, no question of relieving an individual from the brunt of double taxation arises. If the agreement is examined, it will be seen that no attempt has been made in the agreement to give relief to any individual who does not pay tax in the UAE.

25. We shall now examine the provisions of the Double Taxation Avoidance Agreement between India and the United Arab Emirates (UAE). The agreement came into force on September 22, 1993. It was entered into by the Government of India in pursuance of the powers conferred by Section 90 of the Income-tax Act, 1961. The object of the agreement is "for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital".

26. The following articles are relevant for this case (see [1994] 205 ITR (St.) 49) :

"Article 1 PERSONAL SCOPE This agreement shall apply to persons who are residents of one or both of the Contracting States.

Article 2 TAXES COVERED

1. There shall be regarded as taxes on income and on capital all taxes imposed on total income, on total capital, or on elements of income or of capital including taxes on gains from alienation of movable or immovable property as well as on capital appreciation.

2. The existing taxes to which the Agreement shall apply are :

(a) In United Arab Emirates :

(i) income-tax ;

(ii) corporation tax ; and

(iii) wealth-tax ; (hereinafter referred to as "U.A.E. tax") ;

(b) In India :

(i) the income-tax including any surcharge thereon ;

(ii) the surtax ; and

(iii) the wealth-tax ; (hereinafter referred to as "Indian tax").

3. This Agreement shall also apply to any identical or substantially similar taxes on income or capital which are imposed at Federal or State level by either Contracting State in addition to, or in place of, the taxes referred to in paragraph 2 of this Article. The competent authorities of the Contracting States shall notify each other of any substantial changes which are made in their respective taxation laws.

Article 3 GENERAL DEFINITIONS

1. In this Agreement, unless the context otherwise requires : . . .

(e) the term 'person' includes an individual, a company, and any other entity which is treated as a taxable unit under the taxation laws in force in the respective Contracting States ;

(f) the term 'company' means any body corporate or any entity which is treated as a company or body corporate under the taxation laws in force in the respective Contracting States ;

(g) the terms 'enterprise of a Contracting State' and 'enterprise of the other Contracting State' mean respectively, an enterprise carried on by a resident of a Contracting State and an enterprise carried on by a resident of the other Contracting State ;

Article 4 RESIDENT

1. For the purposes of this Agreement, the term 'resident of a Contracting State' means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management, place of incorporation or any other criterion of a similar nature.

2. Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows :

> (a) he shall be deemed to be a resident of the State in which he has a permanent home available to him ; if he has a permanent home available to him in both States, he shall be deemed to be a resident of the State with which his personal and economic relations are closer (centre of vital interests) ;
>
> (b) if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident of the State in which he has an habitual abode ;
>
> (c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident of the State of which he is a national ;
>
> (d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual Agreement.

3. Where by reason of the provisions of paragraph 1, a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident of the State in which its place of effective management is situated.

Article 6 INCOME FROM IMMOVABLE PROPERTY

1. Income derived by a resident of a Contracting State from immovable property (including income from agriculture or forestry) situated in the other Contracting State may be taxed in that other State.

2. The term "immovable property" shall have the meaning which it has under the law of the Contracting State in which the property in question is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources. Ships, boats and aircraft shall not be regarded as immovable property.

Article 7 BUSINESS PROFITS

1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.

2. Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall -in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.

Article 10 DIVIDENDS

1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.

2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the recipient is the beneficial owner of the dividends, the tax so charged shall not exceed :

> (a) 5 per cent. of the gross amount of the dividends if the beneficial owner is a company which owns at least ten per cent. of the shares of the company paying the dividend ;
>
> (b) 15 per cent. of the gross amount of the dividends in all other cases.

3. The term 'dividends' as used in this article means income from shares or other rights, not being debt-claims, participating in profits, as well as income from other corporate rights which is subjected to the same taxation treatment as income from shares by the laws of the State of which the company making the distribution is a resident.

Article 11 INTEREST

1. Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such interest may be taxed in the Contracting State in which it arises and according to the laws of that State, but if the recipient is the beneficial owner of the interest, the tax so charged shall not exceed :

(a) 5 per cent. of the gross amount of the interest if such interest is paid on a loan granted by a bank carrying on a bona fide banking business or by a similar financial institution ; and

(b) 12.5 per cent. of the gross amount of the interest in all other cases.

3. Notwithstanding the provisions of paragraph 2 interest arising in a Contracting State shall be exempt from tax in that State provided it is derived and beneficially owned by :

(i) the Government, a political sub-division or a local authority of the other Contracting State ; or

(ii) the Central Bank of the other Contracting State.

4. The term "interest" as used in this Article means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from Government securities and income from bonds or debentures including premiums and prizes attaching to such securities, bonds or debentures. Penalty charges for late payment shall not be regarded as interest for the purpose of this article.

5. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises, through a permanent establishment situated therein or performs in that other State independent personal services from a fixed base situated therein, and the debt-claim in respect of which the interest is paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 or Article 14, as the case-may be, shall apply.

6. Interest shall be deemed to arise in a Contracting State when the payer is that Contracting State itself, a political sub-division, a local authority or a resident of that State. Where, however, the person paying the interest, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the indebtedness on which the interest is paid was incurred, and such interest is borne by such permanent establishment or fixed base, then such interest shall be deemed to arise in the Contracting State in which the permanent establishment or fixed base is situated.

7. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the interest, having regard to the debt-claim for which it is paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Agreement.

Article 13 CAPITAL GAINS

1. Gains derived by a resident of a Contracting State from the alienation of immovable property referred to in paragraph 2 of Article 6 and situated in the other Contracting State may be taxed in that other State.

2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or together with the whole enterprise) or of such fixed base may be taxed in that other State.

3. Gains from the alienation of any property other than that mentioned in paragraphs 1 and 2 shall be taxable only in the Contracting State of which the alienator is a resident."

27. Now the question is of which State is the applicant a resident ? Article 4 defines "resident" of a Contracting State to mean any person who is liable to tax in that State by reason of his domicile, residence, place of management and place of incorporation, etc. The applicant is an individual and as such is not liable to pay any tax in the UAE. He may be working there for gain and may be getting a monthly salary but he has no statutory liability to pay any tax at all. He cannot be treated as a resident of the UAE under Article 4(1) of the Agreement.

28. Paragraph 2 of Article 4 is attracted only when an individual is a resident of both the Contracting State. Then his status will have to be determined by taking recourse to the principles laid down in the tie-breaker provisions of paragraph 2(a), (b), (c) and (d). The tie-breaker clause cannot be applied in this case because of the fact that the applicant is not a resident of both the Contracting States and, therefore, there is no tie at all.

29. Article 4 gives a special definition of resident of a Contracting State for fiscal purposes which must not be lost sight of in interpreting provisions of the Double Taxation Avoidance Agreement. A "resident" must be a person who pays tax in the country in which he claims to be a resident. Because he pays tax in one country he is entitled to get relief from the full brunt of tax imposed by the laws of the other country, Under the Income-tax Act a person who does not actually reside in India for at least 182 days, must be treated as a non-resident. But that will not be his position under Article 4. An individual who resides in India for less than 182 days will have to be treated as resident of India if he is liable to pay tax in India, However, such an individual cannot be treated a resident of UAE even if he is staying there for the best part of the year because he has no liability to pay any tax there. He cannot be treated as resident in the UAE by the measure of the duration of his stay in the UAE and also at the same time as a resident of India by virtue of the liability to pay tax in India, Paragraph 1 of Article 4 will have to be interpreted consistently. The fiscal residence of a person has to be determined on the basis of liability to pay tax and on no other basis. Neither the internal laws of the UAE nor of India will decide this question.

30. "Person" as defined in Article 3(1)(e) includes an individual, a company, and any other entity which is treated as a taxable unit under the taxation laws in force in the respective Contracting

States. Any entity which is not a taxable unit is not treated as a "person" at all. An Hindu undivided family or a partnership firm or an association of persons which is not liable to pay tax in the UAE will not be treated as a "person".

31. Paragraph I of Article 4 lays down liability to pay tax as the criterion for deciding whether a person is a resident of a Contracting State or not. Paragraph 2 will apply only when an individual is found to be a resident of both the Contracting States. Paragraph 3 will apply where a person other than an individual is a resident of both Contracting States. But neither paragraph 2 nor paragraph 3 will apply unless the individual or a person other than an individual is found to be resident of both the Contracting States. From all these provisions, it follows that unless a person is liable to pay tax in a Contracting State he is not to be treated as a resident of that State under Article 4. Individuals falling under Clauses (a), (b), (c) and (d) of paragraph 2 must be persons who are liable to pay tax in both the Contracting States. Likewise non-individuals in paragraph 3 must be persons who are liable to pay tax in both the Contracting States. There is no other criterion laid down for determination of residence other than liability to pay tax under Article 4, Tax has been defined to mean Indian tax or the UAE tax. Article 2 makes the agreement applicable only to "existing taxes"

> in UAE and in India which means the taxes detailed in paragraph 2 of Article 2 which were in force on the date of the signing of the Agreement of September 22, 1993. In order to gain access to the Double Taxation Avoidance Agreement, the applicant must be able to say that he is liable to pay tax in both the countries and, therefore, he will pay tax only to the extent provided in the Agreement. But if the applicant is liable to pay tax only in one country, he cannot have access to the treaty which is for relieving taxpayers from the burden of double taxation and not for absolving a taxpayer from the obligation to pay tax imposed by only one country. Section 90 of the Income-tax Act and Section 24A of the Surtax Act permit the Central Government to enter into such agreements only when there are laws in force in both the countries subjecting the same income to tax twice. If Article 4 is read along with the other articles of the Double Taxation Avoidance Agreement, it will be seen that the Central Government has not exceeded its statutory mandate by entering into the Agreement with the UAE for avoidance of double taxation in respect of income which is not taxable in the UAE at all.

32. The heading of Chapter IX of the Income-tax Act is "Double Taxation Relief". The Chapter comprises only two sections. Under Section 90(1)(a), relief can be granted in respect of income on which tax has been actually paid under the Income-tax Act and the corresponding law in force of a foreign country by an agreement with the foreign country. Actual levy of such double taxation may be avoided by an agreement entered into in exercise of power under Clause (b) of Section 90(1). The agreement must be between the Central Government and a foreign Government where tax is leviable under law in force of that country on the same income which is subjected to tax in India. Even in the absence of any agreement under Section 91, a person resident in India can get relief from the burden of double taxation if his income accruing or arising in India is subjected to taxation by deduction or otherwise in a foreign country. There are special provisions in Section 91(2) in respect of income accruing or arising in Pakistan on which tax has been paid in Pakistan. Section 91(3) deals with

granting of relief in case of a non-resident partner of a registered firm assessed as a resident in India. All these provisions of Section 91 provide relief where there is actual taxation in a foreign country of income on which tax is also payable in India.

33. Both Sections 90 and 91 deal with relief from double taxation of income. Relief can be granted under Section 90(1)(a) when there has been actual payment of tax in both the contracting countries. Relief can also be granted to a taxpayer from the burden of double taxation under Section 90(1)(b) by an agreement with a foreign country. This agreement can be entered into only when there is a law in force in the foreign country subjecting the income which is taxable in India to a further levy of tax.

Section 91 seeks to grant relief in cases where income liable to tax in India has been actually charged to tax in a foreign country with which India does not have a double taxation agreement. The important thing to note is that neither under Section 90 nor under Section 91, has any attempt been made to grant relief where there is no law in force in a foreign country subjecting to tax the same income which is taxable under the Income-tax Act.

34. The object and the scope of the Double Taxation Avoidance Agreement as well as the ambit of the power of the Central Government under Section 90 of the Income-tax Act and Section 24A of the Surtax Act must be kept in view in interpreting the various articles of this agreement which is for avoidance of double taxation.

35. Under Article 6 of the Double Taxation Avoidance Agreement, income from immovable property including income from agriculture or forestry is to be taxed only in the country where such immovable property is situated. The owner of the property may be a resident of one of the Contracting States and the immovable property situated in the other Contracting State. But the tax will be levied where property is situated according to the local law.

36. Article 7 deals with business profits. It lays down that an enterprise of a Contracting State shall be taxed only in that State. But if the enterprise has a permanent establishment in the other Contracting State and carries on business through that permanent establishment, then only so much profit of the enterprise that is attributable to the permanent establishment may be taxed in the other Contracting State. Article 8 provides that profits earned by an enterprise of the Contracting State from international shipping shall be taxable only in that State.

37. In all these articles, there is no question of reduction in the rate of tax or in abatement of tax in the other Contracting State. That question arises in Article 10 dealing with dividends. In paragraph 1 of Article 10, it has been declared that dividends paid by a company which is a resident of one Contracting State to the resident of the other Contracting State may be taxed in that other State. That is the general law, If dividend is paid by an Indian company to an individual staying in the UAE, the dividend income will be taxable in the UAE, only if the individual pays tax in the UAE, otherwise he is not to be treated as resident of the UAE under Article 4. Article 10 will not apply to his case at all.

38. This also becomes clear if one refers to paragraph 2 of Article 10 which says that such dividend "may also be taxed in the Contracting State of which the company paying the dividend is a resident and according to the laws of that State". (emphasis' added). That means apart from the tax payable under paragraph 1 "such dividends" may additionally be taxed under paragraph 2. This tax is something in addition to the tax leviable under paragraph 1. If dividend income is taxable under paragraph 1, relief from double taxation of such dividend is provided by paragraph 2 by reducing the rate of tax payable on the dividends. This benefit of a smaller rate of tax is given in paragraph 2 only because the dividend income has to bear full tax under paragraph 1 which is the primary tax. The endeavour of Article 10 is to grant relief in a case of double taxation of dividends. Paragraph 2 pre-supposes that a tax is leviable under paragraph 1. The word "also" in paragraph 2, signifies that besides the first levy under paragraph 1, there may be an additional levy of tax. If there is no liability to pay tax at all in the UAE, paragraph 1 will not be attracted. In such a case there cannot be any question of a further tax "also" in the State in which the company resides which in this case is India. Since, this tax payable in India is not something in addition to the tax payable in the UAE, paragraph 2 of Article 10 is not attracted. This means the treaty does not restrict the liability of the shareholder to pay tax on his dividend income according to the domestic law. Statutory levy of tax by the Income-tax Act read with the annual Finance Acts cannot be avoided unless the applicant can show that such levy will result in double taxation for which relief has been given under the Double Taxation Avoidance Agreement. As there is no double taxation of dividend income at all in this case, there cannot be any relief from a non-existent burden. Paragraphs 1 and 2 of Article 10 will have to be read together and not independently of each other. Only because of the primary levy under paragraph 1, relief has to be given at the time of making the second levy under paragraph 2, "Such dividends" refer to dividends which are taxable under paragraph 1 the words "may also be taxed" mean that the dividends which are liable to be taxed under paragraph 1 may also be subjected to an additional levy under paragraph 2.

39. Article 10 of the Agreement between India and UAE appears to be a verbatim reproduction of Article 10.1, 2 of the UN model code which is as under (see [1994] 205 ITR (St.) 56) :

> "1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.
>
> 2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the recipient is the beneficial owner of the dividends, the tax so charged shall not exceed . . ."

40. Article 10 does not specifically state that the relief in the State of source should be conditional upon the dividends being subject to tax in the state of residence. But that is the necessary implication of Article 10(2).

41. It is not in the realm of belief that the parties to the agreement drafted paragraph 1 to include individuals who had no liability to pay any tax at all in the state of residence. This would be a meaningless exercise. Moreover, if only one tax is payable on the dividend income by the

shareholder in one country alone, why should the two countries by a Double Taxation Avoidance Agreement try to reduce the rate of the only tax fixed by Parliament. If Article 10 is for avoidance of double taxation on dividend income, paragraph 2 has to be conditional upon dividend being taxable in the hand of the shareholder in the state in which he resides. In any event in India, Section 90 of the Income-tax Act does not authorise the Central Government to reduce the rate of tax imposed by Parliament even when the dividend income is liable to be taxed in the hands of an individual only in India and not at all under any corresponding law in force in a foreign country. It must be presumed that the Central Government did what it could lawfully do. Paragraph 2 of Article 10 is clearly conditional upon paragraph 1.

42. It has been argued that the U. N. and O.E.C.D. Model Codes have been devised to alleviate the burden of a taxpayer from the rigours of double taxation. This agreement based on the model case grants relief from not only actual but potential double taxation. Lord Macnaghten in the case of London County Council v. Attorney-General [19001 4 TC 265, observed that (page 293) : "Income-tax, if I may be pardoned for saying so, is a tax on income. It is not meant to be a tax on anything else". The argument based on potential double taxation overlooks this simple but basic fact that income tax is a tax on income. It is an actual annual levy and not a potential tax. It has to be an existing tax for the avoidance of which an agreement can be entered into. If there is no tax leviable on an individual's income in the UAE, there cannot be any question of avoidance of double taxation of that income by India and the UAE. Double Taxation Agreements are agreements to avoid tax being levied twice by the two countries on the same income in the same year. It is not a device for evasion of the only tax imposed by a country on the income of a person resident in another country. The Income-tax Act has its own rules for deciding "residence" and taxing the income of the non-resident. These rules cannot be given a go by unless it can be shown that the same income has been subjected to tax in another country with which India has a double taxation treaty. The agreement is not an instrument to grant relief even in case of taxation of the income by only one country and there being no taxation of that income by another country. The agreement before us seeks to relieve the burden of the same income being subjected to tax twice.

43. Income-tax laws are designed to collect revenue every year by charging a person's income to tax. Income-tax is an annual levy on income. It must be an actual levy. There is no such thing as a potential tax known to tax law. The possibility or potentiality of a future levy by one country and actual levy of tax by another country in a given year will not amount to double taxation of income. The question of double taxation will have to be decided by referring to income earned in an accounting year. The Assessing Officer in making an assessment for the year 1996-97 cannot anticipate and give relief on the basis of any tax which has not at all been imposed by the Contracting State in the year of account. A tax which is yet to be imposed is not a tax at all. The Central Government has no power or jurisdiction to waive or reduce taxes imposed by Parliament except in so far as is permitted by the statute itself. The Central Government cannot waive or reduce the rate of any tax imposed by the statute by entering into an agreement to avoid double taxation when a tax corresponding to the Indian tax is not in force in the Contracting State.

44. The point has been put beyond doubt by use of the phrase "corresponding law in force" in Clauses (a) and (b) of Section 91. Even the Wealth-tax Act, with which we are not concerned in this

case, empowers the Central Government by Section 44A to enter into an agreement "for the avoidance or relief of double taxation" under the Wealth-tax Act and "the corresponding law in force in the reciprocating country."

45. If there is no corresponding tax law in force in another country, there is no scope for double taxation. There is no question of avoidance of something which is non-existent.

46. It has to be emphasised at the cost of repetition that the agreement with the UAE is applicable only to the existing taxes and not to any potential levy of taxes. Taxes covered under Article 2 are taxes which have been imposed on total income or total capital or elements of total income or total capital which will include dividend, interest and capital gain. It is specifically declared that the agreement applies to the existing laws enumerated therein. There is no existing law taxing the income of individuals in the UAE. Therefore, the agreement cannot be extended to the income of individuals.

47. Similar will be the position of interest under Article 11. Paragraph 1 thereof speaks of interest arising in one State and paid to the resident of the other State. As we have noticed, in view of the special definition given in Article 4, the petitioner cannot be treated as a resident of Dubai. There is no question of interest income being taxed in Dubai. Paragraph 2 of Article 11 also speaks of "such interest" which means "interest arising in a Contracting State and paid to a resident of the other Contracting State". Article 13 which deals with capital gains speaks of gains derived by a "resident" of a Contracting State from immovable property situated in the other Contracting State. The petitioner is not a "resident" of the UAE. He is not liable to pay any tax under the UAE laws. He cannot invoke protection of Articles 11 and 13 of the Double Taxation Avoidance Agreement in respect of his interest income and capital gains.

48. The Double Taxation Avoidance Agreement has been entered into in exercise of the power given to the Government, inter alia, under Section 90 of the Income-tax Act. This can be done only when there is a law in force in the foreign country imposing tax on the income of a person which is also liable to be taxed under the Income-tax Act in India. The Government of India is not empowered to grant relief in the case of any potential liability for tax which is not in existence.

49. Moreover, the tax laws in the UAE have not created any potential liability to pay tax by an individual. The individuals have been left out of the ambit of the charge of tax altogether. It is possible that in future, the tax law will be amended to include individuals. But as of now there is no law in force in the UAE under which an individual is liable to pay tax. Here, what we are concerned with is the tax liability of an individual in the assessment year relevant to the previous year 1997-98. In this tax year, no income-tax is payable by an individual in the UAE. The Assessing Officer in computing the tax payable for the assessment year 1997-98 will have to make the assessment according to the Income-tax Act. If any relief has to be granted on account of any income on which tax has been paid both under the Income-tax Act and the foreign income-tax law, then such relief will have to be allowed in course of the assessment of that income. Likewise, if tax is levied for any particular year of account under the Income-tax Act, and the foreign income-tax law, then relief will have to be granted in course of the assessment for avoidance of double taxation of that income in

that particular year of account. In making an assessment, the Assessing Officer has only to consider the law in force in the accounting year and not what the law may be in future. It is also to be noted that Article 3 expressly provides that any new tax on income or capital will come within the ambit of the agreement as and when such new taxes are imposed.

50. The argument that even though a person has no existing liability to pay any tax in the UAE he will be entitled to relief from potential double taxation is incomprehensible. The Central Government can enter into an agreement with the Government of any foreign country for the avoidance of double taxation of income under the Income-tax Act and under the corresponding law in force in that country. The Central Government in the instant case has actually entered into an agreement for this purpose with the UAE. The agreement is avowedly for the purpose of avoiding double taxation and also for the prevention of fiscal evasion. If there is any double taxation of income of a person both in India and also in the UAE, this agreement will apply. But in cases where there is no double taxation of income at all during the period under consideration, there is no scope for granting relief from something which does not exist while making assessment of income for that period. Relief from the burden of taxation of income in India cannot be claimed on the plea of double taxation, even when such income is not liable to be taxed at all in the other Contracting State.

51. We shall now examine the decision of this authority in the case of Mohsinally Alimohammed Rafik, In re [1995] 213 ITR 317 (AAR). In this case, it was held that even though there was no law imposing income-tax on individuals in any of the Emirates, the applicant was liable to get the benefit of the Double Taxation Avoidance Agreement and pay tax on income from dividends, interest, etc., at the lower rate specified in the agreement. An application for review of this judgment was dismissed. The authority has followed this judgment in a few cases. The contention on behalf of the applicants is that the controversy is concluded by the decision in Rafik's case [1995] 213 ITR 317 (AAR). Some of the Commissioners of Income-tax also opined that the point stood concluded by this case. Some other Commissioners of Income-tax have however invited this authority to reconsider the view taken in Rafik's case [1995] 213 ITR 317 (AAR).

52. We have carefully gone into various aspects of the matter. We are conscious of the fact that the decision taken by this authority should not ordinarily be disturbed. A very large number of cases are pending on this point. An important question of law is involved which must be examined closely. If the justice of the case so requires, a view contrary to the decision in Rafik's case [1995] 213 ITR 317 (AAR), will have to be taken by a larger Bench.

53. There is another aspect of this matter. Advance rulings are judgments in personam and not in rem. Section 245S of the Income-tax Act, 1961, lays down as under :

> "245S. (1) The advance ruling pronounced by the authority under Section 245R shall be binding only-
>
> (a) on the applicant who had sought it ;
>
> (b) in respect of the transaction in relation to which the ruling had been sought ; and

> (c) on the Commissioner and the income-tax authorities subordinate to him, in respect of the applicant and the said transaction. (2) The advance ruling referred to in Sub-section (1) shall be binding as aforesaid unless there is a change in law or facts on the basis of which the advance ruling has been pronounced."

54. Thus, Sub-section (2) of Section 245S has limited the binding nature of the ruling to the case of the applicant in respect of the transaction in relation to which the advance ruling is sought and to the Commissioner and authorities subordinate to him only in respect of the applicant and the transaction involved. This is not to say that a principle of law laid down in a case will not be followed in future. The Act has made the ruling binding in the case of one transaction only and the parties involved in that case in respect of that transaction. For other transactions and for other parties, the ruling will be of persuasive nature.

55. One important point which was lost sight of in Rafik's case [1995] 21.3 ITR 317 (AAR), was the scope of Section 90 of the Income-tax Act which confers upon the Government of India jurisdiction to enter into an agreement for the purpose of avoidance of double taxation only in a case where income of a person is taxable twice, i.e., under the Indian law as also under the corresponding law in force in a foreign country. If the income of a person is not taxable at all under the foreign law, the Government of India is not empowered to enter into any agreement for avoidance of double taxation in respect of that income of that person. This important factor has to be borne in mind for construing the agreement.

56. The object of the agreement is to avoid the burden of double taxation. Therefore, unless a case of double taxation can be made out, no question of avoidance of double taxation can arise. How can there be a question of avoiding something which does not exist ? Reference in this connection may be made to the objects clause of the agreement wherein it has been recited as follows (see [1994] 205 ITR (St.) 49) :

> "The Government of the Republic of India and the Government of the UAE desiring to promote mutual economic relations by concluding an agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital have agreed as follows:"

57. The avowed object is thus is to avoid double taxation and not to reduce the rate of single tax imposed by one of the Contracting States.

58. A joint reading of Articles 2 and 3 would make it clear that the agree ment will apply to the existing taxes in the UAE and India. It does not deal with any tax which is not in existence. The existing taxes have been specified in Article 2. Paragraph 3 of Article 2 generally provides that the agreement will also apply to any identical or substantially similar taxes on income or capital which "are imposed" at Federal or State level by either Contracting State in addition to the taxes referred to in paragraph 2 of that article. In order to get the benefit of the agreement, a person will have to prove that he has been subjected to taxes in the UAE and India. If the applicant can show that taxes have been imposed on total income, on total capital, or on elements of income or capital including

taxes on gains from alienation of movable or immovable property as well as on capital appreciation both in the UAE and in India, he will be entitled to get the benefit of the appropriate provisions of the agreement. It has to be shown that the applicant has been subjected to an existing UAE tax and the Indian tax as mentioned in Article 2. If he is not liable to pay any UAE tax, there can be no question of avoidance of double taxation in his case.

59. In fact this agreement is in consonance with the powers conferred upon the Government of India by Section 90 of the Income-tax Act. If the Government of India seeks to grant any relief from taxation imposed by Parliament beyond what has been expressly permitted by the statute, exercise of that power will be ultra vires the statute, Fortunately, this agreement with the UAE has been carefully worded to keep it within the ambit of the authority given to the Government of India by Section 90 of the Income-tax Act, 1961.

60. This aspect of the matter was overlooked in Rafik's case [1995] 213 ITR 317 (AAR). Rafik's case [1995] 213 ITR 317 (AAR), takes note of the fact that the only tax imposed in the UAE is on income of the corporate bodies. It further notices that though each Emirate has its own income-tax decree, the decrees are similar. The judgment records (page 327) : "However, it is clear that individuals like the applicant, are not liable to tax under the Dubai law. This being so, it can be said, the applicant cannot claim to be a resident of the UAE, entitled to the benefit of Articles 10, 11 and 13 of the Double Taxation Avoidance Agreement."

61. The judgment goes on to say at page 328 of 213 ITR :

> "While, ex facie, the above seems to be a simple way of reading the Double Taxation Avoidance Agreement, a more liberal interpretation is suggested by other circumstances. The most crucial circumstance to be taken note of is that there is no income-tax or wealth-tax on individuals in any of the Emirates. There was no such tax there when the earlier limited agreement of 1989 was entered into which provided the occasion for discussion on a more comprehensive tax treaty and there can be no doubt that both the States were fully aware of this position. The fact that such a comprehensive Double Taxation Avoidance Agreement was considered necessary in spite of a clear knowledge that there was no such tax in the UAE can only mean that the Double Taxation Avoidance Agreement was intended to encourage the inflow of funds from Dubai to India for investment. In this context, it is necessary to remember that the UAE provides one of the largest export markets for India in West Asia."

62. This reasoning overlooks the specific words of the agreement and the limited power given to the Central Government under Section 90. In order to encourage inflow of funds from the Emirates to India, the Government of India could bring about a legislation granting relief to such inflow of funds and income earned by investments of such funds. The Government of India has not chosen to do so. Therefore, it will not be right to hold that the real object of this agreement instead of avoiding double taxation was to encourage inflow of foreign funds into India by reducing rates of taxes even when there was no double taxation of income at all. The object of the agreement was avoidance of double taxation of income and prevention of fiscal evasion. The agreement was entered into in

exercise of the powers conferred by Section 90 of the Income-tax Act, Section 24A of the Companies Profits (Surtax) Act and Section 44 of the Wealth-tax Act, 1957. Such an agreement could only be entered into, (a) for granting relief in respect of tax actually paid twice on the same income under the tax laws in force in both the countries, or (b) for avoidance of double taxation of income under the Income-tax Act and the corresponding law in force in the foreign country.

63. Under Clause (a) of Section 90, relief can be granted only when tax has been paid both under the Indian law and the law of the foreign country. In a case falling under Clause (b), the agreement is for avoidance of double taxation of the same income which is otherwise taxable under the Income-tax Act and the corresponding law in force in the foreign country. The Central Government is not competent to enter into an agreement for granting relief from taxation to an individual or a company or any other entity under Section 90 unless that income is also liable to be taxed under the law of the other country. The agreement goes to show that the Central Government has not done what it could not do under Section 90 and no interpretation should be placed on the agreement which tends to make the agreement ultra vires Section 90 of the Income-tax Act.

64. The definition given to "resident" in Article 4 of the Double Taxation Avoidance Agreement is a reproduction of the definition of the expression "resident" given in the UN model code. That definition has been reproduced verbatim in Article 4 without any modification. It will not be right to suggest that there was a special underlying object of encouraging UAE investments in India in that definition. The only country where the applicant pays income-tax is India. He cannot be treated as a resident of UAE for the purpose of the tax treaty under consideration.

65. Moreover, the word used in the agreement is quite clear. In Rafik's case [1995] 213 ITR 317 (AAR), it was clearly recognised that "individuals are not liable to tax under the foreign law . . . ." It is also recognised that the applicant cannot claim to be a resident of UAE if a literal interpretation of the rule was made. In Rafik's case [1995] 213 ITR 317 (AAR), the difficulty was sought to be overcome by giving a liberal interpretation.

66. However, a liberal interpretation which does violence to the language of the agreement and makes it ultra vires Section 90 should not be made. The agreement has been very carefully drafted. "Person" has been defined to include an individual, company or any other entity which is treated as a taxable unit under the taxation laws in force in the respective Contracting States. Any entity which does not pay any tax in the UAE will not be a person under the treaty. The position in law has been made doubly clear by Article 4 which says "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein. Therefore, liability to pay tax has been made sine qua non for being treated as a "resident". The liability to pay tax may arise by reason of domicile, residence, place of management, place of incorporation or any other similar criteria. An individual who resides in India for less than 182 days is treated as nonresident under the Income-tax Act and is liable to pay tax in India only on the Indian portion of his total world income. But if that individual resides in India for 182 days or more, he is liable to pay tax in India on his total world income. This liability arises because of his being "resident" in India. But if that individual does not have to pay any tax on the income in the UAE because there is no local tax leviable in the UAE on the income of an individual, no question of granting relief under the Double Taxation Avoidance Agreement in

respect of such income can arise in the course of assessment of his income in India. Such an individual has no liability to pay tax in the UAE even if he resides there for more than 182 days a year. The definition of the term "resident" is not an inclusive definition. It means that any person who does not pay tax under the laws of a Contracting State cannot be treated as a resident of that State. To hold otherwise will make the definition of a "resident" meaningless. This will also defeat the whole purpose of the agreement and make the agreement ultra vires Section 90 of the Income-tax Act.

67. We are of the view that there are compelling reasons for not following the view taken in Rafik's case [1995] 213 ITR 317 (AAR).

68. On a reading of the preamble to the agreement there can be no dispute that the underlying idea behind the agreement is to promote mutual economic relations by relieving the taxpayers from the burden of paying tax twice on the same income in two different countries. This double obligation to pay tax on the same income is sought to be relieved by the agreement. However, the problem of double taxation can only arise if the same income has been subjected to tax simultaneously in two countries in the same year. But here we have a case where an individual has been subjected to tax in respect of his income in India only. There is no tax payable at all by an individual on his income under any law in force in the UAE. Having regard to the object of the Double Taxation Avoidance Agreement, there is no reason to assume that the agreement seeks to grant relief to the individuals residing in the UAE from the burden of payment of the only tax payable by them in India. Moreover, the Government cannot alter this statutory liability to pay tax except to the extent it has been empowered by the statute to do so. The Government cannot reduce the rate of tax fixed by the Finance Act or do away with or whittle down any provision of the Income-tax Act by an executive action or agreement to provide relief from double taxation even in a case where there is no double taxation at all. There cannot be any question of avoiding something which does not exist.

69. The next question raised is why elaborate provisions have been made in the Double Taxation Avoidance Agreement in respect of persons carrying on independent personal services, dependent personal services, director's fees, income earned by entertainers and athletes, and remuneration and pensions in respect of Government service when these provisions can only apply to individuals. It has been argued that other provisions relating to dividend, capital gains, interest will apply equally to individuals and non-individuals.

70. The answer to this argument is obvious. Article 31 declares that the Double Taxation Avoidance Agreement will remain in force indefinitely. Either of the two Contracting States may terminate the agreement by notice in the manner laid down in that article. Because it is expected to continue indefinitely, the agreement has tried to cover all sorts of eventualities. If a new tax is imposed on income by either of the two States, a fresh agreement will not have to be entered into. Article 2 of the agreement has referred to the existing taxes to which the agreement will apply. Existing taxes have been specified as income-tax, corporate tax and wealth-tax imposed on income and capital in the UAE. A tax which is not in existence in the UAE is not covered by the agreement at all. An individual is not a taxable entity either for the purpose of income or wealth-tax in the UAE. In other words, there is no existing tax on income of an individual in the UAE. There is no question of the agreement

being made applicable to any non-existing tax in the UAE. But this agreement will apply to any taxes on income or capital in addition to the taxes mentioned in paragraph 2 of Article 2 as and when such taxes are imposed. No fresh agreement will be necessary in respect of these taxes. The competent authority of the Contracting States shall notify to its counterpart in the other Contracting State of any change in the tax laws whereupon the newly imposed taxes will come within the ambit of the agreement automatically. If any tax is imposed by the UAE on the income of individuals, the UAE authority will have to notify the Indian authority about such changes in tax laws. Thereupon, the tax levied on income of an individual will qualify for the relief provided in the Double Taxation Avoidance Agreement.

71. Further in all these articles, residence of an individual is a very important factor. For example, income derived by a resident of the Contracting State in respect of professional services shall be taxable only in that State. This is the general law subject to some exceptions. Likewise, salaries, wages and other remuneration derived by a resident of the Contracting State, shall be taxable only in that State. However, if the employment is in the other Contracting State then such remuneration may be taxed in the other State. A close scrutiny of the articles will reveal that these articles have been worded in a way that an individual may not have to pay full amount of tax in both the Contracting States. If the salaries, wages and other remuneration derived by a person residing in the UAE is not taxable at all there then he is not a resident of the UAE. There is no scope for application of Articles 14 and 15 to his case. In fact, the importance of the word "resident" in these articles is of very great significance. In order to be a "resident", a person must be a taxpayer in that country. If such a taxpayer is being subjected once again to tax in the other Contracting State, various reliefs have been provided in the agreement. The agreement has neither created any liability to pay tax nor imposed any fresh tax on individuals. If a person domiciled in the UAE does not pay any tax, this agreement will not make him liable to pay tax. This again goes to show that various articles are not to be applied mindlessly, irrespective of whether the applicant has to pay tax in a Contracting State at all or not. To take the illustration which was given before us. For individual's personal service and dependent personal service, reliefs have been granted under Articles 14 and 15. Paragraph 1 of Article 15 lays down that income derived by a resident of a Contracting State in respect of professional services shall be taxable only in that State. These provisions are otiose and redundant in the context of the existing laws of taxation in the UAE so far as the individual residing in the UAE is concerned. Then why was such a provision made ? The provision in paragraph 1 of Article 14 that such income shall be taxable only in that State is really meaningless for a person employed in the UAE. This provision could only have been inserted in that agreement to provide for a situation where an individual may be subjected to tax on income derived from professional services in future. Article 15 likewise lays down salary, wages and other similar remuneration (derived by a resident of a Contracting State) in respect of his employment shall be taxable unless the employment is exercised in the other Contracting State. Therefore, if the individual gets a salary from an employment in the UAE, according to paragraph 1 of Article 15, such salary shall be taxable in the UAE. This again becomes meaningless, if one bears in mind that there is no tax on salary income derived by individual in the UAE. The same is the position with pension. These provisions have been inserted with full knowledge that pension earned by an individual from an employment in the UAE or outside, will not be taxed at all in the UAE under any circumstances. That is the existing law. Therefore, these provisions cannot be given effect to until and unless the UAE imposes a tax on

income earned by individuals. In other words, these provisions will become effective as soon as tax laws corresponding to the In'dian taxes come in force in the UAE.

72. In Rafik's case [1995] 213 ITR 317 (AAR), it was recognised that this will be the position if a literal interpretation of the agreement was made. But it was held that a liberal interpretation should be made to grant relief to the individuals residing in the UAE and the agreement should be held to be effective for individuals from the day it came into force.

73. It is difficult to comprehend that the Central Government with full knowledge that no income-tax is at all payable by an individual in the UAE would enter into an agreement about non-existent taxes, If the Central Government entered into the agreement to grant tax relief in India to nontax paying individuals in the UAE, then the agreement would be a flagrant violation of the powers given to the Central Government by Section 90 of the Income-tax Act and ultra vires the Income-tax Act and the annual Finance Act.

74. It was further contended that paragraph 1 of Article 4, has given a very restricted interpretation of the word, "resident of a Contracting State", which means any person who is liable to pay tax by reason of his domicile, residence, place of management, place of incorporation or any other criterion of a similar nature. It cannot be concluded from this that a person who is not liable to pay tax in a Contracting State is not a resident of that Contracting State. If this argument is accepted then the question arises by what criterion can the petitioner claim to be a resident of the UAE or India ? Under the Income-tax Act, the petitioner is a non-resident. Paragraph 2 of Article 4 cannot apply unless an individual is a resident of both the Contracting States. The underlying idea under Article 4 is to make the agreement applicable to persons who are doubly taxed in both the Contracting States. The agreement does not purport to grant relief to a person who is liable to tax only in one country and not in the other. It cannot be overemphasised that it is an agreement to avoid double taxation. The liability to pay tax may arise by reason of domicile, place of management or incorporation or any other criterion of a similar nature. The words "domicile, residence, place of management, place of incorporation" do not belong to any one particular genus. These words have been used only to denote that a person who may be liable to pay tax by any one of these or any other criterion will be treated as resident. Whatever may be the criterion on the basis of which a person has to pay tax in a particular Contracting State, he will have to be treated as a resident of that Contracting State where he pays tax for the purpose of this agreement, What is of paramount importance is that the person must be a taxpayer in a country for the purpose of being treated as a resident of that country.

75. Although the case has been argued at great length, the simple fact which is plain as pikestaff is that a double taxation avoidance agreement is for granting relief to a person who has to pay tax twice over on the same income in one accounting year. It is incomprehensible that double taxation relief has to be given even when the income in question is taxable only in one country and not at all by the other contracting country.

76. It has next been argued that relief has to be granted on the basis of potential tax. This argument has to be rejected straightaway. The question of granting relief from double taxation can only arise when the income-tax assessment of a person is taken up. If the Assessing Officer finds that any

income of the assessee has already been subjected to tax in another country with which the Government of India has not entered into any agreement for avoidance of double taxation, then the Assessing Officer will have to allow deduction from the income-tax payable on such income in the manner laid down in Section 91.

77. Similarly, if at the time of assessment, the Income-tax Officer finds that the assessee has earned income which is taxable under the existing laws of another country with which the Government of India has entered into an agreement for avoidance of double taxation then relief has to be given to the assessee under Section 90. There are two situations under which this relief can be given :

> (a) Where income-tax has been paid both under the Income-tax Act and also the corresponding Act in the contracting country ; or
>
> (b) Where double taxation is going to take place under the Indian Act and the corresponding law in force of the contracting country.

78. Since it is an annual levy, the Income-tax Officer has to take into consideration the law in force of the year for which the assessment is being made. If the Assessing Officer finds that the income of the relevant year is taxable only in India and not in any other State, he cannot grant any relief under Section 90 from the tax levied by the statute on the assumption that this income will be taxed in another year in the other country. There is no scope for granting any relief on the presumption that a tax is likely to be levied on such income by the Contracting State in the near future. What has to be seen is the law in existence imposing tax in the assessment year in question. Income-tax is an annual levy, Has the income which is being assessed to tax ilready been subjected to tax or is it liable to be taxed in another country ? If in a particular year of assessment, there is only one tax payable by an individual in one country and there is no liability to pay any tax on that income in the other contracting country, there is no double taxation of that income and no question of granting any relief from double taxation can possibly arise. Even if a tax on income is imposed in the Contracting State in a subsequent year then there will be a case of double taxation in that particular year in which the levy is imposed.

79. Article 2 of the agreement specifically restricts the scope of the agreement to "all taxes imposed on total capital, as total income or of capital including taxes on gains from alienation of movable property as well as capital appreciation". The article covers only taxes which have been imposed and not taxes which are imposable or likely to be imposed at a future date. It also enumerates in paragraph 2 "the existing taxes to which the agreement shall apply" (emphasis added), Among the existing taxes mentioned in the agreement are income-tax and corporation tax imposed in the UAE which do not apply to individuals at all. Individuals are not taxable entitites under income-tax law and corporation tax law of the UAE.

There is no existing tax on individuals in the UAE, Therefore, the individuals do not come within the purview of the agreement at all on the basis of the law as it stands now in the UAE.

80. Lastly, an argument has been made that the Central Government has entered into this agreement with the UAE with full knowledge of the fact that there is no corresponding income-tax law in force in respect of individuals residing in the UAE. There is no reason to presume that the agreement was entered into for the purpose of safeguarding the future contingencies of imposing of such laws in the UAE. The agreement must be implemented as it is. An individual residing in the UAE who does not pay any tax there will be entitled to the full benefit of the agreement.

81. There are three major difficulties in upholding this argument. The agreement is for avoidance of double taxation and prevention of fiscal evasion not for reducing the burden of the only tax payable by individuals like the petitioner in India. If there is no corresponding income-tax law in respect of individuals in the UAE, no question of double taxation of such individuals can arise. The avowed object of the agreement is to avoid double taxation. The agreement must not be presumed to be anything other than what it is stated to be.

82. Secondly, as has been emphasised in this judgment earlier, the Central Government is not empowered by Section 90 to enter into any agreement for avoidance of double taxation unless there is a corresponding law in force in the foreign country. The Central Government cannot exceed the scope of Section 90 by entering into an agreement even where there is no corresponding tax law in force for individuals in the UAE. Tax levied by Parliament cannot be waived or reduced by the Central Government except in so far as it is permitted by the statute.

83. Thirdly, the provisions of the agreement have been drafted specifically with a view to avoid double taxation. For example, under Article 10, the UAE is entitled to tax any dividends paid by an Indian company to persons like the petitioner residing in the UAE. But there is no tax payable at all by the individuals like the petitioner in the UAE. Then what is the purpose of this provision ? It does not apply to individuals. Why was such a provision made in the agreement if not for a future contingency. Similarly, Article 11 speaks of interest arising in a Contracting State and paid to a resident of the other Contracting State, Such interest may be taxed in that other State. The petitioner who is an individual resident in the UAE does not have to pay any tax in the UAE, So far as individuals like the petitioner are concerned, this provision is meaningless and otiose. Under Article 14, income derived by a resident of a Contracting State in respect of professional services or other independent activities of a similar character shall be taxable only in that State. "Professional service" has been defined to include independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, surgeons, lawyers, engineers, architects, dentists and accountants. Income from these activities can only be of individuals. Such income is not taxable at all in the UAE and also if the individual happens to be a non-resident under Indian tax law, such income cannot be taxed under income-tax law. Article 15 provides that salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of employment shall be taxable only in that State. In the background of the UAE law, this provision is meaningless. Whether income of an individual arises in the UAE or not is quite immaterial so far as the UAE tax authorities are concerned. The income of an individual is not taxable at all. There are similar provisions for directors' fees in Article 16, income by entertainers and athletes in Article 17, remuneration and pensions in respect of government services as well as non-governmental pensions and annuities in Articles 18 and 19. These provisions will have sense and purpose only if and when

the UAE passes law imposing tax on individuals and notifies such law in the manner laid down in Article 3. In that event, it will not be necessary to enter into a fresh agreement. Therefore, it will not be right to say that all these provisions are presently applicable and not for a future contingency.

84. In this context, the definition of "residence" given in Article 4 has to be kept in view. This definition is specially given for the purpose of this agreement. A person who does not pay any tax in the UAE is not a resident of the UAE at all. The provisions granting relief to residents of the UAE cannot be availed of by persons who do not pay any tax there.

85. The position becomes even more clear from Articles 20 and 25. Article 20 provides that an individual "who is a resident of a Contracting State" goes to the other Contracting State as a student at a recognised educational institution for a period not exceeding six years, shall be exempt from tax in that Contracting State on all remittances from the first mentioned Contracting State for the purpose of his maintenance, education or training and any remuneration (not exceeding 20,000 Indian rupees or its equivalent sum in UAE currency per annum) for personal services rendered in that other Contracting State with a view to supplementing the resources available to him for such purposes. Let us take the example of an Indian student who has gone to a University in the UAE for a period of less than six years and receives remittances from India not exceeding Rs. 20,000. The remittance is not taxable at UAE even if such individual receives remuneration in excess of 20,000 in Indian rupees. This provision and also the ceiling of Rs. 20,000 imposed in Article 20(a) has no meaning unless and until a tax law in respect of income of an individual comes into force in the UAE, Therefore, all these provisions are not presently applicable.

86. Article 25 deals with elimination of double taxation. Paragraph 2 of that article provides that if a resident of India derives income or owns capital which, in accordance with the provisions of this agreement, may be taxed in the UAE, India shall allow as a deduction from the tax on the income of that resident an amount equal to the income-tax paid in the UAE whether directly or by deduction, and also a deduction from the tax on the capital of that resident an amount equal to the capital tax paid in the UAE. Such deduction in either case shall not exceed that part of the income-tax or capital tax which is attributable, as the case may be, to the income or the capital which may be taxed in the UAE.

87. Paragraph 3 likewise provides that where a resident of the UAE derives income which in accordance with the provisions of this agreement may be taxed in India, the UAE shall allow as a deduction from the tax on income of that person an amount equal to the tax on income paid in India. So far as an individual is concerned, this provision in the context of the tax law of the UAE is meaningless. An individual does not pay any tax in the UAE, no question of deduction of tax paid in the UAE can arise in the course of his assessment of tax in India. Likewise, if any tax is paid by the individual residing in India there is no scope for adjustment of that tax in the UAE because he has no present liability of paying any tax in the UAE.

88. These provisions are akin to Article 23E of the UN Model Code. These provisions cannot be enforced so far as individuals residing in the UAE are concerned unless suitable law is made in the UAE for levying tax on income of individuals.

89. This agreement is based on the OECD and the UN model of double taxation which seeks to reduce the burden of double taxation. The mischief that the UN model seeks to rectify is the likelihood of the same income being taxed twice in two different countries in that same year. Both the UN model and the OECD models were devised for relieving the taxpayer from the burden of paying tax on the same income for the identical period. The definition of "resident" in Article 4 is also based on the UN model convention. A resident paying tax in one country is entitled to get relief from the burden of double taxation when a similar tax is imposed by the Contracting State.

90. The adoption of the UN model or the OECD model in the Double Taxation Agreement between India and the UAE is not to reduce the burden of the only tax payable in India by the individuals. No relief from double taxation can be given unless the petitioner is in a position to allege that he is liable to be taxed twice in respect of the same income in the same year in two different countries and as such he is entitled to invoke the protection of the double taxation agreement.

91. Article 31 declares that the agreement shall remain in force indefinitely. Therefore, if any tax is levied on an individual in the UAE, such tax will qualify for relief under the treaty without any fresh agreement, The competent authority imposing such tax will have to notify the other Contracting State in the manner laid down in Article 3. It cannot be argued that the agreement will apply to taxes which have been imposed and are in force in India and also imaginary taxes which have not been imposed and are not in force in the UAE. Article 2 specifically declares that the taxes covered are only the existing taxes imposed on total income or element of income including capital gains. Any tax such as income-tax on individuals or Hindu undivided families which are not in force in the UAE will not qualify for the benefit of the treaty.

92. In the premises, we hold that an individual who is not liable to pay tax under the UAE Jaw cannot claim any relief from the only tax on income which is payable in India under the agreement. The provisions of the Double Taxation Avoidance Agreement do not apply to any case where the same income is not liable to be taxed twice by the existing laws of both the Contracting States.

93. In view of the aforesaid, we answer all the three questions in the negative and against the applicant.

94. DR. subHASH C. jAIN (Member).--The ruling in Mohsinally Alimohammed Rafik's case [1995] 213 ITR 317 (AAR), was given by the then Chairman of the Authority for Advance Rulings on December 23, 1994. This ruling has been followed in a number of cases to which I was a party. As far as I have been able to gather information, in most of these cases except one, no hearing took place. In one of the cases, namely, Devabhaktuni Durga Prasad (AAR No. 357 of 1997), the matter came up for hearing before the then Chairman and myself. However, in that case too, it was observed as follows :

> "These questions have been answered, on similar facts, in the ruling of this authority in the case of M.A. Rafik's case [1995] 213 ITR 317 (AAR) and other cases. It is unnecessary to repeat the discussion here. It is sufficient to state that applicant should be considered to be a resident of both the UAE and India within the meaning

> of paragraph 1 of Article 4. This being the situation, one has to turn to the terms of paragraph 2 of Article 4 which provides for such cases".

95. Since the present chairman of the authority finds himself unable to agree with the ruling given in Rafik's case [1995] 213 ITR 317 (AAR), it has become necessary for me to explain my position while concurring with the ruling given by him.

96. Even in Rafik's case [1995] 213 ITR 317 (AAR), the then chairman had taken the view that individuals were entitled to the benefit of concessions under the provisions of the Income-tax Act on account of the provisions of Article 4 of the Agreement for Avoidance of Double Taxation and Prevention of Fiscal Evasion with respect to the Taxes on Income and Capital between India and the United Arab Emirates (DTAA). He observed as under (page 331) :

> "It will thus be seen that the language of paragraph 1 of Article 4 lends itself to two equally plausible interpretations. One of them seems to give effect to the natural meaning of some of the words employed in the paragraph. . . The second interpretation perhaps places some strain on some of the words but gives a meaning to all the words employed, fully accords with the intention and objective of the agreement and gives immediate effect to all its terms. In this situation, the authority is of the opinion that the second interpretation is the more preferable one and that an individual like the applicant, though at present not actually liable to pay any income-tax in Dubai, should also be considered to be a resident of Dubai for the purposes of the Double Taxation Avoidance Agreement, as being a person living in Dubai and having sources of income there, he is certainly liable to be called upon to pay income-tax under the tax laws of that country." (italics added)

97. The main reason for the above ruling is the perception of the then chairman that the Government of India wished to encourage investments in the country and it intended to give the benefit of tax concessions to even individuals resident in the UAE even though they were not liable to tax in that State. This conclusion appears to be somewhat conjectural and as acknowledged in the ruling in Rafik's case [1995] 213 ITR 317 (AAR), puts a strain on the interpretation.

98. It is necessary to notice the clear words of paragraph 1 of Article 4 which are to the following effect (see [1994] 205 ITR (St.) 49, 52) :

> "For the purposes of this agreement, the term 'resident of a Contracting State' means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management, place of incorporation or any other criterion of a similar nature."

99. Paragraph 2 of the said article goes on to indicate the criteria for determining the status of an individual if he is a resident of both Contracting States. However, that eventuality would arise only, if, to start with, a person is held liable to tax by reason of such facts as domicile, residence, etc. With great respect, it is difficult to agree that even if the tax laws of the UAE did not impose any liability

to pay income-tax on the individual concerned, he could still be considered as a resident of a Contracting State as envisaged by Article 4. It would appear that it is not permissible to bring in any extraneous considerations when the meaning of the words is so plain as in Article 4 of the Double Taxation Avoidance Agreement. I am, therefore, in respectful agreement with the conclusions of the present chairman.

100. In tune with the above thinking, K. Srinivasan in his Guide to Double Tax Avoidance (Vidhi Publishing (P.) Limited, 1998, page 193), has observed as under :

> "If a Contracting State does not levy income tax on individuals or on certain sources of income of the individual, no individual who is required to pay any tax in the other Contracting State will be exposed to any risk of double taxation on the whole of his income or any part of it derived from the exempt sources and, therefore, he has no scope for invoking the Double Taxation Avoidance Agreement and seeking any 'relief' from the country in which he has a tax liability on whatever income does not suffer any tax under the law. This aspect, it is submitted with respect, has escaped due consideration in the rulings given by the AAR in Mohsinally Ali Mohammed Rafik's case [1995] 213 ITR 317 and Dr. Rajnikant R. Bhatt v. CIT [1996] 222 ITR 562. There is a view that neither of the parties concerned in these two cases was entitled to a ruling from the AAR because there was no allegation or expression of apprehension of double taxation by them. It could be argued that they were merely trying to exploit the fact that they were deriving income from both the UAE and India and they were asking for tax concessions in India where they were liable to tax, though they were not called upon to pay any income-tax on the income in question in the UAE. The object of charging tax on dividends, interest, royalties, fees for technical services, etc., at relatively low rates is to enable the country of residence also to tax the same income without casting an undue burden on the assessee. It is not to offer the assessee a concession to which neither his compatriots in India nor other non-resident Indians having 'permanent homes in other countries' (with which India may have tax treaty) are entitled."

101. Lastly, there should be no hesitation in correcting the earlier ruling keeping in view the precedents in the matter. In this connection, attention is drawn to Hotel Balaji v. State of Andhra Pradesh, AIR 1993 SC 1048, 1056 ; [1992] 2 Scale 924, where Ranganathan J, quoted the following observations from Distributors (Baroda) P. Ltd. v. Union of India [1985] 155 ITR 120, 124 (SC) :

> "To perpetuate an error is no heroism. To rectify it, is the compulsion of the judicial conscience. In this, we derive comfort and strength from the wise and inspiring words of Justice Bronson in Pierce v. Delameter (A.M.Y. at page 18) : 'a judge ought to be wise enough to know that he is fallible and, therefore, ever ready to learn : great and honest enough to discard all mere pride of opinion and follow truth wherever it may lead : and courageous enough to acknowledge his errors'."

102. Accordingly, in my view, the ruling given by the present chairman in the instant case represents the correct position in law.