

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH “ G ”: NEW DELHI
BEFORE SHRI H S SIDHU JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

ITA No. 4172/Del/2005
(Assessment Year: 2002-03)

Japan Airlines International Co Limited Chandralok Building 36, Janpath, New Delhi	Vs.	Income Tax Officer TDS 50(2) New Delhi
(Appellant)		(Respondent)

Assessee by :	Shri Rajan Mahajan. Adv
Respondent by:	Ms Shweta Dutta. Sr DR
Date of Hearing	19/1/2017
Date of pronouncement	27/02/2017

ORDER

PER PRASHANT MAHARISHI, A. M.

01. This appeal is filed by the assessee against the order of the Ld. CIT (A) XXX – New Delhi dated 29/08/2005 wherein the order passed by the income tax officer, TDS, Ward – 50 (2), New Delhi under section 201 (1)/(1A) of the Income Tax Act, 1961, was upheld.
02. The brief facts of the case are that appellant is a non-resident foreign company incorporated in Japan and is engaged in the business of carrying passengers and cargo by air. The government of Japan is has a double taxation avoidance agreement with government of India and according to which income accrued to the airline company by its operations in India is taxable in Japan. On 24/02/2005, survey was conducted by

the income tax authorities under section 133A of the income tax act at the premises of the companies' regional office in New Delhi. Subsequently summons were issued under section 131 of the income tax act, requiring the appellant company to submit details of the total salary and perquisites paid to its expatriate employees were resident in India during the aforementioned financial year. Submission of the detailed was examined by the Ld. assessing officer. He held that the company has contravened the provisions of section 192 of the income tax act in deducting the tax at source into cases both falling in the financial year 2002-03. Therefore he passed order under section 201 (1) dated 03/05/2005 holding that assessee is in default for Rs. 2184160/- and interest under section 201(1A) at Rs. 746687/-was determined. According to the assessing officer that employees of the assessee were resident in India for financial year 2002-03. The only dispute is with respect to the residential status of these 2 employees of the assessee company and therefore short deductions and interest thereon was computed and total tax payable was determined at Rs. 2930847/- . Assessee being aggrieved with the order of the Ld. assessing officer preferred an appeal before the Ld. CIT(A) who vide order dated 29/08/2005 dismissed the appeal of the assessee upholding the view of the Ld. assessing officer. Assessee being aggrieved with the order of the Ld. CIT(A) has preferred an appeal before us raising the solitary ground of appeal that:-

on the facts and in the circumstances of the case and in law, the Ld. CIT (A) by misinterpreting the provisions of section 6 of the act, has erred in treating the appellant company has

contravened the provisions of section 192 of the act. Accordingly, he has passed the appellate orders dated 29/08/2005 upholding the assessment of the Ld. AO vide his earlier orders dated 03/05/2005, as true and correct. He ought not to have done so when the provisions of section 6 and the taxman's ready Recknor, both are clear in their meaning and in the interpretation, that supports the appellant company's claim of status of residency in both the disputed cases.

03. The Ld. authorized representative submitted before us that the Ld. CIT(A) has misinterpreted the provisions of section 6 (6) of the income tax and its true meaning and has overlooked the Department circular dated 05/12/1962 that states that both the conditions in section 6 (6) of the income tax act have to be satisfied. Thereby he must have been a resident in India in 9 out of 10 preceding years, and he must have been resident in India for more than 2 years out of preceding 7 years. If either of these two conditions are not satisfied he will be treated as a resident but not ordinarily resident. It was further submitted that the issue is now squarely covered in favour of the assessee by the decision of the Hon'ble Supreme Court in case of Pradeep J Mehta Vs. Commissioner of income tax. It was further stated that both the employees have not satisfied both above two conditions hence are resident but not ordinarily resident in India. Therefore, it was submitted that assessee was not required to withhold any tax under section 192 of the income tax act.
04. Ld. departmental representative relied upon the orders of the lower authorities and submitted that the residential status is required to be worked out once again in view of the submission

made by the assessee and the decision of the Hon'ble Supreme Court relied upon.

05. We have carefully considered the rival contentions as well as the orders of the lower authorities. In the present case, the issue is whether tax is required to be withheld in with respect to two Japanese nationals Mr. Koga and Mr. Yanai. According to the appellant, Mr. M Koga came to India on 28/08/1999 and his stay in India was for 218 days in FY 1999 – 2000, 365 days in FY 2000 -01, 365 days in 2001-02 and 365 days in FY 2002–03. Therefore, according to the assessee is total stay in India was for 1121 days and he is resident and not ordinarily resident for all these years. Similarly, in case of Mr. Y Yanai it was also claimed that he came to India on 28/09/2000 and his stay in India was in 99– 2000 for only 37 days, 365 days for all the 3 years FY 2000– 01 to FY 2002 – 03 and 45 days for FY 2003 – 04. Therefore, it was claimed that for the years in which he stayed for 365 days in India. He is resident and not ordinarily resident and for other years, he is non-resident. Hon'ble Supreme Court has dealt with an identical situation in the case of Pradeep J Mehta pro the J Mehta versus Commissioner of income tax in the 2008 AIR. S CW 3398 as under:-

“10. The assessee thereafter filed an Application before the Tribunal under Section 256(1) of the 1961 Act (as it existed at the relevant time) seeking following two questions of law to be referred to the jurisdictional High Court for its opinion:

“(1) Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the status of the

assessee for the year in question was not that of 'resident but not ordinarily resident' as claimed by him?

(2) *Whether the Tribunal has erred in law in interpreting provisions of section 6 of the Act while holding that the assessee's case did not fall within the purview of section 6(6) of the Act as claimed by him in view of undisputed position of his status in relation to preceding ten years?"*

11. *Accordingly, the aforesaid two questions were referred to the High Court for its opinion. The High Court by the impugned judgment and order upheld the orders impugned before it and answered the reference in favour of the Revenue and against the assessee.*

12. *The High Court refused to grant the status of "not ordinarily resident" as contemplated under Section 6(6)(a) of the 1961 Act by observing thus:*

"12. *The short contention raised for the assessee was that section 6(6)(a) was applicable to this assessee who must be treated to be 'not ordinarily resident' in India, because, he was resident in India in eight out of ten years preceding the previous year 1981-82 and not nine out of ten years. In other words, he would be an individual who is 'not ordinarily resident' in India even if for all the remaining eight years he is a resident in India within the meaning of section 6(1) of the Act. Only if the assessee, has been resident in India for nine out of ten years, he will be ordinarily resident in India, otherwise he will be 'not ordinarily resident' in India. This contention though appearing to be attractive at first blush, is not at all warranted by the provisions of section 6(6)(a) of the Act. Section 6(6) does not define 'ordinarily resident in India' but describes 'not ordinarily resident' in India. It resorts to the concept of 'resident in India' for which criteria is laid down in section 6(1) of the Act. On its plain construction clause (a) of section 6(6) would mean that if an individual has in all the nine out of ten previous years preceding the relevant previous year not been resident in India as contemplated by section 6(1), he is a person who is 'not ordinarily resident' in India. To say that an individual who has been resident in India for eight years out of ten preceding years should be treated as 'not ordinarily resident' in India, does not stand to reason and such contention flies in the face of the clear provision of clause*

(a) of section 6(6) which contemplates the period of nine years out of ten preceding years of not being a resident in India before an individual could be said to be 'not ordinarily resident' in India, which position will entitle such person to claim exemption under section 5(1)(c) of the Act in respect of his foreign income. An individual who has not been resident in India, within the meaning of section 6(1), for less than nine out of ten preceding years does not satisfy that statutory criteria laid down for treating such individual as a person who can be said to be 'not ordinarily resident' in India, as defined by section 6(6). A resident of India who goes abroad and is not a resident in India for two years during the preceding period of ten years will therefore, not satisfy the said condition of not being a resident of India for nine out of ten years."

13. *It may be mentioned here that the Assessee had cited the following judgments before the High Court to support his claim:*

(A) The decision of the Patna High Court in C.N. Townsend v. CIT (1974) 97 ITR 185 (Pat), for the proposition that, if any of the conditions mentioned in clauses (a), (b) or (c) of section 6(1) of the 1961 Act is fulfilled, the assessee will be a 'resident' within the meaning of the 1961 Act and if he comes within the mischief of either of the two conditions mentioned in section 6(6)(a), he will be treated as 'not ordinarily resident'. In that case, the assessee came to India in April, 1964, and continued to stay in India till the end of March, 1965, and therefore, it was held that he clearly fulfilled the condition laid down in sub-section (6)(1)(a) of the 1961 Act and as such, was a 'resident in India' during the previous year in question. It was held that the assessee, however, could not be treated as 'ordinarily resident' in India as he fell within the first condition in section 6(6)(a) namely, that he was not resident in India in nine out of ten previous years preceding the year 1964-65 even though he did not come within the mischief of the second condition. (B) The decision of the Authority for Advance Rulings, In re Advance Ruling A. No. P-5 of 1995 [(1997) 223 ITR 379 (AAR)], to point out that the said authority while construing the meaning of the expression 'resident but not ordinarily resident', held that the correct construction of Section 6(6)(a) of the 1961 Act was that, a person would become 'ordinarily resident' only if

(a) he has been "resident" in nine out of ten preceding previous years; and (b) has been in India for at least 730 days in the seven preceding previous years and that, he will be treated as resident but not ordinarily resident if either of these condition is not fulfilled. (C) The decision of the Bombay High Court in

Manibhai S. Patel v. CIT (1953) 23 ITR 27 (Bom), for the proposition that, in order, that an individual is 'not ordinarily resident' in the taxable territories, he should satisfy one of the two conditions laid down in Section 4B(a) of the Indian Income Tax Act, 1922 (which corresponded to Section 6(6)(a) of the 1961 Act). It was held that, under Section 4B(a), what was required to be considered was the assessee's residence in the 'taxable territories' and not his residence outside the 'taxable territories'. If the assessee had been in the 'taxable territories' for more than two years in the preceding seven years, then he does not satisfy the second condition laid down in Section 4B(a) and would, therefore, not be 'not ordinarily resident' in the taxable territories. In that case, the assessee was living in Africa for four years out of the preceding seven years and he was in the 'taxable territories' for about three years and the question was whether he was 'not ordinarily resident' in 'taxable territories' under the second part of Section 4B(a). It was held that, he did not satisfy the second condition. (D) The decision of the Travancore-Cochin High Court in P.B.I. Bava v. CIT (1955) 27 ITR 463 (Trav. & Coch), to point out that, in the context of section 4B(a) of the Indian Income Tax Act, 1922, the High Court had held that a person was not ordinarily resident in any year unless he satisfies both of the conditions of the said provision which make a person ordinarily resident, namely, (i) the condition that he must have been resident, in nine out of ten years preceding that year, and (ii) the condition that he must have been, here for periods of more than two years during the seven years preceding that year. It was held that a person is 'not ordinarily resident' in India in the previous year if he has not been 'resident' in nine out of the ten years preceding that year; he need not establish that he was 'not resident' in nine out of the ten years. It was observed that 'not resident' and 'not ordinarily resident' are not positive concepts but only the converse of 'resident' and 'ordinarily resident' and a category of persons 'not resident and not ordinarily resident' is impossible to imagine and unknown to the Act.

14. *The aforesaid decisions cited by the assessee have been noted by the High Court. The High Court answered the reference in favour of the revenue and against the assessee, without either agreeing or disagreeing with the view taken by the various High Courts and the Authority for Advance Ruling, which is presided over by a retired Judge of the Supreme Court.*
15. *Section 6(6)(a) of the 1961 Act corresponds to and is pari materia with Section 4B of the Income Tax Act, 1922 (for short "1922 Act"). Section 4B of 1922 Act reads thus:*

"4B. Ordinary Residence For the purpose of this Act

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

16. The proposed definition of "resident" and "not ordinarily resident" was enacted by the British Rulers, i.e., the officers of the Indian Civil Services and those in armed forces serving in India, who were absent from India on furlough for a year out of every four years so that they could be treated as "not ordinarily resident" and avoid tax on income in their home country, notwithstanding continuous stay and service in India.

17. The High Court of Travancore and Cochin in PBI Bava v. CIT [supra] while interpreting Section 6(a) of the Travancore Income Tax Act, corresponding to Section 4B(a) of the 1922 Act, relying upon the speech of Sir James Grigg during the assembly debates on Section 4B, where he had said:

"a man is not ordinarily resident unless he satisfies both of those conditions amount to saying that he must have been resident in nine out of ten years and he must have been here for substantial periods in the preceding seven years."

and the notes embodied in the Travancore Income Tax Rules: "An individual is ordinarily resident in Travancore if he has been resident as defined above in 9 out of 10 years preceding that year and has been in Travancore for periods amounting in all to more than 2 years during the 7 years preceding that year".

held that:

"The clause no doubt is a model of ambiguous and obscure drafting" as observed by Sir Jamshedji Kanga in his "Law and Practice of Income-tax" (p.362) but the basic outlines are clear enough to support the conclusion reached by the Appellate Assistant Commissioner of Income-tax, Trivandrum. His approach was right when he said :

"In my opinion, the only direct way of deciding whether the appellant was 'not ordinarily resident' in the relevant years is to formulate and answer the direct question, 'Has the appellant been resident in Travancore in 9 out of such 10 years?' This question permits of only one answer and that answer is an emphatic 'No'. When such is the answer to the question, how can I help treating the appellant as 'not ordinarily resident'? The answer which the Income-tax Officer seeks to get can be obtained only if the question could be

framed as 'Has the appellant been not resident (or non-resident) in Travancore in 9 out of such 10 years?' But this is not the direct question but very indirect and roundabout and is, in my opinion, quite inappropriate."

18. *The Bombay High Court in Manibhai S. Patel v. Commissioner of Income Tax [supra], held: "...the Legislature is primarily concerned with the residence of the assessee in the taxable territories, and in order that an assessee should be "not ordinarily resident" in the taxable territories what has got to be considered is his residence in the taxable territories..."*

19. *The Patna High Court in C.N. Townsend v. CIT, Bihar [supra] where the assessee came to India in April, 1964 and continued to stay in India till the end of the March 1965, held:*

"he clearly fulfilled the conditions laid down in Sub-section (1)(a) of Section 6 of the Act and as such he has been rightly held to be a "resident" in India during the previous year in question. The assessee, however, could not be treated as "ordinarily resident" in India as he came within the mischief of the first condition laid down in Sub-section (6)(a) of Section 6, namely, that he was not resident in India in nine out of the ten previous years preceding the year 1964-65, though he did not come within the mischief of the second condition."

20. *In the decision of the Authority for Advance Ruling In re Advance Ruling A. No. P-5 of 1995 [supra], it was held:*

"It seems correct to construe the definition as providing that a person will become resident and ordinarily resident only if (a) he has been "resident" in nine out of the ten proceeding previous years, and (b) has been in India for at least 730 days in the seven preceding previous years and that he will be treated as resident but not ordinarily resident if either of these conditions is not fulfilled"

21. *The Income Tax Act of 1922 was replaced by the Income Tax Act of 1961. The Law Commission of India has recommended the total abolition of the provisions of Section 4B of the 1922 Act defining "ordinary residence" of the taxable entities. The Income-tax Bill, 1961 (Bill No. 27 of 1961) did not contain any such provision. On the legislative anvil, it was felt necessary to keep the provisions of Section 4B of the 1922 Act in tact and, therefore, Section 6(6) had to be enacted in the 1961 Act. Referred to Chaturvedi & Pithisaria's Income Tax Law, Fifth Edition, Volume I, 1998 page 565.*

22. Further, in the same book the departmental circular being C.I.T., W.B.'S Circular letter No. J/28320/4A/10/5/58-59, dated Calcutta, the 5th December, 1962, addressed to the Secretary, Indian Chamber of Commerce, Calcutta, has been cited, which states as under:

"I am directed to refer to the correspondence resting with the Ministry of Finance (Department of Revenue) letter No. 4/22/61-IT(AT), dated 25th November, 1961, and to state that the Department's view has all along been that an individual is "not ordinarily resident" unless he satisfies both the conditions in section 4B(a), i.e.,

(i) he must have been a resident in nine out of ten preceding years; and

(ii) he must have been in India for more than two years in the preceding seven years.

Thus, a person will be "resident and ordinarily resident" if both these conditions are satisfied but he will be "resident but not ordinarily resident" if either of those conditions is not satisfied."

23. It may be noted here that the Parliament has amended Section 6(6) of the 1961 Act by Finance Act 2003 w.e.f. 1st April, 2004, which reads as under:

"Section 6 (6) A person is said to be "not ordinarily resident" in India in any previous year if such person is-

(a) an individual who has not been resident in India in nine out of the ten previous years preceding that year, or has not during the seven previous years preceding that year been in India for a period of, or periods amounting in all to, seven hundred and thirty days or more ; or "

However, the said amendment will not be applicable to the present case as the notes on clauses of the Finance Bill, 2003 provide that the said amendment will have effect only from 1st April, 2004.

24. Although the judgments referred to above, were cited at the bar in the High Court, which were taken note of by the learned Judges of the Bench of the High Court, but without either recording its agreement or dissent answered the two questions referred to it in favour of the Revenue. Judicial decorum, propriety and discipline required that the High Court should, especially in the event of its contra view or dissent, have discussed the aforesaid judgments of the different High Courts and recorded its own reasons for its contra view. We quite see the fact that the judgments given by a High Court

are not binding on the other High Court(s), but all the same, they have persuasive value. Another High Court would be within its right to differ with the view taken by the other High Courts but, in all fairness, the High Court should record its dissent with reasons therefor. The judgment of the other High Court, though not binding, have persuasive value which should be taken note of and dissented from by recording its own reasons.

25. *Otherwise also, we find ourselves in agreement with the view taken by the three High Courts, namely, the Patna High Court in C.N. Townsend v. CIT, Bihar [supra], the Bombay High Court in Manibhai S. Patel v. Commissioner of Income Tax [supra] and the High Court of Travancore and Cochin in PBI Bava v. CIT [supra].*
26. *The Law Commission of India had recommended that the provisions of Section 4B of 1922 Act defining "ordinary residence" of the taxable entities be deleted but the suggestion was not accepted by the Legislature. Rather, on the legislative anvil, it was felt necessary to keep Section 4B of 1922 Act in tact and, accordingly, Section 6(6), which corresponds to and is pari materia with Section 4B of 1922 Act, was enacted in 1961 Act. This shows the legislative will. It can be presumed that the legislature was in the know of the various judgments given by the different High Courts interpreting Section 4B but still the legislature chose to enact Section 6(6) in the 1961 Act, in its wisdom, the legislature felt necessary to keep the provisions of 4B of 1922 Act in tact. It shows that the legislature accepted the interpretation put by the various High Courts prior to enactment of 1961 Act. It is only in the year 2003 that the Legislature amended Section 6(6) of the 1961 Act, which came into effect from 1st April, 2004.*
27. *It is well settled that when two interpretations are possible, then invariably, the Court would adopt the interpretation which is in favour of the tax payer and against the Revenue. Reference may be made to the decision in Sneh Enterprises v. Commissioner of Customs, New Delhi [(2006) 7 SCC 714], of this Court wherein, inter alia, it was observed as under:*

"While dealing with a taxing provision, the principle of "Strict Interpretation" should be applied. The Court shall not interpret the statutory provision in such a manner which would create an additional fiscal burden on a person. It would never be done by invoking the provisions of another Act, which are not attracted. It is also trite that while two interpretations are possible, the Court ordinarily would interpret the provisions in favour of a tax-payer and against the Revenue."

28. *This Court in a catena of decisions, has held that the circulars issued by the Department are binding on the Department. See: K.P. Varghese v. ITO [(1981) 4 SCC 173], UCO Bank v. CIT, W.B. [(1999) 4 SCC 599], Collector of Central Excise Vadodra v. Dhiren Chemical Industries [(2002) 2 SCC 127], etc. In all these cases it has been held that the circulars issued under the Income Tax Act or Central Excise Act are binding on the Department. It may be noted that in the circulars issued by the Commissioner of West Bengal, reference has been made to the correspondence resting with the Ministry of Finance (Department of Revenue) letter No. 4/22/61-IT(AT), dated 25th November, 1961, wherein it is stated that the department's view has all along been that an individual is "not ordinarily resident" unless he satisfies both the conditions in Section 4B(a), i.e., (i) he must have been a resident in nine out of ten preceding years; and (ii) he must have been in India for more than two years in the preceding seven years. In the present case, the Circular issued by the Board in which the opinion of the Central Government the Ministry of Finance (Department of Revenue) letter No. 4/22/61-IT(AT), dated 25th November, 1961 has been noted, the interpretation similar to the one put by the various High Courts on Section 4B has been accepted to be the correct position.*
29. *In these circumstances, a person will become an ordinarily resident only if (a) he has been residing in nine out of ten preceding years; and (b) he has been in India for at least 730 days in the previous seven years.*
30. *Accordingly, this appeal is accepted. The order passed by the High Court and the Authorities below are set aside. It is held that the High Court in the impugned judgment has erred in its interpretation of Section 6(6) of the Act and the view taken by Patna High Court, Bombay High Court and Travancore-Cochin High Court has laid down the correct law. The two questions of law referred to above are answered in favour of the assessee and against the revenue."*

06. We find that the order of the Hon'ble Supreme Court squarely covered the issue in favour of the assessee. However, for working out the correct status of the assessee based on the decision of the Hon'ble Supreme Court, we set aside the matter to the file of the Ld. assessing officer, as we do not find the number of days stated by the assessee in the orders of the lower authorities. Therefore, the Ld. assessing officer will compute the number of days of those

2 employees being in India and based on that will decide the residential status of those 2 employees following the principles laid down by the Hon'ble Supreme Court with respect to interpretation of provisions of section 6 (6) of the income tax act and decide the issue afresh on the merits.

07. In the result, appeal filed by the assessee is allowed with above direction.

Order pronounced in the open court on 27/02/2017.

-Sd/-

**(H.S. SIDHU)
JUDICIAL MEMBER**

-Sd/-

**(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER**

Dated: 27/02/2017

A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi