

आयकर अपीलीय अधिकरण "G" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "G" BENCH, MUMBAI

**BEFORE SHRI SANDEEP GOSAIN, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.6579/Mum/2017

(निर्धारण वर्ष / Assessment Year: 2009-10)

Shri. Sanjiv Krishnakant Ashtamkar B-2, Ratna Umaid Residency, Pipe Line Road, Luiswadi, Thane 400604 Maharashtra	बनाम/ v.	Income Tax Officer 3(3) Room No.8, B Wing, Ashar IT Park, Rd No. 16-Z, Wagle Industrial Estate, Thane (W)- 400604 Maharashtra
स्थायी लेखा सं./PAN: ABBPA3596K		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:	Shri. Kishore Poddar	
Revenue by:	Shri. Ajai Pratap Singh (Sr. AR)	

सुनवाई की तारीख /**Date of Hearing** : 25.06.2019

घोषणा की तारीख /**Date of Pronouncement** : 23.08.2019

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member:

This appeal, filed by assessee, being ITA No. 6579/Mum/2017, is directed against appellate order dated 31.08.2017 in Appeal No. PN/CIT(A)-2/ITO Wd-3(3)/THN/83/2017-18, passed by learned Commissioner of Income Tax (Appeals)-2, Pune (hereinafter called "the CIT(A)"), for assessment year(ay) 2009-10, the appellate proceedings had arisen before learned CIT(A) from penalty order dated 27.03.2014 passed by learned Assessing Officer (hereinafter called "the AO") u/s 271(1)(c) of the Income-tax Act, 1961 (hereinafter called "the Act") for ay: 2009-10.

2. The grounds of appeal raised by assessee in memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called “the tribunal”) , reads as under:-

“1. On the facts and in the circumstances of the case and in law the Ld. CIT(A) has erred in confirming levy of penalty u/s. 271(1)(c) of Rs. 9,24,740/-.

2. The appellant craves leave to amend, alter, delete or add any of the above grounds of appeal.”

3. This is an appeal arising from penalty levied by AO u/s. 271(1)(c) of the 1961 Act vide penalty orders dated 27.03.2014 , which was later confirmed by Ld. CIT(A) vide appellate orders dated 31.08.2017. The whole controversy revolves around whether assessee is resident in India or non-resident and consequentially it will decide chargeability of income of Rs. 27,20,633/- earned as salary by assessee outside India , to tax in India. The AO was of the view that assessee is resident in India and accordingly global income of the assessee is chargeable to income-tax in India. The said view of the AO in quantum assessment was later upheld by learned CIT(A) and thereafter also by the tribunal while passing appellate order in quantum in ITA No. 7537/Mum/2012 for ay: 2009-10 vide appellate orders dated 16.09.2015. The assessment was framed by the AO vide assessment order dated 26.12.2011 passed u/s 143(3) in quantum against the assessee , wherein the additions were made by the AO , which are reproduced hereunder:-

“4.2.

During the course of ongoing assessment proceedings following information have been submitted by you regarding the details of your employment in India and abroad.

S.No.	Period	No. of days	Employed with	Salary(Rs.)
1	01.04.2008 to 21.07.2008	112	M/s Precision Drilling Services at Abudhabi	16,70,371/-

2	24.07.2008 to 30.09.2008	69	Triton Holdings Ltd INDIA	5,94,468/-
3	01.10.2008 to 18.12.2008	79	Transocean Offshore International Ventures Ltd. INDIA	9,75,656/-
4	28.01.2009 to 31.03.2009	63	M/s Precision Drilling Services at Abudhabi	10,50,262/-

On going through the details, it is seen that during the period mentioned at Sr. No.2 & 3 you were in India with Triton Holdings Ltd & Transocean Offshore International Ventures Ltd. Companies. You have claimed that during this period you have visited Abudhabi from 14.09.2008 to 13.10.2008. In this regard, you are requested to give following information:

1. Purpose of your visit to Abu Dhabi. If this visit was for the purpose of employment, documentary evidence in this regard may kindly be given. The copy of the contract, the salary received during this period may also be furnished. The place of stay in Abu Dhabi and the details of expenditure incurred during this period may also be given.

2. Copy of contracts with all the employers with whom you have worked may be given.

Furnish details of the remuneration/salary received during your stay in Abu Dhabi from 01.04.2008 to 21.07.2008 and from 28.01.2009 to 31.03.2009. Given details of the expenditure incurred during you stay in Abu Dhabi and amenities provided by the employer, place of stay, place of work in Abu Dhabi.”

4.3 In response to the letter, the AR filed letter dated 12.12.2011 submitted that from 14.09 2008 to 13.10.2008 (30 days) he was in Abu Dhabi for training of inspection and Rigup Procedure and Offshore Safety Courses on behalf of Triton Holding Ltd. He further submitted that during this period he was paid salary for the company and all his expenses at Abu Dhabi were born by the company.

4.4 It may be noted that the assessee has stated that he was paid salary for the period 14.09.2008 to 13.10.2008 by Triton Holding Ltd. On perusal of the information submitted by the assessee it is seen that he was with Triton ltd. till 13.09.2008 and from 01.10.2008, he had shifted his job to Transocean offshore Ltd. If the statement of the assessee is believed to be true then how could he shift the job during the period he was abroad and why Triton paid for the assessee when he had shifted to another company. He further stated that during his stay at Abu Dhabi the expenses were drawn by Triton so he did not have any details in respect of these expenses. In view of the discussions above following issues arises in the case of the assessee:

1. Whether assessee is resident in India.

2. Whether the assessee went to Abu Dhabi for the purpose of employment from 14.09.2008 to 13.10.2008 (30 days).

5. Status of the assessee

"For the purpose of this Act -

(1) An individual is said to be resident in India in any previous year, 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

c. having within 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.

[Explanation - In the case of an individual],-

a. Being a citizen of India, who leaves India in any previous year for the purpose of employment outside India, the provisions of sub-clause (c) shall apply in relation to that year as if for the words "sixty days", occurring therein, the words "one hundred and eighty-two days" had been substituted.

5.1 On going through section 6(1)(c), the assessee is resident if he is in India for 60 days in last year and 365 days in previous four years. The assessee has himself admitted that in previous four years (F.Y.2004-05 to 2007-08), he was in India for 847 days and during F.Y.2008-09 he was in India for 160 days. The condition laid down in section 6(1)(c).

5.2 On going through section 6(1)(a) the assessee is resident in India if he is in India for 182 days or more. The assessee claims that he was in India for 160 days and abroad for 205 days. The period from 14.09.2008 to 13.10.2008 (30 days), the assessee claims that he was at Abu Dhabi. The claim of the assessee that he was in Abu Dhabi for the purpose of training and the payment for his training was done by Triton is not supported by any documentary evidence. As discussed above he had shifted the job on 1st of October, 2008 from Triton to Transocean, therefore the claim of the assessee that the period from 14.09.2008 to 13.10.2008 should be considered as the period for the purpose of employment abroad, is not acceptable.

5.3 Without prejudice to above, as per provisions of section 6(1)(c), the assessee was resident in India as per the chart given by him, which is reproduced below:

Chart for four preceding years (submitted by assessee):

Financial Year	Days	
	Outside	In India
2007-08	198	167
2006-07	271	94
2005-06	144	221

2004-05	—	365
TOTAL	613	847

As per this chart in four years preceding F.Y. 2008-09, the assessee was in India for 847 days. Therefore, the assessee was resident in India as per provision of section 6(1)(c).

Hon'ble Calcutta High Court in the case of Vijay Mallya held that:

“ While deciding the residential status of an assessee, the Assessing Officer should consider the provisions of both section 6(1)(a) and 6(1)(c) and this is a mandatory requirement of law. An assessee may not be a ‘resident’ of India under section 6(1)(a) but may be a resident of India under section 6(1)(c). The authorities functioning under the Act who have been empowered to see that proper revenues are collected can suo motu call for the records to see whether question of residential status has been properly determined by the Assessing Officer or not. Under the circumstances, even when the Assessing Officer accepts the claim of an assessee and decides that the assessee is a ‘non resident’ under section 2(30) , then also he is duty-bound to record the reasons as to why he is not holding the assessee as a ‘resident’ in India either under the provisions of section 6(1)(a) or under section 6(1)(c)-Vijay Mallya V. Asst. CIT (2003) 131 Taxman 477(Cal.)”

6. In view of the submission above, the assessee’s residential status during the year under consideration is ‘RESIDENT’ and his global income i.e. earned inside and abroad is taxable in India.

Accordingly, the Salary earned outside India as per Bank Statement i.e. Rs. 27,20,633/- is added to the total income of the assessee. Penalty proceedings u/s 271(1)(c) initiated for concealing his income.”

4. It is pertinent to mention that whole dispute revolves around period of 30 days when the assessee visited Abu Dhabi from 14th September 2008 to 13th October 2008. The assessee claimed that he was in Abu Dhabi during aforesaid period for training of inspection and Rigup procedure and Offshore safety courses on behalf of Triton Holding Limited, India. The assessee submitted that he was paid salary for this period from 14th September 2008 to 13th October 2008 by Triton Holding Ltd. in India as well as his expenses at Abu Dhabi were borne by Triton Holding Ltd., India. The assessee shifted his job

to Transocean Offshore International Ventures Limited, India w.e.f. 01.10.2008. The assessee thus claimed that he worked with Indian Companies from 24.07.2008 to 18.12.2008 i.e. for a period of 148 days. The assessee also claimed that it worked abroad with Precision Drilling Services , Abu Dhabi from 01.04.2008 to 21.07.2008 and from 28.01.2009 to 31.03.2009, i.e. for 175 days. The assessee claimed that if this period of 30 days of his stay in Abu Dhabi i.e. from 14.09.2008 to 13.10.2008 is also included , then in that case his stay outside India will be 205 days which is more than 182 days of stay and the assessee in that scenario is a non-resident. The assessee was in India in previous four years viz. fy: 2004-05 to 2007-08 for a period of 847 days. The AO while framing assessment rejected this period of stay of the assessee of 30 days abroad from 14th September 2008 to 13th October 2008 in Abu Dhabi, as in the opinion of the AO this period of assessee's stay outside India was not for the purposes of employment outside India. Thus, after exclusion of this period of 30 days of stay in Abu Dhabi of the assessee from 14.09.2008 to 13.10.2008 , the assessee stay outside India was reduced to 175 days which was less than 182 days and hence the assessee was treated as resident in India by the AO and hence consequentially salary income earned abroad was also brought to tax by the AO. The assessee carried the matter in appeal before Ld. CIT(A) who dismissed the appeal filed by the assessee in quantum and on further appeal by the assessee, the tribunal was also pleased to dismiss the appeal of the assessee in quantum in ITA no. 7537/Mum/2012 for ay: 2009-10 , vide appellate orders dated 16.09.2015 passed by tribunal , by holding as under:-

"7. We have considered the rival submissions as well as the relevant material on record. As far as the factual matrix of the case regarding stay of the assessee in India and outside India, the same is not disputed by the parties as reproduced in the foregoing paragraph. There is no dispute that the assessee stayed in India for a period of 847 days in the 4 years preceding the year under consideration. As per provisions of sec.6(1), an individual is said to be resident in India in any previous year if he has satisfied the conditions as provided in clause (a) or (c) of sub-section (1) of sec.6. For ready reference, we quote sec.6(1) as under:

"6. For the purposes of this Act,—

(1) An individual is said to be resident in India in any previous year, 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) [* * *]

(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.

[Explanation 1],—In the case of an individual,—

(a) being a citizen of India, who leaves India in any previous year as a member of the crew of an Indian ship as defined in clause (18) of section 3 of the Merchant Shipping Act, 1958 (44 of 1958), or for the purposes of employment outside India, the provisions of sub-clause (c) shall apply in relation to that year as if for the words "sixty days", occurring therein, the words "one hundred and eighty-two days" had been substituted ;

(b) being a citizen of India, or a person of Indian origin within the meaning of Explanation to clause (e) of section 115C, who, being outside India, comes on a visit to India in any previous year, the provisions of sub-clause (c) shall apply in relation to that year as if for the words "sixty days", occurring therein, the words "one hundred and eighty-two days" had been substituted,

[Explanation 2,—For the purposes of this clause, in the case of an individual, being a citizen of India and a member of the crew of a foreign bound ship leaving India, the period or periods of stay in India shall, in respect of such voyage, be determined in the manner and subject to such conditions as may be prescribed.]

For an individual to be a resident in India, either he is in India during the year, for a total period of 182 days or more or he has been in India during 4 years preceding the year under consideration for a total period of 365 days or more and for a period of 60 days or more in the year under consideration. There is no dispute that the assessee has fulfilled the first limb of the provision provided under clause (c) of sec. 6(1) being in for a period of more than 365 days during the 4 years preceding the year under consideration. The dispute is only with regard to the stay in India during the year under consideration. The AO has computed the stay of the assessee in India for a period of 205 days by including the period of 30 days from 14/9/2008 to 13/10/2008. During the said period, assessee, though was physically in Abudhabi, however the AO was of the view that the stay in Abudhabi for this 30 days is not for purpose of employment outside India. It is pertinent to note that in the case of an individual, other than in employment, the requirement of clause (c) of sub-sec. (1) of section 6 is only 60 days or more in India during the relevant year whereas in the case of an individual who is in employment outside India, the condition of stay in India is for a period of 182 days by virtue of Explanation to sub-sec.(1).

8. The learned AR of the assessee of the assessee argued that the previous year under consideration is not the first year leaving India because the assessee has been outside India for last so many years, Therefore, clause (b) of the Explanation has to be considered for application in the case of the assessee. According to him, as per clause (b) of Explanation to sec. 6(1) only stay in India has to be counted and not the stay and purpose of stay outside India.

9. The plain reading of the provisions of sec.6(1) as well as Explanation manifest that if an individual who is a citizen of India or a person of Indian origin as per sec.115C of the Act and comes on a visit to India then the second condition of clause (c) of sub-section (1) would be the stay of 182 days instead of 60 days. In the case in hand, assessee has come to India being employed by the Indian company and therefore there is no question of enlarging the period of stay as per provisions of clause (b) of Explanation. Therefore, the assessee will not get the benefit as per the Explanation to sec. 6(1) of the Act simply because neither the assessee has left India during the year for the purpose of employment outside India nor the assessee has visited India in the previous year. The assessee though claimed to have left India for the purpose of employment but the employment of the assessee remains with Indian company and the assessee received salary in India even during the said period of 30 days from 14/9/2008 to 13/10/2008. Therefore, the said period of stay outside India cannot be regarded as for the purpose of employment outside India. Accordingly, we do not find any merit in the appeal of the assessee. The impugned order of the CIT(A) is upheld.

10. In the result, the appeal of the assessee is dismissed.”

5. The assessee has now carried the matter in quantum before Hon’ble Bombay High Court and appeal of the assessee stood admitted in ITA no. 657 of 2016 vide orders dated 27.11.2018 of wherein substantial question of law admitted by Hon’ble Bombay High Court is as under:-

“ 1. The Appeal is admitted for consideration on following substantial question of law :

(i)Whether in the facts and in the circumstances of the case and in law, could the appellant be treated as "resident in India" within the meaning of Section 6(1) of the Income Tax Act, 1961 for Assessment Year 2009-10?

2. Registry is directed to communicate a copy of this order to the Tribunal. This would enable the Tribunal to keep the papers and proceedings relating to the present appeal available, to be produced when sought for by the Court.”

6. In the meantime , the AO had confirmed levy of penalty on the assessee u/s 271(1)(c) of the 1961 Act, by holding as under:-

“ 8. The assessee's submissions have been considered carefully. The assessee's submission does not reveal any reasonable and sufficient cause for not levying penalty u/s 271(1)(c) of the I.T. Act 1961. Assessee's request for keep the penalty proceedings in abeyance is not accepted as already the Hon'ble CIT(A) has confirmed the addition made by the AO. On perusal of the facts in the assessment order and the materials on record, the following points were emerged. The assessee's explanation is not satisfactory and not showing any reasonable cause, clarifying why this concealment is not attracting penalty proceedings u/s 271(1)(c). It is a clear case of concealment by deliberately concealing her income. Therefore, the assessee's submission is not acceptable and thus rejected.

9. If the case would not have been picked up for scrutiny, the income of Rs.27,20,633/- could have escaped from the assessment. Thus, the assessee is liable to be penalised for her deliberate concealment. Therefore, in view of the above discussion, I am satisfied that the additions on account of concealed income of Rs.27,20,633/- clearly attracts the penalty provisions of section 271(1)(c) and accordingly, I levy the penalty of Rs.9,24,740/- u/s 271(1)(c) of the IT Act, which is minimum and 100% of the tax sought to be evaded on account of concealed income which is not shown in the return.

10. This order is passed with the prior approval of the Addl. Commissioner of Income Tax, Range-3, Thane vide letter no. THN/CIT(OSD)/Penalty/2013-14/1304 dated. 27.03.2014.”

7. The assessee challenged penalty of Rs. 9,24,740/- u/s 271(1)(c) of the 1961 Act levied by AO before the Ld. CIT(A) and made following submissions as hereunder:-

“ During the course of appellate proceeding, appellant filed written submission against the Assessing Officer's order in levying penalty which is reproduced as under:

i. The appellant is a NRI and he has been enjoying this status in earlier years also and now also he continues to have NRI status. During the assessment year under this appeal also he remains NRI.

ii The fact remains is that during the captioned assessment year the appellant was out of India for 205 days. This is an admitted fact which is contained in para (v) of page 4 of the penalty order also. However, the whole confusion is about the impugned 30 days (from the period 14.09.2008 to 13.10.2008) of his stay in Abu Dhabi is for the purpose of employment or not.

iii. The stay of the appellant out of India, during the impugned period of 30 days is also not in dispute and therefore the total number of days of his stay out of India counts down to 205 days.

iv. As per the provisions contained in section 6(1) of The Income Tax Act, 1961 the residential status of a person is 'Resident' if he has stays in India for 182 days or more during the previous year. Here in this case the stay of the appellant in India is only 160 days and therefore he qualifies to be Non Resident in the A. Y. under this appeal.

v. The quantum addition was made by the Ld. A.O. on the basis of holding residential status of the appellant as Resident, as against

claim of the appellant of non- resident, on the erroneous interpretation of the provisions of section 6(1) of the act.

The Ld. A.O. held that within the provisions of section 6(1)(a) of the act the assessee was not out of India during the impugned 30 days for the purpose of employment (para 5.2 and 5.3 of the assessment order). Whereas the fact remains is that there is no such requirement under the provisions of section 6(1)(a) of the income tax act, 1961 that the person should be out of the country for the purpose of employment or otherwise.

Secondly the Ld. A.O. held that the assessee had been in India for more than 365 days in the preceding 4 years and had been in India for more than 60 days in the previous year and hence becomes 'Resident' within the meanings of section 6(1)(c) of the act. Whereas the fact remains is that for Indian Citizens the condition of 60 days is replaced by 182 days by Explanation (b) to section 6 (1) of the act

vi. As such there is no finding by the department to suggest that the appellant was out of India during those impugned 30 days not for the purpose of employment. It is a sheer imagination of the Ld. A.O. and that too based on a highly non-prudent thinking. The purpose of employment, as has been held in number of cases by various judiciaries, has vast spectrum which covers almost all purposes except leisure & medical purpose.

Submission on the ground of appeal:

The only ground in this appeal is about levy of penalty of Rs. 9,24,740/- u/s 271(1)(c) of the act alleging deliberate concealment of facts on its residential status.

a. There is no dispute on the fact that the appellant was indeed out of India for 205 days during the previous year and therefore was not in India for 182 days or more during the previous year. In such circumstances there is nothing wrong on part of the appellant to declare its status as non-resident and not to offer its income earned abroad to Indian income tax.

b. Mere interpretation on part of the Ld. A.O. on the number of days not eligible to be counted as stay abroad for the purpose of employment and thereby bringing the income earned abroad by the appellant to income tax in India will not amount to concealment of the particulars nor it will amount to furnishing of inaccurate particulars of his income.

C. To mandatory requirement for applying penalty u/s 271(1)(c) of the income tax act is that there should be either a case of concealment of the particulars of income or furnishing of inaccurate particulars of income by the assessee. In the present case no information given in the return was found to be incorrect or inaccurate. It is also not a case where any statement made or any detail supplied was found to be factually incorrect. Hence, at least, prima facie, the assessee cannot be held guilty of furnishing inaccurate particulars.

d. A mere making of the claim, which is not sustainable in law, by itself, will not amount to furnishing of inaccurate particulars regarding the income of the assessee. Such claim made in the return cannot amount to the inaccurate particulars.

Legal position on this issue :

a. The Hon'ble Supreme Court of India has clearly held in *CIT Vs. Reliance Petroproducts (P) Ltd.* (2010) 322 ITR 158 (SC) that mere making of the claim, which is not sustainable in law, by itself, will not amount to furnishing of inaccurate particulars nor it will amount to concealment of particulars.

vi. The present case of the appellant is identical in nature to the above referred case, where he has claimed its residential status as non-resident in the return for A. Y. 2009-10 based on the bona fide belief and facts that he was not in India for 182 days or more in the previous year. However, the Ld. A.O. technically has not counted those impugned 30 days (from the period 14.09.2008 to 13.10.2008) of his stay in Abu Dhabi as his stay abroad and therefore brought his income earned abroad to Indian taxation. Whereas the fact remains is that the appellant was indeed abroad during those impugned 30 days also.

b. The same position was held by the Hon'ble Delhi High Court in *CIT Vs. Dharampal Premchand Ltd.* (2010)329 ITR 572 (Del).

C. In the case of *CIT Vs. Sandur Manganese & Iron Ores Ltd.* (2014) 362 ITR 160 (Kar.) the Hon'ble Karnataka High court held that imposition of penalty is not automatic. It is only when there is attempt to evade tax by offering explanation which is found to be false or not bonafide, that penalty can be imposed. In the present case, the appellant under bonafide belief has claimed his residential status as non-resident, which has technically not been accepted by the Ld. A.O. and hence imposition of penalty is not justifiable.

d. The same position has again recently been held by the Hon'ble High Court of Allahabad in *CIT & Another Vs. Euro Footwear Ltd. & Another* (2015) 94 CCH 128 (All. HC).

Prayer:

In view of the above submissions it is prayed that penalty of Rs. 9,24,740/- imposed by the Ld. A.O. u/s 271(1)(c) of the income tax act, being unwarranted, may kindly be directed to be done away with."

8. The Ld. CIT(A) dismissed the appeal of the assessee vide appellate order dated 31.08.2017, by holding as under:-

"5.1 I have perused the facts of the case as mentioned in the Assessing Officer's order as well as arguments taken on behalf of the appellant. I have also gone through the relevant citations on the issue. On a perusal of the facts, it can be clearly seen that the status of the appellant during the year was that of a resident and he wrongly claimed himself as non resident, thereby, evading the tax liability on the income earned to the tune of Rs. 27,20,633/-. The Assessing Officer in the assessment order has made detailed analysis of the data regarding employment of the appellant and thereafter, he has come to the conclusion that the appellant was in fact having the status of the resident during the year as per the provision of Section 6 of the IT Act. This finding of fact was confirmed by the CIT(A) in the quantum appeal. Not only that, Hon'ble ITAT Mumbai bench also confirmed the order of the lower authorities as informed during the appellate proceedings. Thus, the appellant was guilty of making a false

statement in the return of income with regard to his global income and therefore the appellant was liable for concealing the particulars of income.

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6. *In the facts of the appellant's case also, the appellant deliberately with a malafide intention had shown his status as non-resident while in reality, he was resident as per the provision of Section 6 of the IT Act. By making such false claim regarding his residential status, he avoided paying tax to the extent of income earned of Rs. 27,20,633/-. This fact came to the light only when the Assessing Officer analysed the entire facts. Had the return not been selected for the scrutiny, the appellant would have certainly escaped tax liability on this amount. The stand taken by the Assessing Officer was subsequently confirmed by the first appellate authority as well as by the ITAT Mumbai bench. In the light of the facts of the case as well as detailed decisions cited as referred supra, I hold that the appellant is liable for concealing the particulars of his income to the extent of Rs. 27,20,633/- and therefore penalty levied by the Assessing Officer u/s 271(1)(c) amounting to Rs. 9,24,740/- is absolutely in order and therefore upheld. “*

9. Now the matter is before tribunal at the behest of the assessee who is aggrieved by levying of the penalty by the AO u/s 271(1)(c) of the 1961 Act which was later confirmed by Ld. CIT(A). The Ld. Counsel at the outset submitted that quantum appeal has been decided by tribunal against the assessee and our attention was drawn to appellate order in ITA no. 7537/Mum/2012 dated 16.09.2015 passed by tribunal in quantum, wherein tribunal dismissed the appeal of the assessee by holding that the assessee is resident in India in the year under consideration based on facts and circumstances of the case. It is submitted by Ld. Counsel for the assessee that the assessee has challenged the decision of tribunal before the Hon'ble Bombay High Court who is pleased to admit the substantial question of law in ITA no. 657 of 2016 vide order dated 27.11.2018 and thus, it was submitted that the issue in quantum is now before Hon'ble Bombay High Court who is seized of the aforesaid issue. The Ld. Counsel for

the assessee produced before us written submission as are detailed hereunder:-

“A. Brief Facts of the case :

i. The appellant is a NRI and he has been enjoying this status in earlier years also and now also he continues to have NRI status. During the assessment year under this appeal also he remains NRI.

ii. The fact remains is that during the captioned assessment year the appellant was out of India for 205 days. This is an admitted fact which is contained in para (v) of page 4 of the penalty order also. However, the whole confusion is about the impugned 30 days (from the period 14.09.2008 to 13.10.2008) of his stay in Abu Dhabi is for the purpose of employment or not.

iii. The stay of the appellant out of India, during the impugned period of 30 days is also not in dispute and therefore the total number of days of his stay out of India counts down to 205 days.

iv. As per the provisions contained in section 6(1) of The Income Tax Act, 1961 the residential status of a person is 'Resident' if he has stays in India for 182 days or more during the previous year. Here in this case the stay of the appellant in India is only 160 days and therefore he qualifies to be Non Resident in the A.Y. under this appeal.

v. The quantum addition was made by the Ld. A.O. on the basis of holding residential status of the appellant as Resident, as against claim of the appellant of non- resident, on the erroneous interpretation of the provisions of section 6(1) of the act.

The Ld. A.O. held that within the provisions of section 6(1)(a) of the act the assessee was not out of India during the impugned 30 days for the purpose of employment (para 5.2 and 5.3 of the assessment order). Whereas the fact remains is that there is no such requirement under the provisions of section 6(1)(a) of the income tax act, 1961 that the person should be out of the country for the purpose of employment or otherwise. Also, 'purpose of employment', as has been held, is wide enough to include almost all types of stay barring a few like tourism, medical treatment, studies or the like.

Secondly the Ld. A.O. held that the assessee had been in India for more than 365 days in the preceding 4 years and had been in India for more than 60 days in the previous year and hence becomes 'Resident' within the meanings of section 6(1)(c) of the act. Whereas the fact remains is that for Indian Citizens the condition of 60 days is replaced by 182 days by Explanation (b) to section 6 (1) of the act.

vi. As such there is no finding by the department to suggest that the appellant was out of India during those impugned 30 days not for the purpose of employment. It is a sheer imagination of the Ld. A.O. and that too based on a highly non-prudent thinking. The purpose of employment, as has been held in number of cases by various judiciaries, has vast spectrum which covers almost all purposes except leisure & medical purpose.

B. Submission on the ground of appeal:

The only ground in this appeal is about levy of penalty of Rs. 9,24,740/- u/s 271(1)(c) of the act.

a. There is no dispute on the fact that the appellant was indeed out of India for 205 days during the previous year and therefore was not in India for 182 days or more during the previous year. In such circumstances there is nothing wrong on part of the appellant to declare its status as non-resident and not to offer its income earned abroad to Indian income tax.

b. Mere interpretation on part of the Ld. A.O. on the number of days not eligible to be counted as stay abroad for the purpose of employment and thereby bringing the income earned abroad by the appellant to income tax in India will not amount to concealment of the particulars nor it will amount to furnishing of inaccurate particulars of his income.

c. To mandatory requirement for applying penalty u/s 271(1)(c) of the income tax act is that there should be either a case of concealment of the particulars of income or furnishing of inaccurate particulars of income by the assessee. In the present case no information given in the return was found to be incorrect or inaccurate. It is also not a case where any statement made or any detail supplied was found to be factually incorrect. Hence, at least, prima facie, the assessee cannot be held guilty of furnishing inaccurate particulars.

d. A mere making of the claim, which is not sustainable in law, by itself, will not amount to furnishing of inaccurate particulars regarding the income of the assessee. Such claim made in the return cannot amount to the inaccurate particulars.

e. The appeal against quantum addition has also been admitted by Hon'ble Bombay High Court for consideration of the residential status of the appellant for A.Y. 2009-10 (copy enclosed).

Legal position on this issue :

a. In the case of PCIT Vs. Dhariwal Industries Ltd 408 ITR 102 (2018) the Hon'ble Bombay High Court has observed that when the quantum proceedings have been admitted by this court on a substantial question of law, it means that there were debatable and arguable questions raised and so penalty u/s 271(1)(c) cannot be levied.

In present case also the quantum proceedings have been admitted by the Hon'ble Bombay High Court for consideration of substantial question of law on residential status of the appellant.

b. The Hon'ble Supreme Court of India has clearly held in CIT Vs. Reliance Petroproducts (P) Ltd. (2010) 322 ITR 158 (SC) that mere making of the claim, which is not sustainable in law, by itself, will not amount to furnishing of inaccurate particulars nor it will amount to concealment of particulars.

The present case of the appellant is identical in nature to the above referred case, where he has claimed its residential status as non-resident in the return for A.Y. 2009-10 based on the bona fide belief and facts that he was not in India for 182 days or more in the previous year. However, the Ld. A.O. technically has not counted those impugned 30 days (from the period 14.09.2008 to 13.10.2008) of his stay in Abu Dhabi as his stay abroad and therefore brought his

income earned abroad to Indian taxation. Whereas the fact remains is that the appellant was indeed abroad during those impugned 30 days also.

c. The same position was held by the Hon'ble Delhi High Court in CIT Vs. Dharampal Premchand Ltd. (2010)329 ITR 572 (Del).

d. In the case of CIT Vs. Sandur Manganese & Iron Ores Ltd. (2014) 362 ITR 160 (Karn.) the Hon'ble Karnataka High court held that imposition of penalty is not automatic. It is only when there is attempt to evade tax by offering explanation which is found to be false or not bonafide, that penalty can be imposed. In the present case, the appellant under bonafide belief has claimed his residential status as non-resident, which has technically not been accepted by the Ld. A.O. and hence imposition of penalty is not justifiable.

e. The same position has again recently been held by the Hon'ble High Court of Allahabad in CIT & Another Vs. Euro Footwear Ltd. & Another (2015) 94 CCH 128 (All. HC).

Prayer :

In view of the above submissions it is prayed that penalty of Rs. 9,24,740/- imposed by the Ld. A.O. u/s 271(1)(c) and confirmed by the Hon'ble CIT(A) may kindly be directed to be done away with."

9.2 Prayers are made by learned counsel for the assessee to delete penalty levied by the AO u/s 271(1)(c) which was later confirmed by Ld. CIT(A). It was submitted that assessee was outside India for a period of 205 days and the whole controversy revolves around period of 30 days from 14th September 2008 to 13th October 2008, wherein the assessee was in Abu Dhabi on behalf of Triton Holding Limited, India for training of inspection and Rigup procedure and Offshore safety courses. It was submitted that the assessee was paid salary and all his expenses during stay in Abu Dhabi was borne by Triton Holding Limited, India. Our attention was also drawn to Section 6 of the 1961 Act r.w.s. 2(30) of the 1961 Act. It was submitted that since assessee was out of India for 205 days which is more than 182 days , the assessee was under bonafide belief that assessee is non-resident and hence income earned outside India by way of salary was not to be included while making payment of income-tax in India. It was submitted that Section 6 of the 1961 Act only stipulates stay of period of or more than 182 days in India in Section 6(1)(a) of the 1961 Act to become resident in India. It was submitted that assessee was in India for 847 days during immediately preceding four previous year

preceding relevant previous year viz. previous years 2004-05 to 2007-08 . It was submitted that since assessee left India for employment outside India, period of 60 days is to be extended to 182 days for computing residential status of the assessee. It was submitted that assessee was under a bonafide belief that assessee is a non-resident within meaning of Section 6 of the 1961 Act, r.w.s. 2(30) of the 1961 Act . It was submitted that if a claim is made by assessee under a bonafide belief which is not accepted by Revenue that will not automatically lead to levy of penalty u/s. 271(1)(c) of the 1961 Act.

9.3. The Ld. DR on the other hand placed strong reliance on the appellate order passed by Ld. CIT(A) and our attention was specifically drawn to para 6 of Ld. CIT(A) appellate order dated 31.08.2017.

10. We have considered rival contentions and perused the material on record. We have observed that the assessee is an individual. The assessee has claimed that he is non-resident during the previous year relevant to impugned assessment year under consideration, keeping in view provisions of Section 6 read with Section 2(30) of the 1961 Act. The assessee has claimed that he was out of India for a period of 205 days during the previous year under consideration , while the AO was of the view that the assessee was out of India for 175 days for computing his residential status as per provisions of the 1961 Act. The differential period of 30 days when assessee stayed out of India in Abu Dhabi from 14.09.2008 to 13.10.2008 was not considered by the AO for determining his residential status as the assessee visited Abu Dhabi during the said period on behalf of the Triton Holding Ltd., India, wherein assessee's salary as well reimbursement of expenses were borne by said Indian Company namely Triton Holding Limited, India and consequently said period of 30 days was not considered by AO to be a period of stay outside India for employment abroad and hence even salary of Rs. 27,20,633/- earned by assessee abroad from Precision Drilling Services from 01.04.2008 to 21.07.2008 and from 28.01.2009 to 31.03.2009 was also brought to tax by the AO in India

by holding that the assessee is resident in India. The assessee undisputedly was in India for a period of 847 days during four preceding previous years namely , financial year: 2004-05 to 2007-08. The assessee on the strength of being outside India for a period of 205 days including said period of 30 days of stay outside India from 14.09.2008 to 13.10.2008 had claimed that his income outside India from salaries to the tune of Rs. 27,20,633/- is not chargeable to tax in India , but the AO was of the view that the said salary income is chargeable to tax in India as assessee stayed outside India in Abu Dhabi for the period from 14th September to 13th October 2008 not for the purposes of employment outside India as he was in employment with Triton Holding Limited, India and his salary as well reimbursement of expenses were paid by said company Triton Holding Limited, India . This involved interpretation of provisions of Section 6(1)(a) and (c) of the 1961 Act read with Explanation 1(a) and 2(30) of the 1961 Act. This issue has been held against assessee in quantum even up to tribunal wherein vide ITA no. 7537/Mum/2012 vide orders dated 16.09.2015 , the tribunal decided the issue against the assessee by holding that assessee is resident in India, by holding as under:-

"7. We have considered the rival submissions as well as the relevant material on record. As far as the factual matrix of the case regarding stay of the assessee in India and outside India, the same is not disputed by the parties as reproduced in the foregoing paragraph. There is no dispute that the assessee stayed in India for a period of 847 days in the 4 years preceding the year under consideration. As per provisions of sec.6(1), an individual is said to be resident in India in any previous year if he has satisfied the conditions as provided in clause (a) or (c) of sub-section (1) of sec.6. For ready reference, we quote sec.6(1) as under:

"6. For the purposes of this Act,—

(1) An individual is said to be resident in India in any previous year, 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) [* *]*

(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.

[Explanation 1],—In the case of an individual,—

(a) being a citizen of India, who leaves India in any previous year as a member of the crew of an Indian ship as defined in clause (18) of section 3 of the Merchant Shipping Act, 1958 (44 of 1958), or for the purposes of employment outside India, the provisions of sub-clause (c) shall apply in relation to that year as if for the words "sixty days", occurring therein, the words "one hundred and eighty-two days" had been substituted ;

(b) being a citizen of India, or a person of Indian origin within the meaning of Explanation to clause (e) of section 115C, who, being outside India, comes on a visit to India in any previous year, the provisions of sub-clause (c) shall apply in relation to that year as if for the words "sixty days", occurring therein, the words "one hundred and eighty-two days" had been substituted,

[Explanation 2,—For the purposes of this clause, in the case of an individual, being a citizen of India and a member of the crew of a foreign bound ship leaving India, the period or periods of stay in India shall, in respect of such voyage, be determined in the manner and subject to such conditions as may be prescribed.]

For an individual to be a resident in India, either he is in India during the year, for a total period of 182 days or more or he has been in India during 4 years preceding the year under consideration for a total period of 365 days or more and for a period of 60 days or more in the year under consideration. There is no dispute that the assessee has fulfilled the first limb of the provision provided under clause (c) of sec. 6(1) being in for a period of more than 365 days during the 4 years preceding the year under consideration. The dispute is only with regard to the stay in India during the year under consideration. The AO has computed the stay of the assessee in India for a period of 205 days by including the period of 30 days from 14/9/2008 to 13/10/2008. During the said period, assessee, though was physically in Abudhabi, however the AO was of the view that the stay in Abudhabi for this 30 days is not for purpose of employment outside India. It is pertinent to note that in the case of an individual, other than in employment, the requirement of clause (c) of sub-sec. (1) of section 6 is only 60 days or more in India during the relevant year whereas in the case of an individual who is in employment outside India, the condition of stay in India is for a period of 182 days by virtue of Explanation to sub-sec.(1).

8. The learned AR of the assessee of the assessee argued that the previous year under consideration is not the first year leaving India because the assessee has been outside India for last so many years, Therefore, clause (b) of the Explanation has to be considered for application in the case of the assessee. According to him, as per clause (b) of Explanation to sec. 6(1) only stay in India has to be counted and not the stay and purpose of stay outside India.

9. The plain reading of the provisions of sec.6(1) as well as Explanation manifest that if an individual who is a citizen of India or a person of Indian origin as per sec.115C of the Act and comes on a visit to India then the second condition of clause (c) of sub-section (1) would be the stay of 182 days instead of 60 days. In the case in hand, assessee has come to India being employed by the Indian company and therefore there is no question of enlarging the period of stay as per provisions of clause (b) of Explanation. Therefore, the assessee will

not get the benefit as per the Explanation to sec. 6(1) of the Act simply because neither the assessee has left India during the year for the purpose of employment outside India nor the assessee has visited India in the previous year. The assessee though claimed to have left India for the purpose of employment but the employment of the assessee remains with Indian company and the assessee received salary in India even during the said period of 30 days from 14/9/2008 to 13/10/2008. Therefore, the said period of stay outside India cannot be regarded as for the purpose of employment outside India. Accordingly, we do not find any merit in the appeal of the assessee. The impugned order of the CIT(A) is upheld.

10. In the result, the appeal of the assessee is dismissed.”

10.2 The assessee being aggrieved by the aforesaid decision of the tribunal dated 16.09.2015 has filed an appeal with Hon'ble Bombay High Court u/s 260A of the 1961 Act , wherein Hon'ble Bombay High Court was pleased to admit substantial question of law in ITA no. 657 of 2016 in Sanjiv K. Ashtamkar v. The Tax Recovery Officer, vide orders dated 27.11.2018 as under:-

“ 1. The Appeal is admitted for consideration on following substantial question of law :

(i)Whether in the facts and in the circumstances of the case and in law, could the appellant be treated as "resident in India" within the meaning of Section 6(1) of the Income Tax Act, 1961 for Assessment Year 2009-10?

2. Registry is directed to communicate a copy of this order to the Tribunal. This would enable the Tribunal to keep the papers and proceedings relating to the present appeal available, to be produced when sought for by the Court.”

10.3 After considering the factual matrix of the case, we are of the considered view that once substantial question of law against quantum additions are admitted by Hon'ble High Court in appeal filed u/s 260A of the 1961 Act, wherein the taxpayer is allowed to enter the doors of the Hon'ble High Court, , the tribunal shall refrain from deciding the issue even in penalty proceedings u/s 271(1)(c) keeping in view judicial propriety and discipline, the tribunal being lower in hierarchy than Hon'ble High Court. Once the High Court is seized of the issues which are admitted by Hon'ble jurisdictional High Court against quantum additions, the tribunal shall refrain from deciding even penalty levied u/s 271(1)(c) on merits. In such situation, Section 275(1A) of the 1961 Act comes to the rescue of Revenue as in the

instant case before us and the most appropriate course of action in such situations for tribunal shall be restore the matter back to the file of the AO to adjudicate afresh levy of penalty u/s 271(1)(c) of the 1961 Act against assessee read with Section 274 & 275(1A) of the 1961 Act, wherein the AO be directed to pass penalty order u/s 271(1)(c) of the 1961 Act read with Section 274 & 275(1A) of the 1961 Act. Thus, we are restoring issues in this appeal to the file of the AO for fresh adjudication keeping ,inter-alia, provisions of Section 275(1A) of the 1961 Act. The decision of Hon'ble Gujarat High Court in the case of PCIT v. Geetaben Chandulal Prajapati reported in (2018) 96 taxmann.com 100(Guj.) is relevant. Needless to say that proper and adequate opportunity of being heard shall be provided by the AO to the assessee in accordance with principles of natural justice in accordance with law. The evidences/ explanations submitted by the assessee in its defence in denovo proceedings before the AO shall be admitted by the AO and shall be dealt with on merits in accordance with law. We order accordingly.

11. In the result, the appeal of the assessee in ITA no. 6579/Mum/2017 for ay: 2009-10 is allowed for statistical purposes.

Order pronounced in the open court on 23.08.2019.

आदेश की घोषणा खुले न्यायालय में दिनांक: 23.08.2019 को की गई

Sd/-

(SANDEEP GOSAIN)

JUDICIAL MEMBER

Sd/-

(RAMIT KOCHAR)

ACCOUNTANT MEMBER

Mumbai, dated: 23.08.2019

Nishant Verma
Sr. Private Secretary

copy to...

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench,
6. Master File

// Tue copy//

BY ORDER

DY/ASSTT. REGISTRAR
ITAT, MUMBAI