IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "I" MUMBAI

BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
MS. KAVITHA RAJAGOPAL (JUDICIAL MEMBER)

ITA No. 4258/MUM/2023
Assessment Year: 2021-22

Raghav Agarwalla, 13/14, Buckley Court, 5 Woodhouse Road, Colaba, Mumbai-400 005. **PAN NO. AHBPA 8174 F** **Appellant**	**Vs.**	ITO, International Tax Ward 1(1)(1), Room No. 1817, 18th floor, Air India Building, Nariman Point, Mumbai-400021. **Respondent**

Assessee by	:	Mr. K. Gopal/Akhilesh Deshmukh
Revenue by	:	Mr. Anil Sant, Addl. CIT-DR

Date of Hearing	:	29/08/2024
Date of pronouncement	:	21/10/2024

ORDER

PER OM PRAKASH KANT, AM

This Appeal has been preferred by the assessee against the final assessment order dated 25.10.2023 passed by the Ld. Income-tax Officer, International Tax Ward 1(1), Mumbai [in short 'the Ld. Assessing Officer'] pursuant to the direction of the Ld. Dispute Resolution Panel (DRP) dated 26.09.2023, for assessment year 2021-22, raising following grounds:

I. Status of the Appellant is a Non-Resident Indian and not a Resident of India as held by the Ld. DRP as well as the Ld. A.O.

1. The Ld. Dispute Resolution Panel (hereinafter referred to as 'the Ld. DRP') and Ld. AO erred in not appreciating the fact that the Appellant is a Non Resident of India as per section 6(1)(a) of the Act as he was in India during the Previous Year relevant to impugned Assessment Year for less than 182 days. It is an undisputed fact that the Appellant was in India for 113 days only during the previous year.

2. Without prejudice to the above, the Ld. DRP failed to appreciate that the Appellant's case is covered by clause (a) to Explanation 1 to section 6(1)(c) of the Act.. The Appellant has wrongly been treated as Resident of India without appreciating that the clause (a) to Explanation 1 to section 6(1)(c) provides that where a citizen of India, leaves India in any previous year 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. The Appellant was in India for 113 days only which is less than 182 days.

3. Thus, the Appellant is a Non Resident as per clause (a) to Explanation 1 to section 6(1)(c) since the period of 60 days, as referred to in section 6(1)(c) of the Act, will get substituted by 182 days. As the Appellant's stay in India during F.Y. 2020-21 was 113 days, being lower than 182 days, the Appellant shall be considered as a Non-Resident as per clause (a) to Explanation 1 to section 6(1)(c) of the Act.

II. Taxation of a dividend income received from M/s. Saurashtra Freight Pvt. Ltd. at the rate of 20% as per the Indian Income Tax Act, 1961 is unjustified. - Rs.1,47,00,000/-

The Ld. A.O. erred in taxing the dividend of Rs.1,47,00,000/- under normal provisions of the Act without giving the Appellant the benefit of the Double Taxation Avoidance Agreement with Singapore.

4. The Ld. DRP and Ld. A.O. failed to appreciate that during the year under consideration, the Appellant was a resident of Singapore and a non-resident of India in accordance with the provisions of section 6(1)(a) as well as section 6(1)(c) of the Act. The Appellant had submitted the Tax Residency Certificate issued by the tax authority of Singapore along with the Tax Returns filed in Singapore as a Resident. The same was not disputed by the Ld. DRP and Ld. AO. Being a Tax Resident of Singapore, the Appellant could avail the beneficial provisions of Article 10 of India - Singapore DTAA, according to which dividend income received from M/s. Saurashtra Freight Pvt. Ltd was to be taxed at a flat rate of 15%.. However, the Ld. A.O. has considered the Appellant as a Resident of India and taxed the said dividend income at 30% and also imposed surcharge and cess under the normal provisions of the Act. The surcharge on dividend income is restricted to 15% in case of dividend received by Resident. However, Ld. A.O. erred in levying surcharge at

37%. The said action of the Ld. A.O. is not in accordance with the law and the same may be set aside.

III. The Appellant is not liable to pay the surcharge on the tax imposed on dividend income.

5. The Ld. DRP and the Ld. A.O. failed to appreciate that no surcharge is payable by the Appellant on dividend income received from M/s. Saurashtra Freight Pvt. Ltd. being a Non-Resident Indian during the previous year. The Appellant's case is governed by the India-Singapore DTAA and therefore, as per Article 10 of the said DTAA, the Appellant is liable to pay 15% taxes on the Dividend Income in Singapore without levy of any surcharge. Thus, the levy of surcharge by the Ld.A.O. is not justified and the same may be deleted.

IV. Levy of interest under section 234A, 234B and 234C of the Act is unjustified.

6. The Ld. A.O. is not justified in levying interest under section 234A, 234B and 234C of the Act without appreciating the facts and circumstances of the case.

7. The Appellant seeks leave to add, alter and amend the above grounds whenever required.

2. Briefly stated, facts of the case are that the assessee, an individual, filed return of income in the assessment year under consideration in the status of 'non-resident' declaring income of Rs.5,45,86,920/-. Subsequently, the assessee revised its return of income on 31.03.2022. The return of income filed by the assessee was selected for scrutiny assessment and statutory notices issued under the Income-tax Act, 1961 (in short 'the Act') were issued and complied with. In view of return of income filed in the status of 'non-resident', the Assessing Officer issued a draft assessment order u/s 144C(1) of the Act on 30.12.2022, wherein he held that under the provisions of DTAA, the assessee is a resident and therefore consequently income of the assessee should be taxed at the rate provided under the provisions of the Act and not the rate

applicable under the double taxation avoidance agreement (DTAA) between India and the Singapore. The relevant finding of the Assessing officer is reproduced as under:

> *"5.3.3 The Article 4 of the Singapore Tax Treaty, describes the conditions regarding status of the assessee and its tax implications. Since, the contents of Article 4 has already been re-produced in the aforementioned paras, for the sake of brevity, the sub-section wise examination of the same is as under:-*
>
> *a. The assessee is having permanent home in India and hence he is deemed to be resident of India.*
>
> *b. The assessee is an Indian national and is managing and controlling 15different Indian companies as a director and minimum 2 firms/ LLPs as partner. All these companies are having permanent establishment in India. The list of the companies wherein assessee is director during the year is as under:*

S. No.	Name of the Company	Shareholding percentage
1.	Fairfreight Lines Private Limited	0.01%
2.	Fairwind Shipping Private Limited	
3.	Saurashtra Freight Private Limited	24.5%
4.	Macaroni Media Works Private Limited	50%
5.	Aptis Medical Billing Services Private Limited	
6.	Saurashtra Infra and Power Private Limited	5.27%
7.	Kandla Power Private Limited	
8.	Saurashtra Power Private Limited	
9.	Tastebuds Gourmet Foods Private Limited	
10.	Divyajyoti Holding Private Limited	64%
11.	Nishant Management Private	27.64%

	Limited	
12.	Saurashtra Fuels Private Limited	3.99%
13.	Classic Energy (India) Private Limited	
14.	Hindustan Fuels Private Limited	
15.	Kutch Coal Carbonisation Private Limited	

The assessee is also a partner in the firms M/s Magnum Shipping Services, M/s Secretarial and office services. During the year, the assessee has received dividend from M/s Saurashtra Freight Pvt Limited to the tune of Rs 1,47,00,0007- wherein assessee is a director holding 24.5% of the shares. Thus, it is clear that the assessee is having personal and economic relations more closely to India and his vital interests are with India. During the year, assessee has received salary from the company incorporated at Singapore for the period November 2020 to March 2021. Therefore, the contention of the assessee that his personal and economic relations are closer to Singapore is factually incorrect.

c. The assessee is an Indian national and hence he shall be deemed to be a resident of India.

d. The effective management of the companies and subsidiaries controlled and managed by the assessee is in India and hence, the assessee shall be deemed to be resident of India."

2.1 The assessee filed objection before the Ld. DRP, however, the Ld. DRP also held that as per the provisions of section 6 of the Act, the assessee was a resident during the year under consideration. The relevant direction of the DRP has been reproduced in the impugned order. For ready reference same is extracted as under:

"1. Directions of the DRP :

1. The panel has considered the submissions of the Ld.AR and the stance of the Ld.A.O. The panel notes that, the assessee being a citizen of India, having his permanent home in India, as well as his place of effective management in India, should be held as a Resident of India during the relevant Assessment Year. In this regard, it would be pertinent to

analyse some of the provisions of Section 6 (Residence in India). The relevant portion of the said provisions is being reproduced hereunder :-

"6. For the purposes of this Act, -

1. An individual is said to be resident in India in any previous year, if he-

1. 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.

1. From the above provision it can be seen that the assessee is claiming his suitability under 'Clause (a)', whereas, his case gets squarely covered by the provisions of Clause (c).

1. 1. 1. The panel further notes, that as per the 'Tie Breaker Rule' of the DTAA, the residential status of an individual, who is the resident of both the countries, is to be determined as follows :

2. 1. 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);

3. 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;

4. 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;

5. 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.

1.1. In the opinion of the panel, the assessee remains a resident of India during the relevant assessment year, as per the 'Tie Breaker Rule' and also the provision of Sec.6(1)(c) of the Act.

1.1.1. In light of the above, the objection of the assessee is not tenable and the panel notes that he is a resident of India for the relevant assessment year and, therefore, this objection of the assessee is rejected."

2.1 The consequent to the direction of the Ld. DRP, the Assessing Officer passed the impugned final assessment order on 25.10.2023 and wherein the assessee is treated as non-resident and income was accordingly taxed at the rate provided under the Income-tax Act, 1961 (in short 'the Act').

3. Aggrieved, the assessee is in appeal before the Tribunal raising the grounds as reproduced above.

4. We have heard rival submission of the parties and perused the relevant material on record. The sole issue in dispute is in respect of interpretation of the provisions of DTAA and section 6 of the Act defining the residential status of assessee. The Article 4(1) of the treaty has laid down that the term 'resident of a contracting state' has be decided within the taxation laws of that state and Article 4(2) says that in case of individual, who is resident of both the contracting state, then resident status shall be determined as per sub clause (a) to (d) of Article 4(2) of DTAA. The AO has wrongly invoked the provisions of Article 4 of DTAA for determination of residential status of the assessee, mainly taking into account the permanent home and business activities of the companies in which the assesee invested. Since, before us the assessee has submitted that the assessee is resident of Singapore and not resident of India, the relevant provisions of Indian Income-tax are reproduced 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 and in case of such person having total income, other than the income from foreign sources, exceeding fifteen lakh rupees during the previous year, for the words "sixty days" occurring therein, the words "one hundred and twenty 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.

(1A) Notwithstanding anything contained in clause (1), an individual, being a citizen of India, having total income, other than the income from foreign sources, exceeding fifteen lakh rupees during the previous year shall be deemed to be resident in India in that previous year, if he is not liable to tax in any other country or territory by reason of his domicile or residence or any other criteria of similar nature.

Explanation.—For the removal of doubts, it is hereby declared that this clause shall not apply in case of an individual who is said to be resident in India in the previous year under clause (1).”

4.1 Thus, as per the provisions of section 6(1) of the Act, the assessee shall be resident of India if he satisfies any of the two conditions, ***firstly,*** as per section 6(1)(a) in the relevant assessment year if he is in India for 182 days or more, then he shall be resident of India. The assessee submitted that during relevant previous year he was India for 132 days, thus, the assessee does not fulfill this condition. ***Secondly***, as per section 6(1)(c) of the Act, if an individual, in preceding four years in India for 365 days or more , then if in relevant previous year, he stayed in India for more than 60 days, he shall be treated as resident of India. But under the Explanation to said sub section, it is provided that if a person goes out of India for Employment purposes than, 60 days shall be substituted by 182 days. Therefore, according to second condition *if assessee has remained in India in last four years for more than 365 days and in relevant previous year for more than 182 days, then only shall be treated as non-resident*. Before us, the Ld. counsel for the assessee relied on the decision of the ITAT in ITA No. 2155/Mum/2023 in the case of Shri Nishant Kanodia. The relevant finding of the Tribunal is reproduced as under:

> *"9. Therefore, under section 6(1) of the Act, an individual is said to be resident in India in any previous year, inter-alia, if he has within four years preceding the relevant year been in India for a period of 365 days or more and is in India for a period of 60 days or more in the relevant year. In the present case, there is no dispute that the assessee was in India for a period of 365 days in the four years preceding the relevant year. Explanation-1(a) to section 6(1) of the Act further extends the period of 60 days and substitutes the same to 182 days in case of a citizen of India who has left India for the purpose of employment outside India. Since during the year, the assessee stayed in India only for a period of 176 days, therefore, it becomes necessary to decide whether the*

assessee has left India for the purpose of employment outside India during the year under consideration. If this condition is satisfied, the period of stay in India of 182 days as per Explanation-1(a) to section 6(1) of the Act shall be applicable instead of 60 days period as provided in section 6(1)(c) of the Act for deciding the residential status of the assessee.

10. In the present case, it is undisputed that the assessee, being an individual, was in India for a total period of 176 days. In this regard, the assessee has furnished the summary of the number of days of stay in India along with a copy of the relevant pages of his passport. As per the assessee during the year, he had left India for the purpose of employment with Firstland Holdings Ltd., Mauritius. From the copy of the appointment letter issued by Firstland Holdings Ltd., Mauritius, forming part of paper book pages-97 to 101, we find that the assessee was appointed as Strategist - Global Investment for a period of three years which can be extended as per mutual discussion in due course. As a remuneration, the assessee was offered a salary of USD 1,00,000 per month subject to the deduction of applicable taxes. Further, the assessee was also provided various other benefits, perquisites, allowances, etc. as a Strategist - Global Investment. The roles and responsibilities of the assessee include the following:-

(a) business development in India, USA, Africa, and the Middle East;

(b) further process of raising money in the Company from. Investor(s) and looking at potential Investors for divesting equity in the Company/ its subsidiaries;

(c) raising equity for new projects, expansions, upgrading, diversifications etc.; and

(d) such other similar duties as the Board may assign to you from time to time.

11. Further, the assessee has placed on record the Occupation Permit issued by the Government of Mauritius as an Investor. As per the assessee, he was an employee in Mauritius with Firstland Holdings Ltd. starting from August 2012 to March 2013 and had filed his return of income with Mauritius Revenue Authorities for the calendar year 2013, declaring a total income of Mauritian Rupee ("MUR") 2,44,48,000 and tax deduction of MUR 36,67,200, for the period from January 2013 to march 2013. Further, the assessee also filed his return of income with Mauritius Revenue Authorities for the period from August 2012 to December 2012 declaring a total income of MUR 1,65,12,353 and a tax deduction of MUR 24,76,852, against the same. The Revenue however, did not agree with the submissions of the assessee and on the basis of the status as ―Investor‖ in the Occupation Permit issued by the Government of Mauritius as well as the business visa issued to the assessee concluded that the assessee had left India not for the purpose of employment but as an Investor. In this regard, the A.O. has also taken into consideration that the assessee was holding 100% shareholding in Firstland Holdings

Ltd., Mauritius, from which the assessee received alleged salary and fees for negotiation and obtained investments for the company. Accordingly, as per the A.O., the assessee has considerable control over affairs of the company i.e., Firstland Holdings Ltd., Mauritius, and the copy of the appointment letter and salary slips provided by the assessee are self-serving documents in view of the fact that the assessee had no permit for employment in Mauritius.

12. We find that the issue of whether the term ―employment outside India includes ―doing Business‖ by the taxpayer, came up for consideration before the Hon'ble Kerala High Court in CIT v/s O. Abdul Razak, [2011] 337 ITR 350 (Ker.) wherein the Hon'ble Court while deciding the issue in favour of the taxpayer took into consideration the CBDT Circular no.346 dated 30/06/1982 and held that no technical meaning can be assigned to the word employment used in the Explanation and thus going abroad for the purpose of employment also means going abroad to take up self-employment like business or profession. Therefore, the Hon'ble Kerala High Court has interpreted the term ―employment‖ in wide terms. The Hon'ble Kerala High Court, however, held that the term ―employment‖ should not mean going outside India for purposes such as tourists, medical treatment, studies, or the like. The relevant findings of the Hon'ble Kerala High Court, in the aforesaid decisions, are reproduced as under:-

―6. During hearing, learned senior counsel for the revenue has relied on the decision of the Supreme Court in Lakshminarayan Ram Gopal & Son Ltd. v. Government of Hyderabad [1954] 25 ITR 449. We do not think the decision is applicable to the facts of this case. Learned senior counsel for the assessee has relied on the Memorandum explaining the provisions of the Finance Bill introducing the Explanation, contained in 134 ITR 137 (St.) [Para 35 of the Finance Bill], which reads as follows:-

"(iii) lt is proposed to provide that where an individual who is a citizen of India leaves India in any year for the purposes of employment outside India, he will not be treated as resident in India in that year unless he has been in India in that year for 182 days or more. The effect of this amendment will be that the 'test' of residence in (c) above will stand modified to this extent in such cases."

Similarly the Central Board of Direct Taxes issued Circular No. 346, dated 30- 6-1982, which reads as follows:

"7.3 With a view to avoiding hardship in the case of Indian citizens, who are employed or engaged in other avocations outside India, the Finance Act has made the following modifications in the tests of residence in India:

*(i) & (ii) ***

(iii)Where an individual who is a citizen of India leaves India in any year for the purposes of employment outside India, he will not be treated as resident in India in that year unless he has been in India in that year for

182 days or more. The effect of this amendment will be that the test of residence in (c) above will stand modified to that extent in such cases."

7. What is clear from the above is that no technical meaning is intended for the word "employment" used in the Explanation. In our view, going abroad for the purpose of employment only means that the visit and stay abroad should not be for other purposes such as a tourist, or for medical treatment or for studies or the like. Going abroad for the purpose of employment therefore means going abroad to take up employment or any avocation as referred to in the Circular, which takes in self-employment like business or profession.

So much so, in our view, taking up own business by the assessee abroad satisfies the condition of going abroad for the purpose of employment covered by Explanation (a) to section 6(1)(c) of the Act. Therefore, we hold that the Tribunal has rightly held that for the purpose of the Explanation, employment includes self-employment like business or profession taken up by the assessee abroad. We therefore dismiss the appeal filed by the revenue.

13. We further find that similar findings have been rendered by the Co-ordinate Bench of the Tribunal in the following decisions:-

i) K. Sambasiva Rao v/s ITO, [2014] 42 Taxmann.com 115 (Hyd-Trib.);

ii) ACIT v/s Jyotinder Singh Randhawa, [2014] 46 Taxmann.com 10 (Del-Trib.);

iii) ACIT v/s Col. Joginder Singh, [2014] 45 Taxmann.com 567 (Del-

Trib.).

14. Therefore, even if the taxpayer has left India for the purpose of business or profession, in the aforesaid decisions, the same has been considered to be for the purpose of employment outside India under Explanation-1(a) to section 6(1) of the Act. Accordingly, even if it is accepted that the assessee went to Mauritius as an Investor in Firstland Holdings Ltd., Mauritius, in which he holds 100% shareholding, we are of the considered view that by applying the ratio of aforesaid decisions the assessee is entitled to claim the benefit of the extended period of 182 days, as provided in Explanation-1(a) to section 6(1) of the Act, for the determination of residential status. Since it is undisputed that the assessee has stayed in India only for a period of 176 days during the year, which is less than 182 days as provided in Explanation 1(a) to section 6(1) of the Act, the assessee has rightly claimed to be a "Non-Resident" during the year for the purpose of the Act. Accordingly, we find no infirmity in the findings of the learned CIT(A) on this issue. As a result, the grounds raised by the Revenue are dismissed."

4.2 The assessee submitted that in relevant previous year, he was in India for 132 days only which is less than 182 days and therefore, assessee is not resident as per either of the conditions of section 6(1) of the Act. The assessee has filed evidence in support of employment outside India and also filed visit passes. In view of the evidences filed before us, we feel it appropriate to restore this issue back to the file of the Assessing Officer for verification of residential status of Singapore as well non-residential state in India particularly in view of the Explanation 1 to section 6(1)(c) of the Act and decide the issue in accordance with law. The grounds Nos. 1 to 3 of the appeal of the assessee are accordingly allowed for statistical purposes.

4.3 The ground Nos. 4 to 6 of the appeal are consequential to the decision in ground No. 1 of the appeal and therefore, same are also restored back to the file of the Assessing Officer for deciding afresh.

5. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open Court on 21/10/2024.

Sd/-	**Sd/-**
(KAVITHA RAJAGOPAL)	**(OM PRAKASH KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai;
Dated: 21/10/2024
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

BY ORDER,

//True Copy//

(Assistant Registrar)
ITAT, Mumbai