



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

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRIANIKESH BANERJEE, JM

ITA No. 3986/MUM/2023

A.Y.2013-14

Ashok Kumar Pandey,
3rd Floor, Plot No.37,
Kavita, Vithal Nagar,
CHS, Ltd., Vithal Nagar, Vs.
N.S. Road No.11 J.V.P.D.
Scheme, Vile Parle.

ACIT,
Kautaliya Bhavan,
Income Tax Department,

(Appellant)

(Respondent)

PAN

APXPP8981M

Assessee by

Shri Piyush Chhajed And

Shri Ayush Chhajed

Revenue by

Shri Manoj Kumar Sinha, Sr. DR

Date of hearing

8th July, 2024

Date of pronouncement

3 October, 2024

ORDER

PER PRASHANT MAHARISHI, AM:

1. This appeal is filed by the Mr. Ashok Kumar Pandey (the assessee) against the appellate order passed by the National Faceless Appeal Centre (NFAC), Delhi [The Ld. CIT (A)] for AY



2013-14 dated 11.09.2023 wherein the appeal filed by the assessee against the assessment order passed by the Assistant Commissioner of Income Tax, 25(2), Mumbai (the learned A.O.) u/s. 143(3) of the Income Tax Act, 1961 (the Act) dated 09.03.2016, was dismissed.

2. Assessee is aggrieved and is in appeal before us raising the following grounds of appeal: –

“1. Learned CIT (Appeal), National Faceless Appeal Center erred in confirming the order of ACIT. Circle 25(2) dated 09.03.2016 without giving proper of opportunity of being heard and to that extent the order u/s 250 is devoid of natural justice and bed in law.

2. Learned CIT (Appeal), National Faceless Appeal Center erred in confirming the order of ACIT. Circle 25(2) dated 09.03.2016 without considering the detailed submission and supporting documents submitted on 05.04.2023 wide acknowledge number 109558071050423 and the order u/s250 is bad in law and devoid of natural justice.

3. Learned CIT (Appeal), National Faceless Appeal Center erred in confirming the order of ACIT, Circle 25(2) dated 09.03.2016 and failed to appreciate that the assessee is resident of US in terms of the treaty provisions of India-USA DTAA treaty and therefore any income earned outside of India is not taxable and the said order requires to be set aside

4. Leaned CIT (Appeal), National Faceless Appeal Center erred in confirming the order of ACIT, Circle 25(2) dated 09.03.2016 without appreciating the correct factual position and that the breaker rule for ascertaining the residential status of the assessee is applicable and vital facts are overlooked and thus there is error in applying the tie breaker rule for ascertainment of the residential status of the assessee and the order passed w/s 250 is erroneous and requires to be set aside.



5 Your assessee craves for leave to add, alter, amend and or delete any of the grounds of appeal at the time of hearing.”

3. The brief fact of the case shows that the assessee filed his return of income for A.Y. 2013-14 at a total income of ₹9,570/- . The return was picked up for scrutiny by issue of notice u/s. 143(2) of the Act dated 01.09.2014. Subsequently, notice u/s. 142(1) of the Act was also issued on 14.07.2015.
4. Assessee is an individual deriving income from Capital Gains, Dividend, Interest Income and Income from House Property. The assessee claimed that he is a resident but not ordinarily resident for A.Y. 2009-10 and a resident since A.Y. 2010-11.
5. For this year assessee has claimed that assessee is resident in India as well as in United States of America. Thus, the residential status of the assessee is required to be determined in accordance with the provisions of Double Tax Avoidance Agreement [DTAA] between India and USA. The assessee has also stated that assessee has a permanent home in India as well as in USA and, therefore, his residential status will depend upon his personal and economic relation and its closeness (center of vital interest).
6. The assessee submits that his Centre of Vital Interest lies in USA and, therefore, in terms of Article 4(2)(a) he is a resident of USA. Assessee explains that his family is U S National holding US Passport, he is Overseas Citizen [OCI] , has larger investments in US , one daughter out of three children is studying in USA, therefore his center of vital interest is in USA.



7. The Assessing Officer to verify the claim of the assessee asked for the details of number of days of stay, copy of passport, details of family and their domicile. nativity of spouse, details of all the investments, incomes and nature of work during the year as well as the tax returns filed in U.S. The Assessing Officer found that.
- i. stay of assessee in India is more than 183 days,
 - ii. assessee is staying with his wife Mrs.Pragati Pandey, son Vivek Pandey and daughter Avantika Pandey have shown their place of residence as Mumbai.
 - iii. One of his daughters has shown her residence at New York as she is studying there.
 - iv. Assessee is a Managing Director and has shareholding of more than 50% in an Indian company, namely, Revel Films Pvt. Ltd.He and his wife each hold 50% of shares in that company.
 - v. assessee has earned capital gains and dividend income from investments made in shares and trading in shares in both India and US.
 - vi. He has also earned rental income from house property in US and bank interest from bank deposits made in US.
8. Based on these facts, Assessing Officer issued a show cause notice that why assessee should not be treated as resident of



India for tax purposes and his US income should also not be taxed in India under Section 5 of Indian Income Tax Act, 1961.

9. The assessee filed reference under Section 144A on 18.02.2016 wherein the learned Joint Commissioner after calling report from the Assessing Officer held as under:
- (i) The assessee is a Managing Director of the Company and is actively participating in the affairs of the company.
 - (ii) Assessee has made investment in mutual funds and also shares in India deriving dividend and capital gains.
 - (iii) Income derived by the assessee from US such as interest dividend, house property and capital gain are passive income for which active involvement is not required.
 - (iv) The assessee is residing in India for a major part of the year and is married to an Indian and also living in India along with his spouse and one child. Other child is in US for study purpose only.
 - (v) The assessee has started a company in India and actively participating in affairs of the company.
10. Therefore, he held that assessee's center of Vital Interest i.e., personal and economic interest are closer to India and, therefore, the claim of the assessee that he is resident of United States of America for tax purpose was rejected and Assessing Officer was directed to proceed to tax the income of



the assessee in India in accordance with the provisions of the Act.

11. Based on this direction, the learned Assessing Officer computed the total income of the assessee. The Assessing Officer found that.
 - i. Assessee has earned taxable dividend income of 32489 USD and tax free dividend income of \$ 42,342/- . As per Clause-2 of Article 10 of DTAA assessee is liable to offer the entire amount as income where he is resident and then avail DTA benefit. No taxes have been withheld and, therefore, the entire dividend income arising in United State was considered as income of the assessee by applying conversion rate of Rs. 53.98 per \$ and Rs.40,39,358/- was added back.
 - ii. Assessee has earned taxable interest income of \$ 5695. The assessee did not pay any tax in US as it is less than the minimum income chargeable to tax. Applying Article 11(2), the Assessing Officer held that the assessee is liable to offer the entire amount where he is resident accordingly the total income derived as dividend of ₹3,07,431/- was added.
 - iii. Assessee has earned capital gain of \$ 4640 from sale of shares including short term capital loss of \$ 51,6003 and long term capital gain of \$ 56,270 US dollar. Accordingly, the net capital gain of ₹2,49,064/- was determined. The Assessing Officer found that the assessee has capital loss of ₹44,48,903/- and capital gain



of ₹2,49,064/- resulting in the net loss of ₹41,99,839/- which needs to be carried forward.

iv. Assessee has also earned rental income of ₹66,750 US dollars. However, after deducting expenses and mortgage interest, there is a loss of from house property and, therefore, NIL income is charged to tax.

12. Accordingly, assessment under Section. 143(3) of the Act dated 09.03.2016 was passed determining total income of the assessee at ₹43,56,363/-.
13. Assessee aggrieved with the same preferred an appeal before the learned CIT(A). The assessee challenged the determination of residential status and consequently taxability of the above sum. Before the learned CIT(A) assessee furnished copy of US tax residential certificate but did not upload any written submission, therefore, the learned CIT(A) held that as per Section 5 of the Act, if an individual is residing for more than 183 days in India he would be considered as Resident in India and his entire global income would be taxable in India. The assessee would be allowed credit of tax paid in United States in Indian tax Returns. As assessee has not paid any tax in USA, computation of total income made by the learned Assessing Officer was upheld. Consequently, all other income was found to be chargeable to tax in India. Accordingly, appeal of the assessee was dismissed.
14. Aggrieved with that appellate order the assessee is in appeal before us. The assessee furnished a paper book containing 125 pages along with the copy of Article 4 of Indo- US Double taxable avoidable agreement and general information about



overseas citizenship of India. The assessee also relied upon the decision of order of the Coordinate Bench DCIT vs. Shri KumarSanjeev Ranjan 177 ITD 17Bangalore.

15. The learned A.R. submitted that only issue in this case of determination of residential status of assessee applying tie breaker test of double tax avoidance agreement. He submits that assessee has a permanent home in United States of America, which was acquired in 1997 for \$ 9,00,000 and assessee stayed there till 2016. The assessee has also acquired house in India in 2008 for ₹7.20 lacs. Therefore, assessee has house in India as well as the United States of America and, therefore, has a permanent home available to him in both the states. Therefore, he shall be deemed to be a resident of the state with which his personal economic relations are closer i.e., Centre of Vital Interest.
16. He submits that the
 - i. Assessee is holding passport of United States of America and he is having nationality of USA. He also referred to the certificate of department of the treasury, internal revenue services, Philadelphiadated 04.04.2016 wherein it is certified that assessee is resident of United States of America for purpose of US taxation.
 - ii. He referred to the return of income filed by the assessee wherein the assessee claimed status of resident as per Income Tax Act.



- iii. He referred to the purchase deed of House property in USA on 08.05.1997 at a purchase consideration of \$ 9,05,000. He also referred to the passport of the assessee and assessee's wife, son and daughter who are also US National.
- iv. He also referred to a report of Merryll Lynch Management where total asset of the assessee as at 28.03.2013 is stated to be \$ 3,4531. He also referred to the summary of UBS portfolio wherein the assessee was having investment of \$ 32,888/- US dollars as on 28.02.2013. Assessee also submitted the statements of the assessee with PNC bank wherein the bank balance is shown to be \$ 9,563.
- v. He referred to Page No. 12 of the paper book to show that his Indian income is ₹9,570/- whereas current year loss is ₹77,55,337/-. He further referred Bank book of the assessee with ICICI Bank to show that his bank balance in India is ₹29,53,232 as on 26.03.2013.
- vi. He also referred to affairs of company namely Revel Films Pvt. Ltd. [Where assessee and her spouse , both are holding 50 % shares] by furnishing its audited account as on 31.03.2013 to show that company has equity share capital of 10000 shares of face value of 10/- each therefore, total equity shares are only ₹1.00 lacs. He further stated that assessee has invested in 50% of the



share capital by making investment of ₹50,000 only. He also referred to the profit and loss of that company for the year ended 31.03.2013 stating that only revenue of the company being interest on income tax refund of ₹1,44,350/- against which company has expenditure of ₹ 8,29,000/- including depreciation resulting into net loss of ₹5,44,477/-.

vii. He, therefore, submitted that his economic social interest are more in United States of America and not in India and, therefore, according to Article 4(2) of DTAA , he should be considered as resident of USA. He also relied upon the decision of the Coordinate Bench in the case of DCIT vs. Kumar Sanjeev Ranjan he referred to the several tests mentioned in that judgment and accordingly, he submitted that if all the tests are applied, center of vital interest of assessee is in USA.

viii. He further submitted that if he is considered to be resident of USA all other articles of the double taxation avoidable shall apply to him for computation of his total income.

17. The learned Departmental Representative vehemently supported the order of the learned Assessing Officer and learned CIT(A). It was stated that for the reason given therein, assessee has center of vital interest in India and, therefore, he is considered to be resident of India and accordingly Section 5 will apply for taxation of the income.

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18. We have carefully considered the rival contentions and have perused the orders of the learned lower authorities.
19. Facts clearly shows that.
- i. Assessee has stayed in India for more than 183 days in this AY; therefore, assessee is resident but not ordinarily resident in India.
 - ii. Assessee has claimed that he is resident of USA and India Both. Revenue has accepted this claim. Then assessee claimed that assessee has permanent home available to him in India as well as in USA. This fact is also accepted by revenue. Assessee claims that his center of vital interest in USA , this is disputed by Revenue. According to revenue assessee has closer personal and Economic interest in India than USA.
 - iii. According to article 4 (2) (a) of India USA DTAA in such circumstances, the residential status of the assessee is determined as under :-
 - (2) Whereby reason of the provisions of paragraph 1, an individual is a resident of both Contracting States, then his status shall be determined as follows:
 - (a) he shall be deemed to be a resident of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident of the State with which his personal and economic relations are closer (centre of vital interests);
20. Personal relations of the assessee is as under :-



- i. Assessee and his entire nucleus family is US national, holding US passport.
- ii. Assessee was staying in US earlier but has come back to India, he is staying in India with his Spouse, one daughter and son whereas another daughter is staying in US for study purpose. All are registered as overseas citizen of India.
- iii. Regarding his extended family, His father Mr. Jugal Pandey is US national Overseas Citizen of India. His Mother Annapurna is also a US national holding US Passport. His Brother Mr. Sudarshan Pandey, Uma Shankar Pandey, Sister Anuradha Pandey and Gayatri Pandey are all US national holding US Passport.

21. Regarding his Economic Interest :-

- i. Meryl Lynch report, it shown that as at 28, March 2023 assessee has cash balance of \$ 57010 and investment in M L Fortress partners \$ 268866 and in coast Access LLC of \$ 16653.
- ii. As per summary of UBS Portfolio his investment as at 31/03/2013 is \$ 3213383/- This shows that opening portfolio was \$3166410 and closing portfolio was \$ 32133838, where accretion of dividends and market value changes recorded.
- iii. As per His India Investments Meryl lynch wealth report shows he has mutual fund investments as at 31/03/2013 of Approximately Rs. 50 lakhs. He has bank account with



Union bank of India with bank balance of Rs 212634/- and ICICI bank account with balance of Rs 29,53,232/-,

iv. He is director in revel Films Pvt Limited , held Share capital 50 % of Rs 50,000 and his wife also holds Rs. 50,000. The company has gross revenue of Rs 1.45 lakhs of Interest on Income tax refund during the year. It has work in progress of films Rs. 6,9152,085/-. Cash and bank balances of Rs 31 lakhs. Unsecured loan from Directors[he and his wife are directors] of Rs 81256726/-. He and his wife attended 5 Board Meetings of the company as those are only shareholders and directors of the company.

22. According to article 4 (2) (a) of the Double Taxation Avoidance Agreement, an individual is resident of the state in which he has center of vital interest being where his personal and economic relations are closer. This test is required to be applied for the assessment year for which tax liability of an assessee is to be arrived at. Determination of center of vital interest is a highly factual analysis which may not be applicable to any other individual or which has been decided by the courts in case of other individuals. Thus, this criterion is a vexed issue for everyone. The facts need to be analyzed looking at personal relationship as well as economic relationship and both must be considered together to determine the center of vital interest of an individual close to a particular state. Only the fact with some impact needs to be considered such as for determination of personal relationship, connect with the nucleus family is more important, then extended family. Similarly, for determination of economic relationship, more credential be given to active



involvement in the commercial activities then passive investments. Generally, investments in securities, mutual funds, banks move not necessarily with residence of the assessee but on the basis of rate of return in particular state. For determination of economic relationship, place of business, place of Administration of property and place of earning wages (remuneration) (profit) is of importance. Ambiguous factors, needs to be avoided. In this background and on the basis of the facts stated above, we proceed to decide the issue involved.

23. It is important that assessee is staying in India for the current year for more than 183 days and therefore according to the domestic law, he is considered to be the resident of India. He stays in India with his wife, son and daughter. His other daughter is staying in USA for the purpose of study. The stay of his extended family including parents in USA is not so much relevant to decide whether his personal relationship is close to USA or not. This is also so because, though his parents are USA National, but his brother and his sisters are also staying there. He has a home in India. He also has a home in USA which is earning rental income, purchased by mortgage loan.
24. Regarding his economic interest, He has come back to India for carrying on business in a private limited company which is set up by him and his wife in 2009. The company is involved in distribution of films. It has a work in progress of approximately ₹ 69,152,085/- and long-term unsecured borrowing from the directors of ₹ 81,256,726/-. Assessee holds 50% of the share in the balance 50% of the shares are held by assessee's wife. The loan amount of ₹ 81,256,726/- invested in the above company which is mostly tied up in the work in progress as well

as the bank balance, is also financed by the assessee. Assessee has attended along with his wife five Board meetings of the above company. Therefore, it is important to note that assessee has an active involvement in a running of this company in India. In India he has operative bank accounts with Union Bank of India and ICICI bank. He has also investment in mutual funds. However, operating a bank account and having an investment in mutual funds may not have any vitality of economic relationship because these are passive investments and may flow to any country irrespective of the residence if the other laws permit, based on rate of return.

25. From USA, assessee is deriving rental income where his house property is rented out, he has investments in bank accounts as well as alternative investments. He has also other investments where dividend income accrues along with the increase in market price of the investment. Thus, He does not have any active involvement in USA for earning wages, remuneration, profit.
26. Therefore, on comprehensive appraisal of the personal relationship and economic relationship of the assessee, tilt more in favour of being close to India then US. Accordingly, we hold that the assessee is a resident of India in terms of Article 4(2)(a) of the Indo- US – DTAA as a resident of USA. In view of this, the Ground Nos. 3 and 4 of the appeal are dismissed.
27. Consequently, all his income derived in USA, is chargeable to tax in India by virtue of the provisions of section 5 of the income tax act. On the basis of the income tax return of assessee filed by him in USA, does not show that he is paid any



tax there, therefore, in absence of any payment of tax in the country of source, no credit is available against tax payable by the assessee in India.

28. It was submitted by the learned authorized representative that the only issue is with respect to the decision of closure center of vital interest of the assessee and taxability of the income will follow that decision, we confirm the order of the learned lower authorities in taxing the dividend income, capital gains, sourced by the assessee in USA.
29. Accordingly, appeal filed by the assessee is dismissed.

Order pronounced in the open court on 3/10/2024.

Sd/-
(ANIKESH BANERJEE)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 3.10.2024

Aks/-

Copy of the Order forwarded to :

The Appellant, The Respondent, The CIT, The DR ITAT & Guard File

BY ORDER,

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai