IN THE INCOME TAX APPELLATE TRIBUNAL

"B" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.2155/Mum./2023
(Assessment Year : 2013–14)

Asstt. Commissioner of Income Tax
Central Circle-5(4), Mumbai ..... Appellant

v/s

Shri Nishant Kanodia
A-9, Raj Industrial Complex
Military Road, Marol, Andheri (East)
Mumbai 400 059 PAN – ACQPK0971N ..... Respondent

Cross Objection no.115/Mum./2023
(Arising out of ITA no.2155/Mum./2023)
(Assessment Year : 2013–14)

Shri Nishant Kanodia
A-9, Raj Industrial Complex ..... Cross Objector
Military Road, Marol, Andheri (East) (Original Respondent)
Mumbai 400 059 PAN – ACQPK0971N

v/s

Asstt. Commissioner of Income Tax ..... Respondent
Central Circle-5(4), Mumbai (Original Appellant)

Assessee by : Shri Ajay R. Singh a/w
Shri Akshay A. Pawar
Revenue by : Shri S. Sribivasu

Date of Hearing – 09/11/2023	Date of Order – 08/01/2024

O R D E R

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal by the Revenue and cross objection by the assessee has been filed challenging the impugned order dated 28/03/2023, passed

under section 250 of the Income Tax Act, 1961 (*"the Act"*) by the learned Commissioner of Income Tax (Appeals)−53, Mumbai, [*"learned CIT(A)"*], for the assessment year 2013−14.

ITA no.2155/Mum./2023
Revenue's appeal – A.Y. 2013−14

2. In its appeal, the Revenue has raised the following grounds:−

"1. Whether on the facts and circumstances of the case, the Ld CIT(A) erred in interpreting the provisions of section 9A of the Immigration Act of Mauritius relating to Occupation permit which allows assessee to stay and work in Mauritius as an investor not an employee.?

2. Whether on the facts and circumstances of the case, the Ld CIT(A) erred in deleting the addition income received in Mauritius in USD 43,75,000 converted into INR 23,79,53,188/- (conversion rate at Rs.54.3893 per 1 US $) despite the fact that from the seized documents found it was clear that the assessee has not paid any taxes in Mauritius on Fees of USD 43,75,000 for negotiations and obtaining investment from Credit Suisse. Thus, no taxes has been paid on the fees received of USD 43,75,000 in any jurisdiction?

3. Whether on the facts and circumstances of the case, the Ld CIT(A) erred in determining the residential status of the assessee for the year under consideration as Non-Resident despite the fact that assessee has stayed in India for period of 176 days (which is more than 60 days) in current year and within the four years preceding the current year have been in India for periods amounting in all more than 365 days.?

4. The appellant craves to leave, to add, to amend and / or to alter any of the ground of appeal if need be."

3. At the outset, in the larger interest of justice, a slight delay of 13 days in filing the present appeal by the Revenue is hereby condoned.

4. The brief facts of the case are: The assessee is an individual. A search and seizure action was conducted under section 132/133A of the Act on 10/05/2018, in the case of Matix (Nishant Kanodia) Group. Consequent to the search, the case of the assessee was centralized to the office of the Asstt. Commissioner of Income Tax, Central Circle−5(1), Mumbai. Thereafter, notice

under section 153A of the Act was issued to the assessee on 30/12/2019. In response to the aforesaid notice, the assessee filed his return of income on 28/01/2020, declaring a total income of Rs.23,61,660. Thereafter, notice under section 143(2) as well as under section 142(1) of the Act was issued and served on the assessee. During the assessment proceedings, on perusal of the return of income filed by the assessee, it was observed that the assessee has claimed his resident status as *"Non–Resident"* and has not offered his global income to tax in India. Accordingly, the assessee was asked to furnish documents in support of his residential status. Further, on the basis of documents seized during the course of search action, it was observed that the assessee stayed in India for 176 days and went to Mauritius during the year. However, from the work permit issued by the Government of Mauritius, seized during the course of search action, it was observed that the assessee went to Mauritius on an occupation permit to stay and work in Mauritius as an investor with Firstland Holdings Ltd. and not as an employee. In response to the query raised by the Assessing Officer (*"A.O."*) during the assessment proceedings, the assessee submitted a copy of his passport from 01/04/2008 to 31/03/2014. Further, the assessee provided the year-wise details of his stay in India for the period from 01/04/2008 to 31/03/2014. The assessee submitted that he was physically present in India only for a period of 176 days during the relevant financial year. It was further submitted that the assessee went to Mauritius for the purpose of employment with Firstland Holdings Ltd., on the post of Strategist – Global Investment of the company for a period of three years. Therefore, it was claimed that the assessee was a

non−resident as per the provisions of section 6(1)(c) r/w Explanation 1(a) to section 6(1) of the Act.

5. The A.O., vide order dated 29/09/2021, passed under section 153A of the Act did not agree with the submissions of the assessee and held that the assessee left India in the relevant financial year as an *"Investor"* on a business visa which is usually taken by an investor and not by an employee who leaves India for employment. Accordingly, the A.O. held that the residential status of the assessee for the year under consideration is *"Resident"* and the assessee is not entitled to take benefit of Explanation−1(a) to section 6(1) of the Act. Since the assessee has stayed in India for a period of 176 days (which is more than 60 days) in the current year and has been in India for a period of more than 365 days within four years preceding the current year, the assessee was held to be a *"Resident"* as per the provisions of clause (c) of section 6(1) of the Act. Accordingly, income received by the assessee from offshore jurisdiction of Rs.28,14,64,628 (equivalent to USD 51,75,000) was added to the total income of the assessee.

6. The learned CIT(A), vide impugned order, agreed with the submissions of the assessee and held that the assessee was away from India for the purpose of employment outside India and is accordingly entitled to take the benefit of Explanation−1(a) to section 6(1)(c) of the Act. Being aggrieved, the Revenue is in appeal before us.

7. We have considered the submissions of both sides and perused the material available on record. The only dispute amongst the parties in the

present appeal is pertaining to the residential status of the assessee in the year under consideration. In his return of income filed pursuant to the notice issued under section 153A of the Act, the assessee claimed his residential status to be *"Non–Resident"* and accordingly did not offer his global income to tax in India. In this regard, the assessee has placed reliance on Explanation–1(a) to section 6(1) of the Act and submitted that since during the year, the assessee has left India for the purpose of employment in Mauritius, therefore while determining the residential status, the period of 60 days as per section 6(1)(c) of the Act shall be substituted with 182 days as per Explanation–1(a) of section 6(1) of the Act. Accordingly, it is the plea of the assessee that as he stayed in India only for 176 days during the year under consideration, he is *"Non–Resident"* during the year for the purpose of the Act. On the contrary, as per the Revenue, the assessee left India not for the purpose of employment but he left India as an Investor on a business visa to Mauritius, therefore Explanation–1(a) of section 6(1) of the Act is not applicable in the present case. Accordingly, it is the claim of the Revenue that since the assessee has stayed in India for 176 days which is more than 60 days, therefore, as per the provisions of section 6(1)(c) of the Act the assessee is "*Resident*" in India for the purpose of the Act and accordingly, the income earned by the assessee from outside India is taxable under the Act.

8. Before proceeding further, it is pertinent to note that the following provisions of section 6, which are relevant for the adjudication of the dispute in hand:-

> "*Residence in India.*

6. For the purposes of this Act,—

(1) .....

(a) .....
(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;"

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.

15. In the result, the appeal by the Revenue is dismissed.

C.O. no.115/Mum./2023
By Assessee – A.Y. 2013–14

16. As we have dismissed the appeal filed by the Revenue, the cross objection filed by the assessee becomes academic and infructuous. Therefore is accordingly dismissed.

17. In the result, cross objection by the assessee is dismissed.

18. To sum up, the appeal by the Revenue and cross objection by the assessee are dismissed.

Order pronounced in the open Court on 08/01/2024

Sd/-	**Sd/-**
PRASHANT MAHARISHI	**SANDEEP SINGH KARHAIL**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 08/01/2024

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The PCIT / CIT (Judicial);
(4) The DR, ITAT, Mumbai; and
(5) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai