INCOME-TAX REFERENCE.

Before Harbans Singh, C.J. and Prem Chand Jain, J.

THE COMMISSIONER OF INCOME-TAX,—*Petitioner*

versus

SHARDA AJMANI,—*Respondent.*

Income Tax Reference No. 46 of 1965.

August 19, 1970.

Income-tax Act (XI of 1922)—Section 4, Explanation 2A, Sections 4-A and 17(1A)—Assessee, a family member of a diplomat working abroad—Situs of the source of income in the taxable territories—Such assessee—Whether to be taxed as a resident of such territories.

Held, that unless conditions laid down in section 4A, Income-tax Act, 1922, are fulfilled, an assessee cannot be proved to be a resident of the taxable territories and cannot claim assessment on that basis. From the combined reading of section 4, Explanation 2A, sections 4A and 17(1A), the only irresistible conclusion that can be arrived at is that an assessee who is a mamily member of a diplomat working abroad and whose suits of the source of income is in the taxable territories, is not a resident of such territories and cannot be taxed as such. (Paras 8 and 9)

Reference made by the Income-tax Appellate Tribunal (Delhi Bench) under section 66(1) of the Indian Income-tax Act, 1922, for decision of the following question of law arising out of I.T.A. Nos. 12173 and 12174/63-64 regarding Assessment years 1960-61 and 1961-62.

> *"Whether on the facts and in the circumstances of the case Shrimati Sharda Ajmani should be taxed as a resident of the taxable territories for the assessment years 1960-61 and 1961-62?"*

D. N. AWASTHI AND B. S. GUPTA, ADVOCATES, for the petitioner.

N. K. SODHI, ADVOCATE, for the respondent.

JUDGMENT

The judgment of this Court was delivered by P. C. Jain, J :—

The question which falls for determination in the reference made to this Court under sub-section (1) of section 66 of the Indian Income-tax Act, 1922 (hereinafter referred to as the Act), is as follows :—

> "Whether on the facts and in the circumstances of the case Shrimati Sharda Ajmani should be taxed as a resident of the taxable territories for the assessment years 1960-61 and 1961-62 ?"

(2) The facts giving rise to this question may briefly be recapitulated.

(3) The assessment relates to the years 1960-61 and 1961-62. The assessee is Smt. Sharda Ajmani, wife of Shri Ajmani who in the relevant previous years was working as First Secretary to the Indian Embassy at Baghdad and during those previous years, she was staying with her husband at Baghdad. Smt. Sharda Ajmani was a partner in the registered firm of M/s County Weavers, Amritsar, having a 12 as. share in the rupee. Besides that, she had some interest income. It is an admitted fact that the situs of the source of income was in the taxable territories and the income accrued and arose in the taxable territories. The contention of the assessee before the Income-tax Officer, the Appellate Assistant Commissioner and before the Tribunal, was that in respect of the diplomatic personnel, it should be held that all the members of the staff of an Embassy would be considered as residents for taxation purposes and that the family members of the diplomatic staff working abroad would be entitled to the same privilege. The Income-tax Officer and the Appellate Assistant Commissioner did not accept this contention and assessed Smt. Sharda Ajmani as non-resident. On appeal, however, the Tribunal held that the assessee should be deemed to be a resident of the taxable territories for taxation purposes and this is how on the request of the Commissioner of Income-tax, the above mentioned question of law has been referred to us for our decision.

(4) The Tribunal, while deciding the matter in favour of the assessee, relied on paragraphs 389, 402 and 404 of the Oppenheim's International Law and deduced the following principles :—

"(a) An Ambassador, any member of the staff, or any member of the such staff hereinafter called 'Member' will be deemed to be residing in the taxable territories during the term of office.

(b) During such term of office such members shall be deemed to be carrying the territory with them wherever they are in that foreign country, i.e., they should be deemed to be domiciled and resident in India wherever they may be during such period.

(c) This is not a privilege which can be rescinded by such member, but it is a condition. It follows therefore, that such a

member is liable to all the liabilities of such a condition, vis., he is subject to taxation in the parent country as if he were a resident. If for instance, it was advantageous to him to be taxed as a non-resident then he could not claim that he should be taxed as a non-resident.

(d) It is clear that the expression 'Taxable territories' has an extended meaning in the context of diplomatic personnel. It must be deemed that such a member is deemed to reside within the taxable territories during the period of his office.

(e) As such, the Government of India has a right to levy taxes, on his income as if he were a resident in the taxable territories."

and on the basis of the aforesaid principles it was held that over an Embassy (including the Ambassador, the members of his staff and the members of the family of such staff) the fiscal laws of the parent country (and not the laws of Foreign country) shall prevail, and as such the assessee lady could, as a matter of right, claim that she was a resident in the taxable territories during the previous year because of the aforesaid local fiction.

(5) After hearing the learned counsel for the parties, we are of the view that the answer to the question posed has to be in the negative.

(6) The Tribunal considered the entire matter from a wrong perspective. There are specific provisions in the Act to which the Tribunal did not advert, which leave no room for doubt that the assessee has to be assessed as non-resident. A reference to the International Law was not at all necessary in the instant case as there are specific provisions which deal with the point in controversy. In *Indrajitsinghji Vijaysinghji* v. *Rajendrasinghji Vijaysinghji*, (1), Chagla, C.J., as he then was, who prepared the judgment, observed thus :—

"The Privy Council has held that the consent required under section 86 cannot be waived and, therefore, it would not be

(1) A.I.R. 1956 Bom. 45.

treading on safe ground to inquire what is the principle of International law and to construe section 86 in the light of that principle. If the language of section 86 permitted such a construction, perhaps it would not be objectionable to consider rules of International law because our country also is in the comity of Nations, and there is no reason why we should not as much as other countries give effect to well settled principles of International law.

But if the language of the section is clear and is capable of only one construction in the context in which that language is used, then in our opinion it would be an unjustifiable attempt on the part of the Court to engraft upon the statutory provision a principle of International law which the Legislature itself did not think it proper to do."

(7) Thus it is clear that resort can be made to the principles of International law only if there is no statutory provision in that respect. As earlier observed, the Tribunal has proceeded on entirely wrong premises.

(8) Adverting to the merits, we find that 'residence in (the taxable territories)' for the purposes of this Act have been defined in section 4-A which reads thus :—

"4A. *Residence in the taxable territories.*

For the purposes of this Act—

(a) any individual is resident in the taxable territories in any year if he—

(i) is in the taxable territories in that year for a period amounting in all to one hundred and eighty-two days or more; or

(ii) maintains or has maintained for him a dwelling place in the taxable territories for a period or periods amounting in all to one hundred and eighty-two days or more in that year, and is in the taxable territories for any time in that year; or

(iii) having within the four years preceding that year been in the taxable territories for a period of or for periods

amounting in all to three hundred and sixty-five days or more, is in the taxable territories for any time in that year otherwise than on an occasional or casual visit; or

(iv) is in the taxable territories for any time in that year and the Income-tax Officer is satisfied that such individual having arrived in the taxable territories during that year is likely to remain in the taxable territories for not less than three years from the date of his arrival;

(b) a Hindu undivided family, firm or other association of persons is resident in the taxable territories unless the control and management of its affairs is situated wholly without the taxable territories; and

(c) a company is resident in the taxable territories in any year, if—

(i) it is an Indian company; or

(ii) during that year the control and management of its affairs is situated wholly in the taxable territories."

The definition of the 'taxable territories' is given in section 2(14A); and the relevant portion with which we are concerned, is in the following terms :—

" 'taxable territories' means—

* * * * *

* * * * *

(f) as respects any period after the 12th day of April, 1954, the whole of the territory of India:

Provided that the taxable territories shall be deemed to include—

(a) the merged territories—

(i) as respects any period after the 31st day of March, 1949; for any of the purposes of this Act, and

(ii) as respects any period included in the previous year, for the purpose of making any assessment of the year ending on 31st day of March, 1950, or for any subsequent year;

(b) the whole of the territory of India excluding the State of Jammu and Kashmir—

(i) as respects any period, for the purposes of sections 4A and 4B,

(ii) as respects any period after the 31st day of March, 1950, for any of the purposes of this Act, and

(iii) as respects any period included in the previous year, for the purpose of making any assessment of the year ending on the 31st day of March, 1951, or for any subsequent year ;

(c) the whole of the territory of India—

(i) as respects any period, for the purposes of sections 4A and 4B,

(ii) as respects any period after the 31st day of March, 1954, for any of the purposes of this Act, and

(iii) as respects any period included in the previous year, for the purpose of making any assessment for the year ending on the 31st day of March, 1955, or for any subsequent year;"

From the perusal of these two provisions it is clear the assessee can succeed only if she is proved to be a resident in the taxable territories. It is not disputed on behalf of the assessee that the conditions laid down in section 4A of the Act referred to above are not fulfilled in her case. That being so, she cannot be called a resident in the taxable territories and hence she cannot claim assessment on the basis that she should be deemed to be a resident in the taxable territories. This conclusion of ours is further supported by the provisions of Explanation 2A to section 4 and sub-section (1A) to section 17 which read as under —

"Explanation 2A.—Income which would be chargeable under the head 'Salaries' if payable in the taxable territories but

which is paid without the taxable territories by the Government to a citizen of India for rendering service without the taxable territories shall be deemed to accrue or arise in the taxable territories."

"17(1A). Notwithstanding anything contained in sub-section (1), where a citizen of India, not resident in the taxable territories; is in receipt of salary from the Government for rendering service without the taxable territories, the tax, including super-tax, payable by him on his total income for the assessment years commencing with the assessment year 1960-61 shall be determined with reference to his total world income in the manner specified in the first proviso to sub-section (1)."

(9) No similar provision exists with regard to the family members of a Government servant. The above-mentioned provisions apply only to the case of a Government servant. Thus from the aforesaid provision of the statute, the only irresistible conclusion that can be arrived at is that Smt. Sharda Ajmani was not a resident in the taxable territories during the assessment years 1960-61 and 1961-62 and could not be taxed on that basis. Accordingly, the answer to the question posed by the Tribunal is in the negative. In the circumstances of the case, we make no order as to the costs.

K. S. K.

LETTERS PATENT APPEAL.

Before Prem Chand Pandit and S. S. Sandhawalia, JJ.

CHANDGI RAM AND ANOTHER,—*Appellants*

versus

MOONGA AND OTHERS,—*Respondents.*

Letters Patent Appeal No. 210 of 1970.

August 20, 1970.

Displaced Persons (Compensation and Rehabilitation) Rules (1955)—Rules 90 and 92—Sale of evacuee property by public auction—Application for setting aside of—Whether lies only under Rule 92—Such sale—When can be set aside.

Held, that a combined reading of rule 92 and relevant part of rule 90 of Displaced Persons (Compensation and Rehabilitation) Rhles, 1955, shows that