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

BEFORE SHRI SHAILENDRA KUMAR YADAV, JUDICIAL MEMBER
AND SHRI G.S. PANNU, ACCOUNTANT MEMBER

I.T.A. No. 17/PN/2010
(Asstt. Year: 2006-07)

Mr Madhukar Vinayak Dhavale **Flat No 6, Plot No 16,** **Bhosale Enclave, Bhosale Nagar,** **Pune – PAN AFJPD0514N**	**..**	**Appellant**
Vs.		
Income-tax Officer, **(Intl. Taxation)-III, Pune**	**..**	**Respondent**

Appellant by: Shri M K Kulkarni
Respondent by: Shri Sanjay Singh

ORDER

PER G.S. PANNU, AM

This appeal by the assessee is directed against the order of the Commissioner of Income-tax (Appeals)-I, Pune dated 8.9.2009 which, in turn, has arisen from an order dated 26.12.2008 passed by the Assessing Officer under section 143(3) of the Income-tax Act, 1961 (in short "the Act"), pertaining to the assessment year 2006-07.

2. The first dispute in this appeal relates to the issue regarding status of the assessee and the second issue relates to the disallowance of component of salary under section 5(2) of the Act.

3. The relevant facts are that during the relevant period the assessee was working as a Master of the ship with the Great Eastern Shipping Company Ltd. For the assessment year under appeal, the return of income was filed on 31.7.2006 declaring total income of Rs 92,962/- wherein the status of the assessee was claimed as 'Non resident'. During the assessment proceedings, information was sought from the employer of the assessee by the Assessing Officer in order to verify the 'non-resident' status of the assessee. As per the information obtained from the employer of the assessee, the exact number of days of service of the assessee abroad was found to be 158 days, which according to the Assessing Officer, was less than the days specified in section 6(1) of the Act for being treated as a 'non-resident'. The assessee was thus required to justify the claim of non-resident status. In support of his claim, assessee furnished copies of Passport, which showed that the period of stay outside India during the relevant year was 201 days. On the basis of the entries in the Passport of the assessee, the Assessing Officer adopted the status of the assessee as 'non-resident'.

4. It was further observed by the Assessing officer that the assessee has received salary amounting to Rs 15,33,810/- from his employer in Indian currency, which was claimed to be exempt in the return of income filed on the ground that the same was in the nature of foreign income. Referring to the provisions of section 5(2) of the Act, the Assessing Officer held that the claim of the assessee was not correct as the salary was paid by an Indian company for the services rendered in India. It was also stated by the Assessing Officer that the claim of the assessee that the said income was received from foreign employer remained unsubstantiated in the absence of any evidence to the effect that such foreign income was offered to tax in the respective foreign country. However, the Assessing Officer granted the claim of exemption in respect of salary paid by the employer of the assessee, which was shown to have been paid in foreign currency for the service rendered on board ship(s) outside India,

amounting to Rs 8,14,760.39. Against the above findings of the Assessing Officer, the assessee preferred appeal before the Commissioner of Income-tax (Appeals).

5. Before Commissioner of Income-tax (Appeals), it was contended that the subject income byway of salary was earned by the assessee for the services rendered outside India. It was further stated that the total stay of the assessee outside India during the impugned year was for 201 days at different locations in USA, Malaysia, Indonesia, UAE, Kuwait, Qatar etc. and the assessee had joined the ship at Los Angelis for rendering such services outside India and the salary received by the assessee was obviously for services rendered outside India. Further, the assessee contended that the assessee was not coming to India every month for receiving salary, but the same was paid on board the hip, wherever it was. Placing reliance on the decision of the Tribunal, Mumbai in the case of 3rd ITO v Avtar Singh Wadhwan 28 TTJ 3901 (Bom), it was contended that for deciding taxability of income in case of a non-resident, the vital question was where the income accrued or arose and income by way of wages earned for services rendered outside India by non-resident was not taxable in India. Reliance was also placed on the judgment reported in the case of British Gas India P.Ltd. 285 ITR 218 (AAR). It was thus argued that the subject income in case of the assessee was not taxable income, since it was received for services rendered outside India. It was also submitted that having adopted the status of the assessee as 'non-resident', it was not fair on the part of the Assessing officer to bring the income earned by the assessee outside India.

6. After considering the submissions of the assessee with reference to the material available on record and filed during the proceedings before him, the Commissioner of Income-tax (Appeals), proceeded to consider the issues, (a) what is the status the assessee under section 6 of the Act for the year under consideration, and (b) whether the salary income in question earned by the

assessee during the year as a member of Crew of an Indian ship(s) is taxable in India. The Commissioner of Income-tax (Appeals) observed the tests provided in section 6(1) of the Act for determining the residential status of an individual are alternative and not cumulative. As per the Commissioner of Income-tax (Appeals), an individual is said to be resident when he satisfies any one of the basic conditions in clause (a) or (c) of section 6(1) of the Act. From the details of stay in India furnished by the assessee within four years preceding the year under appeal was for a period exceeding 365 days and for more than 60 days during the year under consideration. The Commissioner of Income-tax (Appeals) further found as a fact that as per the certificate issued by the employer, the assessee had stayed in foreign waters while employed on the ship(s) for only 158 days i.e. less than 182 days and, therefore, Explanation to clause (c) of section 6(1) of the Act was not applicable in the assessee's case. However, according to the assessee, as he stayed for only 164 days in India, clause (c) of section 6(1) read with Explanation was not applicable and, therefore, the assessee was a non-resident for the year under consideration. The Commissioner of Income-tax (Appeals) did not find any merit in this contention of the assessee. After taking into consideration the certificate issued by the employer as also the provisions of section 2(25A) of the Act, the Commissioner of Income-tax (Appeals) held the assessee's status as 'resident' under clause (c) of section 6(1) of the Act.

7. The Commissioner of Income-tax (Appeals) next proceeded to consider as to whether the salary income in question earned by the assessee during the year under appeal as a member of the Crew of an Indian ship(s) was taxable in India. The relevant discussion of the Commissioner of Income-tax (Appeals) is to be found in para 5.2 of his order, which is extracted as under for the sake of brevity:

"5.2 Without prejudice to the above that the status of the appellant is 'resident' u/s 6(1) of the Income Tax Act, 1961, even assuming for a while that the status is 'non-resident' as claimed by the appellant, the salary received by the appellant as member of crew of Indian ship is still taxable in India. Section 5(2) states that the total income of any previous year of a non resident shall include all income from whatever source derived

which is received by him in India and accrues to him in India. Thus, under section 5(2), in the case of a non resident, income which accrues or arises to him in India or which is received by him in India is taxable. In the case of the appellant, the contract of employment has been entered into in India and since all rights flowing from the contract are also enforceable in India, the salary has accrued or arisen to the appellant in India. Therefore, under the general principles, the income has accrued or arisen in India and the deeming provisions of section 9(1) can be resorted to only when the income is not normally to be considered as having accrued or arisen to the appellant in India. In this regard, reference can be made to the decision of the ITAT, Mumbai (TM) in the case reported in 81 ITD 203 wherein it is held that 'although assessee is a non-resident, the salary that accrues or arises to him India as the contract of employment was entered in India and the rights arising from such contract of employment are enforceable in India.' Therefore, in the case of the appellant, by virtue of contract of employment with the employer in India, it is not necessary to examine the question whether the salary is deemed to accrue or arise to the appellant by applying provisions of section 9 and the Explanation thereto. the reliance placed by the appellant on the decision of the ITAT, Mumbai in the case of Avtar Singh Wadhwan reported in 28 TTJ (Bom) 390 does not come to the aid of the appellant in view of the subsequent decision of a larger Bench of ITAT, Mumbai in the case cited above (81 ITD 203).

5.2.1 Therefore, in the case of the appellant, even presuming that appellant is a non-resident during the year, the entire salary income received by virtue of the contract of employment with the Indian shipping company is taxable in India."

In view of the above findings, the Commissioner of Income-tax (Appeals) finally concluded that the status of the assessee is 'resident' during the year under appeal and the salary received by or accrued to the assessee in India or outside India for the services rendered in India or outside India during the year under appeal is taxable in India. According to the Commissioner of Income-tax (Appeals), even assuming that the status of the assessee is 'non-resident' as claimed by the assessee, since the salary has accrued to the assessee in India for the reasons as discussed in para 5.2 of the impugned order, which has been extracted by us above, the same is taxable in India. Accordingly, the Commissioner of Income-tax (Appeals) rejected both the contentions of the assessee, namely, that the appellant is a non-resident for the year and salary has accrued for the services rendered outside India and, therefore, not taxable in India. Against these findings of the Commissioner of Income-tax (Appeals), the assessee is in appeal before us.

8. Before us, the learned Counsel for the assessee vehemently argued that the Commissioner of Income-tax (Appeals) has erred in treating the status of the

assessee as resident, when it was clear from the Passport details that assessee had stayed outside India for a period of 201 days in the previous year relevant to the assessment year under consideration. It was pointed out that the assessee was employed as a Master of the ship with Great Eastern Shipping Co. Ltd., and his stay outside India was 201 days. The learned Counsel vehemently pointed out that the Commissioner of Income-tax (Appeals) has wrongly relied upon the certificate issued by the employer, which stated that the assessee was abroad only for 158 days during the previous year relevant to the assessment year under consideration. In the course of his submissions, reliance has been placed on the judgment of the Hon'ble Karnataka High Court in the case of DKI (International Taxation) v. Prahlad Vijendra Rao 10 Taxmann.com. 238 (Kar) to point out that salary earned by the assessee during his stay outside India on account of work discharged on board of a ship which was outside the shores of India was not liable to be taxed in India. In sum and substance, the primary plea of the assessee is that the residential status in terms of section 6(1) of the Act is liable to be construed as a 'non-resident' during the previous year relevant to the year under consideration.

10. On the other hand, the learned Departmental Representative, appearing for the Revenue has primarily reiterated similar reasoning as taken by the Commissioner of Income-tax (Appeals) in order to defend the stand of the Revenue. The learned Departmental Representative specifically pointed out that the Commissioner of Income-tax (Appeals) has considered the status of the assessee as 'resident' in terms of section 6(1)(c) of the Act, because there was no material brought on record to show that the assessee was abroad for the prescribed period for the purposes of employment, during the previous year relevant to the assessment year under consideration.

10. We have carefully considered the rival submissions. The sum and substance of the controversy relates to determination of the residential status of

the assessee during the previous year relevant to the assessment year under consideration. In this regard, section 6(1) which is relevant for the purpose of determination of residential status, reads 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 o period 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—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 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"*

11. As per section 6(1)(a) of the Act, an individual is said to be resident in India in any previous year if he is in India in that year for a period or periods amounting in all to 182 days or more. Secondly, in terms of Section 6(1)(c) of the Act,he can be construed to be resident of India if he has been in India for a period or periods amounting in all to 365 days or more within the four preceding years and is in India for a period amounting in all to 60 days or more in the relevant previous year. As per Explanation (a), if the individual leaves India as a member of the crew of an Indian ship as defined in the Merchant Shipping Act 1958 (44 of 1958) or leaves India for purposes of employment outside India, the condition of 60 days or more in clause (c) of section 6(1) of the Act has to be read as 182 days or more.

12. The case set-up by the assessee to say that he is non-resident during the previous year relevant to the assessment year under consideration is that he is employed on a ship and has remained abroad for a period exceeding 182 days, i.e. for 201 days during the previous year relevant to the assessment year under consideration and, therefore, he qualifies to be a non-resident for the year under consideration. However, the Commissioner of Income-tax (Appeals) has made out a case that as per section 6(1)(c), the assessee has been in India for a period exceeding 365 days in the four years preceding the year under consideration and therefore, the assessee is required to establish that during the previous year relevant to the assessment year under consideration he has been in India for a period less than 182 days so as to qualify to be a non-resident. According to the Commissioner of Income-tax (Appeals), the assessee has not been able to establish that assessee has remained abroad for the purpose of employment for a period exceeding 182 days and, therefore, it follows that assessee is a resident within the meaning of section 6(1)(c) read with Explanation (a) thereof. In this regard, we find that as per the certificate of employment issued by the assessee's employer, the assessee has spent 158 days in foreign waters while being employed on the ship during the previous year relevant to the assessment year under consideration. This implies that the assessee is a resident in terms of section 6(1)(c) read with Explanation (a) thereof. However, as per the assessee on the basis of the details as per his Passport, his stay abroad during the previous year relevant to the assessment year under consideration is 201 days and thus his stay in India is for 164 days thereby demonstrating that in terms of section 6(1)(c) read with Explanation (a) thereof the assessee is a non-resident. In our view, the crucial point is the presence of the words "*leaves India in any previous year as member of the crew of an Indian ship……..or for the purposes of employment outside India….*" in Explanation (a) to section 6(1)(c) of the Act. In terms of the aforesaid Explanation the assessee has to establish that he was outside India as a member of the crew of an Indian ship or for the purposes of

employment for a period of 182 days or more during the previous year relevant to the assessment year under consideration so as to qualify to be non-resident. In this connection, the Commissioner of Income-tax (Appeals) has appreciated whatever evidence was on record, namely, the certificate issued by the employer of the assessee which clearly depicts that the assessee was outside India for the purpose of employment only for 158 days. The claim of the assessee that he was abroad for 201 days is supported by his Passport details, so however, there is no material or evidence to show that his presence outside India beyond 158 days was as a member of the crew of an Indian ship or for the purpose of employment within the meaning of Explanation (a) read with section 6(1)(c) of the Act. The Commissioner of Income-tax (Appeals) in para 5.1.3 has categorically asserted that the assessee has not furnished any evidence to show that he was abroad during the relevant period in connection with or for purposes of the present employment. Even before us, no material has been laid by the assessee to negate the aforesaid assertion of the Commissioner of Income-tax (Appeals). Under these circumstances, in our view, the assessee qualifies to be a resident in the previous year relevant to the assessment year under consideration on the basis of the tests mentioned in section 6(1)(c) read with Explanation (a) thereof. The decision of the Commissioner of Income-tax (Appeals) on this aspect is therefore affirmed.

13. As a consequence to our aforesaid decision, the Assessing Officer is directed to compute income of the assessee thereof in accordance with law.

14. In so far as the plea raised by the assessee on the basis of the judgment of the Hon’ble Karnataka High Court in the case of Prahlad Vijendra Rao (supra) is concerned, the same in our view is clearly inapplicable to the facts of the present case. In the case before the Hon’ble High Court, the stay of the assessee outside India for the purposes of employment exceeded 225 days and the assessee was thus non-resident and in this background, the Hon’ble High

Court affirmed the decision of the Tribunal that salary earned by the assessee for such period on account of work discharged on a ship abroad was not taxable in India. On the contrary, in the present case on facts the assessee has not been found to be a non-resident within the meaning of section 6(1)(c) of the Act and, therefore, the ratio of the judgment in the case of Prahlad Vijendra Rao (supra) is not applicable to the facts of the present case.

15. Resultantly, the appeal of assessee is dismissed.

Decision pronounced in the Court on 30th day of August,2011.

Sd/-	Sd/-
(SHAILENDRAKUMAR YADAV)	**(G.S. PANNU)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Pune: 30th August,2011

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Copy to:-

1) Appellant
2) Respondent
3) The CIT (A)-I Pune
4) The DIT(Int. Taxation), Pune
5) The Departmental Representative, “A” Bench, I.T.A.T., Pune.

By Order

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Asst. Registrar, I.T.A.T., Pune