PETITIONER:
K.RAMULLAN

Vs.

RESPONDENT:
COMMISSIONER OF INCOME TAX, COCHIN

DATE OF JUDGMENT: 09/08/2000

BENCH:
S.N.Hedge, S.S.M.Quadri, S.P.Bharucha

JUDGMENT:

Syed Shah Mohammed Quadri, J.

The short point that arises for consideration in these appeals is: whether the appellant-assessee is a resident outside India as defined in Section 2 (q) of the Foreign Exchange Regulation Act, 1973? These appeals arise from the common order of the High Court of Kerala at Ernakulam passed in Income Tax Reference Nos.109 and 113-114 of 1992 dated September 10, 1996. The questions referred to the High Court in those cases were under the Income Tax Act as well as the Wealth Tax Act. Being of the view that the second question in I.T.R. No.109 of 1992, viz., Whether, on the facts and in the circumstances of the case, the Tribunal is right in law in holding that the assessee is entitled to exemption of the interest earned on the deposits in Non-resident (External) Account in terms of Section 10(4A) of the Income-tax Act, 1961?, is germane and would cover all the other questions referred to it, the High Court dealt with and answered that question by the impugned common order in the negative, i.e., in favour of the Revenue and against the assessee. The appellant, though of Indian origin, has settled down in Malaysia in 1941 and acquired Malaysian citizenship. His wife and children reside in India and he owns some agricultural land, house property and investments in banks in India. For the Assessment Years 1983-84 and 1984-85, he claimed that the interest accrued on credit balance in his Non- Resident (External) Account cannot be included in computing his total income in view of the provisions of Section 10(4A) of the Income Tax Act, 1961 (for short, the I.T.Act). During the period June 13, 1982 to April 14, 1985 he stayed with his wife in India for undergoing medical treatment. The Assessing Authority treated him as a resident in India on the ground that he was living with his wife and children. The Appellate Authority agreed with that view. On the appellants appeal before the Income Tax Appellate Tribunal, it was held that he was not a person resident in India in terms of Section 2(p)(iii)(c) of the Foreign Exchange and Regulation Act, 1973 (for short, the FERA). The High Court, on reference, held, A bare reference to sub-clause (p)(iii)(c) would show that a person who is not a citizen of India, but has come to or stays in India for staying with his or her spouse, such spouse being a person resident in India would have to be regarded and understood as a person resident in India. In that view of the matter, the High Court held that the appellant was not entitled to the exemption under Section 10(4A) of the I.T.

Act and thus answered question No.2 in the negative, against the appellant. Mr.C.S.Vaidyanathan, learned senior counsel appearing for the appellant, invited our attention to paragraph (c) of sub-clause (iii) of Section 2(p) of the FERA and argued that stay of a person with his or her spouse referred to therein postulates not a mere temporary or short-term stay but somewhat permanent stay. The High Court did not consider the nature of the stay for purposes of Section 2(p)(iii)(c) of the FERA and, therefore, erred in treating the appellant as a resident for purposes of Section 10(4A) of the I.T.Act. Mr.Ranbir Chandra, learned counsel appearing for the Revenue, contended that in view of the long stay of the appellant in India he could not but be treated as a resident in India and, therefore, the High Court rightly held him to be resident in India. In view of these submissions, we shall advert to the point in issue. There is no dispute that Section 10(4A) of the I.T.Act excludes any income from interest on moneys standing to the credit of a non- resident in Non-Resident (External) Account in any bank in India, in computing the total income of a person resident outside India. Explanation appended to Section 10(4A) of the Act says that for purposes of that clause person resident outside India shall have the meaning assigned to it in clause (q) of Section 2 of the FERA. Section 2(q) defines that expression to mean a person who is not a resident of India. And that expression is defined in clause (p) of Section 2 of the FERA, which, insofar as it is relevant for the present discussion, is extracted as under: 2 Definitions In this Act, unless the context otherwise requires,-

(a) to (o) *** *** ***

(p) person resident in India means- (i) to (ii) *** *** (iii) a person, not being a citizen of India, who has come to, or stays in India, in either case-

(a) for or on taking up employment in India, or

(b) for carrying on in India a business or vocation in India, or

(c) for staying with his or her spouse, such spouse being a person resident in India, or

(d) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period;

Explanation A person, who has, by reason only of paragraph (a) or paragraph (b) or paragraph (d) of sub-clause (iii) been resident in India, shall during any period in which he is outside India, be deemed to be not resident in India;

Paragraph (c) of sub-clause (iii) of the FERA deals with stay with his or her spouse. Shorn of immaterial words Section 2(p)(iii)(c) will read thus : a person resident in India means a person, not being a citizen of India, who has come to or stays in India for staying with his or her spouse, such spouse being a person resident in India. A plain reading of paragraph (c), extracted above, makes it evident that the stay contemplated therein has to be of some permanence and not with the intention of returning abroad in some short, set period. The word staying in paragraph

really means residing with the spouse. Even the purposes referred to in paragraphs (a), (b) and (d) indicate that the term stay does not denote a short or casual stay; it has to be a stay for taking up employment or carrying on business or a vocation or with the intention of remaining in India for an uncertain period. If we construe paragraph (c) to include a mere casual stay or stay for a short period, it would defeat the purpose of having Non-Resident (External) Account. This being the position, the appellant cannot be treated as a person resident in India during the relevant period. Consequently, he will be a person resident outside India within the meaning of Section 2(q) of the FERA. We, therefore, set aside the order of the High Court under challenge, answer question No.2 in favour of the appellant and against the Revenue and thus allow the appeals. There shall be no order as to costs.