

(1991) 06 MAD CK 0021

In the Madras High Court

Case No : Tax Cases No"s. 524 and 525 of 1979 (References No"s. 287 and 288 of 1979)

Commissioner of Income Tax

APPELLANT

Vs

A.P. Kalyanakrishnan

RESPONDENT

Date of Decision : 10-06-1991

Acts Referred:

Income Tax Act, 1961 — Section 28, 5(1)

Citation : (1992) 195 ITR 534

Hon'ble Judges : V. Ratnam, J;K.A. Thanikkachalam, J

Bench : Division Bench

Advocate : Deokinandan, for the Appellant; K.M.L. Majele, for the Respondent

Judgement

Ratnam, J.—In these tax case references u/s 256(1) of the Income Tax Act, 1961 (hereinafter referred to as ""the Act""), at the instance of

the Revenue, the following common question of law has been referred to this court for its opinion :

Whether, on the facts and in the circumstances of the case and having regard to the provisions of section 5(1)(a) of the Income Tax Act, 1961,

the Appellate Tribunal was right in holding that the pension earned by the assessee was not assessable in India and was, therefore, liable to be

excluded from the total income of the assessee, who was "not ordinarily resident in India" in the relevant years ?

2. The assessee is an individual whose status is ""resident but not ordinarily resident."" In the return of income filed by the assessee initially for the

assessment year 1970-71, he included therein Rs. 12,881 representing Malaysian pension received in India. Subsequently, a revised return was

filed in which the assessee claimed that the amount of pension was not taxable,

as the pension had been received outside India and later remitted to India. For the assessment year 1971-72, in Part IV of the return submitted by the assessee, the pension received from the Malaysian Government amounting to Rs. 14,052 was claimed as not taxable. The Income Tax Officer negatived the stand of the assessee on the ground that the assessee received the pension in India through the Accountant-General, Madras, directly and hence, the pension received is liable to tax treatment in India on receipt basis. Accordingly, the pension received by the assessee for the two assessment years in question was subjected to tax. On appeal by the assessee before the Appellate Assistant Commissioner contending that the pension received by the assessee for the assessment years 1970-71 and 1971-72 is not liable to be subjected to tax, the Appellate Assistant Commissioner found that the pension amount received by the assessee had been subjected to assessment in Malaya in the status of a non-citizen and non-resident and that clearly pointed out that the pension had accrued to the assessee only in Malaya and the Accountant-General, Madras, was merely authorised to arrange for the payment of pension to the assessee, rendering the amount of pension received in India by the assessee not liable to tax. In that view, the Appellate Assistant Commissioner directed the deletion of Rs. 12,881 and Rs. 14,052 from the assessable total income of the assessee for the two assessment years in question. In the further appeals preferred by the Revenue before the Tribunal contending that the payment of pension to the assessee in India by the Accountant-General, Madras, constituted the first receipt by the assessee in India and, therefore, the pension received was assessable on receipt basis, the Tribunal held, referring to a letter dated June 23, 1969, addressed by the Accountant-General of the Federation of Malaya to the Accountant-General, Madras, that that letter indicated an arrangement for payment in India and the circumstance that the pension of the assessee had also been assessed to tax in Malaya in the status of a non-citizen and non-resident would clearly establish that the pension of the assessee had been remitted to India by arrangement with the Accountant-General, Madras. In that view, the appeals were dismissed and that has given rise to these reference on the common question of law set out earlier.

3. Learned counsel for the Revenue contended that though the status of the

assessee is resident but not ordinarily resident, yet the pension received by the assessee would be taxable as income of the assessee u/s 5(1)(a) of the Act on receipt basis and the payment of the pension to the assessee by the Accountant-General, Madras, constituted the first receipt in India. On the other hand, learned counsel for the assessee submitted that the assessee had received the pension in Malaya and that had also been subjected to tax in the hands of the assessee as a non-citizen and non-resident and the arrangement with the Accountant-General, Madras, was only to facilitate remittance of the pension of the assessee to India where he was living and that would not constitute first receipt of the pension by the assessee in India, when the amount was paid by the Accountant-General, Madras, to the assessee.

4. Whether, u/s 5(1)(a) of the Act, the pension received by the assessee, in the circumstances of this case, can be regarded as ""received in India

by the assessee"" is the question. What is contemplated u/s 5(1)(a) of the Act is the first occasion when the assessee gets the money by way of

pension under his control. It is true that the pension had accrued to the assessee in Malaya, but it is seen that it had already been treated as the

income of the assessee in Malaya and assessed as such, as could be seen from the order of the Appellate Assistant Commissioner. We find from

the tabular statement in para 7 of the order of the Appellate Assistant Commissioner that, during the calendar years 1969, 1970, and 1971

(January 1, 1969 to December 31, 1971), the Malaysian Government had assessed the assessee to Income Tax on the pension, though in the

status of a non-citizen and non-resident and deducted tax also in the amounts mentioned therein and this could be only on the basis that the pension

had accrued to the assessee in Malaya and, therefore, assessable in the hands of the assessee there. In other words, the accrual of the pension and

the receipt of pension to the assessee had already taken place in Malaya as, otherwise, it could not have been subjected to tax treatment by the

Malaysian Government in the hands of the assessee in the status of a non-citizen and non-resident. The letter dated June 23, 1969, addressed by

the Accountant-General, Federation of Malaya, Kuala Lumpur, to the Accountant-General, Madras, which forms annexure D to the stated case

shows that it was intended only as an arrangement for the payment of pension to

the assessee. Indeed, the letter, couched in the form of a request, opens by saying that the payment to the assessee may be arranged for at the nearest treasury and the rate of exchange had also been indicated therein. Further, the letter also stated that the payment requested to be made was in respect of the pension payable to the assessee and at the rate of exchange indicated therein and the amount so paid, should, according to the letter, be charged to the Government of Federation of Malaya in the usual manner. We find from the contents of the letter that it was only an arrangement to ensure the prompt payment of the pension payable to the assessee by the Government of Malaya which, as stated earlier, had also been subject to tax in Malaya. From the facts of this case, it follows that the pension payable to the assessee had accrued in Malaya, subjected to tax there and only thereafter, by an arrangement embodied in the letter found in annexure D to the stated case, the pension had been remitted to the assessee in India and made available to him. The assessee had, therefore, to be regarded as having received the income outside India and the pension had been remitted or transmitted to the place where the assessee was living, as a matter of convenience and that would not, in our view, constitute receipt of pension in India by the assessee, falling within section 5(1)(a) of the Act.

5. We may now make a brief reference to the decisions to which our attention was drawn. COMMISSIONER OF Income Tax, MADRAS. Vs.

P. V. RAGHAVA REDDI AND ANOTHER., , subsequently affirmed by the Supreme Court in Raghava Reddi and Another Vs. Commissioner

of Income Tax, Andhra Pradesh, , dealt with a case of a non-resident who acted as a commission agent of the assessee. In accordance with the

terms of the agreement entered into between the commission agent and the assessee, a certain percentage of sale proceeds was payable as

commission to the non-resident and, on the direction of the commission agent, the amount payable was credited to the account of the commission

agent in the books of the assessee. It was under those circumstances that it was held that the non-resident commission agent should be regarded as

having received his commission in India, when the amount of commission was separated from the sale proceeds and credited to his account.

Though, according to the terms of the agreement, the commission was not paid

or remitted to the non-resident, still as the commission agent had agreed to treat the commission as realised and further directed that the amount of commission payable from time to time should stand as a deposit to its credit in the books of the assessee to be withdrawn or remitted later, according to its pleasure, it was held that there was a receipt of the commission by the non-resident in India and that was taxable, as a receipt of income, within the meaning of section 4(1) (a) of the Indian Income Tax Act, 1922. This was approved by the Supreme Court and it was pointed out that clauses (a) and (c) of section 4(1) can be read disjunctively and clause (a) which provides for receipt of income, profits and gains in the taxable territories cannot be subjected to the limitation that the income must also accrue or arise in the taxable territories and that receipt in the taxable territories would be sufficient to attract section 4(1) (a) of the Indian Income Tax Act, 1922. We have earlier pointed out that, in this case, there is no receipt as income in the taxable territories, but only a remittance from Malaya, after the receipt of the pension and subjecting it to tax, there. We are, therefore, of the view that this decision does not render any assistance. B.R. Sundaram (Decd.) (by Lrs.) Vs. Commissioner of Income Tax, is the other decision to which our attention was drawn. There also, the assessee, a retired teacher of the Malaysian Government, was paid pension by that Government in India by the Accountant-General, Madras, in Indian currency, pursuant to a block arrangement entered into between the Government of India and Malaya. For the assessment year 1970-71, the assessee received Rs. 10,008 as pension and claimed that it was not taxable; but this was negated by the Income Tax Officer and the Appellate Assistant Commissioner. The Tribunal took to view that section 5(1)(c) of the Act stood attracted, rendering the pension liable to assessment and, on a reference, though it was contended that the pension could not be assessed on accrual basis, it was held that receipt normally followed accrual and the right to receive must exist before the actual receipt takes place and that the latter is only the consequence of the former and that the pension was liable to be assessed to Income Tax u/s 5(1)(c) of the Act. We find that the factual background giving rise to these references are very different from the case dealt with in B.R. Sundaram (Decd.) (by Lrs.) Vs. Commissioner of Income Tax, , where the

court was concerned with the applicability of section 5(1)(c) of the Act and not of section 5(1)(a) or the Act as here. In this case, the Revenue had sought to assess the pension of the assessee only on the basis of its having been received in India for the first time and not on any other ground and, under those circumstances, even that decision is not very helpful. On a careful consideration of the facts and the circumstances, we hold that the Tribunal was quite right in the view it took. We, therefore, answer the question referred to us in the affirmative and against the Revenue. The assessee will be entitled to the costs of these references. Counsel's fee Rs. 500 (one set).