
(1987) 07 AP CK 0008

In the Andhra Pradesh High Court

Case No : Case Referred No. 253 of 1982

Commissioner of Income Tax

APPELLANT

Vs

C.S. Murthy

RESPONDENT

Date of Decision : 28-07-1987

Acts Referred:

Income Tax Act, 1961 — Section 2(15), 256(1), 3, 4, 4(1)(b)(ii)

Citation : (1988) 37 TAXMAN 185

Hon'ble Judges : Y.V. Anjaneyulu, J;B.P. Jeevan Reddy, J

Bench : Division Bench

Advocate : M. Suryanarayana Murthy, for the Appellant;

Judgement

Y.V. Anjaneyulu, J.—This reference arising u/s 256(1) of the income tax Act, 1961 ("the Act"), made by the Tribunal at the instance of the Commissioner raises a short but interesting question. The matter relates to the income tax assessment year 1976-77 and the question referred for the consideration of this Court is : Whether, on the facts and in the circumstances of the case, the assessee is entitled to relief u/s 91 of the income tax Act, 1961, of the entire tax deducted at source by the Government of Iran ?

We shall notice the relevant facts. 2. The assessee was employed as a dental surgeon in the Osmania Dental College, Hyderabad. He went on deputation to Iran. In the previous year relevant to the income tax assessment year 1976-77, the assessee received salary of Rs. 64,470 from the Government of Iran wherefrom tax of Rs. 5,974 was deducted under the law in force in that country. The residential status of the assessee for the assessment year 1976-77 is "resident and ordinarily resident", as indicated in the assessment order dated 26-3-1980. u/s 5 of the Act, the total income of any previous year of a person who is resident in India includes, inter alia, all income accruing or arising to him outside India during such year [section 5(1)(c)]. Consequently, the salary income accruing or arising to the assessee outside India in Iran was liable to be included in the total income of the assessee for the purpose of assessment to income tax

in India. There is no dispute that the aforesaid salary income accruing or arising to the assessee in Iran fell to be included in the assessee's total income for the income tax assessment year 1976-77.

3. Before the ITO making the assessment, the assessee put forward two claims. The first claim was that he was entitled to deduction in respect of remuneration received from the foreign employer in terms of section 80RRA of the Act. The second claim was that in determining the tax payable on the foreign income, appropriate relief on the income doubly taxed should be allowed u/s 91 of the Act.

As far as the first claim is concerned, it may be pointed out that section 80RRA provided for deduction equal to 50 per cent of the remuneration received from the foreign employer subject to the requirements specified therein being satisfied. On scrutiny, the ITO was satisfied that the requirements relating to the eligibility for deduction u/s 80RRA were satisfied. Accordingly, the officer allowed, by way of deduction, Rs. 32,235 which is equal to 50 per cent of the remuneration of Rs. 64,470 received from the foreign employer.

4. A dispute arose in the determination of the assessee's second claim. According to the assessee, the income doubly taxed under the Indian laws is Rs. 64,470 which was the remuneration paid by the foreign employer and, consequently, he is entitled to appropriate tax relief u/s 91 of the Act in respect of that doubly taxed income. On the other hand, the ITO's claim was that although the assessee received remuneration of Rs. 64,470 from the foreign employer, the amount that was doubly taxed under the Act in India is only one-half as the balance one-half was allowed u/s 80RRA. The officer accordingly restricted the relief u/s 91 only Rs. 32,235.

5. The tax at the rate applicable to Iran on the sum of Rs. 32,235 was ascertained as Rs. 2,986 and as that tax was less than the Indian rate of tax, the said amount of Rs. 2,986 was allowed as a deduction from out of the tax payable by the assessee.

6. Aggrieved by the order of the ITO, the assessee filed an appeal before the AAC. The AAC accepted the assessee's claim and directed allowance of the entire tax paid in Iran, namely, Rs. 5,974, from out of the tax payable by the assessee.

7. The ITO filed an appeal against the order of the AAC directing allowance of the entire tax paid in Iran. The Tribunal rejected the ITO's appeal and upheld the order of the AAC. The Tribunal did not indicate any reasons for doing so. It merely stated that "the issue was squarely covered by a decision of the Amritsar Bench of the Tribunal in ITO v. B.K. Kapila [1980] 17 CTR. The revenue applied for a reference u/s 256(1). That is how the Tribunal referred the question of law which we have set out in paragraph 1 (at p. 688)(supra) for the consideration of this Court.

8. The question arising for consideration is one of importance. We would have

liked the Tribunal to deal with the question by referring to the relevant provisions of law and set out its views concerning the matter so that this Court would be in a position to appreciate the decision of the Tribunal in proper perspective. In our opinion, it would not be proper for the Tribunal to refer to the decision of another Bench of the Tribunal and merely observe that it agrees with the decision of that Bench. Tax journals which report decisions of the various Benches of the Tribunal are not easily available. It happened that neither standing counsel for the income tax Department nor the learned counsel for the assessee could place before us initially the Tax Tribunal "CTR" wherein the decision of the Amritsar Bench is reported. It was only after some effort that the journal was obtained by the learned counsel for the income tax Department and placed before us. We would appreciate if the Tribunal recorded in future its own reasons for coming to a conclusion so that its order would be complete in all respects and this Court would have the assistance of the reasoning of the Tribunal.

9. Now to the question in dispute. Section 91 corresponds to section 49D of the Indian income tax Act, 1922. Section 91(1) of the 1961 Act is in the following terms :

91. Countries with which no agreement exists.--(1) If any person who is resident in India in any previous year proves that, in respect of his income which accrued or arose during that previous year outside India (and which is not deemed to accrue or arise in India), he has paid in any country with which there is no agreement u/s 90 for the relief or avoidance of double taxation, income tax, by deduction or otherwise, under the law in force in that country, he shall be entitled to the deduction from the Indian income tax payable by him of a sum calculated on such doubly taxed income at the Indian rate of tax or the rate of tax of the said country, whichever is the lower, or at the Indian rate of tax if both the rates are equal.

9. The following requirements have to be satisfied in order that an assessee is entitled to claim deduction on the doubly taxed income :

- (a) The assessee must have been resident in India in the relevant previous year.
- (b) Income must have accrued or arisen to him during that previous year outside India.
- (c) In respect of that income which accrued or arose outside India, he must have paid by deduction or otherwise tax under the law in force in the country in question.
- (d) If the above conditions are fulfilled, the assessee will be entitled to deduction from the income tax payable by him in India of a sum calculated on such doubly taxed income at the Indian rate of tax or at the rate of tax of the said country, whichever is lower.

10. In the present case, there is no dispute that the conditions specified against (a), (b) and (c) are satisfied. The dispute concerns the conditions specified

against (d) above. The entitlement of an assessee to deduction extends to "such doubly taxed income". What then is the real meaning and scope of this expression ? The expression "such" refers to the income which accrued or arose outside India during the previous year. The expression, "doubly taxed income", in its plain grammatical meaning, refers to the foreign income taxed under the Indian law. The main requirement, therefore, is that the income must have been taxed outside India and the same income must have again been subjected to tax under the Act in India. If any portion of the foreign income is not subjected to tax in India, then, the assessee will not be entitled to claim deduction on that part of the foreign income which is not subjected to tax in this country. This fits into the real scheme and intent of section 91 which is to the effect that in respect of any income, a person should not be doubly taxed, once outside India and again in India. If the income taxed outside India is subjected to tax again in India, then, the provisions of section 91 would come into operation and the assessee can claim appropriate relief on the doubly taxed income. We may refer to the judgment of the Supreme Court in K.V.A.L.M. Ramanathan Chettiar by Lrs. Vs. Commissioner of Income Tax , Madras, Speaking for the majority, Jaganmohan Reddy, J. observed :

... The words "such doubly taxed income" can have reference to the tax which the foreign income bears once again the burden of Indian income tax by its being included in the total income chargeable u/s 3, read with section 2(15), which defines it as the total amount of income, profits and gains referred to in sub-section (1) of section 4 computed in the manner laid down in the Act. A reference to section 4(1)(b)(ii) would show that the income which accrues or arises to an assessee without the taxable territories during such year is to be included in the total income so that the income under any of the heads enumerated in section 6 which have accrued or arisen to the assessee without the taxable territory and is subject to the tax under the law in force in that country, is included in his total income attracting the levy of charge under the Act. This would again be taxed under the Act, and would, therefore, be doubly taxed income. Or, it could mean that the income from the same or similar head or source which accrued or arose to him outside the taxable territories during such year and upon which tax was paid by him, can be considered to be doubly taxed if under the head it is again chargeable to tax under the Act. In other words, is the criteria for determining an income as doubly taxed income, the head or source of income under the Act to be considered with the same head or the source of income in respect of which tax was paid under the foreign law, or is the emphasis on the tax paid by deduction or otherwise under the law in force in a foreign country in respect of which relief is being given by reason of the inclusion of that income in the total income of the assessee which is again subjected to tax under the Act." (p. 190)

The aforesaid observations sufficiently emphasise that by merely including the foreign income in the total income, it cannot be said that the foreign income is subjected to tax. The criteria are not only that the foreign income be included in

the total income in the assessment made under the Act in India, but that it should also be subjected to tax in this country. The real test, therefore, is whether the income in respect of which tax deduction is claimed by the assessee is subjected to tax under the Act. If this test is applied, there is no difficulty in coming to the conclusion that although in the gross total income of the assessee, the remuneration of Rs. 64,470 was included because of section 5(1)(c) of the Act, the income that is really subjected to tax is only one-half of it, the remaining one-half having been allowed as a deduction u/s 80RRA and given a holiday from the levy of tax. It seems plain, therefore, that the doubly taxed income on the facts and in the circumstances of the assessee's case is not the gross sum of Rs. 64,470, but only Rs. 32,235 and it is only in respect of the latter mentioned sum that the assessee can claim appropriate relief u/s 91. That is what the ITO did.

11. The learned counsel for the assessee, Shri Parvatharao, contends that, once the remuneration is included in the total income of the assessee, it must be held to have been subjected to tax regardless of the fact that a portion of that income included in the gross total income was deducted and not subjected to tax because of other provisions contained in the Act. We are unable to accept this contention. Section 91 makes it abundantly clear that tax relief can be claimed only in respect of foreign income which is the subject-matter of tax paid doubly, once outside India and again in India. If any particular slice of foreign income is not subjected to tax in the assessment made in India, it is not possible to treat such foreign income not subjected to tax in India also as forming part of doubly taxed income for the purpose of section 91.

Our aforesaid view derives support from the decision of the Supreme Court in *Distributors (Baroda) Pvt. Ltd. Vs. Union of India (UOI) and Others*, The Supreme Court was considering the correctness of its earlier judgment in *Cloth Traders (P) Ltd. Vs. Additional Commissioner of Income Tax , Gujarat-I*, The question that arose for consideration was whether the relief in respect of intercorporate dividends received from a domestic company is with reference to the actual amount of dividend received or only to the net amount as computed for the purpose of assessment to tax. Section 80M of the Act provides for deduction in respect of certain intercorporate dividends. In a case where such deduction was allowed u/s 80M, the question that came up for consideration was whether the relief in respect of intercorporate dividends should be computed with reference to the gross amount of intercorporate dividend or with reference to only that portion of the dividend which is actually subjected to tax. The view taken by the Supreme Court earlier was that the assessee is entitled to relief on the gross dividend income notwithstanding the fact that a portion of the dividend was not subjected to tax by reason of the deduction allowed u/s 80M. This view was held to be erroneous by the Supreme Court in *Distributors (Baroda)(P.) Ltd.'s case (supra)* while overruling its earlier judgment in *Cloth Traders (P.) Ltd.'s case (supra)*.

13. The following observations of the Supreme Court in *Distributors (Baroda)(P.)*

Ltd."s case (supra) provide sufficient guidance :

... Now when an amount by way of dividend is received by the assessee from the paying company, the full amount of such dividend would have suffered tax in the assessment of the paying company and it is obvious, that, in order to encourage inter-company investment, the Legislature intended that this amount should not bear tax once again in the hands of the assessee either in its entirety or to a specified extent. But the amount by way of dividend which would otherwise suffer tax in the hands of the assessee would be the amount computed in accordance with the provisions of the Act and not the full amount received from the paying company. Therefore, it is reasonable to assume that in enacting section 80M, the Legislature intended to grant relief with reference to the amount of dividend computed in accordance with the provisions of the Act and not with reference to the full amount of dividend received from the paying company. It is difficult to imagine any reason why the Legislature should have intended to give relief with reference to the full amount of dividend received from the paying company when that is not the amount which is liable to suffer tax once again in the hands of the assessee. The Legislature could certainly be attributed with the intention to prevent double taxation but not to provide an additional benefit which would go beyond what is required for saving the amount of dividend from taxation once again in the hands of the assessee...." (p. 134)

The aforesaid observations provide a complete answer to the question arising for consideration in the assessee's case. The relief by way of deduction of tax u/s 91 should be confined to the amount doubly taxed in accordance with the provisions of the Act and not to the full amount received by the assessee from the foreign employer. It is reasonable to assume that in enacting section 80RRA, the Legislature intended to grant relief u/s 91 with reference to the amount of foreign income doubly taxed in accordance with the provisions of the Act and not with reference to the full amount which did not bear tax in this country. The Legislature only intended to prevent double taxation but not to provide an additional benefit in respect of foreign income which is not subjected to tax in this country. It seems to us that the Amritsar Bench relied on the decision of the Supreme Court in Cloth Traders (P.) Ltd."s case (supra) which has since been overruled. We are unable to agree that the majority judgment of the Supreme Court in K.V.AL.M. Ramanathan Chettiar's case (supra) supports the assessee's claim for deduction of tax treating the entire income as doubly taxed income ignoring the fact that one-half of such income was not subjected to tax at all in this country.

Having regard to the above, we consider that the ITO was right in restricting the relief to only one-half of the foreign income which accrued or arose to the assessee and the AAC as well as the Tribunal were in error in extending that relief to the entire foreign income. Accordingly, we answer the question referred to us in the negative, that is to say, in favour of the revenue and against the assessee. No costs.