

(2004) 07 MAD CK 0092

In the Madras High Court

Case No : Tax Case (Appeal) No. 329 of 2004

Commissioner of Income Tax

APPELLANT

Vs

Kwality Textile Associate Pvt. Ltd.

RESPONDENT

Date of Decision : 13-07-2004

Acts Referred:

Income Tax Act, 1961 — Section 143(3), 263, 4, 5, 800

Citation : (2005) 272 ITR 371

Hon'ble Judges : P.D. Dinakaran, J;N. Kannadasan, J

Bench : Division Bench

Advocate : J. Narayanaswamy, for the Appellant;

Judgement

P.D. Dinakaran, J.—Heard. The appeal is preferred against the order of the Income Tax Appellate Tribunal Madras Bench "C" dated 03.07.2003 in I.T.A.364/95. The following substantial questions of law are raised for consideration:-

1. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in holding that the technical and engineering fees received by the assessee is not exigible to tax in view of the Double Taxation Avoidance Agreement?
2. Whether on the facts and in the circumstances of the case that the Income Tax Appellate Tribunal was right in holding that the payment for technical and engineering services rendered outside India would constitute royalty and is to be assessed in accordance with the provisions of Article 7 of the Double Taxation Avoidance Agreement since the assessee had no permanent establishment in India?
3. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in not considering Section 80-O of the Income Tax Act as the entire receipt is taxable in India subject to the deduction, as mentioned in the above Section?"

2.1. In brief, the assessee is engaged in the business of export of textile spares and equipments. For the assessment year 1988-89, the assessment was completed on 24.3.1994 u/s 143(3) read with 263 of the Income Tax Act. The assessee disputed the assessability of an amount of Rs. 39,20,252/- being the fees received for technical and engineering services rendered by the assessee outside India. According to the assessing officer, this was assessable as income from India subject to the deduction of 50% admissible u/s 80-O of the Income Tax Act. The assessee contended that the income was totally exempt as the amount was received from Malaysia and as per the Double Taxation Avoidance Agreement between India and Malaysia, the technical service fees received were not taxable in India. It was also pointed out that the Income Tax Appellate Tribunal had held decided the issue in assessee's favour for the immediately preceding assessment year. The Commissioner of Income Tax (Appeals) accordingly allowed the appeal.

2.2. Aggrieved by the order of the Commissioner of Income Tax (Appeals), the Revenue filed an appeal before the Income Tax Appellate Tribunal, Chennai Bench. The Tribunal, following the decision of the Madras High Court in the case of " Commissioner of Income Tax Vs. Vr. S.R.M. Firm and others, , wherein the issue has been decided in favour of the assessee, dismissed the Revenue's appeal. Hence the present appeal by the Revenue.

3. The issue that arises for consideration in this appeal is whether the technical fee earned by the assessee from sources in Malaysia cannot be taxed in India and the technical fee earned by the assessee can be subjected to deduction u/s 80-O?

4. Under identical facts and circumstances, the Apex Court in Commissioner of Income Tax Vs. P.V.A.L. Kulandagan Chettiar (dead) through L.Rs., , held as follows:-

" Where liability to tax arises under the local enactment, the provisions of Sections 4 and 5 of the Income Tax Act, 1961, provide for taxation of global income of an assessee chargeable to tax thereunder. But this is subject to the provisions of an agreement entered into between the Central Government and the Government of a foreign country for avoidance of double taxation as envisaged u/s 90 to the contrary, if any, and such an agreement will act as an exception to or modification of sections 4 and 5 of the Income Tax Act. The provisions of such agreement cannot fasten a liability where the liability is not imposed by a local Act. Where tax liability is imposed by the Act, the agreement may be resorted to either for reducing the tax liability or altogether avoiding the tax liability. In case of any conflict between the provisions of the agreement and the Act, the provisions of the agreement would prevail over the Act in view of the provisions of Section 90(2). Section 90(2) makes it clear that "where the Central Government has entered into an agreement with the Government of any country outside India for granting relief of tax, or for avoidance of double taxation, then in relation to the assessee to whom such agreement applies, the provisions of

the Act shall apply to the extent they are more beneficial to that assessee", meaning thereby that the Act gets modified in regard to the assessee in so far as the agreement is concerned if it falls within the category stated therein.

When it is intended under the Double Taxation Avoidance Agreement between India and Malaysia that, even though it is possible for a resident in India to be taxed in terms of Sections 4 and 5 of the Income Tax Act, 1961, if he is deemed to be a resident of contracting State where his personal and economic relations are closer, then his residence in India will become irrelevant, the Double Taxation Avoidance Agreement will have to be interpreted as such and would prevail over Sections 4 and 5 of the Act."

5. Applying the said ratio in Commissioner of Income Tax Vs. P.V.A.L. Kulandagan Chettiar (dead) through L.Rs., , this Court (N.V. BALASUBRAMANIAN AND M. THANIKACHALAM, JJ.), by an order dated 15.6.2004 in T.C.A. No. 182 of 2004 also held that the income earned from Malaysia is not taxable in India.