

(2004) 07 MAD CK 0028

In the Madras High Court

Case No : Tax Case (Appeal) No. 318 of 2004

Commissioner of Income Tax

APPELLANT

Vs

Smt. Valli Muthiah

RESPONDENT

Date of Decision : 13-07-2004

Acts Referred:

Income Tax Act, 1961 — Section 4, 5

Citation : (2004) 07 MAD CK 0028

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

Bench : Division Bench

Advocate : J. Narayanaswamy, for the Appellant;

Final Decision : Dismissed

Judgement

P.D. Dinakaran, J.—Heard. The appeal is preferred against the order of the Income Tax Appellate Tribunal Madras Bench ""B"" dated

24.7.2003 in I.T.A.1790/95. The following substantial question of law is raised for consideration:-

Whether on the facts and circumstances of the case, the Income Tax Tribunal was right in holding that the long term capital gains arisen out of sale

of properties in Malaysia cannot be taxed in India?

2.1. In brief, the assessee, an individual filed a return of income for the assessment year 1992-93 admitting total income of Rs. 1,48,870/- and

agricultural income of Rs. 28,540/-. The assessing officer reassessed the income u/s 143(1)(a) accepting the total income admitted by the

assessee. But the assessee did not disclose the foreign income of Rs. 31,58,845/- in view of double taxation agreement between India and

Malaysia.

2.2. Aggrieved by the assessment order, the assessee filed an appeal before the Commissioner of Income Tax (Appeals). The Commissioner of

income Tax (Appeals) allowed the issue in favour of the assessee by following the decision of the Madras High Court reported in Commissioner of

Income Tax Vs. Vr. S.R.M. Firm and others,

2.3. Aggrieved by the order of the Commissioner of Income Tax Appeals, the revenue filed further appeal before the Income Tax Appellate

Tribunal, and the Tribunal held following the decision of this Court in the case of SRM firm Commissioner of Income Tax Vs. Vr. S.R.M. Firm and

others, the income from Malaysia cannot be taxed in India and dismissed the appeal. Hence, the present appeal by the Revenue.

3. The issue that arises for consideration in this appeal is whether the long term capital gains arisen out of sale of properties in Malaysia cannot be taxed in India?

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. The substantial question of law raised by the appellant is therefore liable to be answered

against the revenue and accordingly the appeal stands dismissed.