

(1996) 03 KL CK 0048

In the High Court Of Kerala

Case No : Income-tax Reference No. 111 of 1991

Commissioner of Income Tax

APPELLANT

Vs

V.K. Vasudevan Pillai

RESPONDENT

Date of Decision : 11-03-1996

Acts Referred:

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

Citation : (1996) 222 ITR 693

Hon'ble Judges : V.V. Kamat, J;G. Sivarajan, J

Bench : Division Bench

Advocate : P.K.R. Menon and N.R.K. Nair, for the Appellant; P.G.K. Warriyar and K.K. Ravindranath, for the Respondent

Judgement

V.V. Kamat, J.—With regard to the assessment year 1984-85, we are called upon to answer the following question :

"Whether, on the facts and in the circumstances of the case,--

(i) the pension received by the assessee from the Government of Malaysia was not taxable in India ?

(ii) the Tribunal is right in law and fact in relying on the notification dated April 1, 1977, and whether it has got any relevance and application ?"

2. The settled fact-findings would show that the assessee is a resident but not ordinarily resident in India. He is a pensioner of the Government of Malaysia and on retirement settled permanently in India.

3. In the assessment order, Article 18(3) of the agreement between the two Governments is considered. It is as follows [1977] 107 ITR 36:

"Any pension paid by the Government of one of the contracting States to any individual may be taxed in that contracting State."

4. The officer has seen the difference between the use of word "may" and

"shall", to hold that the pension paid by one of the contracting States may be taxed not only in the country of residence as per the basic law of that State but in the country of sources also.

5. The first appellate authority (Appellate Assistant Commissioner of Income Tax, Trivandrum) dealt with the basic undisputed proposition that pension accruing abroad is taxable in India only if it is earned in India. On facts the appellate authority observed that pension received in India from abroad by pensioners residing in this country for past services rendered in the foreign country cannot be charged to tax in India on receipt basis. In the context, on facts, what was taken into consideration was that for earlier years 1982-83 and 1983-84 the position was accepted.

6. Apart therefrom the appellate authority, on evidence, found that the pension is first credited in the United Asia Bank, Bernad, Malaysia, and thereafter remitted to India to the pensioner in payment of the pension through the United Commercial Bank. On the basis of this factual position, the appellate authority observed that the pension can be deemed to have been received abroad in the first instance. Accordingly, it is held that the amount should be exempted from Indian tax.

7. The Tribunal as the second appellate authority (income tax Appellate Tribunal, Cochin Bench) has reinforced this factual position in paragraph 4 of its order. It is observed that the question as to whether the pension received by the assessee from abroad was taxable in India came up for decision before it in I.T.A. Nos. 550 and 551 for the assessment years 1979-80 and 1980-81 in the case of one assessee, named, Shri N. Kochukrishna Pillai, to hold that it was not taxable. The Appellate Bench chose to follow the said decision on the observation that the pension received from the Malaysian Government by the assessee was not taxable.

8. Clearly in view of this factual position and the application of Article 18(3) of the agreement no other view is possible. Learned counsel sought to place reliance on the decision of the Madras High Court in B.R. Sundaram (Decd.) (by Lrs.) Vs. Commissioner of Income Tax, . At the outset the decision would not be applicable to the factual situation specified above and apart therefrom the facts are different because we find that the pension was paid by the Accountant-General, Madras, in Indian currency in pursuance of a block arrangement entered into between the Government of India and the Government of Malaysia as a result of which the Government of India is credited with dollars by the Malaysian Government. The decision before us is entirely different. However, in yet another decision of the same court in Commissioner of Income Tax Vs. A.P. Kalyanakrishnan, the position becomes abundantly clear. The matter also relates to an assessee who is a resident but not ordinarily resident in India and also a pensioner receiving pension from the Malaysian Government. It is held that the pension is received in Malaya by the assessee who is a resident but not ordinarily resident in India and his pension is assessed in Malaya. It is held that it is not

assessable in India in view of the provisions of Section 5(1)(a) of the Income Tax Act, 1961. It is observed that u/s 5(1)(a) of the Income Tax Act, the first occasion when the assessee gets the money by way of pension under his control is required to be pinpointed. If it is found that the amount of pension in the first instance has already been treated as income in Malaya and received as such as far as the assessee is concerned then it is not taxable in India. Apart therefrom Article 18(3) of the agreement in question reproduced ad verbatim hereinbefore emphasises the same aspect. Additionally, apart from the provisions of Section 5(1)(a), the provisions of Section 5(1)(c) relating to income and sources in regard thereto would clearly show, on the basis of the proviso thereto that any income accruing or arising to the assessee outside India during the year in question is not to be included unless it is derived from a business controlled in or a profession set up in India.

9. Be that as it may. In view of the above reasons, we answer the question in the affirmative, against the Revenue, and in favour of the assessee.

10. A copy of the judgment under the seal of this court and the signature of the Registrar shall be sent to the Income Tax Appellate Tribunal, Cochin Bench, for passing consequential orders.