Karnataka High Court Commissioner Of Income-Tax vs R.M. Muthaiah on 11 December, 1992 Equivalent citations: 1993 202 ITR 508 KAR, 1993 202 ITR 508 Karn Author: K S Bhat Bench: K S Bhat, R Ramakrishna JUDGMENT K. Shivashankar Bhat, J. 1. In respect of the assessment year 1982-83, the following question has been referred under section 256(1) of the Income-tax Act, 1961 ("the Act" for short) : "Whether, on the facts and in the circumstances of the case, the appellate Tribunal is right in law in upholding the orders of the Commissioner of Income-tax (Appeals) who held that the income of Rs. 1,99,970 arising in Malaysia was not liable to be included in the total income of the assessee for the assessment year 1982-83 ?" 2. The assessee is an individual and resident in India. During the previous year relevant to the assessment year 1982-83, which is now under consideration, the assessee had earned income in Malaysia and had claimed it as exempt from tax in India in view of the Double Taxation Avoidance agreement between India and Malaysia. The Income-tax Officer did not accept the contention of the assessee; he included the income earned by the assessee in Malaysia in the total income of the assessee and stated that credit would be given after the assessee had paid tax on this income in Malaysia. The assessee appealed before the Commissioner of Income-tax (Appeals). The Commissioner of Income-tax (Appeals), following the decision of the Special Bench of the Tribunal, Madras, in the case of Kulandayan Chettiar (3 ITD 426), held that the income earned in Malaysia was exempt from tax in India by virtue of the double taxation avoidance agreement. The Department felt aggrieved by the decision of the commissioner of Income-tax (Appeals) and came up in appeal before the Tribunal. The Tribunal, following the above-stated decision of the Special Bench of the Tribunal, upheld the order of the Commissioner of Income-tax (Appeals). 3. Mr. Raghavendra Rao, learned counsel for the Revenue, referred to sections 4 and 5 of the Income-tax Act, 1961, and contended that the assessee being a resident in India, his income from whatever source is liable to be taxed under the said Act. As per the agreement entered into between the Government of India and the Government of Malaysia "for the avoidance of double taxation and prevention of fiscal evasion with respect to taxes", (referred to hereinafter as "the agreement"), income received from the immovable properties situated in Malaysia could be taxed by the said country and the position is the same with regard to the business profits and other income of the assessee in the instant case (like dividend income). 4. The combined effect of sections 4 and 5 of the Income-tax Act and the aforesaid agreement is vesting of powers in the two Governments to levy the tax on such income; therefore, according to learned counsel, article 22 of the agreement would operate, Clause 2(a) of the said article, which is relevant, reads thus : "The amount of Malaysian tax payable under the laws of Malaysia, and in accordance with the provisions of this agreement, whether directly or by deduction, by a resident of India, in respect of income from sources within Malaysia, which has been subjected to tax both in India and Malaysia, shall be allowed as a credit against the Indian tax payable in respect of such income but in an amount not exceeding that proportion of Indian tax which such income bears to the entire income chargeable to Indian tax". 5. Therefore, the assessee can claim the benefit of the avoidance of double taxation only by proving that he has paid tax in respect of the income in question in Malaysia. 6. It is true that, under sections 4 and 5, the global income of an assessee could be brought under the net of taxation, but the question is whether the agreement in question entered into between the Government of India and the Government of Malaysia takes away the power of the Indian Government to levy a tax in respect of the income received from various sources referred to in the said agreement. Learned counsel for the Revenue referred to article 2 under Chapter I of the said agreement which refers to Income-tax as one of the taxes covered by the agreements. 7. Mr. Ramabhadran, learned counsel for the assessee, pointed out that the effect of clause 1 of article 6 is to take away the jurisdiction or power of the Indian Government to levy any tax on the income from immovable property situated in Malaysia. Similar is the provision governing the business profits under article 7 and dividends under article 11. 8. Clause 1 of article 6 reads thus : "Income from immovable property may be taxed in the Contracting State in which such property is situated." 9. In the instant case, the result of this clause is that the income from immovable property in Malaysia may be taxed by the Government of Malaysia. According to learned counsel for the Revenue, by virtue of this clause read with section 5, it is clear that both the Government of India as well as the Government of Malaysia could levy tax on such an income, and if so, clause 2(a) of article 22 would govern the assessee's case and that the assessee should establish that he has, or had paid tax at Malaysia, before claiming any credit or exemption in India. 10. When a power is specifically recognised as vesting in one, exercise of such a power by others is to be read as not available; such a recognition of power with the Malaysian Government would take away the said power from the Indian Government; the agreement thus operates as a bar on the power of the Indian Government in the instant case. This bar would operate on sections 4 and 5 of the Income-tax Act, 1961, also. Clause 2 of article 22 is attracted only when tax is levied by both countries. In a case where one of the Governments is precluded from levying a tax on the income in view of the specific provision in the agreement, the said clause 2 cannot be attracted at all. The very language of clause 2 indicates that the tax shall have to be paid under the law of both the countries. The words in clause 2(a) to the effect "in respect of income from sources within Malaysia, which has to be subjected to tax both in India and Malaysia. . . " clearly indicates that there should be a levy by both the countries before the said clause could be attracted. 11. Section 90(a) of the Income-tax Act also refers to the granting of relief in respect of income on which Income-tax has been paid both under the said Act and under the Income-tax Act of the other country. Similarly, clause (b) also refers to the avoidance of double taxation. We are not concerned with the other clauses of section 90 in the instant case. In other words, the parties to an agreement to avoid double taxation is to grant relief to the assessee in case the law of two countries operates on the same income and the assessee may have to pay tax in both countries. The Revenue's contention in the instant case is entirely based on sections 4 and 5. But these provisions shall have to be read subject to the provisions of the agreement in question. The agreement in question, by necessary implication, takes away the power of the Indian Government to levy tax on the income in respect of certain categories as per articles 6, 7, 8, 9, 10, 11, etc., of the agreement. In case the income from a source is not covered by any of the provisions of the agreement, then the provisions of sections 4 and 5 of the Income-tax Act would operate on the said income and the tax certainly could be levied by the Indian Government. In such an event to claim the benefit against double taxation, clause 2 of article 22 of the agreement shall have to be satisfied. 12. The effect of an "agreement" entered into by virtue of section 90 of the Act would be : (i) if no tax liability is imposed under this Act, the question of resorting to the agreement would not arise. No provision of the agreement can possibly fasten a tax liability where the liability is not imposed by this Act; (ii) if a tax liability is imposed by this Act, the agreement may be resorted to for negativing or reducing it; (iii) in case of difference between the provisions of the Act and of the agreement, the provisions of the agreement prevail over the provisions of this Act and can be enforced by the appellate authorities and the court. To the same effect is the circular issued by the Central Board of Direct Taxes as per Circular No. 333, dated April 2, 1982 (see [1982] 137 ITR (St.) 1). Which reads thus : "It has come to the notice of the Board that sometimes effect to the provisions of double taxation avoidance agreement is not given by the assessing officers when they find that the provisions of the agreement are not in conformity with the provisions of the Income-tax Act, 1961. 2. The correct legal position is that where a specific provision is made in the double taxation avoidance agreement, that provision will prevail over the general provisions contained in the Income-tax Act, 1961. In fact the Double Taxation Avoidance Agreements which have been entered into by the Central Government under section 90 of the Income-tax Act, 1961, also provide that the laws in force in either country will continue to govern the assessment and taxation of income in the respective country except where provisions to the contrary have been made in the Agreement. 3. Thus, where the Double Taxation Avoidance Agreement provides for a particular mode of computation of income, the same should be followed, irrespective of the provisions in the Income-tax Act. Where there is no specific provision in the agreement, it is the basic law, i.e., the Income-tax Act, that will govern the taxation of income." 13. In view of the above, the question is answered in the affirmative and against the Revenue. 14. Reference is answered accordingly.