(1989) 05 BOM CK 0001

Bombay High Court

Case No: IT APPEAL NO. 1996 (BOM.) OF 1984

SIXTEENTH Income Tax OFFICER	APPELLANT
Vs	
M. A. CHANDY.	RESPONDENT

Date of Decision: May 31, 1989

Acts Referred:

- Income Tax Act, 1961 - Section 80RRA, 91

Citation: (1990) 32 ITD 388

Hon'ble Judges: Shri. B. M. Kothari, A.M.; B. M. Kothari, A.M.

Bench: Division Bench

Judgement

@JUDGMENTTAG-ORDER

Per Shri. B. M. Kothari, Accountant Member - The Revenue has filed this appeal against the order passed by the C. I. T. (Appeals) for A. Y. 1981-82 raising the following grounds of appeal :-

"On the facts and in the circumstances of the case, the learned CIT (A) erred in holding that the assessee is entitled to get credit, on the entire amount of tax deducted at source by the Nigerian company from the foreign income of the assessee even through only 50% of the foreign income is taxed in India the assessee has been subjected to Indian Income Tax after granting relief u/s 80RRA of the I. T. Act.

Without prejudice to the above, the learned CIT (A) erred in overlooking the fact that D. I. T. relief has to be restricted to the tax paid in both countries on the doubly taxed income and that where only 50% of the foreign income is taxed in India the assessee cannot be held to have been doubly taxed on the whole foreign income and he cannot be given credit for the whole tax paid abroad."

2. The brief facts relating to the aforesaid grounds of appeal are as under :-

2.1 The assessee was employed for a part of the year by M/s. Hindustan Lever Ltd. in India and for the remaining part of the year, he was employed by M/s. Lever Bros., Nigeria. The status of the appellant was admittedly resident for the year under appeal.

2.2 The total income of the assessee was computed by the I. T. O. as under :-

I. Salary

1. Hindustan Lever Ltd., Bombay	Rs. 12,811
2. Lever Brothers, Nigeria Ltd.	Rs. 2,53,281
	Rs. 2,66,092
Less: Std. deduction	Rs. 3,500
	Rs. 2,62,592

II. Income from other sources

1. Dividends	Rs. 1,018
2. Bank interest	Rs. 1,332
3. Int. on F.D.	Rs. 2,462
4. Int. on refund of C.D.S.	Rs. 1,000
	Rs. 5,812

	Rs. 2,68,404
Less: Deductions:	
U/s. 80-C	Rs. 2,167
U/s. 80-L	Rs. 3,000
U/s. 80RRA	Rs. 1,26,641
	Rs. 1,31,808
Taxable Income:	Rs. 1,36,596
Rounded off to	Rs. 1,36,600

The assessee claimed credit for full tax deducted at source by the foreign employer against the tax payable by him with reference to his income chargeable to tax under the provisions of the Income Tax Act, 1961. The I. T. O., however, allowed credit only with regard to 50% of the tax deducted by the Nigerian company, as the I. T. O. was of the view that since only 50% of the foreign salary income had been brought to tax and remaining 50% was deducted from taxable income as per section 80RRA of the Income Tax Act, 1961, hence credit of only 50% of the tax paid abroad could be allowed to the assessee as per section 91 of the Income Tax Act, 1961.

2.3 The C. I. T. (Appeals) observed that since the entire amount of salary received from foreign employer was included under the head Income from salary and formed part of the total income, the mere fact that deduction under Chapter VI-A allowed at 50% of such foreign salary income u/s 80RRA would not mean that the entire amount of foreign salary income was not "doubly taxed income". He further observed that section 91 of the Income Tax Act was prevalent in the statute prior to the deductions as were provided in section 80RRA of the Income Tax Act, 1961 forms part of the relief as is available to the assessee under the aforesaid provisions of the Act contained in Chapter VI-A of the statute. He was, therefore, of the opinion that it

would be more logical to presume that what is contemplated in section 80RRA is in addition to the relief as will be allowed vide section 91 of the Income Tax Act, 1961. In view of these reasons, the C. I. T. (Appeals) had held that credit for entire amount of tax deducted at source from foreign salary income must be allowed as a deduction from the tax payable under the provisions of the Income Tax Act, 1961 in consonance with spirit and intentions indicated by the language of section 91 and 80RRA.

3. The learned Sr. Departmental Representative argued that section 91 of the Income Tax Act grants relief from double taxation only in respect of "doubly taxed income". Since 50% of the salary income received from foreign employer has been allowed as deduction while computing the taxable income as per section 80RRA, only the remaining 50% of such salary income received from foreign employer can be said to have been doubly taxed and the assessee was, therefore, entitled to credit of only 50% of tax deducted at source from such salary income received from foreign employer. He, therefore, submitted that the order passed by the C. I. T. (Appeals) deserved to be set aside and the order passed by the assessing authority should be restored. It was also pointed out that the aforesaid contention of the Revenue is full supported by the judgments of the Honble Andhra Pradesh High Court and Rajasthan High Court in the following judgments :-

(i) CIT v. C. S. Murthy [1988] 169 ITR 686 : 37 Taxman 185 (AP).

(ii) CIT v. Dr. R. N. Jhangi [1988] 40 Taxman 428 (Raj.)

4. The learned authorised representative for the assessee was fair enough to agree that the above referred judgments of Honble Andhra Pradesh High Court and Rajasthan High Court are clearly against the assessee. He further contended that the judgments of Honble Andhra Pradesh High Court and Rajasthan High Court in the above referred cases have not laid down the correct law relating to interpretation of section 91 of the Income Tax Act, 1961. He further supported the order passed by the learned C. I. T. (Appeals) and also relied upon the judgment of Honble Supreme Court in the case of K.V.A.L.M. Ramanathan Chettiar by Lrs. Vs. Commissioner of Income Tax , Madras, . He invited our attention particularly at pages 189 and 191 of the aforesaid judgment delivered by the Honble Supreme Court. The question relating to interpretation of section 49D of the Indian Income Tax Act, 1922, which was contended to be pari materia with section 91 of the I. T. Act, 1961, was involved in the aforesaid judgment of the Honble Supreme Court. It will be worthwhile to reproduce the head-note appearing at pages 169 & 170 of the said judgment :

"Once it is recognized that section 49D does not make the basis of relief the tax paid on the income from the same head or source, then the relief to which an assessee would be entitled would be amount of tax paid on the foreign income which by its inclusion in the total income once again bears tax under the Act. The word such in

the phrase such doubly taxed income has reference to the foreign income which is again being subjected to tax by its inclusion in the computation of the income under the Act and not the same income under an identical head of income under the Act. The income from each head under sec. 6 is not under the Act subjected to tax separately, unless the Legislature has used words to indicate a comparison of similar incomes, but it is the total income which is computed and assessed as such, in respect of which tax relief is given for the inclusion of the foreign income on which tax had been paid according to the law in force in that country. To decide whether the assessee is entitled to double taxation relief in respect of any income, the consideration that the income has been derived under a particular head would not have much relevance. There is nothing in the language of section 49D which either expressly or by necessary implication restricts the grant of double taxation relief to income under the same head.

The scheme of the Act is that although income is classified under different heads and the income under each head is separately computed in accordance with the provisions dealing with that particular head of income, the income which is the subject matter of tax under the Act is one income which is the total income. The Income Tax is only one tax levied on the aggregate of the income classified and chargeable under the different heads; it is not a collection of distinct taxes levied separately on each head of income. In other words, assessment to Income Tax is one whole and not a group of assessments for different heads or items of incomes."

The learned authorised representative further repeated the same arguments which were submitted before the C. I. T. (Appeals). He further contended that the C. I. T. (Appeals) had rightly accepted the assessees contention that credit of full amount of tax deducted from salary paid by foreign employer should be deducted from tax payable in India as per the provisions of section 91 regardless of the fact that 50% of such foreign salary income has been deducted as per section 80RRA from the gross total income computed as per the provisions of the Income Tax Act, 1961.

5. We have carefully considered the rival submissions made by both the sides. The point involved in the aforesaid appeal raises an interesting question of law. It will be worthwhile to reproduce the relevant provisions of section 91 in order to properly examine and decide the question involved in this appeal :

"91(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 of 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.

Explanation : In this section -

(i) the expression "Indian income tax" means Income Tax charged in accordance with the provisions of this Act;

(ii) the expression "Indian rate of tax" means the rate determined by dividing the amount of Indian Income Tax after deduction of any relief due under the provisions of this Act but before deduction of any relief due under this Chapter, by the total income;

(iii) the expression "rate of tax of the said country" means Income Tax and super-tax actually paid in the said country in accordance with the corresponding laws in force in the said country after deduction of all relief due but before deduction of any relief due in the said country in respect of double taxation, divided by the whole amount of the income as assessed in the said country;"

5.1 Sec. 2(45) defines total income as under :-

"total income" means the total amount of income referred to in section 5, computed in the manner laid down in this Act.

5.2 Section 5 explains the scope of total income as under :-

5(1) Subject to the provisions of this Act, the total income of any previous year of a person who is a resident includes all income from whatever source derives which -

(a) is received or is deemed to be received in India in such year by or on behalf of such person; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year; or

(c) accrues or arises to him outside India during such year....

5.3 Chapter IV dealing with computation of total income defines the various heads of income :-

Section 14. Save as otherwise provided by this Act, all income shall, for the purposes of charge of Income Tax and computation of total income, be classified under the following heads of income-

A - Salaries B - Interest on securities C - Income from house property D - Profits and gains of business or profession E - Capital gains F - Income from other sources.

5.4 Section 80B (5) defines gross total income as under :-

"gross total income" means the total income computed in accordance with the provisions of this Act, before making any deduction under this Chapter.

5.5 Section 80RRA provides deduction in respect of remuneration received for services rendered outside India :

(1) Where the gross total income of an individual who is citizen of India includes any remuneration received by him in foreign currency from any employer (being a foreign employer or an Indian concern) for any service rendered by him outside India, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the individual, a deduction from such remuneration.

5.6 It will also be relevant to reproduce section 49D of the Indian Income Tax Act, 1922 which is claimed to be pari materia with present section 91 of the Income Tax Act, 1961 :

"49D. Relief in respect of incomes accruing outside the taxable territories - (1) If any person who is resident in the taxable territories in any year proves that, in respect of his income which accrues or arises during that year without the taxable territories (and which is not deemed to accrue or arise in the taxable territories), he has paid in any country, with which there is no reciprocal arrangement for relief or avoidance of doubt 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....

Explanation : In this section....

(iii) the expression rate of tax of the said country means Income Tax and super-tax actually paid in the said country in accordance with the corresponding laws of the said country after deduction of all reliefs due, but before deduction of any relief due in the said country in respect of double taxation, divided by the whole amount of the income assessed in the said country."

5.7 Section 91 makes provision for grant of unilateral relief by the Govt. of India in respect of incomes which had suffered taxes both in India and in the country with which there is no agreement for double taxation relief for avoidance of double taxation. The expression "such doubly taxed income" has reference to the foreign income which is again being subjected to tax by its inclusion in computation of income under the Indian law. In other words, the expression "such doubly taxed income" has reference to the tax which the foreign income bears once again the burden of the Indian Income Tax Act by its being included in the total income chargeable u/s 4. The submission made by the learned authorised representative for the assessee that since such foreign salary income has been included in the total income computed as per the provisions of the Income Tax Act, 1961, the entire foreign salary income is covered by the expression "such doubly taxed income used in section 91." The C. I. T. (Appeals) has also referred section 2(45) which defines total income means the total income referred to in section 5, computed in the manner laid down in this Act. Section 5 provides that in the case of a resident-assessee, the total income received or deemed to be received, accrued or

deemed to be accrued will be covered by the scope of total income for the purposes of levy of tax under the charging section 4 of the Income Tax Act. Section 14 containing provisions relating to computation of total income provides that all incomes shown for the purposes of charge of Income Tax and computation of total income be classified under the various heads of income prescribed in section 14. Thus, the entire amount of foreign salary income is chargeable to tax as per section 5 in the case of the appellant who was admittedly a resident-assessee during the year under consideration. The entire foreign salary income is subjected to charge of Income Tax and formed part of computation of total income under the head Income from salaries as prescribed u/s 14 of the Income Tax Act, 1961. The entire amount of such foreign salary income has been charged to tax and is part of computation of total income as per the relevant provisions for computation of salary income contained in sections 15 to 17 of the Income Tax Act, 1961. There is no denial of the fact that the entire foreign salary income forms part of the total income computed as per the provisions of the Income Tax Act, 1961. The only question which requires serious consideration is that whether the deductions allowable under Chapter VI-A in section 80RRA providing for deduction of 50% of such foreign salary income can be termed as "doubly taxed income" for the purposes of section 91 of the Income Tax Act, 1961.

5.8 It may be worthwhile to refer few other judgments of Honble High Court and Supreme Court relating to interpretation of old section 49D of the Indian Income Tax Act, 1922 :

(i) Commissioner of Income Tax, West Bengal Vs. Clive Insurance Co. Ltd., . The head-note is reproduced hereunder :-

"Held, affirming the decision of the High Court, (i) that, according to the law of the U. K., dividends which had borne tax in the hands of paying company were treated as franked income in the hands of the shareholder and that meant that the income in the form of dividends had been subjected to tax. It was immaterial whether they were taxed in the hands of the shareholder or not but they were deemed to be taxed in the hands of the shareholder in the U. K.

(ii) That the expression "income assessed in the foreign country" in paragraph (iii) of the Explanation to section 49D, in the context in which it was used, meant subjected to tax in the foreign country; and in this case there was no difficulty in ascertaining the rate of tax of the foreign country for the purpose of paragraph (iii) of the Explanation because the respondent being a company was neither liable to any surtax nor entitled to any relief in the U. K. and, therefore, the rate of tax could be worked out with certainty consistent with tax at the standard rate and that was the rate of tax of the foreign country for the purpose of paragraph (iii) of the Explanation.

(iii) That, therefore, the respondent could be said to have paid Income Tax in the U. K., by deduction or otherwise, in respect of the net dividend of Rs. 15,266 so as to be eligible for the relief contemplated by section 49D."

It will also be worthwhile to reproduce the head-note of the judgment of Honble Bombay High Court in the case of Commissioner of Income Tax Vs. Tata Sons Private Ltd., . The head-note is reproduced hereunder :-

"Where dividend income had accrued in the non-taxable territories and the assessee had paid in those countries Income Tax by deduction or otherwise in respect of that dividend income, and there was no reciprocal arrangement for relief or avoidance of double taxation with those countries, the assessee was entitled to relief u/s 49D of the Indian Income Tax Act, 1922, in accordance with the scheme of that section."

5.9 The question for consideration is whether the various deductions provided in Chapter VI-A, which are meant for fulfilment of the desired national objectives, would alter the true nature of income liable to tax under the provisions of the Income Tax Act, 1961 as an income which is not liable to tax merely because of grant of such deductions under Chapter VI-A. Chapter VI-A provides for various types of deductions in respect of life insurance premium contribution, provident fund u/s 80C, deduction in investments in certain new shares u/s 80CC and deduction in respect of deposits under National Saving Scheme u/s 80CC (A) etc. Suppose an assessee deriving salary income of Rs. 2,62,000 in India, deposits Rs. 40,000 in Life Insurance Premiums, G. P. F., P. P. F. etc., deposits Rs. 30,000 in National Saving Scheme will be eligible to deduction of Rs. 20,200 u/s 80C and Rs. 30,000 u/s 80CC (A). Can it be said that his entire salary income of Rs. 2,62,000 has not been taxed in India and or can it be validly said that only a sum of Rs. 2,11,800 has been taxed out of the salary income of the assessee. In order to appreciate the true nature of deductions allowed under Chapter VI-A as distinguished with income not liable to tax under the provisions of the I. T. Act, 1961, it may be worthwhile to make a useful reference to the following decision of the Honble Bombay High Court :
Commissioner of Income Tax, Bombay City III Vs. Century Spg. and Mfg. Co. Ltd., .

The aforesaid judgment involved the question relating to interpretation of items of income not includible in its total income in Rule 4 of Schedule II of the Companies (Profits) Surtax Act, 1964. At page 18 of the aforesaid judgment, the Honble Bombay High Court has held as under :-

"In respect of the Income Tax assessment, relief was obtained by the assessee-company u/s 84 contained in Chapter VII of the Income Tax Act, 1961, to the extent of Rs. 24,63,318 and decision of the question referred depends upon the interpretation of rule 4 of the Second Schedule to the Act. The provisions of rule 4 are as under :

"4. Where a part of the income, profits and gains of a company is not includible in its total income as computed under the Income Tax Act, its capital shall be the sum ascertained in accordance with rules 1, 2 and 3, diminished by an amount which bears to that sum the same proportion as the amount of its income, profits and gains."

The provisions of rule 4 will be attracted only if a part of the income, profits and gains of a company is includible in its total income. The assessee-company had obtained relief u/s 84 as stated above, in relation to income of newly established industrial undertakings or hotels. Chapter VII is headed "Incomes forming part of total income on which no Income Tax is payable", while Chapter III is headed "Incomes which do not form part of total income". There is material difference between the topics dealt with in Chapter III and those dealt with in Chapter VII, Chapter III only deals with such items of income which do not form part of the total income while Chapter VII on the other hand deals with items of income which form part of total income on which no Income Tax is payable. Section 84 which appears under Chapter VII deals with items of income which forming part of total income on which no tax is payable. Simply because under the provisions of the said Chapter no tax is payable on a particular item of income forming part of total income it cannot be said that such an item will not be includible in the total income. Rule 4 only applies when a part of the income is not includible in total income under the Income Tax Act. If a part of the income was includible in the total income under the Income Tax Act then the provisions of rule 4 will not be attracted. Rule 4 will only apply in respect of items of income which are referred to in Chapter III, but rule 4 will not include any item of income which is included in Chapter VII which deals with incomes forming part of total income on which no Income Tax is payable. At the relevant time as section 84 was in operation, the relief as provided by that section was granted to the assessee-company, but merely by reason of such relief being granted it is not possible to take the view that the provisions of rule 4 are attracted. Notwithstanding the fact that relief is granted u/s 84 it is not possible to say that such income was not includible in the total income."

6. The deduction provided u/s 80RRA for meeting the hardships faced by Indian citizens who are employed abroad for meeting increased cost of living and also for fulfilment of the national objectives of earning more foreign exchange for the country was inserted much after the existing provisions of section 91 of the Income Tax Act, 1961 and perhaps they may have provided further relief to the salaried employees who accepts foreign assignments. In view of the aforesaid discussions, we cannot straightaway say that the arguments advanced by the learned authorised representative of the assessee are without any force.

7. However, the judgments of Honble Andhra Pradesh High Court and Rajasthan High Court relied upon by the learned departmental representative clearly supports his contention that the CIT (Appeals) ought to have allowed credit only to the extent

of tax on 50% of the foreign salary income deducted at source by the foreign employer, as only 50% of such foreign salary income has been subjected to double taxation.

7.1 It will be worthwhile to reproduce the relevant extracts from the aforesaid two judgments of Honble Andhra Pradesh High Court and Rajasthan High Court.

C. S. Murthys case (supra) :

"Held, that the expression such in section 91 referred to the income which arose or accrued outside India during the previous year and the expression doubly taxed income referred to the foreign income taxed under the Indian law. By merely including the foreign income in the total income, it could not be said that the foreign income was subjected to tax in India. The criteria are that only the foreign income must be included in the total income in the assessment made under the Income Tax Act in India, but it should also be subjected to tax in India. Although in the gross total income of the assessee, the remuneration of Rs. 64,470 was included because of section 5(1) (c), the income that was really subjected to tax was only one half of it, the remaining one half being allowed as a deduction u/s 80RRA. The doubly taxed income was not the gross income of Rs. 64,470 but only Rs. 32,235 and it was only on the latter amount that the assessee could claim relief u/s 91. Therefore, the ITO was right in restricting the relief to only one half of the foreign income which accrued or arose to the assessee in India."

Dr. R. N. Jhangis case (supra) :

"Section 80RRA says that in computing the total income of the individual as deduction equal to 50 per cent of the foreign income shall be given. Thus, the total income computed under the Act includes only 50 per cent of the foreign income by virtue of the deduction granted u/s 80RRA. Section 91(1) provides for relief from double taxation on that amount included in the income which has already been taxed in the foreign country. The provision for relief from double taxation is that deduction would be given from the Indian Income Tax payable by the individual of a sum calculated on such doubly taxed income at the rate of tax specified. This means that after ascertaining the total Indian Income Tax payable on the total income determined under the provisions of the Act giving deduction u/s 80RRA and all benefits permitted by other provisions, a deduction would be made therefrom of tax calculated at the specified rate on such doubly taxed income on which tax has already been paid in the foreign country. Thus, that part of the foreign income on which deduction is given u/s 80RRA in computing the total income of the individual for the purpose of determining the Indian Income Tax payable, cannot be said to be taxed once again in India in order to qualify for the relief from double taxation. If the assessees contention was accepted, then the assessee would be given relief not only in respect of the amount which had been taxed twice but also in respect of the amount which had been taxed once only in the foreign country and not also in India

on account of the deduction given under setion 80RRA while computing the total income of the individual. It was obvious that section 91(1) was not to be construed in isolation but in the company of section 80RRA since the two were a part of the same scheme."

8. Since the aforesaid two judgments of Honble Andhra Pradesh High Court and Rajasthan High Court are the only judgments brought to our notice on interpretation of similar matter involved in the present appeal, we respectfully follow the view taken by the Honble Andhra Pradesh High Court and Rajasthan High Court in favour of the Revenue, in view of judgment of Honble Bombay High Court in the case of Commissioner of Income Tax Vidarbha Vs. Godavaridevi Saraf, holding that the ITAT acting anywhere in the country has to respect the law laid down by the High Court, though of a different State, so long as there is no contrary decision of any other High Court on that question.

9. In the result, the appeal filed by the department is allowed.