

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.06.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE D.KRISHNA KUMAR

T.C.A.Nos.387 and 388 of 2016
C.M.P.No.8590 of 2016

The Commissioner of Income Tax,
Circle II, Madurai. ..Appellant/Respondent in both appeals

versus

M/s.M.R.M.Plantations Pvt. Ltd.,
No.40, MRM Arcade,
Amman Sannati Street,
Karaikudi. ..Respondent/Respondent in both appeals

Tax Case Appeals filed under Section 260A of the Income Tax Act, 1961, against the orders made in I.T.A.No.2946 & 2947/Mds/2014, dated 09.10.2015 on the file of the Income Tax Appellate Tribunal, "D"Bench, Chennai against the order passed by the commissioner of Income Tax (Appeals-I) Madurai dt.25.9.14 in ITA.No.0105/13-14 and 0104/13-14 for the assessment year 2006-07 and 2005-06 against the order passed by the Deputy Commissioner of Income Tax Circle-II, Madurai dt.30.3.2013 in PAN/GIR No.AACM9058R for the assessment year 2006-07 and 2005-06 respectively.

For Appellant in both appeals :Mr.M.Swaminathan

COMMON ORDER

(Common Order of this Court was made by S.MANIKUMAR, J.)

Tax Case Appeals arise out of a common order in I.T.A.No.2946 & 2947/Mds/2014, dated 09.10.2015, passed by the Income Tax Appellate Tribunal, 'D' Bench, Chennai, in respect of the assessment years 2005-06 and 2006-07 respectively.

2. Facts deduced from the material on record are that the assessee filed its return of income for the assessment year 2005-06 on 29.10.2005 declaring a total income Rs.9,15,250/-. For the assessment year 2006-07, the assessee filed its return of income 29.10.2005, declaring a total income of Rs.13,77,120/-. Both the returns were processed under Section 143(1) of the Income-Tax Act. Alleging that the income chargeable to tax has escaped assessment, notices have been issued under Section 148.

3. According to the appellant, the assessee has deliberately kept away the income of Malaysian Plantation from Indian Taxation Laws, when the company affairs are controlled in India. Regarding Taxation of Malaysian Income from India, the assessee has raised two facts for consideration, viz., (a) Income from Penang branch of Malaysian Plantation is income derived from plantation in Malaysia and immovable property at Malaysia, and (b) As per article 5(g) of the Double Taxation Avoidance Agreement (In short, "DTAA"), the term "permanent establishment" shall be deemed to include Farm or Plantation.

4. Referring to Article V(3)(e) of the existing DTAA between India and Malaysia, the appellant has contended that the plantation income from Malaysia is taxable in India and accordingly, for the assessment year 2005-06, a sum of Rs.56,60,224/- has been included in the total income of the assessee and for the assessment year 2006-07, a sum of Rs.55,92,897/- has been included in the total income. For both the assessment years, the assessment was completed on 30.03.2013, under Section 143(3) r/w. 147 of the Income-Tax Act.

5. Being aggrieved by the assessment orders, dated 30.03.2013, for both the assessment year 2005-06 and 2006-07, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals) in ITA Nos.104 & 105/2013-14 respectively. The Commissioner of Income-Tax (Appeals), by his common order, dated 25.9.2014, allowed the appeals in favour of the assessee. Being aggrieved by the same, the department preferred an appeal before the Income Tax Appellate Tribunal in ITA No.2946 and 2947/Mds/2014. Following the decision in CIT v. P.V.Kulandayan Chettiar reported in 267 ITR 654, the Income Tax Appellate Tribunal, by its order, dated 9.10.2015, dismissed the appeals filed by the revenue. Against which, the instant Tax Case Appeals have been filed, on the following substantial questions of law,

"(1) Whether on the facts and in the circumstances of the case and in law, the Income Tax Appellate Tribunal is correct in law in holding that the income from rubber plantations situated in Malaysia, is to be taxed in Malaysia when control and management of the plantation situated in Malaysia is controlled in India; share holders and annual general meeting were conducted in India; the income of the Malaysian branch is included in the accounts of the company and profits appropriated?

(2) Whether on the facts and in the circumstances of the case and in law, the Income Tax Appellate Tribunal is correct in law in holding that since Article V(2)(g) of the DTAA, the term permanent establishment shall include a "farm of plantation" and hence income from plantation from Malaysia cannot be subjected to tax in India, when Article V(2)(g) refers to "a mine, oil well, quarry or other place of extraction of natural resources?"

6. Reiterating the substantial questions of law, Mr.M.Swaminathan, learned Standing Counsel for Income-Tax Department contended that the Income Tax Appellate Tribunal has erred in deleting the addition of Rs.56,60,224/- and Rs.55,92,897 for the assessment years 2005-06 and 2006-07 respectively, made by the Assessing Officer in his re-assessment order, dated 30.03.2013 under "Income from business (Malaysian income)". He further submitted that the Tribunal ought to have appreciated the fact that the assessee has deliberately kept away the income of Malaysian Plantation from Indian Taxation Law, when the company affairs are controlled in India. He placed reliance on Article V(3)(e) of the existing DTAA between India and Malaysia.

Heard the learned counsel for the appellant and perused the materials available on record.

7. Before advertng to the merits of the case, let us extract the Articles V and VI of the DTAA between India and Malaysia,

"Article V

Permanent Establishment:

1. For the purposes of this Agreement, the term "permanent establishment" means a fixed place of business in which the business of the enterprise is wholly or partly carried on.

2. The term "permanent establishment" shall include especially:

- a. a place of management;
- b. a branch;
- c. an office;
- d. a factory;
- e. a workshop;
- f. a warehouse;
- g. a mine, oil well, quarry or other place of extraction of natural resources;
- h. a building site or construction, installation or assembly project which exists for more than six months;
- i. a farm or plantation;
- j. a place of extraction of timber or forest produce.

3. The term "permanent establishment" shall not be deemed to include:

- a. the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;
- b. the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;
- c. the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

d. the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or collecting information, for the enterprise;

e. the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for similar activities which has a preparatory or auxiliary character, for the enterprise.

4. An enterprise of one of the Contracting States shall be deemed to have a permanent establishment in the other Contracting state if;

a. it carries on supervisory activities in that other Contracting State for more than six months in connection with a construction, installation or assembly project which is being undertaken in that other Contracting State;

b. it carries on a business which consists of providing the services of public entertainers (such as stage, motion picture, radio or television artistes and musicians) or athletes in that other Contracting State unless the enterprise is directly or indirectly supported, wholly or substantially, from the public funds of the Government of the first-mentioned Contracting State in connection with the provision of such services.

2. Subject to the provisions of paragraph 6 of this Article, a person acting in one of the Contracting States on behalf of an enterprise of the other Contracting State shall be deemed to be a permanent establishment in the first-mentioned Contracting State if:

a. he has, and habitually exercises in that first-mentioned Contracting State, an authority to conclude contracts on behalf of the enterprise unless his activities are limited to the purchase of goods or merchandise for the enterprise; or

b. he maintains in the first-mentioned Contracting State a stock of goods or merchandise belonging to the enterprise from which he regularly fills orders on behalf of the enterprise.

3. An enterprise of one of the Contracting States shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other Contracting State through a broker, general commission agent or any other agent of an independent status, where such persons are acting in the ordinary course of their business.

4. The fact that a company which is a resident of one of the Contracting States controls or is controlled by a company which is a resident of the other Contracting State or which carries on business in that other Contracting State whether through a permanent establishment or otherwise shall not of itself constitute either company a permanent establishment of the other.

ARTICLE VI

Income from Immovable Property:

1. Income from immovable property may be taxed in the Contracting State in which such property is situated.

2. The term "immovable property" shall be defined in accordance with the law of the Contracting State in which the property in question is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, oil wells, quarries and other places of extraction of natural resources or of timber or forest produce. Ships, boats and aircraft shall not be regarded as immovable property.

3. The provisions of paragraph 1 of this Article shall apply to income derived from the direct use, letting, or use in any other form of immovable property.

4. The provisions of paragraph 1 and 3 of this Article shall also apply to the income from immovable property of an enterprise."

8. In Commissioner of Income-Tax v. S.R.M. Firm reported in 1994 (208) ITR 400 (Mad.), this Court held as follows:

"Sections 22 to 27 of the Income-tax Act, 1961, broadly deals with the taxability in this regard under the Act. But, in view of paragraph 1 of article VI, income from immovable property can be taxed only in and by the contracting State in which such property is situated. There is no scope for the other contracting State dealing with such income. As to what constitutes immovable property for the purposes of the article has also been stated in detail. The article further stipulates that the provisions of paragraph (1) shall apply to income derived from the direct use, letting or use in any other form of immovable property. Controversies and conflicting claims have been made by the parties before us regarding the capital gains which is derived on account of the sale, exchange or transfer of the capital asset itself. Sections 45 to 55A of the Income-tax Act, 1961, deals with this aspect. Normally, the situs of the capital asset alone should provide the safe guide to decide as to which of the contracting States should have the power to tax such income. The ratio underlying paragraph 1 of article VI would also lead only to this inevitable course. But, the plea on behalf of the Revenue is that the sale or exchange or transfer of the capital asset itself cannot be claimed to be an instance of "use" of the property itself so as to contend that it is an income from immovable property. Disposal of the property or the capital asset itself is in our view as much a form or

method of use of the immovable property as such, and the words "direct use..... or use in any other form" are sufficiently wide enough to include within its scope the transfer, sale or exchange of the property. As held by the apex court in the decision in Sevantilal Maneklal Sheth v. CIT [1968] 68 ITR 503, the profits and gains which arise from the sale of the asset would arise or spring from the asset, although the operation by which the profits or gains is made to arise out of the asset is the operation of the sale and consequently, there is no warrant for the submission that the capital gain is not income arising from the use of the assets. The provisions of article VI alone would apply and govern the assessment of capital gains also derived from the immovable property situated at Malaysia."

9. In CIT v. P.V.A. Kulandagan Chettiar reported in 2004 (267) ITR 654 (SC), the Hon'ble Supreme Court, at Paragraph 12, held as follows:

"12. The immovable property in question is situate in Malaysia and income is derived from that property. Further, it has also been held as a matter of fact that there is no permanent establishment in India in regard to carrying on the business of rubber plantations in Malaysia out of which income is derived and that finding of fact has been recorded by all the authorities and affirmed by the High Court. We, therefore, do not propose to re-examine the question whether the finding is correct or not. Proceeding on that basis, we hold that business income out of rubber plantations cannot be taxed in India because of closer economic relations between the assessee and Malaysia in which the property is located and where the permanent establishment has been set up will determine the fiscal domicile. On the first issue, the view taken by the High Court is correct."

10. Reverting to the case on hand, agreeing with the contentions of the assessee that reference to Article V(3)(e), relied on by the assessing officer, has no relevance to the case on hand, as the income derived was from the plantation in Malaysia and that the provisions of DTAA agreement, override the provisions of the Income-Tax Act and such provisions of DTAA is binding on the department and following the decisions, extracted supra, the Commissioner of Income-Tax (Appeals), by a common order, dated 25.09.2014, allowed the appeals filed by the assessee.

11. Being aggrieved by the common order, dated 25.09.2014, the Commissioner of Income-Tax has filed two appeals, before the Income Tax Appellate Tribunal in I.T.A.No.2946 & 2947/Mds/2014, contending inter alia that the Commissioner (Appeals) ought to have noted the fact that the assessee had deliberately kept away the income from plantation in Malaysia treating it as not forming part of total

income by quoting a decision of the Supreme Court in CIT v. P.V.Kulandayan Chettiar (cited supra), whereas the ratio of the said decision is not applicable to the assessee's case. However, vide common order, dated 09.10.2015, the Income Tax Appellate Tribunal has dismissed the appeals filed by the revenue.

12. Though Mr.M.Swaminathan, learned Standing Counsel for the Income-Tax Department raised the very same grounds, for a decision of this Court, under Section 260(A) of the Income-Tax Act, going through the material on record and the decisions relied on by the appellate authority, this Court is of the view that there is absolutely no ground to entertain the appeals of the revenue. Decision of the ITAT, Chennai, following the judgment of the Hon'ble Supreme Court, which has considered the significance of DTAA entered between India and Malaysia and notified in G.S.R.No.667(E), cannot be said to be erroneous, warranting interference.

13. Revenue is not able to distinguish the decision of the Hon'ble Supreme Court, either on facts or law, excepting to state that the Commissioner of Income Tax (Appeals) and the Income-Tax Appellate Tribunal have failed to note that the assessee had deliberately kept away the income from Malaysia. The fact that the plantation is in Malaysia, would be a permanent establishment, in terms of DTAA, extracted supra, through which, business is carried on, by the assessee and therefore, the income from such plantation, would be taxable only in Malaysia and not in India, has been substantiated by the assessee.

14. There are no valid grounds to reverse the orders impugned. Question of law raised is answered against the revenue and in favour of the assessee.

15. In the result, the Tax Case Appeals are dismissed. No costs. Consequently, connected Miscellaneous Petition is also closed.

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

To

1.The Income Tax Appellate Tribunal,
"D" Bench, Chennai.

2.The Commissioner of Income Tax,
Circle - II, Madurai.

3.The Commissioner of Income Tax, (Appeals-I)
Madurai.

4.The Deputy Commissioner of Income Tax,
Circle II, madurai.

5.The Assistant Registrar,
Income Tax Appellate Tribunal,
Rajaji Bhavan III Floor,
Besant Nagar, Chennai.

+1 cc to Mr.M.Swaminathan, Advocate, sr.32218.

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