Cit Vs. K.C. John

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Court : Kerala

Decided On : Jan-28-2003

Reported in : [2003]132TAXMAN793(Ker)

Appeal No. : IT Reference No. 57 of 1999 28 January 2003 A .Y. 1994-95

Appellant : Cit

Respondent : K.C. John

Advocate for Def. : Sri. P. Balachandran

Advocate for Pet/Ap. : P.K.R. Menon and George K. George, *for the Revenue* P. Balachandran, *for the Assessee*

Judgement :

G. Sivarajan, J.

The following questions of law are referred by the Tribunal under section 256(1) of the Income Tax Act at the instance of the Commissioner of Income Tax, Kochi for decision by this court :

'1. Whether on the facts and in the circumstances of the case, and also in the light of the provisions of section 115E, the assessee is eligible for the rebate under section 88 of the Income Tax Act, 1961?

2. Whether on the facts and in the circumstances of the case, the Tribunal is correct in holding that the computation of the tax liability denying the rebate under section 88 was by way of a prima facie adjustment, which could not be made under section 143(1)(a) of the Act?'2. The brief facts necessary are as follows : The respondent-assessee is a non-resident Indian. The assessment year concerned is 1994-95. The only income of the assessee is income from investments made in India. In the return filed by the assessee for the year 1994-95 he made a claim for rebate under section 88 of the Act on PPF of Rs. 40,000 and MEP of Rs. 10,000. The said return was processed by the assessing officer under section 143(1)(a) of the Act and an intimation (Annexure A) was issued to the assessee. In the said intimation the assessing officer made prima facie adjustment by disallowing the rebate claimed under section 88 of the Act. In appeal by the assessee, the Dy. Commissioner (Appeals), Trivandrum allowed the claim and directed the assessing officer to allow the rebate on PPF and MEP claimed in the return. This was confirmed by the Tribunal in appeal by the department.

3. The question that arises for consideration in this case is as to whether the assessee who is a non-resident Indian having only income from investment is entitled to get the deduction by way of rebate provided under section 88 of the Act. There is also a subsidiary question as to whether the assessing officer is entitled to disallow the said claim by making prima facie adjustment contemplated under section 143(1)(a) of the Act.4. Sri P.K.R. Menon, learned senior Central Government standing counsel for the department submitted that an assessee who is a non-resident Indian, having only income from investment is not entitled to claim any deduction provided under the Act in the computation of his income from investment in view of the special provisions contained in Chapter XII-A of the Act particularly section 115E(2)(a) read with section 115E(1) therein and that the entire investment income has to be subjected to tax at the rate of 20 per cent as provided in section 115E(1) of the Act. The senior counsel took us to the provisions of sections 115D, 115E, 115-I, section 80C as it stood prior to 1-1-1991 and the provisions of sections 87 and 88 of the Act and submitted that the legislative intention in enacting a special provision for computation of total income of non-resident in respect of investment income was to assess the investment income at a lesser rate of 20 per cent without any deductions provided under the

other provisions of the Act. The senior counsel also submits that if such an assessee wants to have the computation of his total income as provided under the other provisions of the Act, section 115-I of the Act clearly provided for the same and the assessee is free to make a request in the return itself seeking for computation of the total income in accordance with the other provisions of the Act. The senior counsel with reference to the provisions of section 87 of the Act in regard to the rebate allowable under section 88 of the Act and the provisions of section 115E particularly sub-sections

(1) and

(2) thereof submitted that the legislative has clearly made a distinction in section 87 as well as in sub-section

(1) of section 115E on the one hand and sub-section

(2) on the other by using the expression 'tax payable on the total income and tax chargeable on the total income' and further submitted that this also makes the position clear that if the only income of the non-resident Indian, is his income from investment or from capital gains, tax has to be paid on such income at the rate of 20 per cent whereas in the case of a non-resident Indian who is having other income also the expression 'chargeable' used shows that the other income has to be computed in accordance with the general provisions. In short the submission of the senior counsel is that in the computation of total income of a non-resident Indian who is having income only from investment his total income the entire invest income has to be assessed at the rate of 20 per cent without any deduction or rebate whatsoever.5. Sri P. Balachandran, learned counsel for the respondent-assessee submits that section 115D occurring in Chapter XII-A providing for computation of total income of a non-resident who is having income only from investment is very clear and no internal or external aid as required for understanding the scope of the said section. The counsel submitted that section 115D(1) clearly provides that no deduction in respect of any expenditure or allowance shall be allowed under any provision of this Act in computing the investment income of a non-resident Indian and that under clause (a) of sub-section

(2) in respect of such income no deduction shall be allowed to the assessee under Chapter VI-A. The counsel submits that in view of this clear provision excepting the deduction under Chapter VI-A, the non-resident Indian is entitled to claim all other deductions available under the other provisions of the Act. The counsel submitted that earlier there was a provision in section 88 occurring in Chapter VI-A, for a deduction in the matter of computation of capital gains which was omitted with effect from 1-4-1991 and the said relief was provided in section 48 dealing with computation of capital gains contained in another chapter. The counsel submitted that the Legislature has noted that in view of the omission of section 80T from Chapter VI-A obtaining the same relief provided in section 48 is an unintended benefit and therefore the Legislature has amended the provisions of clause (a) of sub-section

(2) of section 115D making a specific provision for denying the deduction provided under section 48 in the computation of total income under the head 'Capital gains'. The counsel also relied on the departmental circular issued by the Central Board of Direct Taxes in that regard. The counsel on the basis of all these materials submitted that in the absence of a specific provision in Chapter X11-A particularly section 115D of the Act excluding the benefits available under the other provisions of the Act an assessee is entitled to claim the benefit of those provisions which are not specifically covered by section 115D. Since the rebate claimed under section 80T is not occurring in Chapter VI-A which is specifically excluded by clause (a) of sub-section

(2) of section 115D and is occurring in Chapter VIII the assessing officer was not justified in denying the said relief, at any rate in proceedings under section 143(1)(a) of the Act. The counsel also submitted that this is not a matter for prima facie adjustment contemplated under the said section since the question regarding the entitlement is a debatable issue.6. In order to appreciate the respective contentions it is necessary to refer to the relevant provisions of the Act as it stood at the relevant time. Section 115D reads as follows :

'Special provision for computation of total income of non-residents.(1) No deduction in respect of any expenditure or allowance shall be allowed under any

provision of this Act in computing the investment income of a non-resident Indian.

(2) Where in the case of an assessee, being a non-resident Indian,--

(a) the gross total income consists only of investment income or income by way of long-term capital gains or both, no deduction shall be allowed to the assessee under Chapter VI-A and nothing contained in the provisions of the second proviso to section 48 shall apply to income chargeable under the head 'Capital gains'.

(b) the gross total income includes any income referred to in clause (a), the gross total income shall be reduced by the amount of such income and the deductions under Chapter V1-A shall be allowed as if the gross total income as so reduced were the gross total income of the assessee.'

Section 115E reads as follows :

'Tax on investrnent income and long-term capital gains.-(1) Where the total income of an assessee, being a non-resident Indian, consists only of investment income or income by way of long-term capital gains or both, the tax payable by him on his total income shall be the amount of' income-tax calculated on such total income at the rate of twenty per cent of such income.'

Section 115-I reads as follows :

'Chapter not to apply if the assessee so choosesA non-resident Indian may elect not to be governed by the provisions of this chapter for any assessment year by furnishing his return of income for that assessment year under section 139 declaring therein that the provisions of this chapter shall not apply to him for that assessment year and if he does so, the provisions of this chapter shall not apply to him for that assessment year and his total income for that assessment year shall be computed and tax on such total income shall be charged in accordance with the other provisions of this Act.'

Section 80C of the Act as it stood prior to 1-4-1991 reads as follows :

'Deduction in respect of life insurance premia, contributions to provident fund, etc,---(1) In computing the total income of an assessee, there shall be deducted in

accordance with and subject to the provisions of this section, an amount calculated with reference to the aggregate of the sums specified in sub-section (2), at the following rates, namely :

(a)

Where such aggregate does not exceed Rs. 6,000

The whole of such aggregate.

(b)

Where such aggregate exceeds Rs. 6,000 but does exceed Rs. 12,000

Rs. 6,000 plus 50 per cent of the Rs. 6,000 amount by which such aggregate not exceeds.

(c)

Where such aggregate Rs. 12,000

Rs. 9,000 plus 40 per cent of the amount by which such aggregate exceeds Rs. 12,000.'

Section 87 of the Act introduced with effect from 1-4-1991 reads as follows :

'87. Rebate to be allowed in computing income-tax.(1) In computing the amount of income-tax on the total income of an assessee with which he is chargeable for any assessment year, there shall be allowed from the amount of income-tax (as computed before allowing the deductions under this chapter), in accordance with and subject to the provisions of sections 88, 88A and 88B, the deductions specified in those sections.

(2) The aggregate amount of the deductions under section 88 or section 88A or section 88B shall not, in any case, exceed the amount of income-tax (as computed before allowing the deductions under this chapter) on the total income of the assessee with which he is chargeable for any assessment year.'

Section 88(1) of the Act with the proviso reads as follows :

'88. Rebate on life insurance premia, contribution to provident fund, etc.(1) Subject to the provisions of this section, an assessee, being

(a) an individual, or

(b) a Hindu undivided family.

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shall be entitled to a deduction, from the amount of income-tax (as computed before allowing the deductions under this chapter) on his total income with which he is chargeable for any assessment year, of an amount equal to twenty, per cent of the aggregate of the sums referred to in sub-section (2) :

Provided that in the case of an individual, whose income, derived from the exercise of his profession as an author, playwright, artist, musician, actor or sportsman (including an athlete), is twenty-five per cent or more of his total income, the provisions of this sub-section shall have effect as if for the words 'twenty per cent', the words 'twenty five per cent' had been substituted : '

Section 80T of the Act as it stood prior to 1-4-1988 reads as follows :

'80T. Deduction in respect of long term capital gains in the case of assessees other than companiesWhere, the gross total income of an assessee not being a company includes any income chargeable under the head 'Capital gains' relating to capital assets other than short-term capital assets (such income being, hereinafter, referred to as long-term capital gains), there shall be allowed, in computing the total income of the assessee, a deduction from such income of an amount equal to,

(a) in a case where the long-term capital gains do not exceed ten thousand rupees, the whole of such long-term capital gains;

(b) in any other case, ten thousand rupees as increased by a sum equal to

(A) fifty per cent of the amount by which the long-term capital gains relating to capital assets, being buildings or lands, or any rights in buildings or lands or gold, bullion or jewellery, exceed ten thousand rupees;

(B) sixty per cent of the amount by which the long-term capital gains relating to any other capital assets exceed ten thousand rupees : '7. The respondent-assessee admittedly is a non-resident Indian and his only income which is assessed to tax under the Act is the income from investment in foreign exchange. Section 4 of the Act is the charging section under which income-tax shall be charged for any assessment year at any rate or rates, income-tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions (including provisions for the levy of additional income-tax), of this Act in respect of the total income of the previous year of every person. Section 5 deals with the scope of total income. Section 10 of the Act deals with incomes which do not form part of total income. Section 14 deals under different heads such as (A) Salaries, (B) (C) Income from house property, (D) Profits and gains of business or profession, (E) Capital gains, (F) Income from other sources. The income with which we are concerned will fall under the head 'income from other sources'. Sections 56 to 59 of the Act deals with the computation of income under the head 'income from other sources'. Section 56(2)(id) income by way of interest on securities if the income is not chargeable to income-tax under the head 'profits and gains of business or profession-'shall be chargeable to tax under the head 'income from other sources-section 57 deals with various deductions available in the computation of income from 'other sources'. Section 58 specifically provides for amounts not deductible and section 59 deals with profits chargeable to tax such as balancing charges and other deemed income.8. Normally the income by way of interest on securities is liable to be assessed under the head 'iIncome from other sources'. Occurring in sections 56 to 59 of the Act. However, the legislature has made a special provision in regard to the assessment of the said income of a non-resident Indian in a new Chapter XII-A introduced with effect from 1-6-1983 by the Finance Act, 1983 for the benefits of non-resident Indians. The object of introducing the said section as could be seen from the note appended to this Chapter in 'A.N. Aiyar's Indian Tax Laws, 1983' would show that it was with a view of encouraging the flow of foreign exchange remittances to India and investment in

India by non-resident Indian citizens and foreign nationals of Indian origin. It is a special provision dealing with incomes of such non-residents from investments in certain specified assets. Here, it is also relevant to note that an option is given to an assessee, who is covered by the provisions of sections 115D & 115E to avail the normal provisions regarding the computation of income under the Act in section 115-I. It is specifically stated therein that. a non-resident Indian may elect not to be governed by the provisions of this chapter for any assessment year by furnishing his return of income for that assessment year under section 139 declaring therein that the provisions of this chapter shall not apply to him for that assessment year and if he does so, the provisions of this chapter shall not apply to him for that assessment year and his total income for that assessment year shall be computed and tax on such total income shall be charged in accordance with the other provisions of this Act. Admittedly the assessee has not chosen to opt for the benefit of computation of his total income and charge of tax under the general provisions contemplated under section 115-I of the Act.9. Now we will come to the special provision for computation of total income of non-residents provided under section 115D occurring in Chapter XII-A. Under sub-section

(1) of section 115D no deduction in respect of any expenditure or allowance shall be allowed under any provision of this Act in computing the investment income of a nonresident Indian. If the computation provision ended there it would have been possible for the department to contend that in the computation of the investment income of a non-resident Indian there is no question of allowing any expenditure or allowance provided under the other provisions of the Act. However, the computation section did not stop there. Sub-section

(2) clause (a) states that in the case of an assessee being a non-resident Indian where the gross total income consists only of investment income or income by way of long-term capital gains or both, no deduction shall be allowed to the assessee under Chapter VI-A (the remaining portion omitted as unnecessary). From this sub-section it would appear that the rigour of sub-section

(1) is diluted and only the deduction provided under Chapter VI-A is excluded. If as a matter of fact the deduction provided under Chapter VI-A is an item falling under

sub-section

(1) of section 115D it would not have been necessary for the legislature to make a provision as obtained in clause (a) of sub-section

(2) of section 115D in respect of the matters covered by the said sub-section. It would appear that there is a rationale behind the enactment of clause (a) of sub-section (2), As already noted the income from investment under the normal provisions of the Act is liable to be computed in accordance with the provisions of sections 56 to 59 of the Act. The expenditure and the allowance which are entitled to be deducted are specified in section

57. Various other provisions with regard to the general deductions are provided in Chapter VI-A, Chapter VIII, etc. which are applicable to all assessees covered by the provisions of section 14 of the Act. Probably it is in view of the fact that apart from the deductions which are provided under section 57 of the Act various other deductions provided under Chapters VI, VIII, etc., are also there the legislature might have thought of making dichotomy and made two provisions, one in regard to non-availability of the deduction in respect of expenditure and allowances which are provided in section 57 and tile other in regard to the general deductions available under the provisions of Chapter VI-A and Chapter VIII, etc. If we understand the scheme in that manner there is no difficulty in understanding the scope of the provisions of section 115B(1) and clause (a) of sub-section

(2) thereof.10. Here, admittedly the assessee has no claimed the benefit of section 57 of the Act in the computation of income from investment under the head 'income from other sources'. The assessee has only claimed the rebate provided under section 88 occurring in Chapter VIII of the Act. As already noted, clause (a) of sub-section

(2) of section 115D only provides that in the computation of gross total income which consists only of investment income no deduction shall be allowed to the assessee under Chapter VI-A. It is pertinent to note here that the legislature has not said anything with regard to the deductions provided under other chapters of the Act.11. On a harmonious construction of the provisions of sub-section

(1) and clause (a) of sub-section

(2) of section 115D of the Act it would appear that in the computation of total income-investment income of a non-resident Indian as provided under sub-section

(1) and clause (a) of sub-section

(2) of section 115D the assessee is not entitled to claim any expenditure or allowance provided under section 57 of the Act and also the deduction provided under Chapter VI-A of the Act. The section does not go further and say that other general deductions available under the other chapters of the Act are not available. However, we do not think it necessary to deal with this aspect any further since the assessee has not claimed any deduction from the investment income.12. The provisions of Chapter XII-A of the Act making special provisions relating to certain income of non-residents including sections 115C to 115-I has been inserted with effect from 1-6-1983 by the Finance Act, 1983. Sub-section

(1) of section 115D was the same as contained during the relevant assessment year. However, clause (a) of sub-section

(2) of section 115D as it stood prior to 1-6-1983 reads as follows :

'(2) where in the case of an assessee, being a non-resident Indian,

(a) The gross total income consists only of investment income or income by way of long-term capital gains or both, no deduction shall be allowed to the assessee under Chapter VI-A;

(b) The gross total income includes any income referred to in clause (a) the gross total income shall be reduced by the amount of such income and the deductions under Chapter VI-A shall be allowed as if the gross total income as so reduced were the gross total income of the assessee.'

13. Here, it must be noted that sub-section (2) provides that where in the case of an assessee, being a non-resident Indian the gross total income consists only of investment income or income by way of long-term capital gains or both, no deduction shall be allowed to the assessee under Chapter VI-A. The relevant

portion of section 80T which we have already extracted earlier specifically provided for deductions in the computation of long-term capital gains occurring in Chapter VI-A of the Act. By virtue of clause (a) of sub-section (2) in a case where the gross total income consists only of long-term capital gains, the deduction provided under section 80T was not available. However, it must be noted that section 80T had been omitted from Chapter VI-A with effect from 1-4-1988 by the Finance Act, 1987 and the relief provided therein was introduced in sub-section (2) of section 48 providing for of capital gains simultaneously. Even after the omission of section 80T from Chapter VI-A non-resident assessee whose total income, included capital gains started claiming the benefit of section 48(2) of the Act. The legislature found that in view of the omission of section 80T from Chapter VI-A the assessee are getting an unintended benefit and the same has to be plugged by making an, amendment to clause (a) of sub-section (2) of section 115D of the Act. Accordingly the legislature intended the said provision by Direct Taxes Laws (Second Amendment) Act, 1989 with retrospective effect from 1-4-1988, i.e., the date on which section 80T has been omitted from Chapter VI-A of the Act.

14. We have referred to these circumstances only to show that but for the amendment made in clause (a) of sub-section (2) of section 115D of the Act excluding the benefit of the provisions of section 48(2) of the Act, in ascertaining the total income in respect of capital gains it was possible for a non-resident Indian who is having income by way of capital gains to claim the benefit of deduction provided under section 48(2). It is only after the amendment of clause (a) of sub-section (2) of section 115D of the Act the intention of the legislature could be carried out. Probably a distinction can be drawn in the case of income from investment and in the case of income by way of capital gains in regard to the application of clause (a) of sub-section (2) of section 115D so far as income from investment is concerned there is already a ban under section 115D(1) whereas the said ban was not there in the case of income by way of capital gains when the amendment was made to clause (a) of section 115D(2) in 1989. In other words in respect of income by way of capital gains the only ban was contained in clause (a) of section 115D(2).

15. We are now concerned with a situation where the provisions of section 80C of the Act providing for deduction in respect of PPF, MEP etc. are omitted from Chapter VI-A with effect from 1-4-1991 and a lesser relief in respect of the said items in the form of a rebate was provided under section 88 of the Act occurring in Chapter VIII introduced simultaneously. The question with which we are concerned in the present reference is as to whether the rebate provided under section 88 occurring in Chapter VIII can be claimed by the assessee whose assessment under the Act is governed by the special provisions made in Chapter XII-A of the Act. In other words the question is as to whether the provisions of section 115D read with section 115E stand in the way of the assessment claiming the rebate from tax provided under section 88 of the Act.

16. Here, it must be noted that section 80C of the Act, as it stood prior to 1-4-1991 provided for a deduction in the computation of total income of an assessee an amount calculated with reference to the aggregate of the sums specified in sub-section (2). Section 88 introduced with effect from 1-4-1991 after omitting section 80C, on the other hand, is not a deduction in the computation of the total income of the assessee. It is only a deduction in the form of a rebate from the income-tax chargeable on the total income as computed before allowing deduction under this chapter. It is an amount equal to 20 per cent of the aggregate of the sums referred to in sub-section (2). Sub-section (2) of section 88 clearly provides for the rebate in respect of PPF and MEP. It is relevant to note in this context that section 115D is a special provision for computation of total income of non-residents. It must be further noted that section 115B(1) only says that no deduction in respect of any expenditure or allowance shall be allowed under any of the provisions of this Act in computing investment income of a non-resident Indian. Clauses (a) and (b) of sub-section (2) of section 115D deal with the separate treatment of investment income/income by way of long-term capital gains of a non-resident Indian. The ban under clause (a) is regarding the deduction under, sub-section (2) of section 48 or under Chapter VI-A. In other words both under sub-section (1) of section 115D and under clause (a) of sub-section (2) of section 115D the ban is only in allowing deduction of expenditure or allowance in computing the investment income. It is not a deduction from the total income viz. the investment income but only a deduction by way of rebate from the amount of income-tax chargeable on the total

income [See sections 87 and 88 already extracted]. Section 115E, it must be noted only provides for the rate of tax payable on the investment income computed in accordance with the provisions of section 115D of the Act. It does not in any way bar the rebate available under section 88 of the Act. Thus it would be clear that there is no prohibition either in section 115D or in section 115E of the Act with regard to the allowance of the rebate provided under section 88 of the Act occurring in Chapter VIII of the Act.

17. Looked at from any angle we are of the view that the Tribunal was perfectly justified in holding that the assessee is entitled to the rebate provided under section 88 of the Act.

18. In the above circumstances, we answer the first question referred by the Tribunal in the affirmative, i.e., in favour of the assessee and against the revenue. Hence it is unnecessary for us to answer the second question. Accordingly we decline to answer the said question. The tax reference is disposed of as above.