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JUDGMENT ISSUED BY THE SUPREME COURT OF MAURITIUS
2024 SCJ 191

Mauritius Revenue Authority

v/s

1.Hilmi Mohammad Ehsan Dilloo
2.The Assessment Review Committee

In the matter of:

Hilmi Mohammad Ehsan Dilloo

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1.The Assessment Review Committee
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Executive Summary

The Supreme Court ("SC") has heard the appeals of both the Mauritius Revenue Authority ("MRA") and Mr Dilloo (together referred as "the Appellants"), by way of case stated against a decision of the Assessment Review Committee ("ARC"). The case concerned the taxability of foreign sourced income derived by Mr Dilloo which he remitted to Mauritius. Section 5 of the Income Tax Act ("ITA") provides two bases on which income is derived by a person: **source** and **residence**. The SC held that the residence requirement is intricately linked with the source of income and that the ARC has erred by failing to recognise the interrelation between the said bases. The applicability of the remittance principle also played its share in drawing the inference that foreign sourced income remitted to Mauritius is taxable for residents only.

It was further established that employment income retains its character despite being retained for a long time period and cannot be treated as savings or of capital nature

Analysis of the Judgment

The facts which were established before the ARC are as follows –

- Mr Dilloo, a Mauritian national, was employed by a company based in Saudi Arabia.
- Mr Dilloo did not submit his returns of income for the years of assessment 2016/2017 to 2018/2019 to the MRA.
- Upon "circularising" Mauritian financial institutions, the MRA unveiled, inter alia, that Mr Dilloo:
    a. had transferred approximately Rs 25.2m from his Saudi Arabian bank account into his local Mauritius Commercial Bank ("MCB") account during the period under review;
    b. had acquired an immovable property worth Rs 10m in Mauritius; and
    c. had received monthly rental income by letting the said property.

- The MRA was of the opinion that Mr Dilloo is a resident of Mauritius and hence, is taxable on his worldwide income when the income is received in Mauritius, as provided by section 5(3) of the ITA.
- Mr Dilloo clarified that his income was not received in Mauritius and that he had paid Expatriate tax under the Saudi law, which he later substantiated by providing a letter from his employer wherein it was mentioned that he had paid SAR 449,240 as tax for the period under review.
- However, the MRA was of the view that this could not considered, pursuant to section 4 of the ITA which provides that income tax is payable on all income and Regulation 8 of the Income Tax (Foreign Tax Credit) Regulations 1996. As such, it reaffirmed its decision and a notice of assessment claiming a total of Rs 5,069,003 was issued to Mr Dilloo.
- Mr Dilloo lodged an objection to the assessment. However, he conceded that the rental income was taxable and this aspect was no longer in dispute.
- Mr Dilloo was requested to submit a Tax Residence Certificate from the Saudi Arabian Authority
- Mr Dilloo's tax representative responded that at that point in time, it would be difficult for him to obtain the certificate as Mr Dilloo had already left Saudi Arabia a few years ago and was subsequently residing in Canada.
- The MRA thus upheld the assessment and issued a notice of determination of objection under section 131 B(2) of the ITA.
- Being aggrieved, Mr Dilloo lodged representations before the ARC. However, these were set aside and the determination of the MRA was maintained.

Subsequently, the MRA appealed against ARC's decision on the following grounds:

i. Whether the Committee erred in holding that section 5(3) of the ITA: a. is not subject to any other provision of law; and b. does not provide for any requirement to establish that the individual "was resident in Mauritius".
ii. Whether the Committee erred in holding that "a plain and literal interpretation of section 5(3) of the ITA leads to the conclusion that the remittance basis is set out as a stand-alone provision".
iii. Whether the Committee erred in holding that the "residence requirement under section 73 of the ITA is inapplicable when the deeming provision under section 5(3) applies"

The grounds of appeal on which Mr Dilloo challenged ARC's decision are as follows –

A. Whether the ARC did not err in law in its interpretation and application of section 5(3) of the ITA by construing it as an independent charging provision, which is repugnant to its plain and literal meaning and by failing to take into account the amending provisions of Finance Act 2007 that enacted section 5(3) of the ITA.
B. Whether the Committee has not erred in law in concluding that the money transferred from Saudi Arabia to the Appellant's local bank account was purportedly "income" on its interpretation of sections 4(1)(a) and 10 of the ITA.
C. Whether the ARC has not erred in law in its conclusion that the Appellant was a resident of Mauritius for the years of assessment 2016/2017 to 2018/2019 pursuant to its interpretations of section 73(1)(a)(i) of the ITA.

The SC's decision was binding on the ARC.

Grounds (i), (ii) and A

From a reading of the above grounds, it can be deduced that the Appellants challenged the interpretation of section 5(3) by the ARC.

Learned Counsel for the MRA submitted that:

i. The MRA had to consider the taxability of the Appellant in Mauritius and in the affirmative, it had to consider the time when the foreign sourced income became taxable in Mauritius;
ii. To hold that section 5(3) of the ITA is a standalone provision and that any income from abroad once remitted to Mauritius becomes taxable, would negate the effect of section 5(1)(b) of the ITA which provides that income derived from abroad is taxable where the person is resident in Mauritius. It was further argued that the provisions of section 5 of the ITA are clear and unambiguous and accordingly, a literal interpretation must be favored; and
iii. The Court should override the decision of the ARC on the interpretation of sections 5(1) and (3) of the ITA, and state that sections 5(1) and (3) are interconnected and that once a person is found to be resident in Mauritius, income derived by him from abroad is taxable when it is received in Mauritius by him or on his behalf, or it is dealt with in Mauritius in his interest or on his behalf.

Learned Counsel for Mr Dilloo submitted, in a gist, that the interpretation of section 5(3) of the ITA by the ARC is incongruous.

Section 4(1)(a) of the ITA requires tax to be paid to the MRA by every person on all income (other than exempt income) derived by him during the preceding year.

Section 5(1)(a) provides that where a person is a non-resident, he is deemed to have derived income where the income has a Mauritian source. Under section 5(1)(b), income is deemed to be derived by a person where he is a resident of Mauritius irrespective of where the income is sourced.

Furthermore, section 5(2) deems income to be derived when it is earned or accrued or is dealt with in a taxpayer's interest or on his behalf, whether or not it has become due or receivable. For example, income is deemed to be derived by a taxpayer when the income is paid to a third party or entity as directed by him, although the taxpayer does not actually receive the income.

It is important to highlight that in the case of foreign sourced income, section 5(3) deems income to be derived when it is received by the individual in Mauritius or on his behalf or dealt with in Mauritius in his interest or on his behalf. Section 5(3) thus identifies the timing of the derivation of the income where it is derived from abroad by an individual.

It is obvious from section 5 that only a Mauritian resident is taxable on foreign sourced income. Section 5(3) which identifies when income is deemed to be derived from outside Mauritius is therefore a provision which patently has to be read along with section 5(1)(b) which enunciates that a resident is taxable on all his income whatever its source. In other terms, foreign sourced income is deemed to be derived by an individual when it is remitted to Mauritius.

In light of the above, the SC held that the ARC failed to grasp that pursuant to section 5(1)(b) of the ITA, only a resident of Mauritius is liable to tax on income derived from outside Mauritius. The ARC further erred when it stated that section 5(3) is not subject to any other provisions of the law and does not provide for any requirement to establish the residence status of the individual.

Ground (iii)

At this juncture, in order to determine the point raised under Ground (iii), reference was made to section 73 of the ITA. It was gleaned from the said section that it provides for the definition of residence "for the purposes of this Act", that is, for the whole of the ITA.

Therefore, the SC affirmed that the ARC was wrong to hold that the residence requirement under section 73 of the ITA is inapplicable when the deeming provision under section 5(3) applies.

Ground B

Under ground B, learned Counsel for Mr Dilloo contended that the money transferred from Saudi Arabia to the Appellant's local bank account was a transaction of capital nature as the money had remained in his Saudi Arabian bank account before being remitted to his MCB account.

Learned Counsel for the MRA argued that Mr Dilloo had failed to provide documentary evidence in support that the money transferred from Saudi Arabia to Mauritius was 'savings' and 'income'.

The ARC referred to the UK HMRC Internal Manual concerning the remittance basis of taxation and contended that whether the employment remuneration of Mr Dilloo is received directly in Mauritius or transits through a Saudi Arabian bank account and only part of it is credited into a Mauritian Bank account, does not alter its "income nature".

The SC could not find any flaw in the above finding of the ARC. Hence, Ground B was accordingly dismissed.

Ground C

Under ground C, Mr Dilloo challenged the ARC's finding that he was a resident of Mauritius for the period under review.

Learned Counsel for the MRA objected that Ground C cannot be entertained as it falls foul of section 21(1)(a) of the Mauritius Revenue Authority Act 2004 which provides that an appeal from a decision of the ARC lies to the SC on a point in law. She further submitted that the residence status of Mr Dilloo entails an appreciation of facts/evidence adduced by the parties in reaching the conclusion and cannot be challenged unless it is averred that the findings are perverse.

If there was any contrary evidence in Mr Dilloo's favour and which the ARC had failed to consider, learned Counsel for Mr Dilloo should have directed the Court's attention thereto but he failed to do so. Considering the above, the SC agreed with the finding of the ARC, and it accordingly set aside ground C.

For all the reasons mentioned above, the SC allowed the appeal of the MRA on all the grounds and the appeal of Mr Dilloo on ground A. In the circumstances, it made no order as to costs.

Our observation

It is remarkable that despite the ARC had ruled in favour of the MRA in determining the objection lodged by Mr Dilloo against the assessment issued to him by the MRA, the latter did not vacillate to appeal against ARC's decision in order to establish the correct interpretation of section 5 of the ITA, which essentially led to the conclusion that foreign sourced income remitted to Mauritius is not taxable for non-residents. Another important aspect to be highlighted is that an appeal from a decision of the ARC to the SC may only be made on a point in law unless it is attested that the ARC's finding is perverse or unreasonable on the facts found proved or that it is unsustainable in view of evidence adduced.

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