**(1998) 04 CAL CK 0024**

**Calcutta High Court**

**Case No:** Income Tax Reference No. 158 of 1992

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| Commissioner of Income Tax | | APPELLANT |
| | Vs | |
| Nippon Yusen Kaisha Tokyo and Japan | | RESPONDENT |

**Date of Decision:** April 2, 1998

**Acts Referred:**

- Income Tax Act, 1961 - Section 24A, 28, 29, 30, 31

**Citation:** (2000) 1 ILR (Cal) 10

**Hon'ble Judges:** Yad Ram Meena, J; Bijitendra Mohan Mitra, J

**Bench:** Division Bench

**Advocate:** ;D.D. Pal, for Assessee Company, for the Respondent

**Judgement**

Yad Ram Meena, J.
In this reference application, the following questions are referred for our opinion:

1. Whether on the facts and in the circumstances of the case and keeping in view particularly the provisions of the Sections 5(2) and 9(1) of the income tax Act, 1961 the Tribunal was justified in law in holding that the receipt of detention/demarrage charges of Rs. 31,63,688.00 is not taxable in India and thereby excluding the same from the income of the Assessee?

2. Without prejudice to the question No. (1) whether on the facts and in the circumstances of the case particularly in view of the finding of facts recorded by the Commissioner of income tax (Appeals) in his order the Tribunal was justified in law in holding that the detention/demarrage charges received by the Assessee are not covered by the provisions of the Section 44B of the income tax Act 1961 and thereby revarsing the order of the Commissioner of income tax (Appeals)?

2. Though case hence taken on March 16, 1998 the judgment has not yet been signed and on re-thinking we thought it proper to hear the parties again on the

question whether the income of the non-resident which accrued outside India can be taxed in India. We re-fixed the case for fresh hearing today, and heard the Learned Counsel for the parties.

3. The Assessee is a non-resident company engaged in the business of operation of ships. The Assessee declared freight earnings at Rs. 18,21,23,117.00 and total receipts from detention/demurrage on containers at Rs. 31,63,668.00. The Assessing Officer took 7.6% of the total freight earnings as taxable profits of the Assessee-company. To this extent there is no dispute between the parties. However, the Assessing Officer further took the entire receipts of Rs. 31,63,668.00 received against detention/demarrage as income of the Assessee and therefrom allowed deduction at the rate of 5% as expenses on estimate basis. Thus, he took out Rs. 30,05,504.00 as income of the Assessee received against detention/demarrage charges.

4. Being aggrieved, the Assessee carried the matter in appeal before the C.I.T.(Appeals). C.I.T.(Appeals) has taken the receipt against detention/demarrage charges as part and parcel of the carriage of goods within the meaning of Section 44B of the Act. Therefore, C.I.T.(Appeals) directed that the amount received against detention/demarrage charges should be treated at par with freight and only 7.5% of that amount should be treated as profit of the business from operation of ships.

5. Being aggrieved, department filled the appeal before the Tribunal challenging the view taken by C.I.T.(Appeals) and contending that the entire receipt against detention/demarrage charges should be treated as profit and gains by the Assessee as has been taken by the Assessing Officer. The Assessee raised cross objection and claimed that dimarrage charges cannot be taxed at all under the Act, as that income does not accrue in India. Tribunal has accepted the grounds raised in the cross objection by the Assessee and held that the amount of demarrage charges cannot be taxed as no income does accrue in India.

6. At the outset, counsel for the Assessee, Dr. Pal brought to our notice that by virtue of insertion of the Explanation in Sub-section (2) of Section 44B of the Act, question No. 2 can be answered against the Assessee and in favour of the Revenue and so far as question No. 1 is concerned, the matter should be sent back to the Tribunal for further findings of facts as to whether the income which accrued outside India can be taxed in India u/s 5 or Section 9 or u/s 44B of the Act.

7. Learned Counsel for the Revenue submitted even the income which accrues outside India can be taxed u/s 44B treating the same at par with the freight receipts. Dr. Pal for the Assessee submitted that the income which has not accrued in India cannot be taxed, the same cannot be treated as income under the provisions of the Act.

8. The facts are not in dispute that the Assessee is a non-resident shipping company and has earned freight Rs. 18,21,23,117.00 and also received Rs. 30,05,504.00

against the detention/demarrage charges. The dispute relates only to the amount received against detention/demarrage charges whether that should be assessed as income of the Assessee at all, and if so assessed, whether the same should be assessed u/s 5(2) and Section 9(1) of the Act or u/s 44B of the Act. The explanation which has been inserted in Sub-section (2) of Section 44B of the Act reads as under:

Explanation-For the purposes of this Sub-section, the amount referred to in Clause (i) or Clause (ii) shall include the amount paid or payable or received or deemed to be received, as the case may be, by way of demurrage charges of handling charges or any other amount of sililar nature.

9. This Explanation though inserted by virtue of the Finance Act, 1997, but has come into force with effect from April 4, 1976. Thus it covers the assessment years of the Assessee which is before us. Dr. Pal fairly admitted that after this Explanation, the demurrage charges or handling charges or any other amount of similar nature shall be taxed in the same way as the amount in Clause (i) or Clause (ii) of Sub-section (2) of Section 44B of the Act. Accordingly, question No. 2 we answer against the Assessee and in favour of the Revenue holding that demurrage charges or freight charges should be taxed in the same way as that of freight taxable u/s 44B of the Act.

10. So far as question No. 1 is concerned, Dr. Pal submits that in the absence of necessary findings of facts relevant to the question as to whether demarrage charges are accrued in India or outside India, this question cannot be answered. According to him, as the demarrage charges accrued outside India, the income accrued outside India, is not taxable under the provisions of Section 28 to 44D. He also draw our attention to Section 5 of the Act which provides for as to what will be the income and Section 9 provides what will be the deemed income which is taxable under the Act. According to him, demarrage charges which are accrued only outside India is not taxable under the provisions of this Act. On perusal of the provisions of Section 5 of the Act, we find that provisions contained in Section 5 of the Act starts with the words, ''subject to the provisions of this Act....'' Thus, the provisions of Section 5 is subject to other provisions of the Act. If other provisions are contrary to provision of Section 5, other provision will have overriding effect on the provisions of Section 5.

11. Section 44B provides how the income from shipping business can be taxed in case of non-residents and Section starts with a non-obstantive clause, i.e. ''Notwithatanding anything to the contrary contained in Section 28 to 43A of the Act''. Thus, it is made clear that whatever is provided in the provisions contained in Section 28 to 43A that will not come in the way of the provisions contained in Section 44B as to how the income from shipping business in the case of non-residents will be computed, whether the income will be computed or not or what will be the rate of that income. Sub-section (2) of Section 44B provides as under:

(2) The amounts referred to in Sub-section (1) shall be the following, namely-

(i) the amount paid or payable (whether in or out of India) to the Assessee or to any person on his behalf on account of the carriage of passengers, livestock, mail or goods shipped at any port in India; and

(ii) the amount received or deemed to be received in India by or on behalf of the Assessee on account of the carriage of passengers, lives took mail or goods shipped at any port outside India.

12. Dr. Pal also laid emphasis in his argument that when the income which accrued outside India is not taxable under the provisions of Sections 28 to 43A, the detention/demarrage charges cannot be taxed. Therefore, for necessary findings of facts whether the income accrued in India or outside India the matter should be sent back to the tribunal.

13. It is true that the provisions of Section 44B have overriding effect over the provisions of Section 28 to 43A of the Act and that if anything is contrary to the provisions of Section 44B, then the provisions of Section 24A will prevail; but the question before us is where an income of a nonresident has accrued outside India by way of demurrage charges, can that be taxed in India? A query was put to the Learned Counsel for the Revenue, but he miserably failed to show any provision or authority that any income of a non-resident which accrued outside India can be taxed in India under any provision including the provision of Section 44B. But at the same time when we perused the order of the Tribunal, there is no specific finding by the Tribunal that what part of the demurrage income accrued to the Assessee in India of outside India. Therefore, in order to answer question No. 1, it is necessary to have the finding whether the demurrage income accrued in India or outside India and if not the entire income of demurrages, as to what part of the income of demarrages accrued in India or outside India.

14. Dr. Pal also brought to our notice that when it is not possible to answer the question referred to us for want of a finding, the matter can be sect back to the Tribunal. In Sutlej Cotton Mills Limited Vs. Commissioner of Income Tax, Calcutta, . Their Lordships of the Apex Court observed as under:

The question whether the loss suffered by the Assessee was a trading loss or a capital loss cannot, therefore, be answered unless it is first determined whether these two amounts were held by the Assessee on capital account or on revenue account or, to put it differently, as part of fixed capital or of circulating capital. We would have ordinarily, in these circumstance, called for a supplementary statement of case from the Tribunal giving its finding on this question, but both the parties agreed before us that their attention was not directed to this aspect of the matter when the case was heard before the revenue authorities and the Tribunal and hence it would be desirable that the matter should go back to the Tribunal with a direction to the Tribunal either to take additional evidence itself or to direct the ITO to take

additional evidence and make a report to it, on the question whether the sum of Rs. 25 lakhs and Rs. 12,50,000/- were held in West Pakistan as capital asset or as trading asset or, in other words, as part of fixed capital or part of circulating capital in the business. The Tribunal will, on the basis of this additional evidence and in the light of the law laid down by us in this judgment, determine whether the loss suffered by the assesses on remittance of the two sums of Rs. 25 lacs and Rs. 1.2,50,000/- was a trading loss or a capital loss.

Considering the view taken by Their Lordships in Sutlet Cotton Mills Ltd.''s Supra case, we remit the matter back to the Tribunal to give a finding as to whether the income by way of demarrage charges accrued to the Assessee in India or outside India and, ff not the entire income, what part of the income accrued to the Assessee in India and what part of income accrued outside India and decide the issue afresh whether if the income accrued outside India to the non-resident, can that be taxed in India?

The application stands accordingly disposed of. No order as to costs.

Bijitendra Mohan Mitra, J.

15. I agree.