UNIVERSAL CARGO CARRIERS INC. AND ANOTHER Vs COMMISSIONER OF Income Tax.

Court: Calcutta High Court

Date of Decision: Nov. 20, 1990

Acts Referred: Income Tax Act, 1961 â€" Section 256(1)

Citation: (1995) 124 CTR 363 : (1993) 124 CTR 363 : (1993) 205 ITR 215 : (1993) 70 TAXMAN 515

Hon'ble Judges: Bhagabati Prasad Banerjee, J; Ajit K. Sengupta, J

Bench: Full Bench

Judgement

AJIT K. SENGUPTA J. - In this reference u/s 256(1) of the Income Tax Act, 1961, at the instance of the assessee, the following question of law

has been referred by the Tribunal for the opinion of this court for the assessment year 1978-79 :

Whether, in the facts and circumstances of the case, the assessee was entitled to deduction of 50% of the tax charged in India in respect of its

shipping business as provided in article VI of the Agreement for Avoidance of Double Taxation between India and Greece ?

The facts leading to this reference are stated hereafter.

The two assessee-companies are non-resident shipping companies incorporated in the Republic of Panama. The assessee-companies have no

business apart from shipping business.

On May 31, 1976, they entered into a management agreement with a Greek company, namely, Messrs. Hellenic Lines Ltd. According to the

agreement, the entire affairs of the assessee-companies were to be managed by the said Hellenic Lines Ltd., as their general manager and agents.

Since there was an agreement for relief from double taxation between India and Greece, the assessees claimed the benefit thereof. The Income

Tax Officer was, however, of the opinion that Messrs. Hellenic Lines Ltd., had only been appointed as general managers and agents of the

assessee-companies to control and manage the affairs, operate the vessels, collect the moneys and make disbursements, etc. For that purpose,

Messrs. Hellenic Lines Ltd. was to receive only a fixed percentage (1 to 1.25) on the total freights collected. These arrangements did not mean

that the de facto control and management of the assessees business had been actually given to Messrs. Hellenic Lines Ltd. Therefore, the

assessees could not be treated as resident in Greece within the meaning of article II(1) (f) of the Agreement for Avoidance of Double Taxation

between India and Greece.

On appeal, the Commissioner of Income Tax (Appeals) held that the assessees has no business apart from their shipping business, the preamble

and article I of the agreement clearly show that Hellenic is appointed to control and manage the entire shipping business of the assessees;

subsequent articles in the agreement did not, in any way, restrict the total control and management given to Hellenic Lines by the preamble and

article I of the agreement; Hellenic Lines Ltd. has been given power to dismiss the staff of the assessee-companies, to control the entire shipping

business of the assessee-companies; to collect and disburse moneys on behalf of the assessee-companies; to appoint an agent and sub-agent at its

discretion; to enter into all negotiations and contracts on behalf of the assessee-companies.

The Commissioner of Income Tax (Appeals) was of the opinion that, by virtue of the agreement between the assessees and Messrs. Hellenic Lines

Ltd. the control of the entire business of the assessees company had been given to the Greek company. Therefore, the Income Tax Officer was not

correct in saying that only the shipping business of the assessees had been given to the management of Messrs. Hellenic Lines Ltd. The assessees

should, therefore, be regarded as resident in Greece, because their entire business was wholly managed and controlled in Greece. He, accordingly,

allowed the appeals of the assessees.

On Second appeal, the Tribunal held that it is correct that, according to the preamble of the agreement, the assessees shall arrange for the

management and control wholly or entirely of their business by Hellenic Lines Ltd., for all practical purposes such management and control was

actually transferred to Hellenic Lines Ltd., but this fact alone is not sufficient to entitle the assessees to the benefit of the double taxation relief; the

direction, management and control, ""the head and seat and directing power"" of a companys affairs is situated at the place where the directors

meetings are held and, consequently, a company would be resident in this country if the meetings of the directors who manage and control the

business are held here; the assessees, therefore, cannot be said to be resident in Greece in terms of article II(1) (f) of the agreement between the

Government of India and the Government of Greece for Avoidance of Double Taxation of Income.

Thus, the Tribunal was of the view that the entire management and control of the assessees business could not be said to have been vested in

Messrs. Hellenic Lines Ltd. wholly. Moreover, there was no allegation or proof that the assessee-companies were subject to Greek taxes except

for the small amount of commission earned by Messrs. Hellenic Lines Ltd. Since the assessees were incorporated within the Republic of Panama,

they might be liable to taxes imposed by the said Republic but there was nothing to show they would be liable to Greek taxes on the incomes

earned by them in India. Over this matter, the assessees wanted to lead further evidence. But the Tribunal was not inclined to allow them to do so

because, apart from this, they could not be said to be residents of Greece within the meaning of the Agreement for Avoidance of Double Taxation

between India and Greece and, therefore, there was no point in going through this matter.

The short question which calls for determination in this case is whether, having regard to the terms of the agreement dated May 31, 1976, by and

between the assessee-companies and Messrs. Hellenic Lines Ltd., it can be said that the business of the assessee is wholly managed and controller

in Greece. If the answer to this question is in the affirmative, then the assessees will be entitled to deduction of 50% of the tax charged in India in

respect of their shipping business as provided in article VI of the Agreement for Avoidance of Double Taxation between India and Greece.

Article II(1) (f) of the Agreement for Avoidance of Double Taxation between India and Greece runs as under :

the terms resident of Greece and resident of India mean respectively a person who is resident in Greece for the purposes of Greek tax and not

resident in India for the purposes of Indian tax...

A company shall be regarded as resident in Greece if it is incorporated in Greece or its business is wholly managed and controlled in Greece.

Under section 6(3) of the Income Tax Act, 1961, a company is said to be resident in India in any previous year, if either it is an Indian company

or, during that year, ""the control and management of its affairs"" is situated only in India. In the context of this section, several judgments have been

delivered by different courts in this country.

In Commissioner of Income Tax Vs. Bank of China (in liquidation), , this court held that the expression ""control and management"" means de facto

control and management and not merely the right or power to control and manage.

The word ""affairs"" means affairs which are relevant for the purposes of the Income Tax Act and which have some relation to the income sought to

be assessed.

In Commissioner of Income Tax Vs. Chitra Palayakat Co., , the Madras High Court held that a mere theoretical de jure right to control and

manage the affairs is not sufficient in order to prove that the firm was resident in India, but it must be shown by evidence that control and

management of its affairs was partly exercised in India. The mere presence of the managing partner in India could not lead to the inference that

control and management of the affairs of the firm had been exercised in India.

In M.L. Yacoob Sheriff Vs. Additional Assistant Controller, Estates duty cum Income Tax Circle, Madras, , the Supreme Court was concerned

with the question of determination of residence of a firm. In that context, the court observed as under (at page 5) :

It is true that the control and management which must be shown to be situated at least partially in India is not merely theoretical control and

power, not a de jure control and power, but the de facto control and power actually exercised in the course of the conduct and management of the

affairs of the firm. Theoretically, if the partners reside in India, they would naturally have the legal right to control the affairs of the firm which carries

on its operations outside India. The presence of this theoretical de jure right to control and manage the affairs of the firm which inevitably vests in all

the partners, would not by itself show that the requisite control and management of the affairs of the firm is exercised, may be to a small extent, in

India before it can be held that the control and management is not situated wholly without the taxable territories. . .

In The Commissioner of Income Tax, Bombay City, Bombay Vs. Nandlal Gandalal, , the Supreme Court held again that the expression ""control

and management""in section 4A(b) of the Indian Income Tax Act, 1922, means de facto control and management and not merely the right or power

to control and manage.

In the light of the principles laid down in the aforesaid decisions it appears to be by now well-settled that the question as to where the control and

management lies is to be decided in the light of actual or factual exercise or control inasmuch as the courts consistently took the view that the mere

presence of a partner of a firm in India even when he happens to be a managing partner is not conclusive of the issues.

It appears that almost similar words have been used in article II(1) (f) of the Agreement for Avoidance of Double Taxation between India and

Greece with the only difference that in this article, the expression used is ""business is wholly managed and controlled in Greece"" as against "" the

control and management of its affairs is situated wholly in India"" as appearing in section 6(2) and section 6(3) (ii) of the Income Tax Act, 1961.

The expression ""control and management"" is common at both places; but, while in section 6, the expression ""control and management"" is used in

relation to ""affairs"", the double taxation avoidance agreement between India and Greece used the expression ""management and control : with

reference to the word ""business"". The expression ""affairs"" may be said to be much wider than the expression ""business"".

In the light of the aforesaid provisions, we may now examine the agreement dated 31, 1976, entered into by and between the assessee-company

and Messes. Hellenic Lines Ltd. We may usefully refer to some of the important clauses of the said agreement.

(a) Clause 1 of the agreement clearly says that the assessee has appointed Hellenic, the Greece Co., as its general manager and agent to control

and manage ""wholly"" the entire affairs of ""Universal"", the assessee-company.

(b) The assessee-company has not staff of its own and all facilities including officers, staff, agents and sub-agents and the provisions of all

administrative services necessary for the due organisation or management in accordance with accepted commercial practice of the entirety of the

assessees affairs shall be provided by Hellenic, the Greece Co., as stipulated in clause 2(a).

(c) The principal occupation of the agency is the running of seagoing vessels and all vessels as may be in the ownership or control of the assessee

shall be managed and looked after by the Greece Co., in respect of all matters as laid down in clause 2(b).

(d) Hellenic, the Greece company, has been given power to appoint and dismiss the staff of the assessee-company; to manage and control the

entire shipping business of the assessee-company; to operate all vessels belonging to the assessee-company, to collect and disburse monies on

behalf of the assessee-company; to appoint agent and sub-agents; to negotiate all legal matters; to act as accountants and to maintain accounts; to

enter into all negotiations and contracts on behalf of the assessee-company, etc.

(e) Clause 9 of the agreement further provides that Hellenic, the Greece company shall have power to do all such things on behalf of Universal, the

assessee-company, as are not expressly forbidden by the provisions of any relevant statute or by the memorandum or articles of association of

Universal.

The very preamble of the agreement clearly stipulates that the assessee-company wishes to arrange for the management and control wholly of the

entirely of its business by Hellenic Lines Ltd., and, with that end in view, it wishes to appoint Hellenic, the Greek company, as its general manager

and agent.

The Tribunal clearly held that, for all practical purposes, such management and control was actually transferred to that company"" (Hellenic Lines

Ltd.). In other words, admittedly, the de facto control and management of the assessee-company was actually vested in Hellenic Lines Ltd., the

Greek company, and such control and management over the business of the assessee-company was actually exercised by the said Greek

company. Notwithstanding the aforesaid finding of fact recorded by the Tribunal, it still decided the case against the assessee-company on the

following grounds :

(a) There are certain extracted clauses in the agreement to show that the ultimate control, more particularly the right to secure accounts still remains

with the assessee-company. For example, according to clause 4 of the agreement, Hellenic were to render a voyage account to the assessees as

soon as possible after completion of each voyage by each vessel from time to time owned and/or controlled by the assessee, showing the balance

due to or receivable from the assessee after payment of all commission and disbursements incurred in connection with the management, control and

operation of the said vessels. According to this clause, all this management and control was to be carried on for the account of the assessee.

(b) According to clause 6, Hellenic was to receive as its managing fee, a commission of 1 1/4 per cent. of the total freight collections of the

assessee in respect of the relevant year.

These are the only two clauses which have been referred to by the Tribunal in support of its conclusion as to why the business of the assessee

cannot be wholly managed and controlled in Greece. We have not been able to appreciate the logic and/or the reasonings adopted by the Tribunal

to come to this conclusion. Admittedly, Hellenic Lines Ltd., the Greek company was not the owner of the shipping business. The business was

owned by the assessee-company. The question is one of control and management of the business being vested in Greece. The control and

management is certainly different from the concept of ownership. The mere fact that the final accounts of the business, control and management by

Hellenic Lines Ltd., were to be rendered to the assessee-company and that Hellenic Lines Ltd., were only entitled to some commission at a certain

rate calculated with reference to the total freight collection, in our view, cannot lead to the conclusion that the business of the assessee cannot be

said to be wholly managed and controlled in Greece. In our view, the approach of the Tribunal was wholly erroneous.

Under article II(1) (f) of the agreement for avoidance of double taxation, a company shall be regarded as resident in Greece if its business is wholly

managed and controlled in Greece. The test to be applied, therefore, is as to whether the business is wholly managed and controlled in Greece.

The Tribunal accepts the factual position that for all practical purposes, the management and control of the business was actually transferred to

Hellenic Lines Ltd. But, the Tribunal takes the view that a companys affairs are controlled and managed at the place where the directors meetings

are held and consequently the company will be resident in the country if the meetings of the directors are held in that country. This view of the

Tribunal is patently wrong. According to section 6(3) of the Income Tax Act, 1961, a company is said to be resident in India if, inter alia, during

that year, the control and management of its affairs is situated wholly in India. The test, therefore, for determining the residence of a company under

the Income Tax Act, 1961, is materially different from the test of residence of a company under the Income Tax Act, 1961, is materially different

from the test of residence of a company according to article II(1) (f) of the agreement between India and Greece for the avoidance of double

taxation. For the purpose of the agreement, it is not the requirement that the control and management of the affairs of the company must be in

Greece. The requirement of article II(1) (f) is that the business is wholly managed and controlled in Greece. There cannot be any dispute that the

business is wholly managed and controlled by Hellenic Lines Ltd., in Greece. The Tribunal also accepts that factual position.

As indicated earlier, the finding is that the assessee-company has no business apart from shipping business. The agreement itself has given the been

given entire power of control and management to Hellenic Lines Limited. It has been given the power to appoint and dismiss all the staff of the

assessee; to control the entire shipping business of the company; to collect and disburse moneys on behalf of the assessee-company to appoint

agents and sub-agents at its discretion, to enter into all negotiations and contracts on behalf of the assessee-company.

The Tribunal, therefore, applies a wrong test for determining whether the assessee-company is resident in Greece in terms of article II(1) (f) of the

Double Taxation Avoidance Agreement. The mere fact that, under the agreement, Hellenic Lines Ltd., is to render accounts for its collection of

money and for disbursement of money does not, in any way, affect the complete control and management of the business of shipping vested in

Hellenic Lines Ltd., in terms of the agreement between the assessee and Hellenic Lines Ltd.

The question as to whether the assessee is resident in Greece is raised in question No. 5. The Tribunal, while referring the question has

categorically observed that questions Nos. 2 and 5 should be taken to have been included in the question above referred. Therefore, the question

about the residence of the company in Greece is included in the questions which are being referred to the High Court. Once it is held that the

assessee-company is resident in Greece in terms of article II(1) (f) of the Agreement for Avoidance of Double Taxation, the assessee is entitled to

the benefit provided under article VI of the said agreement. In other words, the assessee, in terms of article VI of the Agreement for Avoidance of

Double Taxation, will be charged to tax in India by way of reduction of an amount equal to 50% of the tax so charged.

For the reasons aforesaid, the question referred to this court is answered in the affirmative and in favour of the assessees.

There will be no order as to costs.

BHAGABATI PRASAD BANERJEE J. - I agree.