(1989) 12 CAL CK 0033

Calcutta High Court

Case No: Income-tax Reference No. 100 of 1983

COMMISSIONER OF Income Tax		APPELLANT
	Vs	
SWEDISH EAST ASIA CO. LTD.		RESPONDENT

Date of Decision: Dec. 19, 1989

Acts Referred:

- Income Tax Act, 1961 - Section 5

Citation: (1992) 94 CTR 106 : (1991) 94 CTR 106 : (1992) 193 ITR 608 : (1991) 57 TAXMAN 135

Hon'ble Judges: Suhas Chandra Sen, J; Bhagabati Prasad Banerjee, J

Bench: Full Bench

Judgement

SUHAS CHANDRA SEN J. - The following question of law has been referred by the Tribunal u/s 256(1) of the Income Tax Act, 1961 :

"Whether, on the facts and in the circumstances of the case and on a correct interpretation of rule 4 of the Second to the Companies (Profits) Surtax Act, 1964, the Tribunal was justified in holding that the capital of the non-resident assessee company should be determined with reference to its income instead of its operating revenue ?"

The facts as narrated by the Tribunal are as under :

"The assessee is a shipping company, having its head office in Sweden. Part of its income is assessable in India in terms of section 44B of the Income Tax Act, 1961. In the course of assessment proceedings to surtax, a question arose as to how the capital of the company for the purposes of the Surtax Act should be computed. The company worked out the capital for purpose of the Surtax Act by taking Indian capital to world capital to world capital in the same ratio as Indian income to the world income. Profit as per world profit and loss account was worked out by the assessee at Rs. 83,37,289. Indian income as per the Income Tax return was Rs. 14,06,948. Income arising outside India thus came to Rs. 69,30,349. The total world

capital of the assessee-company was Rs. 9,32,65,839. The proportionate part of it, being in the ratio of Indian income to world income, was worked out by the assessee-company to be Rs. 1,57,39,368 by deducting from the world capital the proportionate part relatable to income arising outside India the Inspecting Assistant commissioner, however, did not accept the above working. He felt that it would be more appropriate for the purpose of determining the Indian capital to go to the ratio between Indian operating revenue and world operating revenue. The Indian operating revenue as per his working was Rs. 1,87,59,210. It worked out to be 3.3177% of the world operating revenue which was Rs. 56,54,15,267. He, therefore, worked out the Indian capital at 3.3177% of the world capital, i.e., at Rs. 29,00,709.

The appeal preferred by the assessee was dismissed by the Commissioner of Income Tax (Appeals). A further appeal was made to the Tribunal. The Tribunal held that "there is merit in the assessees contention that the computation of capital done by the assessee-company is in accordance with rule 4 of the Second Schedule, as illustrated in the return form in Item No. 13 and Note No. 17". They pointed out that "the concept of total income, as is well-known, is not co-equal to the commercial concept of income, profits and gains of a company. Some part of income, profits and gains of a company may not be includible in the total income of the company for various reasons as given in section 5 read with sections 6 and 10. Thus, fir example, in the case of a company which is non-resident on the basis of test laid down in section 6 of the Income Tax Act, 1961, all these incomes which are received by it outside India or which accrues or arises or are deemed to accrue or arise to him outside India are not includible in his total income in terms of sub-section (2) of section 5. Similarly, there are incomes mentioned in section 10, which, though accrue and arise to a company, are not includible in its total income. The reasons for non-inclusion may, thus be either on account of the operation of sub-section (2) of section 5 or the operation of various subsections of section 10. For whatever reasons, if the income, profits or gains is not includible in the total income of a company, rule 4 would apply, and the computation of capital would have to be done in accordance with the ratio which the income, profits and gains, not includible in the total income bear to the total amount of its income, profits an gains..." According to the Tribunal, the Commissioner of Income Tax (Appeals) had omitted to take note of the above Item No. 13 and Note No. 17 of the return form and had also missed the true import of section 5 (2). In the opinion of the Tribunal, "the sub-sections of section 10, in their effect, excluded some of the income from the purview of total income. Qualitatively, there is no difference in the exclusion effected by sub-section (2) of section 5 and those effected by various sub-sections of section 10". As a result, the Tribunal reversed the order of the Commissioner of Income Tax (Appeals) and accepted the assessees appeal."

It appears to us that the Tribunal has taken a correct view of the matter. The Companies (Profits) Surtax Act has imposed a tax on every company in respect of "so much of its chargeable profits of the previous year... as exceed the statutory

deduction..." "Chargeable profits" has been defined in section 2 (5) to mean the total income of an assessee computed under the Income Tax Act, 1961, and adjusted in accordance with the provisions of the First Schedule. "Statutory deduction" has been defined by section 2(8) to mean an amount equal to 10% of the capital of the company as computed in accordance with the provisions of the Second Schedule, or an amount of Rs. two hundred thousand, whichever is greater.

Therefore, in order to calculate the chargeable profits of a company, it is necessary to find out the quantum of capital in accordance with the provision of the Second Schedule. The Second Schedule lays down the rules for computing the capital of a company for the purposes of surtax. Rule 1 lays down that the capital of a company shall be the aggregate of the amounts, as on the first day of the previous year relevant to the assessment year of its paid-up share capital, certain specified reserves and debentures. Rule 2 lays down that where a company owns any assets the income of which was required to be excluded from its total income in computing its chargeable profits under the provision of rule 1 (iii) or (vi) of the First Schedule, then the amount of its capital shall be diminished by the cost of the said assets. Rule 3 lays down the method of computation of capital where the capital of a company was increased or reduced in certain circumstances in the course of the relevant previous year. Rule 4 the construction of which is the subject-matter of dispute in this case, is as under :

"4. Where a part of the income, profits and gains of a company is not includible in its total income as computed under the Income Tax Act, its capital shall be the sum ascertained in accordance with rules 1, 2 and 3, diminished by an amount which bears to that sum the same proportion as the amount of the aforesaid income, profits and gains bears to the total amount of its income, profits and gains."

The dispute is as to the exact meaning of the phrase "where a part of the income... is not includible in its total income as computed under the Income Tax Act." The assessee is a non-resident company. "Total income" has been defined in section 2(45) of the Income Tax Act, 1961, to mean "the total amount of income referred to in section 5, computed in the manner laid down in this Act."

Section 5(2) lays down that "Subject to the provisions of this Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which -

(a) is received or is deemed to be received tin India in such year by or on behalf of such person; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year."

The Explanations to the section are not necessary for the purpose of this case.

Therefore, the scope of total income of a non-resident is limited to income which is received or deemed to be received in India or which accrues or arises or is deemed to accrue or arise to him in India. The income which has neither been received by a non-resident assessee in India or which has not accrued or arisen to him in India will not come within the ambit of "total income" as defined in section 5 of the Income tax Act

The question that has been raised in this case is whether it can be said that whatever is left out of the ambit of total income as defined in section 5 can be described as a part of the income of the company which is not includible in its total income.

On behalf of the Revenue, reliance was placed on the language of section 10 which provides that "in computing the total income of a previous ye ar of any person, any income falling within any of the following clauses shall not be included". There are various other categories of income mentioned in section 10 including "agricultural income" which, according to the Revenue, are not includible in the total income. The other types of income which may not be included in the total income of an assessee for various other reasons cannot be described as income not includible in total income. Such income may be excluded for various reasons; but the phrase "not includible in its total income" must be confined to the categories of income mentioned in section 10.

I am unable to uphold this contention because of the definition of total income given in section 2 (45) and also the clear language of section 5 under the section heading "Scope of total income". When sub-section (2) of section 5 defines total income of a non-resident, it specifically includes certain types of income within the total income of a non-resident. That means that the types of income which are not specifically mentioned in sub-section (2) will not be included in his income. But even in a case where a non-resident has received income in India, a portion of such income may not be includible in its total income by virtue of various other provisions of the Act including section 10. That, however, does not mean that whatever has not been excluded from the income of a non-resident by section 10 must be deemed to be included or includable in his total income.

Moreover, an assessee has to file a return of chargeable profits u/s 5(1) of the Companies (Profits) Surtax Act, 1964. The form of the return has been provided in the Appendix to the Companies (Profits) Surtax Rules, 1964. In Part II of Column I of the prescribed form, an assessee is required to state "the total income computed in accordance with the provision of Income Tax Act, 1961." Part III of the return provides for "Computation of statutory deductions."

Column 13 of Part III is as under :

"13. (a) Amount of income, profits and gains, if any, not includible in the total income as computed under the Income Tax Act, 1961.

Rs.....

(Please see Note 8).

(b) Total amount of income, profits and gains in respect of the previous year(s) [i.e., the amount shown in entry (a) above, and the amount of the total income in respect of the previous year(s) as shown in item I of Part II of this return]

(c) Amount by which the capital as shown in item 12 is required to be diminished in accordance with rule 4 of the Second Schedule to the Companies (Profits) Surtax Act, 1964, i.e., the amount shown

$$\text{in item 12} \times \frac{\text{Amount shown in entry (a) of item 13}}{\text{Amount shown in entry (b) of item 13}}$$

(Please see Note 9)"

Notes 8 and 9 are as under :

Note 8 (See entry (a) of item 13 of Part III).

Instances of income, profits and gains not includible in the total income as computed under the Income Tax Act, 1961, are agricultural income in India, and in the case of a non-resident company, its income accruing or arising outside India.

Note 9 (See entry (c) of item 13 of Part III).

Item 13 is to be filled in only in the case of company a part of the income, profits and gains of which is not includible in its total income as computed under the Income Tax Act, 1961.

Rule 4 of the Second Schedule to the Companies (Profits) Surtax Act, 1964, provides that where a part of the income, profits and gains of a company is not includible in the total income as computed under the Income Tax Act, 1961, its capital shall be the sum ascertained in accordance with rules 1, 2 and 3 diminished by an amount which bears to that sum the same proportion as the amount of the aforesaid income, profits and gains bears to the total amount of its income, profits and gains."

Therefore, Notes 8 and 9 make it quite clear that the phrase "incomes not includible in its total income" cannot be confined to the items of income which have been specified in section 10 of the Act. In the case of a non-resident company, income which has not accrued or arisen in India will come within the phrase "income, profits and gains not includible in the total income."

Therefore, we are of the view that the Tribunal has taken a correct decision in this case.

The question is, therefore, answered in the affirmative and in favour of the assessee.

There will be no order as to costs.

BHAGABATI PRASAD BANERJEE J. - I agree.