Mcdermott International Inc. (No. 1) Vs Union of India and others

Court: Bombay High Court

Date of Decision: April 6, 1988

Acts Referred: Income Tax Act, 1961 â€" Section 2(25A), 226(3)

Citation: (1988) 70 CTR 481 : (1988) 173 ITR 155

Hon'ble Judges: Sujata V. Manohar, J

Bench: Single Bench

Judgement

Mrs. Sujata Manohar, J.
The petitioner is a company established under the laws of the Republic of Panama. It carries on the business of

designing, fabrication, construction of platform jackets, decks and piles, bridges, pipelines and similar construction work on-shore and off-shore.

At the relevant time, the petitioner was engaged in the activity of installing platform jackets, decks and laying pipelines at the Bombay High off-

shore area. This area is at a distance of about 100 nautical miles from the Indian coastline.

2. The Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976, u/s 3(2), prescribes the limit of

territorial waters at 12 nautical miles from the nearest point of the appropriate baseline. Section 3(1) states that the sovereignty of India extends

and has always extended to the territorial waters of India.

3. u/s 6(1), the continental shelf of India extends to a distance of 200 nautical miles from the baseline referred to in sub-section (2) of section 3

where the outer edge of the continental margin does not extend up to that distance. Section 6(2) describes sovereign rights of India in respect of its

continental shelf. Section 6(6) enables the Central Government by notification in the Official Gazette to extend, with such restrictions and

modifications as it thinks fit, any enactment for the time being in force in India or any part thereof to the continental shelf or any part thereof.

4. Section 7(1) describes the exclusive economic zone of India as an area beyond and adjacent to the territorial waters and the limit of such zone is

200 nautical miles from the baseline referred to in sub-section (2) of section 3. u/s 7(7), the Central Government may, by a notification in the

Official Gazette, extend, with such restrictions and modifications as it thinks fit, any enactment for the time being in force in India or any part thereof

to the exclusive economic zone or any part thereof.

5. Under a notification bearing G. S. R. No. 304(E) dated March 31, 1983, issued in exercise of the powers u/s 6, sub-section (6), and section 7,

sub-section (7), of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976, the Central

Government extended the Income Tax Act, 1961, to the continental shelf of India with effect from April 1, 1983, subject to the restriction that the

Income Tax Act shall apply only in respect of income derived by every person from any of the following activities :

(a) the prospecting for or extraction or production of mineral oils in the continental shelf of India or the exclusive economic zone of India;

(b) the provision of any services or facilities or supply of any ship, aircraft, machinery or plant (whether by way of sale or hire) in connection with

any activities referred to in clause (a);

(c) the rendering of services as an employee of any person engaged in any of the activities referred to in clause (a) or clause (b).

6. The activities of the petitioner are covered by the notification.

7. The petitioner received a letter dated February 21, 1986, from the Income Tax Officer, Dehradun, in which, inter alia, the attention of the

petitioner was drawn to the notification dated March 31, 1983. The Income Tax Officer directed the petitioner to ensure that taxes in respect of

expatriate personnel employed by it in the previous year relevant to the assessment year 1983-84 are paid without delay. The petitioner also

received on March 3, 1986, a copy of the notice (letter) dated February 21, 1986, issued by the Inspecting Assistant Commissioner of Income

Tax, Dehradun, to the Oil and Natural Gas Commission (respondent No. 6 herein). In the said notice the ONGC was informed that a sum of Rs.

2,28,47,367 is due from the petitioner on account of Income Tax and interest. The notice did not indicate how the said figure was arrived at.

Under the notice, the ONGC was requested u/s 226(3) of the Income Tax Act, 1961, to pay forthwith any amount held by it for or on account of

M/s. Hyundai Heavy Industries Co. Ltd., of whom the petitioner is a sub-contractor, up to the above amount. After some correspondence, under

a notice dated March 21, 1986, the ONGC was informed by the 2nd respondent that as against the original tax liability of Rs. 2,28,47,367, the

effective demand remains at Rs. 82,59,862 which represents the tax payable by the employees of the petitioner, who were engaged during the

period April 1, 1982, to March 31, 1983, and who rendered services beyond 12 nautical miles from the Indian shore. This revised figure is also an

estimated figure. There is admittedly no order of assessment against the petitioner. The ONGC (respondent No. 6), which is a public sector

undertaking, has deposited with respondents Nos. 1 to 5 this sum of Rs. 82,59,862 due and payable by ONGC to M/s. Hyundai Heavy Industries

Co. Ltd. (respondent No. 7) without demur.

8. Although the ONGC (respondent No. 6 herein) has been served, it has not cared to appear at the hearing of the petition or to file any return.

9. The first question which requires determination is whether by virtue of the notification which came into effect from April 1, 1983, the income

which has accrued within the area of continental shelf or economic zone, but beyond the territorial waters of India, in the accounting year April 1,

1982, to March 31, 1983, is subject to Income Tax under the Income Tax Act, 1961. The relevant assessment year for this period is undoubtedly

the assessment year 1983-84 (April 1, 1983, to March 31, 1984) when the Income Tax Act was applicable. But, Income Tax is actually levied on

income which accrued during the previous accounting year which is April 1, 1982, to March 31, 1983. As the territory in which income arose was

beyond 12 nautical miles, the Income Tax Act was not applicable to such income during this accounting year. Income Tax, therefore, cannot be

levied on income which accrued during the period when the territory in which it accrued was not governed by the Income Tax Act, 1961.

10. In the case of COMMISSIONER OF Income Tax, MADRAS Vs. VALLIAMMAI ACHI., , the assessee had sustained a loss in the

accounting year 1936-37 in a business carried on in Burma. Burma had ceased to be a part of British India in the assessment year 1937-38. The

assessee claimed a set-off in respect of loss sustained by her in Burma in the accounting year 1936-37. The Income Tax Officer refused to allow

her this set off on the ground that on April 1, 1937, Burma had ceased to be a part of British India and the loss having been sustained outside

British India, it could not be set off. The Madras High Court, relying on its earlier Full Bench decision, CIT v. Karuppiah Kangani [1929] 55 MLJ

844, held that under the Income Tax Act, the income of the year previous to the year of assessment is not to be taken as merely a guide to the

ascertainment of the income of the year of assessment. It is the actual sum which is subject to taxation. When the assessee sustained loss, Burma

was a part of British India. The assessee, therefore, was allowed the set-off of such loss.

11. This decision was followed by the Division Bench of the Bombay High Court in the case of RAWJI DHANJI and CO., IN RE., . The Division

Bench has observed in similar circumstance. "" But as you have to impose the tax for the year of assessment on the actual income of the previous

year, it seems to me plain that you must take the facts as they existed during that previous year : otherwise you are only ascertaining what would

have been the income of the previous year if the facts had been as they existed in a subsequent year"". The Division Bench allowed the assessee to

set off the loss in Rangoon for the previous year ending March 31, 1937, against profits in Bombay for the assessment year 1937-38.

12. Similarly, in the case of E. M. Vs. MUTHAPPA CHETTIAR v. COMMISSIONER OF Income Tax, MADRAS., income accruing or arising

in British India in the previous year was held assessable under the Indian Income Tax Act, though the place of accrual ceased to be part of British

India in the year of assessment. This was also a case of income arising in Burma in the accounting year 1936-37.

13. In the case of SARUPLCHAND AND HUKUMCHAND Vs. UNION OF INDIA AND ANOTHER., , a Full Bench of the Madhya

Bharat High Court was required to consider the liability under the Indian Income Tax Act of income accruing to a resident of a Part B State from

April 1, 1949, to March 31, 1950. The Full Bench held that though Madhya Bharat was not a taxable territory as respects any period prior to

April 1, 1950, it was deemed to be such under the express provision of Section 2(14A) of the Indian Income Tax Act, 1922. Hence, tax was

payable under the Indian Income Tax Act in respect of income accruing during the previous accounting year.

14. In the case of The Union of India Vs. Madan Gopal Kabra, , the Supreme Court was required to consider an assessment under the Indian

Income Tax Act, 1922, of income arising in a Part B State in the accounting year ending on March 31, 1950. The Supreme Court relied upon sub-

clause (1) of clause (b) of the proviso to section 2(14A) of the Indian Income Tax Act, 1922, under which the whole of the territory of India

including Rajasthan was to be deemed taxable territory for the purposes of section 4A as respects any period before or after March 31, 1950. In

view of this express provision, the income accruing in the accounting year 1949-50 in Rajasthan was held taxable under the Indian Income Tax

Act, 1922.

15. Under the Taxation Laws (Extension to Union Territories) Regulation, 1963, which came into effect from April 1, 1963, section 2(25A) was

inserted in the Income Tax Act, 1961. Under sub-clause (b) of section 2(25A), it is provided as follows :

(25A) "India" shall be deemed to include the Union Territories of Dadra and Nagar Haveli, Goa, Daman and Diu and Pondicherry, - ...

(b) as respects any period included in the previous year, for the purposes of making any assessment for the assessment year commencing on the

1st day of April, 1963, or for any subsequent year.

16. Therefore, when it is sought to tax income arising in the previous year relevant to the assessment year from which the Income Tax Act is made

applicable, an express provision has to be made to cover income accruing in the previous year. In the absence of such an express provision,

income accruing in an accounting year for which the Income Tax Act was not applicable, cannot be brought to tax simply because from the

relevant assessment year, the Income Tax Act is made applicable.

17. There is no such express provision in the notification of March 31, 1983. The income arising in the accounting year April 1, 1982, to March

31, 1983, to the petitioner in the territory beyond 12 nautical miles is not, therefore, subject to the Income Tax Act, 1961.

18. Mr. Jetly, learned counsel for respondents Nos. 1 to 5, has now raised a contention that there is no material to show that the employees of the

petitioner worked beyond 12 nautical miles. This contention was never raised before. It is now raised, for the first time, in an attempt to defend the

indefensible. The work, by the petitioner, was as a subcontractor under four different contracts for work in the Bombay High Area given by

ONGC (respondent No. 6 herein). For each of these four contracts, the ONGC had issued Bid Packages. In the introductory part of these Bid

Packages, this area has been described on the following lines :

The Oil and Natural Gas Commission (hereinafter called "the company") has discovered commercial oil field in the Bombay High Area located off

the West Coast of India. The Bombay High Field is located in the Arabian sea water 100 miles (160 km.) West-Eastern, West-North/West of

Bombay with a water depth ranging from approximately 184-276 feet (56-84 m.).

19. The employees of the petitioner who rendered services in the Bombay High Area did their work beyond 12 nautical miles from the Indian

coastline. The contention of Mr. Jetly is, therefore, baseless. It should be noted that in respect of project work which is done by the petitioner on-

shore or within 12 nautical miles, the petitioner has deducted Income Tax from the salaries of its employees and has filed the relevant returns.

These are not the subject-matter of this petition.

20. The sixth respondent, the ONGC, has been called upon to deposit a sum of over Rs. 82 lakhs due and payable by it to the seventh

respondent, Hyundai Heavy Industries Co. Ltd., in respect of the alleged tax dues of the petitioner. u/s 226(3), the Income Tax Officer can require

by a notice in writing only such persons from whom money is due or may become due to the assessee or any person who holds or may

subsequently hold money for or on account of the assessee to pay to the Income Tax Officer such money or so much of the money as is sufficient

to pay the amount due by the assessee. In the present case, the ONGC was not liable to pay any part of the amount deposited pursuant to the

notice to the petitioner. The contract of the ONGC was with Hyundai Heavy Industries Company Ltd. (respondent No. 7). Under this contract,

the amount was payable by the ONGC to Hyundai Heavy Industries Co. Ltd. There is an independent contract between Hyundai Heavy

Industries Co. Ltd. and the petitioner under which Hyundai Heavy Industries Co. Ltd. have given a sub-contract to the petitioner. The petitioner

can recover their amount under their contract only from Hyundai heavy Industries Co. Ltd. and from nobody else. They have no right to recover

any amount from the ONGC. The sum of Rs. 82,59,862, which is paid over to respondents Nos. 1 to 5, is not, therefore, any part of the money

which is due or may become due to the petitioner or to any person who holds or may subsequently hold money for or on account of the petitioner.

On this ground alone, notices u/s 226(3) are clearly in violation of the provisions of section 226(3) of the Act. Moreover, since the petitioner is not

liable to pay tax on income accrued in the accounting year 1982-83 in respect of work done beyond 12 nautical miles, the notice u/s 226(3) in

respect of tax on such income is clearly bad in law.

21. There are other contentions raised in the petition which it is not necessary to examine in view of my above findings.

22. It is surprising that although this position, which is clear in law, was pointed out to respondents Nos. 1 to 5, they have chosen to ignore the

legal provisions and have issued a notice u/s 226(3) in the teeth of the provisions of the section. As a result, a very large amount due and payable

by the ONGC to respondent No. 7 has been held up by respondents Nos. 1 to 5 without any authority of law. Respondents Nos. 1 to 5 are,

therefore, directed to refund the amount to respondent No. 7 with interest at the rate of 15% per annum which is the rate prescribed u/s 244.

23. Rule is accordingly made absolute in terms of prayers (a), (b) and (c). The amount should be returned forthwith to the ONGC with interest at

the rate of 15% per annum. The ONGC, in turn, are directed to hand over the amount together with interest received by them forthwith to the

seventh respondent. The ONGC have not cared to appear at the hearing and they obviously have no claim to the amount deposited.

24. Respondents Nos. 1 to 5 to pay to the petitioner costs of this petition.

25. A copy of this judgment and the judgment in Writ Petition No. 1882 of 1986 [McDermott International Inc. (No. 2) v. Union of India (infra p.

164)] to be sent to the Secretary, Ministry of Finance, Government of India, New Delhi.