
(1968) 04 CAL CK 0020

In the Calcutta High Court

Case No : Income-tax Reference No. 163 of 1964

Commissioner of Income Tax

APPELLANT

Vs

Ellerman Lines Ltd.

RESPONDENT

Date of Decision : 11-04-1968

Acts Referred:

Income Tax Act, 1961 — Section 5(8)
Income Tax Rules, 1922 — Rule 33

Citation : (1970) 75 ITR 47

Hon'ble Judges : P.B. Mukharji, J;K.L. Roy, J

Bench : Division Bench

Advocate : B.L. Pal and B. Gupta, for the Appellant; D. Pal, for the Respondent

Judgement

P.B. Mukharji ,J.

1. This is a reference u/s 66 (1) of the Indian income tax Act, 1922. The two questions of law which have been referred to this court for an answer as follows :

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the destination earnings collected in India should be considered as part of the Indian earnings in determining the assessee's Indian income under Rule 33 of the Income Tax Rules ?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was right in allowing the claim of the assessee for the investment allowance under the U. K. Act (corresponding to development rebate under the Indian Income Tax Act, 1922) in the computation of its total world income for the purpose of determining the assessee's Indian income under Rule 33 of the Income Tax Rules, 1922 ? "

2. The facts giving rise to these questions of law may now be briefly stated. The assessment years 1960-61 and 1961-62 are the relevant years. The previous relevant years are the calendar years 1959 and 1960. The assessee is a non-resident British shipping company whose vessels ply on the waters all over the

world including Indian waters.

3. The Income Tax Officer determined the assessee's Indian profits at a percentage of its total earnings on the basis of Rule 33 of the Income Tax Rules. Of the three alternative methods laid down by Rule 33 for estimating the assessee's Indian profits, the statement of the case makes it quite clear that the Income Tax Officer adopted the second of the three methods. In other words, he computed the assessee's Indian profits at an amount which bore the same proportion to the total profits of the business (computed in accordance with the Central Board of Revenue Circular No. 7 of 1942 dated 10th February, 1948) as the receipts accruing or arising in the taxable territories bore to the total receipts of the business.

4. Before the Income Tax Officer the assessee's contention was that even while its profits were being computed in accordance with Rule 33 of the Income Tax Rules, in doing so the instructions issued by the Central Board of Revenue were to be adhered to. As the assessee was electing to be assessed on the basis of the ratio certificate granted by the U. K. authorities, a course permitted to him under the circular of the Central Board of Revenue in respect of its profits as well as for wear and tear, the assessee's total profits had to be worked out according to the said ratio without making any adjustment in it. In other words, the extreme contention of the assessee before the Income Tax Officer was that the U. K. ratio certificate must be taken as it is. The Income Tax Officer made his own computation and in doing so he did not include the destination earnings in the Indian ports for the purpose of applying the ratio. This gave rise to the first question before this court.

5. There was an appeal by the assessee and the Appellate Assistant Commissioner on appeal observed that the assessee shipped cargo on the "freight payable at destination " basis. Thus the freight in respect of the cargo loaded at non-Indian ports was collected by the assessee on arrival of the vessel at Indian ports. Such freight was definitely earned in India and the Appellate Assistant Commissioner found it difficult to understand why such earnings should not have been included in computing the assessee's income on the basis of the ratio certificate. The Appellate Assistant Commissioner, therefore, accordingly directed the Income Tax Officer to include the destination earnings while determining the assessee's profits for the years in question.

6. The department, being aggrieved by the order of the Appellate Assistant Commissioner, preferred an appeal to the Tribunal. The Tribunal came to the conclusion that the freights collected in Indian ports by the assessee, even if they related to cargo loaded outside India, were earned and received in India and there was no reason why they should be excluded from the Indian earnings before applying the ratio as given by the U. K. certificate. The Tribunal accordingly confirmed the order passed by the Appellate Assistant Commissioner.

7. The other question relates to the allowance of development rebate which the

Appellate Assistant Commissioner had ordered to be given. It was argued on behalf of the department before the Tribunal that, since the conditions required for allowance of development rebate were different from the investment allowance in U. K., the U. K. ratio certificate in so far as grant of investment allowance was concerned could not be applied unless the conditions laid down under the Indian Income Tax Act were satisfied. It was also argued that notwithstanding the allowance for wear and tear provided for in the U. K. ratio certificate which the assessee could adopt, such allowance could not be granted under the Indian Income Tax Act unless the assessee had created a reserve of 75 per cent, of the claim. Thirdly, it was contended for the department that the wear and tear allowance mentioned in the instructions of the Central Board of Revenue corresponded only to the depreciation allowance under the Indian Income Tax Act which was an allowance only u/s 10(2)(vi) of the Act and did not include an allowance by way of development rebate.

8. The decision of the Tribunal indicates that the Income Tax Officer was bound u/s 5 of the Income Tax Act to follow the instructions of the Central Board of Revenue. These instructions of the Central Board of Revenue clearly laid down that investment allowance was permitted as a deduction in respect of the development rebate allowable under the Indian Income Tax Act. As for the two years under question the rate of development rebate was the same as the rate of investment allowance in U. K., the Tribunal held that the Appellate Assistant Commissioner was justified in allowing the development rebate to the assessee on the basis of U. K. ratio certificate for the two years under appeal. It is, under these circumstances, that the two questions of law, quoted above, have been referred to this court for decision.

9. At the outset it might be pointed out that there is no case on Rule 33 on the particular point which is raised before this court. Reference was made to the decision in COMMISSIONER OF Income Tax, WEST BENGAL Vs. NETHERLANDS STEAM NAVIGATION CO. LTD., That case, however, in our opinion, does not apply in the present reference before us. In the first place, that was a case dealing no doubt with Rule 33 but in its impact with Section 10(2)(via) and not with (b) with which we are concerned. It was a case of initial depreciation and not an investment allowance. Secondly, this was not a case of British shipping company which is situated differently under Rule 33 and the circular of the Central Board of Revenue read together, but was a case of a Dutch company.

10. That case, however, makes one point quite clear and that is that Section 10(2)(via) confers a relief on the assessee and should therefore be strictly construed and the assessee must establish that his case falls within the terms of the clause.

11. I shall take up the first question first. This relates to destination earnings. The facts found are that such earning or freight is earned in India. These destination earnings are all collected in India and are part of Indian earnings.

12. Rule 33 of the Income Tax Rules reads, inter alia, as follows :

"In any case in which the Income Tax Officer is of opinion that the actual amount of the income, profits or gains accruing or arising to any person residing out of the taxable territories whether directly or indirectly through or from any business connection in the taxable territories, or through or from any property in the taxable territories, or through or from any asset or source of income in the taxable territories, or through or from any money lent at interest and brought into the taxable territories in cash or in kind cannot be ascertained, the amount of such income, profits or gains for the purposes of assessment to Income Tax may be calculated on such percentage of the turnover so accruing or arising as the Income Tax Officer may consider to be reasonable, or on an amount which bears the same proportion to the total profits of the business of such person (such profits being computed in accordance with the provisions of the Indian Income Tax Act), as the receipts so accruing or arising bear to the total receipts of the business, or in such other manner as the Income Tax Officer may deem suitable."

13. An analysis of Rule 33 will show the three methods to estimate the Indian profits. These three alternative methods are : (a) on such percentage of the total turnover as the Income Tax Officer may consider reasonable ; or (b) at an amount which bears the same proportion to the total profits of the business (computed according to the Indian Income Tax Act) as the receipts accruing or arising in the taxable territories bear to the total receipts of the business; or (c) in such other manner as the Income Tax Officer may deem suitable.

14. The Income Tax Officer adopted the second method. In other words, the method adopted in this case was an estimate at an amount which bears the same proportion to the total profits of the business (computed according to the Indian Income Tax Act) as the receipt accruing or arising in the taxable territories bear to the total receipts of the business.

15. The crucial part of the second method of the estimate is that the profits of the business have to be computed according to the Indian Income Tax Act. It is thereafter that the proportion has to be worked out at a figure or amount which bears the same proportion to such total profits so estimated as the receipts arising or accruing in the taxable territories, bear to the total receipts of the business. The receipts have been found as a fact in this case in respect of the destination earnings to be arising or accruing in the taxable territory of India.

16. On the plain language of Rule 33, therefore, the Tribunal was right in holding that the destination earnings collected in India should be considered as part of the Indian earnings in determining the assessee's Indian income under Rule 33 of the Income Tax Rules.

17. The next part of the argument on this point is a consideration whether the circular of the Central Board of Revenue, being Circular No. 7 of 1942 dated February 10, 1942, makes any difference on this point. The circular reads as

follows :

" CENTRAL BOARD OF REVENUE C.B.R. Cir. No. 7 of 1942. C. No. 27 (17)-I.T./41 dated 10-2-42. Sub : Assessments--British and other foreign shipping companies.

The Board has decided that the instructions which appeared in paragraphs 112 and 113 of the Income Tax Manual (7th edition) and which have been substantially reproduced at pages 348-350 (excepting the last two paragraphs at page 350) of the Income Tax Manual (8th edition) should be followed in respect of the assessments of foreign shipping companies from 1940-41 onwards. These instructions, inter alia, allow a foreign shipping company furnishing annual accounts for the whole of its business, Indian and foreign, to adopt the U. K. wear and tear allowance for the purpose of the computation of its income in accordance with the second method provided by Rule 33, and also allow a British shipping company to elect to be assessed on the basis of a ratio certificate granted by the U.K. authorities regarding the income or loss and wear and tear allowance.

2. The bearing of the provisions of Sections 10(2)(vii) and 24(2), however, requires to be considered in this connection. As no record of any depreciation allowance has been kept in India in respect of the companies assessed in accordance with either of the methods noted above, it will not be possible to work out the written down value without which the provisions of Section 10(2)(vii) cannot be applied. If, therefore, any foreign shipping company desires to follow the method of electing the U. K. wear and tear allowance for the purpose of its Indian assessment, it must agree either to forgo the allowance u/s 10(2)(vii)--the Government also agreeing, in such a case, to forgo the tax on the "excess" described in the second proviso to Section 10(2)(vii)--or to give particulars (agreed with the U. K. authorities) in respect of (i) the original cost of the asset sold or discarded, (ii) the aggregate U. K. wear and tear allowance in respect of that asset, and (iii) its scrap value or sale price. The "excess" or the loss computed on the basis of these particulars will, in that case, be added to or deducted from the whole world income computed for the purpose of the second method in Rule 33. As regards companies electing to be assessed on the basis of the U. K. ratio certificates it will not be possible to apply the provisions of Section 10(2)(vii) to such cases and the companies concerned will have to accept this position.

3. As regards Section 24(2), there will be no difficulty in respect of companies electing the U.K. wear and tear allowance only. It will, however, not be possible to work out correctly the loss to be carried forward in respect of the companies electing to be assessed on the basis of the U. K. ratio certificate unless the certificate in respect of the assessments from 1939-40 onwards contains the following particulars in place of the particulars furnished for assessments up to and including the year 1938-39 : --

(i) the ratio of profits (before deduction of any previous loss) of any accounting period as computed for the purposes of the U.K. Income Tax, computed without making any allowance for wear and tear, to the gross earnings of the company's whole fleet ;

(ii) the ratio of loss (before including any previous loss) of any accounting period computed as above ;

(iii) the ratio of United Kingdom allowance for wear and tear to the gross earnings of the whole fleet.

4. Thus either certificates (i) and (iii) or certificates (ii) and (iii) will apply to a particular case. The relative ratios being applied to the Indian "gross earnings", it will be possible to work out separately the proportionate Indian profit or loss and depreciation and there will be no difficulty in carrying forward the loss or the depreciation or both, as the case may be. "

18. It is clear from the language of this circular that it does not in terms at all include destination earnings and therefore this circular, by any process of interpretation, cannot exclude the destination earnings. The ratio certificate given in this case by the U. K. authorities is naturally therefore silent on the point of destination earnings.

19. I, therefore, have no hesitation to come to the conclusion on the above grounds and reasons that the Tribunal was right in holding that the destination earnings collected in India should be considered as part of the Indian earnings in determining the assessee's Indian income under Rule 33 of the Indian Income Tax Rules. I, therefore, answer the first question in the affirmative.

20. The next point relates to the investment allowance. The ratio certificate given by the Chief Inspector of Taxes, U. K., states thus :

" An investment allowance in respect of capital expenditure incurred in the same year on the provision of new machinery or plant has also been made. This allowance bears a ratio to the gross shipping earnings of 5.085 per cent.

A balancing charge in respect of the sale of machinery or plant in the same year has also been made. This charge bears a ratio to the gross shipping earnings of 0.177%.

In arriving at the profit mentioned in the first paragraph of this letter, no account has been taken of the above wear and tear and investment allowance, or of any trading losses, wear and tear, investment, initial and balancing allowances brought forward from previous years."

21. The ratio certificate indicates also that " the allowance for wear and tear of plant for the same year bears a ratio to the gross shipping earnings of 14.197 per cent."

22. Now, Rule 33 of the Indian Income Tax Rules quoted above naturally does

not speak of any " investment allowance " as such. At the time when this rule was framed, there was no investment allowance as such known under the Income Tax Act either in India or in the U.K. Therefore, it could not have been in the contemplation of the circular of the Board of Revenue, Circular No. 7 of 1942, that such " investment allowance" should be affected by such a circular. The " investment allowance" as such came into the U.K. tax in 1954 but this Central Board of Revenue circular of India, being Circular No. 7 of 1942, continued unchanged.

23. What has been contended on behalf of the assessee is that the " development rebate " under the Indian Income Tax Act corresponds to the " investment allowance under the U. K. Act. Now, " development rebate" was introduced in the Indian Act on April 1, 1955, by Section 8 of the Finance Act, 1955, by amending Section 10 of the Income Tax Act and enlarging it. Further amendment on this point of development rebate was introduced in the Indian Act on April 1, 1958, by the Finance Act of 1958. Now that the development rebate is a matter of the Indian statute, it can only be allowed on the terms of the Indian Act and not on any ratio certificate granted under the U.K. Act or under the circular of the Central Board of Revenue. Such a course will lead to conflict between the Indian statute and the ratio certificate granted by the U.K. tax authorities and the Central Board of Revenue Circular No. 7 of 1942 which was not and could not be dealing with the question of development rebate at all.

24. The Tribunal realised this difficulty and therefore adopted the course which meant reliance on a letter from the Secretary, Central Board of Revenue, to Messrs. Turner Morrison & Co. Ltd. This letter was quoted in another order of the Tribunal in I. T. Ref. No. 2406 of 1961-62. The letter is quoted at length in the Tribunal's order, and is relevant for the present purpose. The crucial part of this letter dated August 26, 1957, is as follows :

" I am directed to refer to your letter dated February 8, 1957, on the above subject (assessment of British shipping companies on the basis of ratio certificates--Treatment of investment allowance granted in the U. K.) and to state that as the development rebate which corresponds to the investment allowance granted in the U. K. is allowed under the Indian Income Tax Act from the assessment year 1956-57, there is no objection to allow the investment allowance for the purpose of the computation of the Indian income of British shipping companies. This would, however, be subject to the condition that investment allowance would be permitted as a deduction only to the extent to which the rate of the allowance granted in the U. K. is not greater than the rate of the development rebate allowed under the Indian Income Tax Act. "

25. The Tribunal's reasons are that the Income Tax Officer was bound u/s 5 of the Indian Income Tax Act to follow these instructions of the Central Board of Revenue because this particular letter of August 26, 1957, clearly shows that the investment allowance is permitted as a deduction in respect of the development rebate allowable under the the Indian Income Tax Act.

26. I have carefully considered this reasoning and the nature and character of this letter. I am unable to accept the conclusion to which the Tribunal arrived on this point of " investment allowance " and on the character and nature of this letter. I shall state my reasons very briefly.

27. I am of opinion that sitting here on a reference under the Indian Income Tax Act, it is not permissible for this court to interpret and construe the U. K. Act, to construe and interpret U. K. revenue laws, and come to a finding that what in the U. K. is called an investment allowance under the U. K. Act is the same as development rebate under the Indian Income Tax Act. That will be exceeding our jurisdiction. It may also lead to a conflict of decisions between the courts in the U. K. and the courts in India on the proper interpretation and scope of the U. K. Act and what are the implications of investment allowance granted by the U. K. Act. Jurisdiction to decide the nature and character of investment allowance under the U. K. Act must therefore have to belong to the U.K. courts. The assumption of jurisdiction therefore by way of interpretation and construction which the Tribunal did on the basis of the letter of the Central Board of Revenue dated August 27, 1957, appears to me a course which cannot be adopted in India. I, therefore, cannot hold that the U. K. investment allowance is the same as or corresponds to the development rebate under the Indian Income Tax Act. That really knocks the bottom out of the very foundation of the finding of the Tribunal on the basis of which investment allowance under the U. K. Act was allowed in the computation and estimate in the present case.

28. The other part of the logic based on the letter of the Central Board of Revenue to -Messrs, Turner Morrison & Co. Ltd., Bombay, is also open to objection. That part is in these terms and which has already been quoted above :

" This would however be subject to the condition that investment allowance would be permitted as a deduction only to the extent to which the rate of allowance granted in the U. K. is not greater than the rate of development rebate allowed under the Income Tax Act. "

29. Interpretation of a statute or a rule or a direction cannot vary according to the rates involved, unless of course there are special express conditions to that effect or a conclusion which is directed by most compelling circumstances. Neither of these conditions is present in this reference. To accept the ratio certificate of the U. K. taxing authorities only when the rate of investment allowance is below or up to the rate of the development rebate of India and not to do so when it is above seems to be a strange way of interpreting the statutory or legal position in this respect, a course adopted perhaps to avoid an open breach of the Indian Income Tax Act, after its amendment as noticed above.

30. Incidentally, it also affects the assessee's own contention in this regard that the ratio certificate granted by the Income Tax authorities is final and the tax authorities in India under the Income Tax Act have to accept it as such, a view which I am unable to accept.

31. The very language in which this second question is framed is therefore indicative of the confusion, for it speaks of allowing the claim of the assessee for the investment allowance under the U. K. Act and assumes that it corresponds to the development rebate under the Income Tax Act. In my view, whether it corresponds or not cannot be within the jurisdiction of the taxing authorities and courts here to find out."

32. Thirdly, I am of the opinion that the letter of August 26, 1957, cannot be elevated to the category of " orders, instructions and directions " within the meaning of Section 5(8) of the Indian Income Tax Act. It must be recorded here that this was only a letter written in response to the letter of Turner Morrison & Co. The letter itself from the Secretary, Central Board of Revenue, dated August 26, 1957, recites that this was in reply to the letter of Turner Morrison of February 8, 1957. Dr. Pal realised this difficulty and therefore relied on the fact that a copy of this letter was sent to the Commissioners, Income Tax, Calcutta and Bombay, with a view to establish as if it was a general order, instruction and direction to all taxing authorities. Therefore, he contends that it was not really a private reply to a private assessee but a very formal "order, instruction and direction" within the meaning of Section 5(8) of the Indian Income Tax Act. But then, that in my view is not enough argument on the facts of this case. The copy of the letter was sent to the two Commissioners because Turner Morrison had their office in Bombay and also in Calcutta. If it was going to be the " order, "instruction and direction " u/s 5(8) of the Income Tax Act, (hen it should have been sent to all officers and persons employed in the execution of the Indian Income Tax Act as the language of the Act itself says :

" All officers and persons employed in the execution of this Act shall observe and follow the orders, instructions and directions of the Central Board of Revenue ;

Provided that no such orders, instructions or directions shall be given so as to interfere with the discretion of the Appellate Assistant Commissioner in the exercise of his appellate functions."

33. Reading this letter of August 26, 1957, from the Secretary, Central Board of Revenue, to Messrs. Turner Morrison & Co. Ltd. and the context in which this letter appears, I am unable to hold that this was an "order, instruction and direction " of the Central Board of Revenue within Section 5(8) of the Income Tax Act. I, however, make it quite clear that even were it so, the view taken there was against both the Act and circular of the Central Board of Revenue in so far as it assumed jurisdiction to determine what is an investment allowance under the U.K. Act and whether investment allowance as construed by the U. K. authorities corresponds to the development rebate under the Indian Income Tax Act.

34. For these reasons, I answer the second question in the negative by holding that the Tribunal was wrong in allowing the claim of the assessee for the investment allowance under the U. K. Act in computing the total world income for the purpose of determining the assessee's Indian income under Rule 33 of the

Income Tax Rules, 1922.

35. In the view that I am taking, it is not necessary to discuss :

(a) the reference to 15 Halsbury 328, paragraphs 597-598 about proving foreign law. But we need only say that paragraph 598 of Halsbury's statement of the law is : the English courts are not, in general entitled to construe the foreign law themselves without expert assistance " ;

(b) nor is it necessary also to discuss Section 45 of the Indian Evidence Act stating, " when the court has to form an opinion upon a point of foreign law ... the opinions upon that point of persons specially skilled in such foreign law are relevant facts" ;

(c) nor the authority quoted to us in Kumar Jagadish Chandra Sinha Vs. Commissioner of Income Tax, West Bengal, where a Bench of this court held that an official version of the Pakistan Income Tax Act could only prove that the Act as printed in it was in force on the date of publication of the version but it cannot show whether the law has been amended or subsequently supplemented and the exact law of a foreign State prevailing at a particular time could not be proved except by calling an expert as provided in Section 45 of the Evidence Act.

36. Dr. Pal, appearing for the assessee, sensed the difficulty in his way and therefore tried to argue that what the taxing authorities have done in this case was to follow the third method under Rule 33. In other words, his contention is that the estimate in this case was made by exercise of discretion by the Income Tax Officer. I am unable to accept this contention. All throughout the case it has been said repeatedly that it is the second method under Rule 33 which was applied by the taxing authorities. That is clear from the statement of case on this reference. That is also clear from the order of the Tribunal expressly holding that the Income Tax Officer adopted the second and not the third alternative method under Rule 33. Lastly, if the third method of discretion was used, then there would be no point in the assessee's relying on the circular and in the taxing authority's consideration of the circular of the Central Board of Revenue, being Circular No. 7 of 1942, and the ratio certificate. Indeed, the very letter of August 26, 1957, from the Secretary, Central Board of Revenue, to Messrs. Turner Morrison & Co. Ltd. quoted above itself shows that it was not the third method which was adopted by the revenue in this matter at all. It is needless, however, to point out that this letter in a sense is against Section 10(2)(vib) as amended from April 1, 1958.

37. Lastly, a brief reference may be made to a contention advanced by Mr. Pal on the question of destination earnings. The question was whether freight under destination is wholly earned at the place of destination or whether it is only a part because the carriage is from a non-Indian port to an Indian port and the freight is for the whole carriage. Notionally, therefore, what is earned at the destination has been really and constructively maturing throughout the carriage. That question really turns on the contract--whether the freight is an advance

freight or a freight to pay or whether it is a lump freight or a pro-rata freight. It is unnecessary to discuss this question because of the language of Rule 33 using the expression " the receipts so accruing or arising". Accrual or arising of the receipt in this case was wholly in India. I am not inclined to express any opinion on this argument of Mr. Pal on the facts and circumstances of this case and I shall leave it to be decided in an appropriate case which will make a decision on the point essential.

38. I, therefore, repeat, for reasons already recorded, that my answer to the first question is in the affirmative and my answer to the second question is in the negative. There will be no order as to costs.

K.L. Roy, J.

39. I agree. So far as question No. 1 is concerned, I am of the opinion that the income from destination freight collected in the Indian ports not only accrued or arose but was also received in the taxable territories and as such the first question must be answered against the department.

40. As Dr. Pal, the learned counsel for the assessee, has referred to certain decisions of the Income Tax Appellate Tribunal and particularly to the order in I.T.A. No. 9889 of 1960-61 (T. & J. Brockle Bank Ltd. v. Income Tax Officer) to which I was a party as a Member of the Bench deciding that appeal, and as he submitted that the aforesaid decisions of the Tribunal support his contention so far as question No. 2 is concerned, I would like to give my own view in the matter.

41. As my Lord has made it clear, all Income Tax authorities are required to observe and follow any orders, instructions or directions given by the Central Board of Revenue. Rule 33 of the Income Tax Rules, 1922, provides three methods, as hereinafter mentioned, for the computation of the assessable income of non-resident assesseees where the Income Tax Officer thinks that such income cannot be properly ascertained, viz :

(i) either as a percentage of turnover, or

(ii) on an amount which bears the same proportion to the total profits of the business of such person (such profits being computed in accordance with the provisions of the Income Tax Act) as the receipts so accruing or arising bear to the total receipts of the business, or

(iii) in such manner as the Income Tax Officer may deem suitable.

42. For the assessment of foreign shipping companies, whose ships ply to and from Indian ports and where the accounts of the entire shipping business, are not available for the purpose of the Indian assessment, the Central Board of Revenue has issued certain instructions from time to time. Similar, but separate instructions, have also been issued by the Central Board of Revenue for the assessment of British shipping companies. The last of such instructions were

issued in 1942 and were contained in Part III of the 10th edition of the Income Tax Manual published by the authority of the Central Board of Revenue. It is to be noted that though subsequently various new allowances were made available to the assessee both under the United Kingdom Income Tax laws and also under the Indian Income Tax Act, no modification or change was made in these instructions. As the assessee is admittedly a British shipping company, the instructions regarding the assessment of such companies would be applicable to its assessment. Such instructions provide that for the assessment for the years beginning with 1940-41 the following method would be adopted :

" When assessing British shipping companies, the Income Tax Officer should accept a certificate granted by the Chief Inspector of Taxes in the United Kingdom stating, (i) the ratio of the profits of any accounting period as computed for the purposes of the United Kingdom Income Tax (computed without making any allowance for wear and tear) to the gross earnings of the company's whole fleet, and the ratio of the United Kingdom allowance for wear and tear to the gross earnings of the whole fleet, or (ii) the fact that there were no such profits. The expression "gross earnings" of the company's whole fleet means the total receipts of the shipping company, excepting only receipts from non-trading sources, such as income from investments.

As regards Section 24(2), there will be no difficulty in respect of companies electing the U. K. wear and tear allowance only. It will, however, not be possible to work out correctly the loss to be carried forward in respect of the companies electing to be assessed on the basis of the U. K. ratio certificate unless the certificate in respect of the assessments from 1939-40 onwards contains the following particulars in place of the particulars furnished for assessments upto and including the year 1938-39 :

(i) the ratio of profits (before deduction of any previous loss) of any accounting period as computed for the purposes of the U. K. Income Tax computed without making any allowance for wear and tear, to the gross earnings of the company's whole fleet ;

(ii) the ratio of loss (before including any previous loss) of any accounting period computed as above ;

(iii) the ratio of United Kingdom allowance for wear and tear to the gross earnings of the whole fleet.

Thus either certificates (i) and (iii) or certificates (ii) and (iii) will apply to a particular case. The relative ratios being applied to the Indian " gross earnings", it will be possible to work out separately the proportionate Indian profit or loss and depreciation and there will be no difficulty in carrying forward the loss or the depreciation or both, as the case may be."

43. Under these instructions, therefore, the Income Tax Officer is required to see what was the ratio of profits, before deduction of any previous loss or the wear

and tear allowance, disclosed by the ratio certificate and the ratio of the United Kingdom allowance for wear and tear and to apply these two ratios to the Indian gross earnings to work out the proportionate Indian profit. In this case the ratio certificates granted by the Chief Inspector of Taxes in the United Kingdom showed the following ratios separately :

- " (i) the ratio of profits to the gross shipping earnings,
- (ii) the ratio of the allowance for wear and tear to the gross shipping earnings,
- (iii) the ratio of the investment allowance in respect of capital expenditure to the gross shipping earnings, and
- (iv) the ratio of the balancing charge to the gross shipping earnings. "

44. It was claimed by the assessee that in determining the ratio of profits to the gross shipping earnings the investment allowance should also be deducted as otherwise the true ratio of the profits to the gross earnings would not be arrived at.

45. The difficulty in the way of the assessee is that, though the allowance for development rebate was introduced in India from the assessment year 1955-56 and the corresponding investment allowance in the U. K. even earlier in 1954, no corresponding modification in the instructions was issued by the Central Board of Revenue for guidance of the Income Tax Officers. It must therefore be held that the Central Board of Revenue intended that no allowance other than U.K. wear and tear allowance should be considered and allowed in determining the ratio of profits to total turnover for the purpose of applying the same to the Indian turnover.

46. In I.T.A. No. 8260 of 1959-60 in the case of Bank Lines Ltd., in respect of the assessment year 1958-59, the U.K., ratio certificate showed the ratio of profit to gross earnings at 33.07% and also the ratio of the wear and tear allowance as in that year. In determining the aforesaid ratio of profits, the Income Tax authorities had already deducted the investment allowance allowed in U.K. In that year, the investment allowance in U.K. was 40% as against 25% allowable under the corresponding provision for development rebate in India and the Income Tax Officer made adjustments to the total profits as well as to the ratio of profits to gross earnings shown in the ratio certificate to bring it in line with the Indian allowance. The Tribunal held that, as under the departmental instructions the Income Tax Officer had to accept the ratio certificate granted by the Chief Inspector of Taxes in the U.K., he could not dissect the certificate and improve on it. He must either accept the certificate or reject it altogether. In I.T.A. No. 9889 of 1960-61, the decision of the Tribunal, to which I was a party, the aforesaid decision of the Tribunal was quoted with approval and followed.

47. During the arguments in the present reference, I repeatedly pointed out to Dr. Pal that if instead of giving the ratio of the investment allowance separately, the ratio certificate only mentioned the ratio of profits to the gross earnings after

deducting the investment allowance and also gave the ratio of the wear and tear allowance in the U.K. as was done in the case of Bank Lines Ltd., the Income Tax Officer would be bound under the aforesaid instructions to accept the aforesaid ratios. He could not dissect the certificate and add back the amount of the investment allowance. As the certificate in the present case has shown the ratio of profit and the ratio of the wear and tear allowance and that of the investment allowance separately, the departmental instructions did not authorise the Income Tax Officer to determine the ratio of profits afresh after giving a further deduction on account of the investment allowance in the U.K.

48. For the above reasons and the reasons given by my Lord, I agree that question No. 2 must be answered in the negative and against the assessee.