

(1991) 04 DEL CK 0051

In the Delhi High Court

Case No : Income-tax Reference No. 87 and 88 of 1974

Dalmia Cement Ltd.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 12-04-1991

Acts Referred:

Citation : (1991) 96 CTR 1 : (1991) 191 ITR 331

Hon'ble Judges : Milap Chand Jain, C.J.; Arun Kumar, J

Bench : Division Bench

Advocate : N. Khaitan, for the Appellant; Rajendra, for the Respondent

Judgement

This Judgment has been overruled by : Dalmia Cement Ltd., Rajasthan Vs. Commissioner of Income Tax, New Delhi, AIR 1999 SC 2154 : (1999) 237 ITR 617 : (1999) 3 JT 130 : (1999) 2 SCALE 641 : (1999) 4 SCC 124 : (1999) 2 SCR 735 : (1999) AIRSCW 2164 : (1999) 4 Supreme 195

M.C. Jain, C.J.—These references u/s 256(1) of the Income Tax Act, 1961, have been made by the Income Tax Appellate Tribunal, Delhi Bench, as the questions referred by it arise out of the order of the Tribunal dated September 29, 1972, in Income Tax Appeals Nos. 4639 and 4640 of 1970-71 in respect of the assessment years 1964-65 and 1965-66. The Tribunal has referred the following questions to this court for its opinion XXXI :

2. For 1964-65 :

"Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the profits arising from the working of the two cement factories situated in Pakistan for the year October 1, 1962, to September 30, 1963, was taxable in the hands of the applicant-company ?"

3. For 1965-66 :

"Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the profits arising from the working of

the two cement factories situated in Pakistan for the year October 1, 1963, to September 30, 1964, was taxable in the hands of the applicant-company ?"

4. We may state a few relevant and material facts giving rise to the present references. The questions are in respect of the two assessment years but they essentially relate to the question as to whether the profits arising during the aforesaid two years are taxable in the hands of the applicant-company. There were two cement factories situated in Shanti Nagar and Dan dot in Pakistan. By an agreement dated July 24, 1964, the assessed-company agreed to sell and transfer to one Mr. Maneckji its properties and assets in Pakistan represented by the two cement factories. The assessed-company agreed to sell and Shri Bruch Maneckji agreed to purchase :

(a) All lands including lessee rights in leasehold lands (subject to the approval/permission of the appropriate authority, if any) building and here ditaments upon which the said business of cement and refractory manufacturing is carried on and in all erection works, fixed engines, machinery and plant thereon which belongs to the company which said lands, interests in land, erections, works, fixed engines, machinery and plants are intended for ease of identification to be more particularly described in a schedule to be separately prepared and signed by the parties hereto together with the rights, easements and appurtenances thereto belonging;

(b) all the finished goods, stock-in-trade general stores and other stocks of materials and things in or about any of the said premises or belonging to the said business;

(c) all the licenses, patterns, drawings, designs, apparatus, implements, tools and like chattels belonging to the company and used in or adapted or intended for the said business;

(d) all the office furniture, motor and other vehicles and utensils to which the company is entitled in connection with the said business;

(e) all the rights and privileges appertaining to the said business of cement and refractory manufacturing as now carried on by the company on the premises aforesaid and all the trade marks, credits, book debts and securities for the same (including cheques and bills given to the company in payment or satisfaction of such debts) contracts, engagements, orders, matters and things belonging or in any way relating to the said business and the full benefits thereof respectively and also all the assignable interest and benefit of the company in all improvements and secret processes relating to the said business which the company now has or may by the date of completion of the purchase have discovered or have become entitled to and whether as patentees, licensees or otherwise and whether jointly with any other person or persons or otherwise;

(f) all cash in hand and at the bank, and all bills and notes of the bank, and all bills and notes of the company relating to the said business;

- (g) all investments in shares and Government securities;
 - (h) all the following documents, account and papers either in original or duly certified copies;
 - (i) pending orders for equipment and stores;
 - (ii) outstanding supplies to be made;
 - (iii) books debts taken over by Mr. Maneckji;
 - (iv) technical working date and log books, etc.,;
 - (v) stores ledger showing stocks of raw material, finished stocks and stores;
 - (vi) such other books of account of the company as may be required by Mr. Maneckji for production before any competent authority;
- (i) the assets comprised in sub-clause (b) and (g) of this clause shall be specified in detail in a separate schedule of movable assets to be prepared as on the completion day.

5. The parties further agreed as to how the consideration for the said sale shall be ascertained. This was provided in clause 2 of the agreement which reads as under;

"2. The consideration for the said sale shall be ascertained in the following manner and the total sum thereby ascertained [less the deduction of Rs. 20,00,000 (Rupees twenty lakhs) there from] is hereinafter called "the purchase price;"

(a) the price to be paid by Mr. Maneckji for all the fixed assets to be more fully described in the schedule hereinbefore mentioned shall be their value in the books of account of the company on September 30, 1962, hereinafter called "assessment day", subject to adjustments at book prices for fixed assets bought, sold, damaged or destroyed between assessment day and the date on which the transaction is complete, hereinafter called "completion day" (normal wear and tear excepted);

(b) the price to be paid by Mr. Maneckji for all shares including firebricks, grinding media, gunny bags, spare parts, general stores, coal and miscellaneous items to be transferred to Mr. Maneckji shall be their value in the books of account of the company upon assessment day, subject to adjustment at book prices for the above items bought, manufactured, in process, damaged, sold or destroyed between assessment day and completion day;

(c) the price to be paid by Mr. Maneckji for all goods in transit, raw materials in process, clinker (half made cement), manufactured cement, firebricks manufactured by Dandot factory, shall be their value in the books of account of the company upon assessment day, subject to adjustment at book prices for the above items bought, manufactured, in process, damaged sold or destroyed

between assessment day and completion day;

(d) cash shall be transferred at par;

(e) investments and Government securities shall be transferred at average market price on assessment day;

(f) the price to be paid by Mr. Maneckji for all the company's loans, advances, outstanding and other debts standing to the credit of the company shall be their value in the books of the company upon assessment day, subject to adjustment for realisation and new debts between assessment day and completion day."

6. Clause 3 further provides the mode of payment of the purchase price. Clause 19 of the agreement provided the transfer of the subject-matter of the agreement shall be completed on or before December 31, 1963, and, unless otherwise mutually agreed in writing, the agreement shall expire on that day. It also made a provision that the agreement or the subject-matter thereof may be transferred to any body corporate formed and controlled by Mr. Maneckji, if so required and the company shall be bound to effect the transfer as if such body corporate were a party to the agreement. The completion of the transaction is subject to the approval of the Governments and Governmental agencies of both Indian and Pakistan. On November 2, 1962, a supplemental agreement was entered into between the assessed-company and Maneckji and clause 3 thereof provides as under :

"3. The profit and loss arising from the operation of the company during the period subsequent to September 30, 1962, shall, in the event of the completion of the sale transaction in accordance with the said agreement, be to the account of Mr. Maneckji. The operations of the company's factories and business in Pakistan shall, however, continue to remain under the full and undisturbed control and discretion of the company, as hitherto, and nothing stated herein shall be construed as permitting in any manner interference on the part of Mr. Maneckji with the conduct of the business and operations of the factories until the same are transferred to Mr. Maneckji on the completion of the transaction."

7. According to the aforesaid clause, the profit and loss arising from the operation of the company during the period subsequent to September 30, 1962, shall be to be account of Mr. Maneckji in the event of the sale transaction in accordance with the agreement, and the operations of the company's factories and business in Pakistan shall continue to remain under the full and undisturbed control and discretion of the company as hitherto, and no interference can be made by Mr. Maneckji in the conduct of the business of the factories until the same are transferred to Mr. Maneckji on completion of the transaction. The sale deed could not be erected on or before the date already fixed, i.e., December 31, 1962, and the date of the transfer of the factories was extended from time to time by supplemental agreements dated December 31, 1962, March 29, 1963, June 24, 1963, September 23, 1963, December 29, 1963, March 24, 1964, and June 30, 1964. The sale deed ultimately came to be executed on September 30,

1964 and, on that date, the transfer of the two cement factories was effected in favor of Pakistan Progressive Cement Industries Limited, the nominee of Mr. Maneckji as provided in clause 20 of the original agreement. The dates of the main agreements as well as of the supplemental agreement were extended up to the 8th Supplemental Agreement entered into on June 30, 1964, wherein the date of completion was extended up to September 30, 1964. The purchase price was fixed at Rs. 2,33,66,678 by reference to the book value of the assets on September 30, 1962, and the liabilities of the company to pay rents, rates, cesses and assessment in respect of the lands and building was restricted to the liabilities arising up to September 30, 1962. The accounting year in respect of the two assessment years ended on September 30, 1963, and September 30, 1964, respectively.

8. The assessed-company filed the return of income for the assessment year 1964-65 on June 30, 1964, showing a total income of Rs. 24,28,675 and a revised return showing a total income of Rs. 1,40,852 was filed on January 20, 1968. Similarly, for the year 1965-66, a return was filed on June 30, 1966, showing an income of Rs. 24,58,314 and a revised return was filed on October 22, 1969, showing a loss of Rs. 2,45,786. For the assessment year 1965-66, the return did not include profit from the working of the two Pakistan factories but it included only the interest income for the two-year period from October 1, 1962, to September 30, 1964. But, in the revised return, the two years' interest was also deleted on the ground that the same had not been received. The assessed-company's case before the Income Tax Officer was that the profits from the two factories belonged to Mr. Maneckji or his nominee with effect from October 1, 1962, but this plea was not accepted by the Income Tax Officer and the Income Tax Officer's assessment included the profits of the two factories in the total income of the assessed-company for both the years. The Appellate Assistant Commissioner confirmed the decision of the Income Tax Officer for both the years. The assessed then filed appeals before the Tribunal. The tribunal, however, held that the profits arising after September 30, 1962, and before September 30, 1964, were taxable in the hands of the assessed-company. The Tribunal found that the profits actually accrued to the assessed-company and profits could accrue only to the assessed-company for both the years. The Tribunal stated that the agreements did not retrospectively make Mr. Maneckji or his nominee the owners of the factories or bring about the accrual of the profits in favor of Mr. Maneckji or his nominee. The profits had already accrued before September 30, 1964, and so they had accrued to the company because nobody else was on the scene and, as a matter of fact, the profits were to all intents and purposes received by the company. The accrual of the profits could not be stopped till the arrangement between the assessed-company and Maneckji was finalised nor could the accrual of profits to the company during the years be undone and the process reversed so as to turn the accrual of the profits in favor of Maneckji. The Tribunal also observed that the completion of the transaction of sale only made certain basic arrangements effective from September 30, 1964,

and the fact that the purchase price was determined by reference to the value of the assets as on September 30, 1962, did not ante-date the arrangement. It only gave the parties an agreed basis for the determination of the purchase price. The agreement did not give retrospective effect and all that the agreement did was to safeguard the interest of the parties in view of the delay in the finalisation of the transaction of sale. Thus, vis-a-vis outside parties the position of the assessed-company and the factories did not change at all.

9. Reference was made to the observations made in *Waddington v. O' Callaghan* [1931] 16 TC 187 Rowlatt J., where it was expressed that no one could alter the past by an agreement and reference was also made to *Western States Trading Co. Ltd. Vs. Commissioner of Income Tax, Central Calcutta*, wherein it was observed that, by means of an agreement, it was not possible to alter the actual state of affairs. The reasoning adopted in *Western States Trading Co. Ltd. Vs. Commissioner of Income Tax, Central Calcutta*, was made applicable by the Tribunal to the case in hand. The Tribunal also examined the question of agency and turned down the same and stated that the Tribunal is unable to extend the principle of agency backward in point of time in the present case so as to convert the present company into an agency of Mr. Maneckji. The Tribunal also declined to accept the contention of the Departmental representative that, even u/s 60, the profits accruing after September 30, 1962, were chargeable in the hands of the company. The reasoning given by the Tribunal for declining to accept the said contention is that there would be an underlying assumption that income had actually accrued to Maneckji or his nominee whereas for the reasons given by the Tribunal, the Tribunal is unable to accept this assumption. The other reasoning given by the Tribunal for declining to accept the assumption relating to section 60 is that, according to its reading of section 60, it relates to an arrangement or settlement according to which both the transfer of an income and the retention of the ownership of the assets formed part of one scheme and, according to the Tribunal, in the present case, the scheme is quite different. There is one scheme and that scheme is for the transfer of assets as well as the income. Only there has been some delay in the transfer of the assets while the transfer of income has become a controversial issue. Thus, for the reason given by the Tribunal for accrual of the profits to the assessed-company, the Tribunal held that the profits arising after September 30, 1962, and before September 3, 1964, were taxable in the hands of the assessed-company. pH It is to be seen as to whether, in the facts and circumstances of the case, the profits arising from the working of the two cement factories, in the two years, are taxable in the hands of the assessed-company or not. Shri Khaitan, learned counsel for the assessed-company vehemently urged that as per clause 3 of the supplemental agreement dated November 2, 1962, the profits have to be taken to the account of Mr. Maneckji during the period subsequent to September 30, 1962. When they have to be taken to the account of Mr. Maneckji, no profits had accrued to the assessed-company although the business would be run by the assessed-company without any interference from Mr. Maneckji. Simple on the basis that the assessed-

company remains in full and undisturbed control of the business, it cannot be taken that the profits would accrue to the assessed-company.

10. Reliance was placed by the learned counsel for the assessed-company on a decision of the Calcutta High Court in Commissioner of Income Tax Vs. Jhanzie Tea Association, . In that case, the assessed was a non-resident company. It owned a number of tea estates. The assessed sold four of its tea estates under different agreements. The assessed had agreed to sell one tea estate with effect from January 1, 1969, and the other three tea estates with effect from January 1, 1970, but the deeds of conveyance in favor of the purchasers were not executed within the relevant previous year. The Tribunal found that the agreements clearly provided that their term and condition would come into effect from dates anterior to the dates of execution of the deeds of sale. The agreements provided that all the expenses connected with the tea estates would be borne by the purchaser and that all the tea manufactured from January 1, 1969, or January 1, 1970, as the case may be, and the profits arising there from would belong to the purchasers. The Income Tax Officer held that for the assessment year 1970-71, the income from the four tea estates was assessable in the hands of the assessed. The Appellate Assistant Commissioner, however, held that the income was diverted by overriding title to the purchasers of the tea estates. The learned judges of the Calcutta High Court held that the income arising out of the agricultural operations in the tea estates will not come within the provisions of the Income Tax Act and the income arising from the manufacturing process after the tea is grown is a business income and it was held that. In this case, not only the tea estates had been transferred but the income accruing there from had also been transferred to the purchasers with effect from January 1, 1969, in respect of the one tea estate and with the effect from January 1, 1969, in respect of the one tea estate and with effect from January 1, 1970, in respect of the other three tea estates.

11. All the manufacturing activities of the assessed as from those dates were on behalf of the purchaser. There was, Therefore, diversion of income by overriding title and the income from tea business from January 1, 1969, in the case of one tea estate and from January 1, 1970, in respect of the other three tea estates was not liable to be assessed in the hands of the assessed. It would appear from this decision that a distinction was made between agricultural income and business income and it was found as a fact that the entire expenses were to be borne by the purchaser and the assessed was to run the business for and on behalf of the purchaser and, under the agreement, the income was that of the purchaser. Even before accrual of the income, income was diverted by an overriding title and reliance was placed on CIT v. Tea Producing Co. of India Ltd. [1963] 48 ITR 200 .

12. So far as the facts of the present case are concerned, it would appear that the transfer of income or profit to the account of Mr. Maneckji is to take place only on completion of sale transaction and the assessed-company was to remain

in full control of the business and operation of the factories. The profits would arise simultaneously by the conduct of business and running of the factories. It is true that, as per clause 3 of the supplemental agreement, dated November 2, 1962, the profits have to be taken to the account of Mr. Maneckji but that would be only in the event of completion of the sale transaction by a particular date which would be an event to take place subsequent to the accrual of the profits. When the business and operation of the factories is to be effected by the assessed-company without any interference by Mr. Maneckji or his nominee and the sale transaction is yet to take place, which may take place or may not take place in such a situation, there will be no stoppage of accrual of profits to the assessed-company. It is true that cash in hand as well as in the bank and all bills and notes of the bank would also stand transferred but that will take place on a future date when the sale deed is executed. In respect of an event which is yet to take place, overriding title does not come into existence, and accrual of profits can be stopped only if an overriding title is created before the accrual of the profits. Thus, the said authority, in our opinion, is clearly distinguishable on the facts of the present case.

13. Reference has also been made to another decision of the Calcutta High Court in Commissioner of Income Tax Vs. A. Tosh and Sons (P.) Ltd., . In that case. The assessed exported tea to foreign countries, under agreements entered into with the foreign buyers, the foreign buyers were liable to pay all taxes, duties and levies in respect of the tea and if any refund or rebate of such taxes and duties were received, these would be remitted to them by the assessed to the foreign buyer. The assessments for the two years were reopened on the ground that income arising from the receipt of rebate on excise duty and customs duty drawback and interest on deposits of such rebate and drawback has escaped assessment in the assessment years 1973-73 and 1975-76. The Tribunal held that these amounts were not assessable in the hands of the assessed as they were received by the assessed on the account of foreign buyers and not on its own account. The assessed was under an obligation to remit the said amounts to the foreign buyers after obtaining permission from the Reserve Bank. These amount were not received by the assessed as its own receipt or income. They were received on behalf of the foreign buyers. They can hold the assessed accountable for the same. Even if permission is not given by the Reserve Bank, the foreign buyers can receive the said money in India and spend the same in India. It was observed that the amounts were never the real income of the assessed as they were diverted even at the inception by an overriding title of the foreign buyers. Any accretions to the said amount by way of interest or otherwise could not also be held to be the income of the assessed. It would appear that there was an agreement between the assessed and the foreign buyers for payment of duties, levies and taxes and if any drawback or rebate is received, the same would be payable to the foreign buyers. The decision of the case, Therefore, turned on the facts of that case.

14. Reference has also been made to the decision in State Bank of Travancore

Vs. Commissioner of Income Tax, Kerala, . Their Lordships of the Supreme Court laid down the following proposition in relation to the theory of real income.

15. It would appear from the above propositions that the matter has to be examined in the light of the reality of the situation and the theory would have no application when the concept of real income defeats the provisions of the Act. In that case, with regard to the interest on "sticky" advances although the accounts of the respective parties were debited in respect of the amounts of interest, the interest was carried to the "interest suspense account" and the amount of interest debited was not offered for taxation. Hon''ble Mr. Justice Sabyasachi Mukharji (as he then was) and Hon''ble Mr. Justice Ranganath Misra (as he then was) concurred and observed as under (headnote) :

"(i) For the content of taxable income, one has to refer to the substantive provisions of the Income Tax Act, 1961, mainly section 5 read with the other relevant sections.

(ii) In some limited fields where something which is the reality of the situation prevents the accrual of the income, then the notion of real income, i.e., making the income accrue in the real sense of the term, can be brought into play but the notion of real income cannot be brought into play where income has accrued according to the accounts of the assessed and there is no indication by the assessed treating the amount as not having accrued. Suspended animation following inclusion of the amount in the suspense account does not negate accrual and after the event of accrual, corroborated by appropriate entries in the books of account, on the mere ipse dixit of the assessed, no reversal of the situation can be brought about.

(iii) The concept of reality of the income and the actuality of the situation are relevant factors which go to the making up of the accrual of income but once accrual takes place and income accrues, the same cannot be defeated by any theory of real income. The concept of real income cannot be so used as to make accrued income non-income simply because after the event of accrual, the assessed neither decides to treat it as a bad debt nor claims deduction u/s 36(2) of the Act, but still enters the same with a diminished hope of recovery in the suspense account. Extension of the concept of real income to this filed to negate accrual after the amount had become payable is contrary to the postulates of the Act.

(iv) Where interest has accrued and the assessed has debited the account of the debtor, the difficulty of recovery would not make its accrual non-accrual."

16. In Western States Trading Co. Ltd. Vs. Commissioner of Income Tax, Central Calcutta, , the assessed owned a colliery, and entered into an agreement on November 29, 1954, to sell the colliery to another company as and from September 1, 1954, with all the underground rights, etc., of the colliery with the machinery and other articles detailed in the schedules annexed to the agreement. The sale was to be effected within one year from the date of the

agreement. Clause 7 of the agreement provided that pending completion of the sale or delivery of possession of the premises to the purchaser, the vendor was to carry on business on behalf of the purchaser and run the said colliery as on and from September 1, 1954, on the account and at the cost of the purchaser. The purchaser was to get all the profits and was liable for all the losses from that date. Their Lordships observed that, by means of the agreement, it was not possible to alter the actual state of affairs, namely, the carrying on of the business by the appellant. The agreement was entered into on November 29, 1954, and it could not operate from a back date, i.e., September 1, 1954.

17. On merits, the first question was answered in favor of the assessed. The first question was whether, on the facts and circumstances of the case, a sum of Rs. 11,257 being a claim for loss on sale of assets on which depreciation was allowable in earlier years is allowable u/s 10(2)(vii) in computing the total income of the assessed. The Tribunal has relied upon the aforesaid observation that the actual state of affairs cannot be altered by an agreement. Reference was also made to Commr. of Income Tax, U.P. and Ajmer-Merwara, Lucknow Vs. Bijli Cotton Mills Ltd., Agra, . That was a case of floating of the company and accepting of the profits by the company before its incorporation. It was held that the income of the period prior to the incorporation could be legally assessed in the hands of the company. The case turned on the special relationship of the promoters with the company which is yet to come into existence.

18. Thus. Having regard to the provision contained in clause 3 of the supplemental agreement dated November 2, 1962, which clause continued to survive till the execution of the sale deed and having regard to the manner in which the assessed's relationship continued with Mr. Maneckji or his nominee and the outsiders, it cannot be said that there was no accrual of profits to the assessed-company up to September 30. 1964. It is only thereafter that effect has to be given to the agreed term contained in clause 3, i.e., in the event of completion of the sale transaction, the profit shall be to the account of Mr. Maneckji. It is at this stage that the term would be operative, i.e, on completion of the sale transaction, the profits and losses arising from the aforesaid-company shall be to the account of Maneckji but before that date, it would not be so.

19. There is yet another aspect of the matter based on section 60 of the Income Tax Act which, according to the Tribunal, would not govern the case. A contention has been advanced by Shri Rajendra, learned counsel for the Revenue that. In view of the provisions contained in section 60, even if the income is transferred, before the transfer of assets takes place, the income would be deemed to be the income of the assessed and, according to learned counsel, section 60 has full application to the facts of the present case.

20. For facility of reference. We reproduce section 60 and 63 of the Act.

"60. Transfer of income where there is no transfer of assets. - All income arising to any person by virtue of a transfer whether recoverable or not and whether

effected before or after the commencement of this Act shall, where there is no transfer of the assets from which the income arises, be chargeable to Income Tax as the income of the transferor and shall be included in his total income."

"63. "Transfer" and "recoverable transfer" defined. - For the purposes of sections 60, 61 and 62 and of this section, -

(a) a transfer shall be deemed to be revocable if -

(i) it contains any provision for the re-transfer directly or indirectly of the whole or any part of the income or assets to the transferor, or

(ii) it, in any way, gives the transferor a right to re-assume power directly or indirectly over the whole or any part of the income or assets;

(b) "transfer" includes any settlement, trust, covenant, agreement or arrangement."

21. Section 60 contemplates as to how the income would be chargeable to Income Tax when there is no transfer of the assets from which income has arisen. Section 63, clause (b), defines the word "transfer" to include any settlement, trust, covenant, agreement or arrangement, if any document of the nature mentioned in clause (b) exists. It would be considered to be a transfer. In the present case, there are agreements between the parties. The agreements between the parties would be considered to the transfer but, in fact, transfer of assets had not taken place till September 30, 1964. So, whatever income has arisen prior to the transfer of assets, section 60 clearly contemplates that such an income which has arisen before the actual transfer of assets has taken place would be chargeable to an Income Tax as the income of the transferor and shall be included in his total income. We may refer to the commentary of Kanga and Palkhivala on the Law and Practice of Income Tax, Vol. 1, 8th edition, at p. 831, where the following passage of Lord Macmillan in *Chamberlain (A.G.) v. IRC* [1943] 25 TC 317 is extracted :

"This legislation forms part of a code of increasing complexity, beginning with the Finance Act, 1923, section 20, designed to overtake and circumvent a growing tendency on the part of tax-payers to endeavor to avoid or reduce tax liability by means of settlements. Stated quite generally, the method consisted in the disposal by the tax-payer of part of his property in such a way that the income should no longer be receivable by him, while at the same time he retained certain powers over, or interest in, the property or its income. The Legislature's counter was to declare that the income of which the taxpayer had thus sought to disembarass himself should, notwithstanding, be treated as still his income and taxed in his hands accordingly."

22. It may be stated that as the agreement is a transfer and under this agreement, profits had accrued to the transferee, as they had to be to the account of the transferee, then such profits arising by virtue of a transfer would be treated to be an income of the transferor and shall be chargeable to Income

Tax in his hands, in the aforesaid commentary, the matter regarding application of income and its diversion by overriding title has been considered at page 131 in the commentary on section 4. It is stated that if a person has alienated or assigned the source of his an income so that it is no longer his, he may not be taxed upon the income arising after the assignment of the source, apart from special statutory provisions like sections 61 to 64 which artificially deem it to be the assignor's income, but, if he does not transfer the source of income and merely applies the income so that it passes through him and goes on to an ultimate purpose, even though he may have entered into a legal obligation to apply it in that way, still it remains his income. Thus, if dividends or royalty or share of profits in a firm are settled upon trust, while the capital asset, viz., the shareholding or the leased assets or the partner's interest in the firm, remains the property of the settler, the case would be one of mere application of an income, statutory effect has been given to this principle in section 60.

23. On behalf of the Revenue, reliance has been placed on Commissioner of Income Tax, Gujarat-III Vs. Thobhandas Jivanlal Gajjar, . In that case, the assessed took one contract from the Bombay Housing Board relating to work of construction of certain tenements. The said contract and the income were assigned by him in favor of the vendee without a completed and valid assignment. It was held that the contract was not in fact valid since the relevant deed was not signed at all by the executant. All the moneys under the contract were in fact received by the assessed. Thobhandas Jivanlal Gajjar. It was further observed that, in view of the provisions contained in section 60 of the Income Tax Act, 1961, all income arising to any person by virtue of a transfer, whether revocable or not, and whether effected before or after the commencement of the said Act would, where there is no transfer of the assets from which the income arises, be chargeable to Income Tax as the income of the transferor and would be included in his total income. Learned judges of the Gujarat High Court held that the Tribunal erred in reaching the conclusion that though the source from which this income was earned was not transferred in fact, nor could have been transferred in law, the income arising from the source could be held to be the income of the alleged transferee and that it was Popatlal Panachand Shah who was liable to be assessed on the income accrued and earned under the contract. It was further observed that all the payments made by Thobhandas Jivanlal Gajjar, as found by the Income Tax authorities to M/s. Vasant and Co., who was held to be the benamidar of Popatlal Panachand Shah, would amount to application of the income of the Thobhandas Jivanlal Gajjar who should be held liable to pay the tax since, no legally enforceable obligation was ever created by the assessed, Thobhandas Jivanlal Gajjar, in favor of the assessed, Popatlal Panachand Shah, or his benamidar, M/s, vasant and Co.

24. Another decision which was relied upon by learned counsel for the Revenue is COMMISSIONER OF Income Tax Vs. LATE BANWARI LAL AGARWALA (THROUGH LEGAL REPRESENTATIVE P. K. AGARWAL), .

25. In that case, the commercial assets from which the income arise were not transferred to the trust. Only the income was transferred to the trust and consequently section 60 applied and the entire commission had to be included in the assessed total income.

26. In the present case, up to September 30, 1964, there was no transfer of assets and, under clause 3 of the supplemental agreement dated November 2, 1962, the profits had to be taken to the account of the transferee on completion of the sale transaction. Even if there is an agreement for diversion of the profits prior to September 30, 1964, still, in our opinion, in the light of the provisions contained in section 60, the profits would be taxable in the hands of the assessed-company.

27. There is another decision of this court in Commissioner of Income Tax Vs. Dr. Rameshwar Lal Pahwa, . In that case, the assessed was the owner of a house property whose annual letting value was Rs. 11,115. He transferred all his properties in the name of his father and executed a deed in relation to his property out of natural love and affection when he was to leave for England. He created an obligation on himself to pay his mother maintenance in a sum of Rs. 275 per month for her lifetime, and if his father survived her, a similar sum of his father till his death. A charge was created on the house property to secure payment of the maintenance, and any sale of the property was to be subject to that charge which was to continue even after the assessed should sell the property. The Income Tax Officer simultaneously applied section 60, since it was only income that was transferred under the maintenance deed and added that amount of Rs. 3,300 as income from other sources. This decision was upheld by the Appellate Assistant Commissioner but, on further appeal, the Tribunal held that though section 60 was attracted, the sum of Rs. 3,300 could not be assessed in the hands of the assessed but the sum was income from property and could only be assessed as such and that income could be computed u/s 24 and that deductions had to be given there under. Their Lordships held that the provisions of section 60 were attracted in the case. Definition of the expression "transfer" u/s 63(b) was considered and it was observed that it could, Therefore, be said that, taking into account the clauses of the maintenance deed as well as the above circumstances, there was an agreement or arrangement that the rent should be paid by the tenant to the parents. The learned judges, Therefore, agreed with the conclusion of the Tribunal that the provisions of section 60 are attracted in the present case.

28. Thus, on both the grounds, on the ground of accrual of profits to the assessed-company and also on the ground of applicability of section 60 of the Income Tax Act, we are of the opinion that the profits arising from the working of the two cement factories situated in Pakistan for the years October 1, 1962, to September 30, 1963 and October 1, 1963, to September 30, 1964, were taxable in the hands of the applicant-company.

29. Our answers to the aforesaid two questions are in the affirmative. References

are answered accordingly.