
(1956) 12 CAL CK 0036
In the Calcutta High Court
Case No : Matter No. 84 of 1956

P.C. ROY and CO. (INDIA) PRIVATE LTD.	APPELLANT
Vs	
A.C. MUKHERJEE AND ANOTHER.	RESPONDENT

Date of Decision : 12-12-1956

Acts Referred:

Income Tax Act, 1961 — Section 18(3B), 18(7)

Citation : (1958) 33 ITR 817

Hon'ble Judges : Sinha, J

Bench : Division Bench

Judgement

SINHA J. - The facts in this case are shortly as follows :

The petitioner is a company incorporated in India under the Indian Companies Act, 1956, and has its registered office situate in Calcutta. In 1954, the petitioner came to have exclusive right to exploit some 700 sq. miles of forests in North Andamans from the Government of India. In order to carry out the exploitation, it was found necessary for the company to charter a ship for carrying timber from the Andamans to Indian ports. By a charterparty dated August 25, 1954, executed in London, the petitioner company chartered from Messrs. Newland Steamship Co. Ltd. of Hongkong, a vessel called "Eastern Venture", on terms and conditions contained in the said charterparty.

The charter was in the standard form known as the "Uniform Time Charter", whereby the owners let and the company hired the said vessel for a period of six months in the first instance. The charterparty agreement was renewed from time to time. A copy of the charterparty agreement is annexed to the petition and marked with the letter A. The clauses in the said charterparty agreement, which are important for our purposes are set out below :

"6. The charterers to pay as hire : 16s. (sixteen shillings) per ton on vessels deadweight of 5,250 tons, per 30 days commencing in accordance with clause (1) until her re-delivery to the owners.

Payment of hire to be made in cash, in Calcutta, without discount, every 30 days in advance.....

14. The charterers or their agents to advance to the master, if required, necessary funds for ordinary disbursements for the vessels account at any port, charging only interest at 6 per cent. Per annum, such advances to be deducted from hire.

25. The owners to pay a commission of 3 per cent. to Clegg, Cruickshank and Co. Ltd., Calcutta, also 1 1/2 per cent. to Harris and Dixon and brokerage of 1 per cent. to Lambert Bros. Ltd., on any hire paid under the charter....."

On or about the 25th August, 1954, the parties agreed to a variation of the terms, and clause 26 was introduced which is as follows :

"26. Hire in accordance with clause 6 to be payable by telegraphic transfer to London; charterers application for exchange control; approval for such telegraphic transfer to be filed with bank by the due date."

By a sixth addendum dated the 5th September, 1955, the payment of hire was made payable in cash in London or Hongkong.

It is alleged that sometime in December, 1955, the vessel was sold by the owners to Messrs. Pan Norse Steamship Co. of Panama. The petitioner however has not produced sufficient evidence of the transfer before the Income Tax authorities and this application has proceeded on the footing that the original charterparty agreement is in force.

The petitioner has been paying the owners in terms of the charterparty agreement, at London. During the relevant period it has also made disbursements in terms of clause 14 of the charter by advancing funds by way of disbursements on the vessels account. The particulars of disbursements are contained in a statement furnished by the petitioner itself to the Income Tax Officer and a copy thereof is to be found at pages 48-49 of the annexure to the petition (annexure exhibit E). Upon receipt of the statement, the Income Tax Officer wrote to the petitioner company that it was apparent that Rs. 52,109 and Rs. 69,678 were constructively received in India by the non-resident owner of the above-mentioned vessel during 1954-55 and 1955-56 respectively. It was stated that the petitioner should have, before making the payment, deducted and paid tax u/s 18(3B) of the Indian Income Tax Act and that, as it had not done so, it was liable for payment of such taxes u/s 18(7) of the Income Tax Act. The petitioner was therefore called upon to make payment of such taxes. The petitioner protested against the payment of taxes, but had ultimately to pay the same under protest. It is said that this was done because the ship could not be moved from port without such payment.

The point that arises for determination is in a very short compass. It is admitted that moneys have been paid under clause 14 by the petitioner in India, and they have been deducted from hire. The amount also is not in dispute. Mr. Mitra

appearing on behalf of the petitioner argues that section 18(3B) has no application to the facts of this case and no tax is payable by the petitioner. He argues that the hire which is payable to the owner, is payable in London, and, therefore, is not liable to Indian Income Tax Act. In fact, as he points out, the Income Tax authorities have not sought to impose any tax on the hire as such. He then proceeds to argue that the amounts that have been advanced in terms of clause 14 are loans made to the owner at interest at the rate of 6 per cent. per annum, and loans cannot be treated as income. He says that even assuming that it becomes income when it is deducted from hire, it must be deemed to be income which has arisen in London, the stipulated venue of payment. Next he argues that on the facts and circumstances of this case, it does not follow that the amount that has been so advanced, even when it becomes hire, becomes the income of the non-resident foreigner, because income has to be determined after taking into account the disbursements, etc., that is to say before one can tax the income, it will have to be determined not on the gross hire but on the net amount available to the owner after deducting the outgoings.

The relevant provisions of section 18(3B) are as follows :

"Any person responsible for paying to a person not resident in the territories any interest not being interest on securities or any other sum chargeable under the provisions of this Act shall, at the time of payment, unless he is himself liable to pay any Income Tax and super-tax thereon as an agent, deduct Income Tax at the maximum rate and super-tax at the rate applicable to a company or in accordance with the provisions of sub-clause (b) of sub-section 17, as the case may be.....

The whole question is whether the amounts advanced under clause 14, and then deducted from the hire are chargeable under the provisions of this Act. I have already indicated that Mr. Mitter bases his argument on the fact that the advance was by way of loan bearing 6 per cent. interest. There can be no doubt that so far as the loan is considered by itself, it cannot be considered as income, nor has it been argued that it is so. But the matter does not rest there. If the payment remained in the nature of a loan, then there would be no question of paying Income Tax thereon. But by the agreement itself, it is to be deducted from hire. According to the terms of the charterparty agreement, the hire is payable every month in advance. It is obvious that at the point of time, when the advance is made, no hire has actually become payable and, therefore, it is a payment in advance towards hire. The petitioner would be entitled to deduct it from hire which will be payable in advance at the commencement of the next month of hire.

Mr. Pal appearing on behalf of the respondent has pointed out that while it is true that the charterparty contract does lay down the venue of payment of hire, which in the first instance was Calcutta and then London, it also lays down how advances were to be made for local disbursements, and further provides that such advances are to be treated as hire. Therefore, it is contemplated by the agreement itself that part of the hire shall be payable, or might become payable

in accordance with clause 14. I have already indicated that so far as Mr. Mitras argument is concerned, namely, that a loan as such is not chargeable to Income Tax, there can be no difficulty. I think however that to determine the application of section 18(3B) simply by treating the payment as a loan would be an oversimplification of the issue. It is not as if a loan is made and then the parties agree to treat it as hire, apart from the charterparty agreement. The charterparty agreement has to be considered as a whole. It lays down how and where the hire is to be paid, and it also lays down that advances would have to be made under clause 14 and such advances would be deductible as hire. The provisions of the charterparty agreement must be taken as a whole, and considered from this point of view, it appears to me to contemplate that part of the hire would be payable in places other than London, that is to say, payable where money would be required for local disbursement. It has been held that the expression "constructive payment" is not a happy one. Either a payment is made, or it is not made, and where it is made in a particular place, it is incorrect to consider it as being made somewhere else constructively. In this particular case, payment has been made under clause 14, of the sums in question, in Calcutta. The charterparty agreement contemplates that such payment shall be deemed as payment of hire. It is impossible to hold that the payments were made elsewhere than in Calcutta. It is argued that the mere advance of the money will not do, because the petitioner would have to adjust its books and debit the hire to the owners. Now, so far as that operation is concerned, there can be no doubt that it happened in Calcutta. What is then argued is that if it is a constructive payment of hire, the hire being payable under the contract in London, the constructive payment must be deemed to be in London. I am unable to accept this argument. It is true that the hire was agreed to be paid in London. But it was also agreed that part of the hire might have to be made in a place other than London, by way of making advances for defraying local disbursements. It is impossible to deem the payment as having been made in London, where in fact it has never been made. The payments have been made in Calcutta, and when made, the parties had agreed to treat it as payments of hire. It is, therefore, a payment of hire in terms of the contract by the petitioner to the owners, in Calcutta.

Reference has been made by Mr. Mitra to a number of cases which have dealt with the question of the venue of payment. They are, in my opinion, of not much use in deciding this case. The cases cited have depended on their own facts, and the decisions also are not uniform. The first case cited is *Trinidad Lake Asphalt Operating Co. Ltd. v. Trinidad and Tobago Income Tax Commissioner*.

The facts in that case were shortly as follows :

The Barber Asphalt Corporation of New Jersey, U.S.A., were the holders of 499,992 shares out of 500,000 shares in the Trinidad Lake Asphalt Operating Co. Ltd. In a particular year, a dividend of over a million dollars was declared. On that date, the Barber Co. owned to the Trinidad Co. a sum of over a million dollars for

asphalt purchased by it. A resolution was passed whereby the dividend payable to the Barber and Co. was adjusted by cancellation of the liabilities of the Barber and Co. for a like amount. Barber and Co. was, of course, at all material times a non-resident of the colony. It carried on business at its head office in Barber, New Jersey, United States. The transaction was carried out by each party making corresponding entries in its books. Under a Trinidad Ordinance, any person who "transmitted" any monies from Trinidad was liable for payment of tax. The question was whether the amount of dividend would be taken to have been transmitted by the Trinidad Co. to Barber and Co. to New York. Lord Wright considered the facts and the law and held that the transaction did amount to a transmission. The learned Judge further held that the amount was to be deemed to have been transmitted to New York. This decision was doubted in the House of Lords case, *Commissioners of Inland Revenue v. Gordon*. Lord Cohen pointed out that in the Trinidad case, payment could be certainly deemed to be a transmission, but he did not agree that it was a transmission to New York. In *Gordon's* case, it appears that he was as partner in a firm carrying on business in Ceylon. He had an account with the Colombo branch of a bank which had its head office in London. He came to the United Kingdom in 1940 and opened an account at the head office of his bank in London. By arrangement he was allowed to overdraw his account, the overdrafts being transferred to the Colombo branch whenever it reached Pounds 500. At the Colombo branch, they were converted into rupees and satisfied by periodic payment into the Colombo account from the respondents firm, representing his share of the business profits. It was held that there was no remittance of income from foreign possession to the United Kingdom and accordingly there was no liability to tax. Another case that was cited was *Nielsen, Anderson and Co. v. Collins Muller*. There again, on the facts of that case, it was held that the Danish company would be assessable to Income Tax in the name of certain agents, in respect of the profits resulting from cargoes shipped from England through the agents. A decision of the Supreme Court was also cited : *Keshav Mills Ltd. v. Commissioner of Income Tax, Bombay*. In that case, a non-resident company manufactured textile goods in Petlad in Baroda State, and sold the goods ex-mills. The firm R and Co. carrying on business within British India, guaranteed the sale price of goods sold by the company ex-mill, to purchasers at Ahmedabad within British India. The company debited R and Co. with the price of goods sold and credited the sales account with the amount of the bills. R and Co. collected the amounts of the bills from the purchasers on behalf of the company and credited the sums realised in the company's account with banks at Ahmedabad and also disbursed them to creditors of the company in British India. These payments were credited by the company to R and Co. The question was whether certain sums so adjusted, were sale proceeds of the goods sold by the assessee to merchants in British India and whether they were received in British India and could be included in the assessable income of the company in British India. It was held that they were neither received by the company nor could be deemed to have been received by it, when the entries were made in the books of account at Petlad outside British

India, but had merely accrued or arisen to it there, and that they were first received by R and Co. and by the banks through whom the railway receipts were negotiated on behalf of the company in British India, and that they were therefore liable to tax u/s 4(1)(a) of the Indian Income Tax Act, as having been received in British India on its behalf.

It will thus be seen that the decisions in the cases cited above, turn on their own facts. It appears however that mere adjustment of entries in a book does not necessarily decide the question. If no actual payments were made within the territory, then the tendency is not to treat it as an income accrued within the taxing territory. On the other hand, when such payments have been made within the taxing territory, then the tendency is to treat it as made where it was made, and not by notionally treating it as being made where the books were adjusted or where it should have been made. So far as the Trinidad Asphalt case is concerned, it really turned on the particular wordings of the Trinidad Ordinance, and the question was whether it could be said to have been "transmitted" according to the words used in the Ordinance. In this particular case, we are concerned with the question as to whether the amount in dispute is chargeable to Indian Income Tax. That depends on the question as to whether the income arose within the taxing territory. In my opinion, it did so. The actual payment was made in the territories of India and it cannot be notionally considered to be made anywhere else. Not only has it been made in India, but it was contemplated by the charterparty agreement that it should be so made. Thus, there is no injustice in enforcing the provision of section 18(3B) of the Indian Income Tax Act. Of course, this might give rise to certain practical difficulties. It was pointed out by Mr. Mitter that if advances are made to masters of ships, then how could tax be deducted therefrom? In other words, he says that if a master of a ship requires Rs. 10,000 for urgent repairs, it would not do to advance the said sum, less the tax due thereon. There is considerable force in what he says, but then, the difficulty of book-keeping cannot avoid the liability. One way of doing it would be to adjust the payment of hire by including the tax payable, that is to say, adding the same to the advance made under clause 14, and treating the hire deducted as including the taxes paid. Then, again, there is section 18(3C) in the Act, which provides that where a person responsible for paying, be in doubt, then he could make an application for determination of the liability. The petitioner could have made such an application and safeguarded itself.

The next point to be dealt with is the point made by Mr. Mitter that the amount advanced should not be considered as an income, without final adjustments of the credits and debits. This is a very vexed question, and the matter has been elaborately dealt with in the case of *Turner Morrison and Co. Ltd. v. Commissioner of Income Tax, West Bengal*. I have also referred to this point in the *Anglo-Indian Jute Mills Co. Ltd. v. S.K. Dutt*. In *Turner Morrisons* case Mr. Mitra had himself advanced the very same argument before the Supreme Court but Das, J., (as he then was), did not accept the argument, holding that the

income, profit or gain was lying dormant, or hidden, or otherwise embedded, in the gross income. It is easy to see that if in every case the taxing authorities have to wait until the net profit has been determined, then it would be extremely difficult to make the provision of section 18(3B) applicable. In *Nielsen, Anderson and Co. v. Collins Lord Hanworth, M.R.*, has dealt with this aspect of the matter at pages 115 and 116. He said as follows :

"It is said that the meaning of these words receipt of any profits or gains arising as herein mentioned must indicate the net profits or gains on which the tax would actually be imposed, and does not include gross profits or gains which on examination and when proper deductions have been made fade away and leave nothing upon which the tax itself can be payable. But I do not think that is the right interpretation to be put upon these words. I think it is made plain by what was said by Lord Justice Fry, as affirmed in the case of *Grainger v. Gough*, that the meaning of these words factor or agent having the receipt of any profits or gains is gross profits or gains in which there may be wrapped up some net profits or gains ultimately to be found chargeable to Income Tax....."

"Now, holding that view of section 41, it appears that both these agents can be assessed, because upon the very statement of the case they do receive sums in the way of freight which will include, may include, or probably do include profits or gains in respect of their business of ship owners....."

It will thus be seen that the consensus of opinion does not exempt the petitioner from liability of deducting the Indian Income Tax, simply on the ground that the net income of the owner cannot be determined until an account is taken of the entire disbursement. At the moment of payment, the Income Tax must be deducted in terms of section 18(3B) and the relative section of the Indian Income Tax Act. It is not necessary for me to indicate how this will ultimately be adjusted between the petitioner and the owner.

In my opinion, therefore, the Income Tax authorities have rightly taken steps u/s 18(3B) of the Indian Income Tax Act, and the petitioner has not been able to satisfy me that any interference is called for. That being so, this application must fail. The rule must be discharged but there will be no order as to costs.

Rule discharged.