

Commissioner of Income-Tax, Madras

Vs

Mysore Chromite Limited

Civil Appeal No. 117 of 1953

(CJI M. C. Mahajan, T. L. Venkatarama Ayyar, Ghulam Hasan, S. R. Dass, N. H. Bhagwati JJ)

01.11.1954

JUDGMENT

DAS, J. -

This is an appeal from the judgment pronounced by the High Court of Judicature at Madras on the 29th March, 1951, on a consolidated reference by the Income-tax Appellate Tribunal under section 66(1) of the Income-tax Act whereby the High Court answered in the affirmative both the referred questions which were expressed in the following terms :

"(1) Whether on the facts and in the circumstances of the case the profits derived by the assessee company from sales made to European and American buyers arose outside British India ?

(2) Whether on the facts and in the circumstances of the case the profits derived by the assessee company from sales made to European and American buyers were received outside British India ?"

The above questions of law arose out of proceedings for the assessment to income-tax of the respondent, Mysore Chromite Ltd., (hereinafter referred to as the assessee company), for the years 1939-40, 1940-41, 1941-42, and 1942-43. The facts leading up to the reference as found by the Income-tax Appellate Tribunal are shortly as follows :

The assessee company is a private limited company registered in the Mysore State under the Mysore Company Regulations and has its registered office at Sinduvalli in Mysore State. The management and control of the assessee company was vested in Messrs. Oakley Bowden & Co. (Madras) Ltd., another private limited company incorporated under the Indian Companies Act, having its registered office at No. 15, Armenian Street, Madras. The assessee company owns chromite mines in Mysore State. Chrome ores are extracted from the mines and converted into a merchantable product and then sold to buyers mostly outside India. A very small proportion of the total sales is effected in India and for the purposes of this case may be left out of consideration. The sales are mostly to buyers in America and Europe. The sales to the purchasers in Europe are put through in London by Bowden Oakley & Co. Ltd., London, which is the agent of the assessee company in Europe holding a power of attorney from the assessee company. The contracts for sale to European purchasers are signed by Bowden Oakley & Co. Ltd., in London. The sales to purchasers in America are effected through Messrs. W. R. Grace & Co., who buy for undisclosed

principals. The contracts for sale to American purchasers are signed by W. R. Grace & Co., presumably in America and by Oakley Bowden & Co., (Madras) Ltd., in Madras. Specimen forms of contracts with European purchasers and those with American purchasers are set out in the order of the Tribunal dated the 22nd January, 1948, out of which the present reference arises. Under both forms of contracts the price was F. O. B. Madras or Marmagoa. A very small quantity of goods was sold F. O. B. Marmagoa and the same need not be considered here. Provision was made for weighment, sampling and assay of goods at destination. The terms of payment under the European contract were as follows :-

"Payment. - Buyers to open a confirmed irrevocable Bankers' credit in favour of Messrs. Mysore Chromite Ltd., Madras (to be advised to sellers) through the Eastern Bank Ltd., for 90 per cent. (ninety per cent.) of the Provisional Invoice against documents. Documents to consist of :-

1. Bills of Lading,
2. Provisional Invoice.

Provisional invoice to be based on Bill of Lading weight and contract price for 48 per cent. Cr 203. Balance on ascertainment of weight and analysis to be paid in London to Bowden Oakley & Co. Ltd., within 10 days of the final invoice, based on outturn weights and assays."

The corresponding terms of payment under the American contracts were as follows :-

"Payment. - Letter of credit for eighty per cent. (80%) of invoice value to be available against drafts at ninety (90) days' sight with documents attached to be opened immediately in London in favour of the seller. Balance estimated twenty (20%) of the margin due to be paid by telegraphic transfer through London on receipt of information as to assay and outturn which should be submitted with a month after the arrival of the steamer at destination. Charges for such telegraphic transfer for account of beneficiary."

The European contracts also provided for insurance by buyers but no such provisions was made in the American contracts.

The course of dealing as found by the Appellate Tribunal was as follows : Before the goods were actually shipped, the buyers used to open a confirmed irrevocable bankers' credit with some first class bank in London. Being informed of the opening of such credit the Eastern Bank Ltd., London, sent intimation to the Eastern Bank Ltd., Madras, and the latter in its turn used to pass on the intimation by letter addressed to the assessee company. A specimen of such letter is also set out in the order of the Appellate Tribunal. In such communication the Eastern Bank Ltd., Madras, informed the assessee company that "in accordance with advices received by letter from our London Office, a confirmed and irrevocable credit has been opened in your favour by Messrs. Morgan Grenfell and Co. Ltd., London, for account of Messrs. W. R. Grace and Co., New York, for a sum not exceeding Pound 7,300 (seven thousand three hundred pounds sterling) in all, available by delivery to us on or before 15th January, 1940, of the following documents....." Towards the end of the letter the Eastern Bank Ltd., Madras, used to write that they were "prepared in our option as

customary to negotiate drafts drawn in terms of the arrangement provided that the documents as above mentioned appear to us to be in order." The letter concluded with a warning that the advice was "given for your guidance and without involving any responsibility on the part of this Bank." On receipt of such intimation the assessee company placed the contracted goods on board the steamer at Madras and obtained a bill of lading in its own name. As already mentioned, the shipments were made principally at Madras Port. Thereafter the assessee company used to make out a provisional invoice on the basis of the bill of lading weight and contract price for 48 per cent. Cr 203 and used to draw a bill of exchange on the buyers' bank, where the letter of credit had been opened, for 90 per cent. of the amount of the provisional invoice payable at sight in the case of European contracts and 80 per cent. of the amount of the provisional invoice at 90 days' sight in the case of American contracts and in either case the bills of exchange used to be drawn in favour of the Eastern Bank Ltd., London. The bill of exchange together with the relative bill of lading endorsed in blank by the assessee company and the provisional invoice was then negotiated with the Eastern Bank Ltd., Madras, the bankers of the assessee company, who used to credit the assessee company with the amount of the bill of exchange. The Eastern Bank Ltd., Madras, then forwarded the documents to the Eastern Bank Ltd., London, who used to present the bill of exchange to the buyers' bank in London and upon the bill of exchange being accepted the Eastern Bank Ltd., London, used to deliver the bill of lading and the invoice to the buyers' bank. The buyers' bank in due course used to pay the amount of the bill of exchange to the Eastern Bank Ltd., London. Thereafter, on arrival of the goods and after weightment and assay, the sale price was ascertained and the balance of price, after deducting the payments made against the bill of exchange, used to be paid to the Eastern Bank Ltd., London, which was the assessee company's agent and banker in London.

On the facts stated above the Income-tax Officer assessed the assessee company on the entire profits in respect of these sales on the footing that they arose and were also received in British India. On appeal, the appellate Assistant Commissioner confirmed the assessment. The assessee company went up on appeal to the Income-tax Appellate Tribunal. The Tribunal, by its order dated the 22nd January, 1948, came to the conclusion that the sales took place outside British India and that the money in respect of such sales was also received by the agent of the assessee company in London. The Commissioner of Income-tax thereupon applied to the Appellate Tribunal requiring the latter to state a case and refer certain questions of law said to arise out of the order of the Tribunal. The Appellate Tribunal accordingly referred the two questions of law hereinbefore set out. The High Court of Madras in a well reasoned judgment upheld the decision of the Appellate Tribunal and answered the two questions in the affirmative and against the Commissioner of Income-tax. The Commissioner of Income-tax has now preferred this appeal with a certificate of fitness from the High Court.

It appears from the statement of case as also from the order of the Appellate Tribunal that it was agreed between the department and the assessee company that the income arose at the place, wherever that be, where the sales took place. This was not disputed before the High Court or before us although in the appellant's statement of case it was suggested that this was erroneous. The point for determination, therefore, is as to where the sales took place.

Learned Solicitor-General appearing in support of this appeal contends that having regard to the terms of the contracts the sales must be regarded as having taken place in British India. The facts strongly relied on by him are (i) that the price and delivery of goods were on F. O. B. terms, (ii) that in the European contracts the insurance, if any, was to be the concern of the buyers and (iii) that payment of the 80 per cent. or 90 per cent. as the case may be was made in Madras by the Eastern Bank Ltd., Madras, to the assessee company on the delivery of the documents. All these facts taken

together indicate, according to his submission, that the property in the goods passed at Madras and the sales accordingly were completed in British India. We are unable to accept this line of reasoning. According to section 4 of the Indian Sale of Goods Act a contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price and where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell. By sub-section (4) of that section an agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred. Section 18 of the Act clearly indicates that in the case of sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained. In the present case, the contracts were always for sale of unascertained goods. Skipping over sections 19 to 22 which deal with contract of sale of specific goods we come to section 23 which lays down that where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. It is suggested that as soon as the assessee company placed the goods on board the steamer named by the buyer at the Madras Port the goods became ascertained and the property in the goods passed immediately to the buyer. This argument, however, overlooks the important word "unconditionally" used in the section. The requirement of the section is not only that there shall be appropriation of the goods to the contract but that such appropriation must be made unconditionally. This is further elaborated by section 25 which provides that where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such a case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled. The question in this case, therefore, is : was there an unconditional appropriation of the goods by merely placing them on the ship ? It is true that the price and delivery was F. O. B. Madras but the contracts themselves clearly required the buyers to open a confirmed irrevocable bankers' credit for the requisite percentage of the invoice value to be available against documents. This clearly indicated that the buyers would not be entitled to the documents, that is, the bill of lading and the provisional invoice, until payment of the requisite percentage was made upon the bill of exchange. The bill of lading is the document of title to the goods and by this term the assessee company clearly reserved the right of disposal of the goods until the bill of exchange was paid. Placing of the goods on board the steamer named by the buyer under a F. O. B. contract clearly discharges the contractual liability of the seller as seller and the delivery to the buyer is complete and the goods may thenceforward be also at the risk of the buyer against which he may cover himself by taking out an insurance. Prima facie such delivery of the goods to the buyer and the passing of the risk in respect of the goods from the seller to the buyer are strong indications as to the passing also of the property in the goods to the buyer but they are not decisive and may be negated, for under section 25 the seller may yet reserve to himself the right of disposal of the goods until the fulfilment of certain conditions and thereby prevent the passing of property in the goods from him to the buyer. The facts found in this case are that the assessee company shipped the goods under bill of lading issued in its own name. Under the contract it was not obliged to part with the bill of lading which is the document of title to the goods until the bill of exchange drawn by it on the buyers' bank where the irrevocable letter of credit was opened was honoured. It is urged that under the provision in the contract for weight and assay, which was ultimately to fix the price unless the buyer rightly rejected the goods as not

being in terms of the contract, the passing of property in the goods could not take place until the buyer accepted the goods and the price was fully ascertained after weighment and assay. It is submitted that that being the position, the property in the goods passed and the sales were concluded outside British India, for the weighment, sampling, assay and the final fixation of the price could only take place under all these contracts outside British India. It is not necessary for us to express any opinion on this extreme contention. Suffice it to say, for the purpose of this case, that in any event upon the terms of the contracts in question and the course of dealings between the parties the property in the goods could not have passed to the buyer earlier than the date when the bill of exchange was accepted by the buyers' bank in London and the documents were delivered by the assessee company's agent, the Eastern Bank Ltd., London, to the buyers' bank. This admittedly, and as found by the Appellate Tribunal, always took place in London. It must, therefore, follow that at the earliest the property in the goods passed in London where the bill of lading was handed over to the buyers' bank against the acceptance of the relative bill of exchange. In the premises, the Appellate Tribunal as well as the High Court were quite correct in holding that the sales took place outside British Indian and, ex hypothesi, the profits derived from such sales arose outside British India.

As to the second question, the learned Solicitor-General contends that irrespective of the place where the sale may have taken place the profits derived from such sales were received in Madras. It is recalled that after shipment the assessee company, through its managing agent in Madras, prepared provisional invoices and drew bills of exchange for 80 per cent. or 90 per cent., as the case may be, of the amount of such invoices and handed over the same to the Eastern Bank Ltd., Madras and received the amount of the bill of exchange from them in Madras. He contends that the receipt of this payment by the assessee company was really the receipt of the price of the goods and amounted to receipt of profits in Madras. He draws out attention to the terms of payment in the European contract and to the letter of intimation of the opening of the credit sent by the Eastern Bank Ltd., Madras, to the assessee company which have been quoted in part in the earlier part of this judgment. He relies on the words "through the Eastern Bank Ltd.," appearing in the contract and the words "available by delivery to us" appearing in the letter. We do not think that those words support the contention of the learned Solicitor-General. The words "through the Eastern Bank Ltd.," appear to us to go with the preceding words "to be advised to sellers" which are put within brackets which seem to have been wrongly closed after the word "sellers" instead of after the words "the Eastern Bank Ltd." Ordinarily, the buyer opens a letter of credit with his bank in favour of the seller and the words "through the Eastern Bank Ltd." would be meaningless unless it was contended to mean that the irrevocable credit which was in favour of the assessee company was to be operated upon by the latter through the Eastern Bank Ltd. If that were the true meaning, then that certainly does not make the Eastern Bank Ltd., the agent of the buyers. The words "available by delivery to us" occurring in the letter of the Eastern Bank Ltd., Madras, do not appear to us to indicate that this was any part of the terms of the letter of credit. This was an intimation in accordance with the advice received by the Eastern Bank Ltd., Madras, from the Eastern Bank Ltd., London, that the assessee company might avail itself of the letter of credit by delivery of the documents to the Eastern Bank Ltd., Madras. This is made further clear by the latter part of the letter where the Eastern Bank Ltd., Madras, expressed their willingness at their option to negotiate the drafts drawn in terms of the arrangement provided that the documents were in order. The concluding sentence of that letter whereby the Eastern Bank Ltd., Madras, disown any responsibility in respect of the advice clearly militates against the suggestion of the learned Solicitor-General. It is, in these circumstances, impossible to accede to the argument that the payment of 80 per cent. or 90 per cent., as the case may be, of the amount of the provisional invoice by the Eastern Bank Ltd., Madras, was a payment

on account of the price. Normally, price is paid by or on behalf of the buyer. In this case the fact found is that the Eastern Bank Ltd., Madras, and the Eastern Bank Ltd., London, were agents of the assessee company. Neither of them had any relation with the buyers. Therefore, a payment by them cannot be regarded as a payment of the price. The true position is very clearly put by Lord Sumner in *The Prinz Adalbert*:

"When a shipper takes his draft, not as yet accepted, but accompanied by a bill of lading indorsed in this way, and discounts it with a banker, he makes himself liable on the instrument as drawer, and further makes the goods, which the bill of lading represents, security for its payment. If, in turn, the discounting banker surrenders the bill of lading to the acceptor against his acceptance, the inference is that he is satisfied to part with his security in consideration of getting this further party's liability on the bill, and that in so doing he acts with the permission and by the mandate of the shipper and drawer."

This payment by the Eastern Bank Ltd., Madras, therefore, is nothing but an advance made by them to their own customer on the security of the goods covered by the bill of lading reinforced by the benefit of the liability taken up by the assessee company as drawer of the bill which in its turn is backed by the confirmed and irrevocable credit of the buyers' London Bank. If this payment was on account of the price, why should the assessee company, as the seller, undertake any liability to the Eastern Bank Ltd., as the drawer of the bill of exchange? The truth of the matter is that the price was paid on behalf of the buyers by their respective London Banks in London to the Eastern Bank Ltd., London, which was the agent of the assessee company. The first receipt of the price, therefore, as pointed out by the High Court, was by the Eastern Bank Ltd., London, on behalf of the sellers. There is no dispute that the balance of the price ascertained after weighing and assay and deducting the amount paid on the bill of exchange was similarly received in London by the Eastern Bank Ltd., London, on behalf of the assessee company. The subsequent adjustment made in the books of the Eastern Bank Ltd., London, did not operate as a receipt of profits in British India. In our opinion the High Court correctly answered the second question also in favour of the assessee company.

For reasons stated above, this appeal must stand dismissed with costs and we order accordingly.

Appeal dismissed.

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