

Commissioner of Income-Tax, West Bengal I

Vs

Bengal River Service Co. Ltd.

Civil Appeal No. 865 of 1968

(K.S. Hegde, A.N. Grover JJ)

05.08.1971

JUDGMENT

HEGDE J. -

This is an appeal by certificate under section 66A(2) of the Indian Income-tax Act, 1922 (in brief "the Act"), arising from the decision of the High Court of Calcutta in Income-tax Reference No. 18 of 1958 on its file. Therein two questions of law were referred to the High Court for its opinion. They are :

"(1) Whether, on the facts and in the circumstances of this case, the amount of Rs. 3,43,138 received by the assessee was derived from a source or category of transaction mentioned in item 5(g) of the Schedule to the Agreement for the Avoidance of Double Taxation of Income between India and Pakistan ? and

(2) If the answer to the above question be in the negative, then whether the aforesaid sum fell under item 9 of the Schedule of the aforesaid Agreement."

The respondent-assessee carried on the business of plying river boats before the partition of India. Herein we are concerned with the income earned by the assessee in the assessment year 1947-48, the relevant accounting year being the calendar year 1946. In that accounting year the Government requisitioned certain boats belonging to the assessee on charter basis. The statement of the vessels so chartered and income received therefrom duration the year was placed before the Tribunal. But it is not necessary to refer to the same as it has no bearing on the question of law that we are called upon to decide. The assessee's registered office was in Calcutta. It is said that during the accounting year in question, the assessee received Rs. 3,43,138 as "hire" for the boats requisitioned by the Government. But the traffic originated in the areas which are now a part of Pakistan. The question for consideration is whether the receipt of Rs. 3,43,138 can be brought to tax in this country. For deciding that question, it is necessary to refer to a few more facts.

In order to avoid double taxation of income, profits and gains because of the partition of India, the Government of India entered into an agreement with Pakistan in 1947 in exercise of the powers conferred on it by section 49AA of the Act, section 11A of the Excess Profits Tax Act, 1940, and section 18A of the Business Profits Tax Act, 1947, as adapted. That agreement, to the extent material for our present purpose, reads thus :

"Whereas the Government of the dominion of India and the Government of the Dominion of Pakistan desire to conclude an agreement for the avoidance of double

taxation of income chargeable in the two dominions in accordance with their respective laws :

Now, therefore, the said two Governments do hereby agree as follows :.....

Article IV. - Each Dominion shall make assessment in the ordinary way under its own laws; and, where either Dominion under the operation of its laws charges any income from the sources or categories of transactions specified in column 1 of the Schedule to this Agreement (hereinafter specified referred to as the Schedule) in excess of the amount calculated according to the percentage specified in columns 2 and 3 thereof, that Dominion shall allow an abatement equal to the lower amount of tax payable on such excess in their Dominion as provided for in Article VI.....

Article VI. - (a) For the purposes of the abatement to be allowed under Article IV or V, the tax payable in each Dominion on the excess or the doubly taxed income, as the case may be, shall be such proportion of the tax payable in each Dominion as the excess or the doubly taxed income bears to the total income of the assessee in each Dominion.....

The Schedule (See Article IV).-----Source of income or Percentage of income which nature of transaction each Dominion is entitled Remarks from which income is to charge under the derived Agreement-----
------(1) (2) (3) (4)-----5. Income from "business" or other sources" :-... (g) Transport (Ships, 100 per cent. by the Dominion Nil by the Air, Road) in which the traffic originates other. 9. Any income derived 100 per cent. by the Dominion Nil by in which the income actually the other." a source or category of accrues of arise transactions not mentioned in any of the foregoing items of this Schedule-----
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It appears from the statement of the assessee as that the assessee earned Rs. 3,43,138 in Calcutta and Rs. 7,296 in Narayan Ganj (now in Pakistan) from out of the here received from the Governments in respect of the boats chartered by them. The Income-tax Officer held that the amount of Rs. 3,43,138 so received was income earned in Indian Dominion and therefore liable to be brought to tax in this country. In so doing he applied the provisions of item 9 of the Schedule to the Agreement for Avoidance of Double Taxation. According to the assessee its case fell within item 5(g) Double Taxation. According to the assessee its case fell within item 5(g) and not item 9. The Income-tax Officer did not accept that contention. In appeal the Appellate Assistant Commissioner agreed with the conclusions reached by the Income-tax Officer but the Income-tax Appellate Tribunal differed from the view taken by the Income-tax Officer and the Appellate Assistant Commissioner. It came to the conclusion that the receipt in question fell within item 5(g) of the agreement and therefore it is not liable to be taxed in this country as admittedly the traffic originated in areas which are now part of Pakistan. As mentioned earlier the High Court agreed with the view taken by the Tribunal.

It was urged on behalf of the department by the learned Solicitor- General that there is a distinction between the "hire" and "freight". According to him item 5(g) of the Agreement deals only with "freight" whereas any "hire" received would come within item 9. We see no basis for this subtlety. Quite plainly item 5 deals with transport by ships, air and road. Herein we are dealing with income realised as a result of the transport by ships. Item 5(g) does not make any distinction between "hire" and "freight". It deals with all types of transport by ships. Item 9 is a residuary clause. That item will be attracted only if the income, profits or gains earned or received cannot come within any other item. As mentioned earlier, the income with which we are concerned in this case plainly

comes within item 5(g). We agree with the tribunal and the High Court that the receipt with which we are concerned in this case comes within item 5(g).

For the reason mentioned earlier, we are of opinion that the High Court correctly answered the questions referred to it.

In the result this appeal fails and the same is dismissed with costs.

Appeal dismissed.

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