Commissioner of Income-Tax, West Bengal-III

Vs

Carew & Co. Ltd.

Civil Appeal NO. 2097 of 1972

(N.L. Untwalia, R.S. Pathak JJ)

13.09.1979

JUDGMENT

UNTWALIA J. -

1. This is an appeal by certificate and in it is involved an important question of law as to the interpretation of art. IV of the "Agreement for Avoidance of Double Taxation in India and Pakistan", hereinafter called "the Agreement". The only case on the point decided by any court in India so far brought to our notice is the decision of the Calcutta High Court, which is under appeal, reported in CIT v. Carew & Co. Ltd. [1973] 87 ITR 459.

Carew & Company Ltd., the respondent in this appeal, was resident in India having its registered office in Calcutta. The concerned assessment year is 1956-57. the corresponding previous year of the company ended on June 30, 1955. During the relevant period the sources of income of the respondent-company were from, (a) business in India and interest earned in India on securities; (b) manufacturing business in Pakistan; and (c) agricultural properties in Pakistan. For the relevant year the assessee's Indian income as computed by the ITO was Rs. 2,01,329 from business and Rs. 373 from interest on securities. The total of the two items was Rs. 2,01,702. The profit from the assessee's manufacturing business in Pakistan was computed at Rs. 3,26,368. In respect of the agricultural property, however, there was loss and it was determined at Rs. 3,20,839. The ITO deducted by way of set of the agricultural loss of Rs. 3,20,839 against the profit of the manufacturing business amounting to Rs. 3,26,368. The net profit of the assessee thus determined in respect of the two sources in Pakistan was Rs. 5,529. Deducting the statutory figure of Rs. 4,500 from the above net profit of Rs. 5,529, he gave the company relief against double taxation on the figure of Rs. 1,029 only. Initially, the assessee asked for abatement of tax on Rs. 5,529 but subsequently by filling a revised return it claimed abatement on the entire profit from its manufacturing business in Pakistan, i.e., Rs. 3,26,368 claiming at the same time a set off of the whole amount of Rs. 3,20,839 from the total income determined in India. The AAC affirmed the decision of the ITO, as in his opinion, art. IV of the Agreement permitted relief only on the amount of net profit of Rs. 5,529 from which, of course, the statutory deduction of Rs, 4,500 had to be made. The assessee-company, however, succeeded when it took the matter in second appeal to the Appellate Tribunal. It was held by the Tribunal that the assessee was entitled to abatement of tax under the Agreement on the entire profit from manufacturing business earned in Pakistan during the relevant year. Since the agricultural income of the assessee in respect of its agricultural properties in Pakistan was to be treated as taxable income in India the loss was allowable under the Indian I.T. Act, 1922, (hereinafter called "the Act"). The final conclusion drawn by the Tribunal was in these terms :

> "Now, therefore, the position is that the assessee has : (1) income from business in Pakistan, which is taxed 100 per cent. there; (2) loss in agricultural, which is not taxed there. Therefore, whereas relief has to be given on the taxed business income in Pakistan under the aforesaid Agreement for Avoidance of Double Taxation, no question of relief arises on the loss in agricultural income. In this view of the matter, the rebate granted only on the difference between the business profit and agricultural loss in Pakistan amounts to negation of the assessee's right to receive abatement of tax on income taxed in Pakistan.
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> In our opinion, therefore, income-tax relief has to be given on the Pakistan business income in accordance with the provisions of the aforesaid agreement without setting it off against the agricultural loss."

At the instance of the CIT, Bengal, the Tribunal referred the following question of law to the High Court for its opinion :

> "Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that relief should be given to the assessee on its Pakistan business income in accordance with the provisions of the Agreement for Avoidance of Double Taxation between the Government of India and Pakistan without setting off against it the loss in agricultural operations in Pakistan ?"

In agreement with the conclusion arrived at by the Appellate Tribunal, the High Court answered the reference in favour of the assessee. Hence, this appeal by the department.

It could not be and was not disputed that while computing the total income of the assessee, the income or the loss, as the case may be, from agricultural property in a foreign country had to be added to or adjusted in the assessee's total income. Obviously it will be an income from other sources within the meaning of cl. (v) of s. 6 of the Act. So also the assessee's income from business in Pakistan had to be added to the figure of his profits and gains of business in India. The statutory deduction of Rs. 4,500 had to be granted under the third proviso to s. 4(1) of the Act. The exclusion of agricultural income as mentioned in cl. (viii) of sub-s. (3) was to be granted only if it was an agricultural income as defined in s. 2(1). Otherwise not. The Calcutta High Court in the case of Kumar Jagadish Chandra Sinha. v. CIT [1955] 28 ITR 732 had rightly held that income agricultural lands situated in Pakistan was not agricultural income within the meaning of the Indian. I.T. Act, Income-tax was, therefore, chargeable on the said income. This view of the law is beyond any dispute or pale of attack. Similarly, if there is a figure of loss from agricultural lands situated in Pakistan, it has got to be deducted while computing the total income of the resident-assessee in India.

In the Act of 1922 were inserted ss. 49A, 49B, 49C and 49D by the Indian I.T. (Amendment) Act, 1939 (Act 7 of 1939). Subsequently, was inserted s. 49 AA which became s. 49A with effect from the 1st April, 1953, by virtue of s. 3 of the Finance Act, 1953. The marginal note of s. 49A reads : "Agreement for granting relief in respect of double taxation or for avoidance thereof". It provides :

> "The Central government may enter into an agreement -
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> (a) with the Government of any country outside India for the granting of relief in respect of income on which have been paid both income-tax (including super-tax)

under this Act and income-tax in that country, or

(b) with the Government of any country outside India for the avoidance of double taxation of income, profits and gains under this Act and under the corresponding law in force in that country;

and may, by notification in the Official Gazette, make such provisions as may be necessary for implementing the agreement."

The Agreement for Avoidance of Double Taxation in India and Pakistan was entered into and was followed by Notification No. 28, dated the 10th December, 1947, published in the Official Gazette. In s. 49D, there were no sub-section prior to the Amendment Act of 1953, but after its amendment new provisions were added and the said section thereafter consisted of four sub-section. For the purposes of this appeal I shall read only sub-s. (3). It runs as follows :

"If any person who is resident in the taxable territories in any year proves that in respect of his income which accrues or arises to him during that year in Pakistan he has paid in that country, by deduction or otherwise, tax payable to the Government under any law for the time being in force in that country relating to taxation of agricultural income, he shall be entitled to a deduction from the Indian income-tax payable by him -

(a) of the amount of the tax paid in Pakistan under any law aforesaid on such income which is liable to tax under this Act also; or

(b) of a sum calculated on that income at the Indian rate of tax; whichever is less."

It should be noticed that if the assessee's agricultural income in Pakistan was chargeable to tax, there then relief in respect of such income could be granted to the assessee only in accordance with sub-s (3). Such a case would not be covered by any of the articles of the Agreement. Since in the relevant years no amount of tax was charged or paid in Pakistan by the assessee, either because such income was not chargeable there or because the net figure was a figure of loss, in the matter of calculation of relief against double taxation sub-s.(3) of s. 49D was not attracted at all. The loss had simply to be allowed in India while computing the assessee's total income, because, if there were any figure of profit from agricultural lands in Pakistan the same could have been added in the total income of the assessee.

Section 49D(1) is attracted for giving relief against double taxation only if the income derived by the assessee is from a foreign country with which there is no reciprocal arrangement between that country and India for relief or for a avoidance of double taxation. In the case of Pakistan there being a reciprocal agreement the relief has to be granted only under it.

Article IV of the Agreement provides :

"Each dominion shall make assessment in the ordinary way under its own law; 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 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."

The method of calculation of the amount of abatement of the tax is indicated in the latter part of art. IV read with art. VI and the Schedule appended to the Agreement. There were four columns in the Schedule. The heading of col. 1 is "source of income or nature of transaction from which income is derived" and that of cols. 2 and 3 is "percentage of income which each Dominion is entitled to charge under the Agreement". The fourth column is a "remarks" column only. The scheme of the Agreement, it would be noticed, is quite different and distinct from what is provided for in sub-s. (1) of s. 49D.

The interpretation of sub-s (1) came up for consideration of this court in K. V. AL. M. Ramanathan Chettiar v. CIT [1973] 88 ITR 196. In the majority opinion of the court the view expressed at page 191 runs as follows :

> "..... What commends to us most is that once it is recognised that the section we are interpreting does not make the basis of relief the tax paid on the income from the same head or source, as we have shown that the change in the language does not, then the relief to which an assessee would be entitled would be the amount of tax paid on the foreign income which by its inclusion in the total income once again bears tax under the Act. The word 'such' in the phrase 'such doubly taxed income' has reference to the foreign income which is again being subjected to tax by its inclusion in the computation of the income under the Act and not the same income under an identical head of income under the Act. The income from each head under section 6 is not under the Act subjected to tax separately, unless the legislature has used words to indicate a comparison of similar incomes but it is the total income which is computed and assessed as such, in respect of which tax relief is given for the inclusion of the foreign income on which tax had been paid according to the law in force in that country. The scheme of the Act is that although income is classified under different heads and the income under each head is separately computed in accordance with the provisions dealing with that particular head of income, the income which is the subject-matter of tax under the Act is one income which is the total income. The income-tax is only one tax levied on the aggregate of the income classified and chargeable under the different heads; it is not a collection of distinct taxes levied separately on each head of income. In other words, assessment to income-tax is one whole and not group of assessment for different heads or items of income."

Learned counsel for the revenue heavily relied upon this decision to assail the correctness of the High Court judgment [1973] 87 ITR 459 under appeal. In Ramanathan Chettiar's case [1973] 88 ITR 169, the assessee, a resident in India, was doing money-lending business in Malaya as well as in India. For the assessment year 1953-54, the assessee's income in Malaya was Rs. 2,22,532, the assessee had incurred a business loss in India of Rs. 68,858. In India he had income from other source to the extent of Rs. 39,142. The ITO added the income from other sources to the foreign income and, deducting from the total thus computed the loss in India of Act, 1922, on the balance of Rs. 1,92,816. The Commissioner in revision took the view that the entire business los of Rs. 68,858 was to be adjusted against the assessee's business income in Malaya which was to the tune of Rs. 2,22,532 and only the balance of this being Rs. 1,53,674 could be held to have suffered double taxation. The High Court affirmed this view. This court differed and held that the assessee was entitled to double taxation relief in respect of the sum of Rs. 1,92,816 as granted by the ITO. It is to

be noticed that in s. 49D, as it stood prior to amendment in 1953, the expression used was "the same income" while after the amendment the wordings of sub-s. (1) were "such doubly taxed income". And that made all the difference in the interpretation, and the total income of the assessee determined by computation in India was Rs. 1,92,816 and the whole of it, although coming from different sources, was held to have been subjected to tax in Malaya irrespective of the fact that the income of the assessee in that country was only from business.

In the judgment under appeal the High court has said at page 467 ([1973]) 87 ITR 459) :

> "Thus, for purposes of abatement, income from each source or category to transaction specified in the Schedule has to be seperately considered and dealt with. If a particular item of income comes from a source or category which is not specified in the Schedule cannot be the subject-matter of the Agreement and no abatement in respect thereof can be allowed. In our view, the agricultural income in Pakistan is one of such excepted sources or categories."

If there were no differences in the phraseology of s. 49D(1) of the Act and art. IV of the Agreement the view expressed by the High Court could have been successfully challenged. But the view of the High Court on interpretation of arts. IV and VI of the Agreement is quite correct and 1 approve of the same. I have already said that the question of giving double taxation relief in case of agricultural income in Pakistan could only be dealt with under sub. s (3) of s. 49D of the Act and not under the Agreement. It is significant to note that in art. IV the wordings are "where either Dominion under the operation of its laws charges any income from sources or categories of transactions specified in col. 1 of the Schedule to this Agreement". It would be seen further that the various items in the Schedule clearly indicate that if the sources or categories of transactions are to be clubbed together and not treated separately, then it will be difficult, almost impossible, to give effect to the Agreement with reference to the Schedule. To illustrate view point, I may take cl. (g) of item 7 providing that in the case of metal ores, minerals, etc., extracted in one Dominion and sold in the other without any further manufacturing process and without selling establishment or a regular agency 75 per cent. of the profits is to be charged by the Dominion in which minerals are extracted and 25% by the Dominion in which goods are sold. Although in the Dominion in which the goods are sold it would be the assessee's income from business; under the Agreement the profit chargeable to tax in a particular Dominion has to fit in by a separate calculation under item 7(g).

On a careful consideration of the matter, I have come to the conclusion that the assessee was entitled to the relief against double taxation in accordance with the Agreement leaving out of consideration the figure of loss of Rs. 3,20,839 incurred in its agricultural activities in pakistan albeit the said loss had to be taken into account and adjusted against the assessee's profit in India. The appeal, therefore, fails and is dismissed with costs.

PATHAK J. -

I have had the benefit of perusing the judgment proposed by my learned brother. I would like to say a few word on the question before us.

The question is whether for the purpose of abatement of tax under the Agreement for the Avoidance of Double Taxation between the Government of India and the Government of Pakistan the respondent is entitled, in an assessment made in India under the Indian I.T. Act, to set off the agricultural loss suffered by it in Pakistan against its business income earned in that country.

Towards the end of 1947, the Government of India entered into an Agreement for the Avoidance of Double Taxation with the Government of Pakistan. Article I of the Agreement explicity declares that the taxes which are the subject of the Agreement are "the taxes imposed in the Dominions of India and Pakistan by the Indian I.T. Act (XI of 1922), the Excess profits Tax Act, 1940 (XV of 1940), and the Business Profits Tax Act 1947, (XXI of 1947), as adapted in their respective Dominions". The Agreement relates to the taxes imposed by only those three statutes, operating according to their respective adapted provisions in India and Pakistan separately. The tax imposed by any other enactment has not been included within the purview of the Agreement. Therefore, art, IV of the Agreement, under which the respondent claims benefit, must be construed as relating to assessments made in the two countries under the Indian I.T. Act, the Excess Profits Tax Act and the Business Profits Tax Act only. For the purpose of abatement under art. IV of the Agreement, the primary condition is that tax under those enactments should be leviable in both countries on income from the sources or categories of transactions specified in the Schedule to the Agreement. In the present case, which relates to an assessment in India under the Indian I.T. Act for the assessment year 1956-57, it is not disputed that in respect of that assessment year agricultural income arising in Pakistan was not liable to tax in Pakistan under the Indian I.T. Act as applied in that country. Consequently, any agricultural income arising or accruing in Pakistan cannot be considered for the purpose of abatement under the Agreement for the Avoidance of Double Taxation.

For a period of time, there was no provision of law which gave to an assessee, resident in India, relief against double taxation if he was assessed to tax in Pakistan on his agricultural income accruing or arising there. In India that income would be liable to tax under the Indian I.T. Act, which did not exempt, under s. 4(3)(viii) read with s. 2(1), agricultural income from land situated outside India. In Pakistan it would be liable to tax under a law other than the Indian I.T. Act as applied there. The Agreement for the Avoidance of Double Taxation did not provide for such relief. It was apparently for that reason that Parliament made provision in India by enacting s. 49D(3) in the Indian I.T. Act for granting relief with effect from April 1, 1956, against double taxation in respect of agricultural income accruing or arising in Pakistan and taxed in that country.

In my opinion, since agricultural income does not fall within the scope of the Agreement for the Avoidance of Double Taxation the loss suffered by the respondent in agricultural operations in Pakistan cannot be set off against the business income arising or accruing in that country for the purpose of determining the abatement due to the respondent under the aforesaid Agreement. In the absence of such set- off the respondent is entitled to a rebate in respect of the entire business income from Pakistan.

Before parting with this case, it is appropriate to point out that a distinction exists between the avoidance of double taxation and relief against double taxation. That distinction is evidenced by the two clauses of s. 49A of the Indian I.T. Act. One important feature distinguishing the two concepts lies in this that in the case of avoidance of double taxation the assessee does not have to pay the tax first and then apply for relief in the form of refund, as he would be obliged to do under a provision for relief against double taxation. The respective schemes embodying the two concepts differ in some degree from each other, and that needs to be bornein mind when statutory provisions are referred to and cases are cited before the court on a point involving double taxation.

The High Court is right in the view taken by it and, in the result, the appeal must be dismissed with costs.

Appeal dismissed.

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