SUPREME COURT OF INDIA

Kanchanganga Sea Foods Ltd.

Vs.

Commnr. of Income Tax

C.A.Nos.3844-3847 of 2003

(D.K. Jain and C.K. Prasad JJ.)

07.07.2010

JUDGEMENT

C.K.Prasad, J.

1. All these appeals arise out of a common judgment dated 7th June, 2002 passed by the Division Bench of the Andhra Pradesh High Court in Referred Case No.144 of 1995 and Writ Petition No.1103 of 1998 and as such they were heard together and are being disposed of by this judgment.

2. Facts giving rise to the present appeals are that the appellant M/s. Kanchanganga Sea Foods Limited is a company incorporated in India and engaged in sale and export of sea food and for that purpose obtained permit to fish in the exclusive economic zone of India. To exploit the fishing rights, the appellant-company (hereinafter referred to as the "assessee") entered into an agreement dated 7th March, 1990 chartering two fishing vessels i.e., two pairs of Bull Trawlers, with Eastwide Shipping Co. (HK) Ltd. a non-resident company incorporated in Hong Kong. Clause 4 of agreement which is relevant for the purpose reads as follows :-

> "4. Deponent Owners to provide:
>
> The Deponent Owners will provide fishing vessels, as approved by Government of India, for all inclusive charter fee of US $ 600,000.00 per vessel per annum. The charter fee is inclusive of fuel cost, maintenance repairs, wages, food for the crew and any other expenses incurred in connection with the operation of the vessel. They will provide training to the Indian crew in all aspects of fishing techniques, maintenance and running of the engine. In addition:
>
> a) The Deponent Owners should pay the charterers Rs.75,000/- or 15% of the gross value of the catch whichever is more.

b) Annual charter fee shall be maximum of US $ 600,000 per vessel per annum payable by way of 85% of gross earning from the fish sales subject to the condition that this will not exceed 85% of the sales value of the catch per vessel per annum on voyage to voyage basis.

Minimum 15% of the earning by way of sales value of catch of fish should accrue to the charterer. Payment to the Deponent Owners should not exceed the above charter fee.

c) Export value of catch from the chartered vessels should not be lower than the prevailing international market price at the time of export."

Thus, according to the terms of the agreement the Eastwide Shipping Co.(HK) Ltd., the owner of the fishing Trawlers (hereinafter referred to as the "non-resident company") was to provide fishing Trawlers to the assessee for all inclusive charter fee of US $ 600,000 per vessel per annum. In terms of the agreement the assessee was to receive Rs.75,000/- or 15% of the gross value of catch, whichever is more. The charter fee was payable from earning from the sale of fish and for that purpose 85% of the gross earnings from the sale of fish was to be paid to the non-resident company."

3. Necessary permission to remit 85% of the gross earning from the sale of fish towards charter-fee was granted by the Reserve Bank of India. As per agreement the Trawlers were to be delivered at Chennai Port for commencement of fishing operation. Clause 4 of the terms and conditions of permission granted by the Reserve Bank of India reads as follows:

"4. In case you are required to deduct tax at source while paying charter hire charges, you have to produce documentary evidence showing the payment of taxes by deduction at source from the charter hire charges paid by you.

However, if no tax is to be deducted at source as above, a clearance to that effect should be obtained from the Ministry concerned and submitted to us before payment of charter hire charges."

4. Trawlers were delivered to the assessee with full equipment and complement of staff at Chennai Port. Actual fishing operations were done outside the territorial waters of India but within the exclusive economic zone. The voyage commenced and concluded at Chennai Port. The catch made at high seas were brought to Chennai where surveyor of Fishery Department verified the log books and assessed the value of the catch over which local taxes were levied and paid.

"The assessee after paying the dues arranged Customs clearance for the export of the fish and the Trawlers, which were used for fishing, carried the fish to destination chosen by non-resident company. The Trawlers reported back to Chennai Port after

delivering fishes to the destination and commenced another voyage. The assessee did not deduct the tax from the non-resident company nor produced any clearance certificate during the Assessment Years 1991-92 to 1994-95. Notice under Section 201(1) of the Income Tax Act was issued to it to show cause as to why it should not be deemed to be an assessee in default in relation to tax deductible but not deducted. The assessee filed objection contending that the non-resident company did not carry out activities or operations in India which have the effect of resulting in accrual of income in India and hence it was not obliged to make any deduction. Alternatively, it was contended that even if the operation of bringing the catch to India Port for Customs appraisal and export to the non-resident company results in an operation, it was an operation for mere purchase of goods and, therefore, there was no income liable for assessment. It was also contended that even if 85% of the catch is considered as charter fee to the non-resident company it was paid outside India. Accordingly the plea of the assessee is that where the entire income is not taxable there is no obligation to deduct tax at source. The Income Tax Officer considered the objections raised by the assessee and finding the same to be untenable rejected the same and while doing so observed as follows:

"In the light of the above, I have no hesitation in holding that the income earned by the non-resident company was chargeable to tax u/s. 5(2) of the Income Tax Act. The assessee made payment to the foreign- company, the sums representing hire charges, without deducting taxes at source, thereby committed default under the provisions of Section 195. This is, therefore, a fit case to deem it to be an assessee in default as laid down in Section 201(1) of the Income Tax Act, 1961."

5. Ultimately, it held the assessee to be in default of Rs.1,66,91,962/-, which included interest due under Section 201(1A) of the Income Tax Act. The Income Tax Officer further held the assessee liable to pay interest @ 15% on the taxes payable and interest accrued at a rate of Rs.1,55,872/- per month from 1st October, 1992 onwards till the date of payment.

6. On appeal by the assessee, the Deputy Commissioner (Appeals) declined to interfere and affirmed the order of the Income Tax Officer on its following findings:

"It is commercial venture of the appellant. For giving assistance to it, Eastwide is paid hire charges.

Actual payment is made at an Indian Port, that is, in India. Only when the catch is brought in, its suitability is certified on inspection its valuation is made, and customs and port clearance is given, that Eastwide effectively receives its payment.

Simultaneously the appellant also credits Eastwide's account. Therefore, Eastwide actually receives the hire charges in India. In this connection it has to be remembered that for the purpose of Income Tax Act the nature of a receipt is to be considered from

the commercial point of view and is not to be confused with its nature under the general law. (C.I.T. vs. Scindia Worshop Ltd. - 119 I.T.R. 526, 331 Bom.).”

7. However, the Deputy Commissioner reduced the liability to Rs.8,34,597/-. The assessee unsuccessfully preferred appeal before Income Tax Appellate Tribunal (hereinafter referred to as the "Tribunal") and on its following finding it dismissed the appeal :

“The entire catch of fish belonged to the assessee. It was shown as sale by the assessee, 85% of such fish catch was adjusted against the liability of the assessee towards hire charges for chartering the vessels from the non-resident. It was thus in discharge of the assessee's liability against hire charges and therefore, it would be receipt in the hands of the non-resident under Section 5(2) of the Act.”

8. The Tribunal on an application filed before it by the assessee had referred to the Andhra Pradesh High Court, the following questions of law:

“1. Whether on the facts and in the circumstances of the case the Appellate Tribunal is correct in law in holding that payment is made to the Non-Resident by the assessee in India ?

2. Whether on the facts and in the circumstances of the case the Appellate Tribunal is correct in law in holding that the receipt in the form of 85% of the catch of fish by the Non-Resident was in India since all the formalities are completed in India ?

3. Whether on the facts and in the circumstances of the case the Appellate Tribunal is justified in rejecting the claim that there is no payment to the non-resident by the assessee but there was only a receipt of 15% of the value of fish catch from the non-resident to the assessee ?

4. Whether on the facts and in the circumstances of the case the Appellate Tribunal is correct in law in holding that the assessee is liable to deduct tax at source under section 195 of the Act on the alleged payment made to the Non- Resident towards hire charges even though the alleged payment is not in cash ?

5. Whether on the facts and in the circumstances of the case the Appellate Tribunal is correct in law in holding that the assessee was in default under Section 201 of the Income Tax Act, 1961, for the failure to deduct tax under section 195 of the Act ?”

9. The assessee, then filed application before the Tribunal for stay of collection which was rejected and the writ petition and special leave petition preferred against that order were dismissed by the High Court and this Court. The assessee had also filed application for rectification of the order dismissing the appeals dated 14th February, 1995 but the said application was also dismissed.

10. Aggrieved by the same assessee filed Writ Petition No.1103 of 1998 and both the Reference and the Writ Petition were heard together by the High Court and have been answered and disposed of together by the common judgment impugned in these appeals. The Tribunal answered all the questions referred to it against the assessee and in favour of the Revenue, same read as follows:- "On the facts and in the circumstances of the case, the Tribunal is correct in law in holding that payment is made to the non-resident by Assessee in India.

> "On the facts and in the circumstances of the case, the Tribunal is correct in law in holding that the receipt in the form of 85% of the catch of fish by the non-resident was in India since all the formalities are completed in India.
>
> On the facts and in the circumstances of the case, the Tribunal is justified in rejecting the claim that there is no payment to the non-resident by the Assessee but there was only a receipt of 15% of the value of fish catch from the non-resident to the Assessee;
>
> On the facts and in the circumstances of the case, the Tribunal is correct in law in holding that the Assessee is liable to deduct tax at source under Section 195 of the Act on the alleged payment made to the non-resident towards hire charges even though the alleged payment is not in cash; and On the facts and in the circumstances of the case, the Tribunal is correct in law in holding that the Assessee was in default under Sec.201 of the Income Tax Act, 1961 for the failure to deduct tax under Section 195 of the Income Tax Act."

11. Mr. A. Subba Rao, learned Counsel appearing on behalf of the appellant-assessee submits that there was no income chargeable which resulted to the non-resident company as no payment of any sum by the assessee to the non-resident company took place in India and therefore, the liability to deduct tax at source under Section 195 of the Income Tax Act or the liability under Section 201 of the Act did not arise. It has also been pointed out by the learned Counsel that there was no receipt of income at all in India as the 85% of the fish catch, which was given to the non-resident company, was sold outside India and the sale proceeds thereof were also realized outside India. In his submission, the non-resident company, therefore, had no receipts in India. In support of the submission reliance has been placed on a decision of this Court in the case of Commissioner of Income-Tax, A.P. v. Toshoku Ltd. (125 I.T.R. 1980 525) and our attention has been drawn to the following passage from the said judgment:

> "In the instant case, the non-resident assessees did not carry on any business operations in the taxable territories. They acted as selling agents outside India. The receipt in India of the sale proceeds of tobacco remitted or caused to be remitted by the purchasers from abroad does not amount to an operation carried out by the assessees in India as contemplated by cl.(a) of the Explanation to s.9(1)(i) of the Act. The commission amounts which were earned by the non-resident assessees for services rendered outside India cannot, therefore, be deemed to be incomes which

have either accrued or arisen in India. The High Court was, therefore, right in answering the question against the department."

Reliance has also been placed on a decision of this Court in the case of *Ishikawajima-Harima Heavy Industries Ltd. v. Director of Income-Tax, Mumbai*[1] and our attention has been drawn to the following passage at pages 443-444:

"Therefore, in our opinion, the concepts profits of business connection and permanent establishment should not be mixed up. Whereas business connection is relevant for the purpose of application of Section 9; the concept of permanent establishment is relevant for assessing the income of a non-resident under the DTAA. There, however, may be a case where there can be overlapping of income; but we are not concerned with such a situation. The entire transaction having been completed on the high seas, the profits on sale did not arise in India, as has been contended by the appellant. Thus, having been excluded from the scope of taxation under the Act, the application of the double taxation treaty would not arise. The Double Tax Treaty, however, was taken recourse to by the appellant only by way of an alternate submission on income from services and not in relation to the tax of offshore supply of goods."

12. Mr. R.P. Bhatt, learned Senior Counsel appearing on behalf of the respondent, however, contends that income had accrued to the non-resident company in India and admittedly the assessee having not carried out its obligations to make deductions, the authorities and the Tribunal rightly held the assessee in default.

13. We have considered the submissions advanced and we do not find any force in the submissions of the Counsel for the appellant and the authorities relied on are clearly distinguishable and those in no way support assessee's contention. Section 5(2) of the Income Tax Act provides, what would be the total income of a non-resident, same reads as follows:

"5(1) xxxx xxxx xxxx (2) Subject to the provisions of this Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which-- (a) is received or is deemed to be received in India in such year by or on behalf of such person; or (b) accrues or arises or is deemed to accrue or arise to him in India during such year.

Explanation 1.--Income accruing or arising outside India shall not be deemed to be received in India within the meaning of this section by reason only of the fact that it is taken into account in a balance sheet prepared in India.

Explanation 2.--For the removal of doubts, it is hereby declared that income which has been included in the total income of a person on the basis that it has accrued or arisen or is deemed to have accrued or arisen to him shall not again be so included on the basis that it is received or deemed to be received by him in India."

14. From a plain reading of the aforesaid provision it is evident that total income of non-resident company shall include all income from whatever source derived received or deemed to be received in India. It also includes such income which either accrues, arises or deem to accrue or arise to a non-resident company in India. The legal fiction created has to be understood in the light of terms of contract. Here, in the present case the chartered vessels with the entire catch were brought to the Indian Port, the catch were certified for human consumption, valued, and after customs and port clearance non-resident company received 85% of the catch. So long the catch was not apportioned the entire catch was the property of the assessee and not of non-resident company as the latter did not have any control over the catch. It is after the non-resident company was given share of its 85% of the catch it did come within its control. It is trite to say that to constitute income the recipient must have control over it. Thus the non-resident company effectively received the charter-fee in India.

> "Therefore, in our opinion, the receipt of 85% of the catch was in India and this being the first receipt in the eye of law and being in India would be chargeable to tax. In our opinion, the non-resident company having received the charter fee in the shape of 85% of fish catch in India, sale of fish and realization of sale consideration of fish by it outside India shall not mean that there was no receipt in India. When 85% of the catch is received after valuation by the non-resident company in India, in sum and substance, it amounts to receipt of value of money. Had it not been so, the value of the catch ought to have been the price for which non-resident company sold at the destination chosen by it. According to the terms and conditions of the agreement charter fee was to be paid in terms of money i.e. US Dollar 600,000/= per vessel per annum "payable by way of 85% of gross earning from the fish-sales".
>
> In the light of what we have observed above there is no escape from the conclusion that income earned by the non-resident company was chargeable to tax under Section 5(2) of the Income Tax Act."

15. Now referring to the decisions of this Court in the case of Toshoku Ltd.(supra), same is clearly distinguishable. In the said case the amount credited in favour of the assessee was not at its disposal and in the background of the said fact it was held that making entries in the books would not amount to receipt of income, actual or constructive, which would be evident from the following passage of the judgment:

> "It cannot be said that the making of the book entries in the books of the statutory agent amounted to receipt by the assessees who were non-residents as the amounts so credited in their favour were not at their disposal or control."
>
> Here the non-resident company had received charter-fee in India in the shape of 85% of the catch after its valuation, over which it had alone control and therefore receipt was chargeable to tax."

16. In the case of Ishikawajima-Harima Heavy Industries Ltd.(supra) the entire transaction was completed on high- seas, and in this background, it was held that profit did not arise in India. In the case in hand, undisputedly the catch was brought to an Indian Port, where it was valued and after paying the local taxes, charter fee in the shape of 85% of the catch was given to the non-resident company.

17. Both the decisions, therefore, do not lend any support to the contention of the assessee.

18. From the conspectus of discussion aforesaid, it is obvious that the assessee was liable to deduct tax under Section 195 of +the Income Tax Act on the payment made to the non-resident company and admittedly it having not deducted and deposited was rightly held to be in default under Section 201 of the Income Tax Act.

19. We do not find any merit in these appeals and they are dismissed accordingly, but without any order as to costs.

[1]*(2007) 288 I.T.R. 408 (SC)*