BOMBAY HIGH COURT

Commissioner of Income-Tax

Vs

Shanti K. Maheshwari

(Desai, C.J. Tendolkar, J.)

17.09.1957

JUDGMENT

Tendolkar, J.

1. This reference involves in the main an interpretation of certain provisions in the Agreement for Avoidance of Double Taxation in India and Pakistan in respect of which a cynic may well say that the language has been employed to conceal the thoughts of its authors. The facts giving rise to the reference are few. The assessment year is 1953-54 and the previous accounting year ended on the 31st of March, 1953. The status of the assessee is that of a resident and ordinarily resident in the taxable territories. The total income of the assessee determined by the Income-tax Officer was Rs. 77,154. In this total was included dividend income of the assessee from the Sutlej Cotton Mills Ltd. The amount of the dividend was Rs. 8,000. The company had its registered office in Delhi, but according to the certificate issued under section 20 of the Indian Income-tax Act read with rule 14 the company's income chargeable to tax in the taxable territory was 6.7 per cent. and in Pakistan 93.3 per cent. Applying this proportion to the total dividend of Rs. 8,000 the income chargeable in the taxable territory was Rs. 360 and the income chargeable in Pakistan was Rs. 7,640. The Income-tax Officer grossed up the amount of Rs. 360 only for the purpose of inclusion in the total income of the assessee; and he included the amount of Rs. 7,640 without being grossed up. He also made an order under article VI sub-clause (b) of the Agreement for Avoidance of Double Taxation in India and Pakistan that the tax in respect of the income which is chargeable in Pakistan will be kept in abeyance for a period of one year; and if the assessee produces a certificate of assessment in Pakistan within that period, the tax will be adjusted against the abatement allowable under the agreement; but if he fails to do so, the tax kept in abeyance shall be recovered. Upon appeal, the Appellate Assistant Commissioner took the view that since tax on a company's income is paid at the maximum rate and the payment made by the company is deemed under the Income-tax Act to be a payment of income-tax made by the shareholder, so far as income-tax was concerned the abatement may be granted without production of a certificate of assessment; but since the assessee was subjected to super-tax, the abatement in respect thereof could only be determined when the total income of the assessee

which was liable to tax in Pakistan was known and for that purpose the assessee should produce an order of assessment. Against this order, the assessee appealed to the Tribunal. It must be noted at this stage that the Department did not appeal to the Tribunal against the Appellate Assistant Commissioner's order granting an abatement in respect of income-tax, and, therefore, the order for such an abatement became final and conclusive, whether it was or was not in accordance with law. Before the Tribunal it was urged on behalf of the assessee that the amount of Rs. 7,640 representing that portion of the dividend income which was chargeable to tax in Pakistan was wrongly included in the total income of the assessee in the taxable territory and that it should have been included only for rate purposes having regard to the provisions of the Agreement for Avoidance of Double Taxation in India and Pakistan. It was also urged that in any event the entire dividend of Rs. 8,000 should have been grossed up and not only Rs. 360 out of it, having regard to the provisions of section 16, sub-clause (2), section 18, sub-clause (5) and section 49(6); and the assessee should be granted credit for the tax deemed to have been paid by him which was in fact paid by the company whether in India or in Pakistan. It was further urged that the Income-tax authorities had no right to require the production of a certificate of assessment in the Dominion of Pakistan and that the assessee was entitled to an abatement without production of such a certificate. These contentions of the assessee were accepted by the Tribunal, and the Tribunal came to the conclusion that the Department was bound to gross up the entire dividend and to give credit for the tax deemed to have been paid by the assessee in respect of the dividend income and that the assessee was not bound to produce a certificate of assessment in Pakistan. Arising out of this order of the Tribunal, the following three questions have been referred to us. They are :

> "(1) Whether the dividend income of Rs. 7,640 out of a total income of Rs. 8,000 received from Sutlej Cotton Mills Ltd. was not liable to be included in the total income of the assessee at all or for rate purposes only in accordance with the provisions of the agreement contained in Notification No. 28 of 10th December, 1947, issued in accordance with the provisions of section 49AA of the Indian Income-tax Act ?
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> (2) Whether on the facts and in the circumstances of this case the entire dividend income of Rs. 8,000 received from Sutlej Cotton Mills Ltd., 93.3 per cent. of which was also liable to be taxed in Pakistan is liable to be included in the total income of the assessee after grossing up, in accordance with the provisions of section 16(2), and the assessee is entitled to get a credit for the income-tax deemed to have been paid on her behalf by the paying company ?
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> (3) Whether in view of the provisions of the agreement for avoidance of double taxation contained in Notification No. 28 dated 10th December, 1947, read with Section 49AA of the Indian Income-tax Act the assessee was entitled to the abatement of tax (both income-tax and super-tax) payable on the dividend income of Rs. 7,640 without production of a certificate of assessment in the Dominion of Pakistan ?"

2. We may in the first instance deal with question 2 which relates to grossing up, because that

question is capable of being answered very shortly. Section 16, sub-section (2), an amended with retrospective effect provides for the grossing up of any dividend received by an assessee for the purpose of including the amounts so grossed up in the total income of the assessee. There is a proviso to this section, the relevant part of which is :

"Provided that when the sum out of which the dividend has been paid, credited or distributed or deemed to have been paid, credited or distributed includes -

(i).....

(ii) any income of the company on which income-tax was not payable.....

the increase to be made under this section shall be calculated only upon such proportion of the dividend as the said sum after deduction of the inclusions enumerated above bears to the whole of that sum."

3. Now, the effect of this proviso appears to us to be quite clear and beyond the possibility of any controversy. It provides that from the income out of which dividend was paid that portion of the income of the company on which income-tax was not payable is to be excluded for the purpose of grossing up. In other words, the balance of the income of the company is to be grossed up and that is the income on which tax was payable in the taxable territories. It appears to us to be clear, therefore, that the only part of the divided that could be grossed up is that portion of the dividend which came out of the income of the company on which tax was payable in the taxable territories and not the entire dividend; and, with respect to the Tribunal, in our view, the Tribunal erred in coming to a contrary conclusion and in holding that the Department was bound to gross up the entire dividend.

4. We next come to the other part of the same question which relates to the credit which the assessee shareholder is entitled to get for the income-tax deemed to have been paid on her behalf. Now, the relevant provision in the Income-tax Act is section 18(5) and the relevant part of the sub-section is :".... any sum by which a dividend has been increased under sub-section (2) of section 16 shall be treated as a payment of income-tax.... on behalf of the.... shareholder...., and credit shall be given to him therefore on the production of the certificate furnished under sub-section (9) of section 20. ..... in the assessment, if any, made for the following year under this Act." Therefore, there is no difficulty in determining the extent of credit that the shareholder is entitled to which is exactly the amount by which the dividend income was increased for the purposes of grossing up and that is the total credit to which the shareholder is entitled. Section 49B is so far as it is relevant provides :Sub-section (1) : "Where any dividend has been paid,.... to any of the persons specified in section 3 who is a shareholder of a company which is assessed to income-tax in the taxable territories or elsewhere, such person shall, if the dividend is included in his total income, be deemed in respect of such dividend himself to have paid income-tax (exclusive of super-tax) on an amount equal to the sum by which the dividend has been increased under sub-section (2) of section 16."

4. That, therefore, is the extent of the credit to which she was entitled, but the Tribunal, having taken the view that the entire dividend had to be grossed up, also took the view that credit had to be given to the shareholder in respect of the whole amount that was added to the dividend for the purpose of grossing up. It the decision that the whole dividend was to be grossed up was right, the rest would have followed as a necessary corollary; but since we are of the opinion that the decision of the Tribunal, with respect to the Tribunal, that the entire dividend of Rs. 8,000 should have been grossed up was wrong in law, the corollary is quite wrong; and the only credit that the assessee would be entitled to would be the amount that was added to the dividend income of Rs. 360 for the purpose of grossing up under section 16(2) of the Income-tax Act. There is in the agreement for Avoidance of Double Taxation in India and Pakistan a provision which has reference to the question of credit that the shareholder is entitled to get. That provision leads to the same result as we have indicated above; but we will refer to that provision after discussing the other articles in the agreement which arise for interpretation for the purpose of determining the other question referred to us, because the interpretation of that provision, as it stands, also creates some difficulties, which can only be viewed at in the context of the agreement.

5. Turning now to the relevant provisions in this regard, before one looks at the agreement, it is essential to look at two sections in the Act itself, which have since been repealed but which were in force at the relevant time. Section 49A dealt with relief in respect of Part B States and Dominion income-tax and sub-section (1) provided :

> "The Central Government may, by notification in the official gazette, make provision for the granting of relief in respect of income on which have been paid both income-tax (including super-tax) under this Act and either Dominion income-tax in one or more countries or Burma income-tax."

6. This sub-section in clear terms contemplates payment of tax in two different places and the relief against double taxation only becomes operative if tax has been paid in two different places and not otherwise. Tuning next to section 49AA, it was in the following terms :

> "The Central Government may either into an agreement with Pakistan or the United Kingdom for the avoidance of double taxation of income, profits and gains under this Act and under the corresponding law in force in Pakistan or the United Kingdom and may, by notification in the official gazette, make such provisions as may be necessary for implementing the agreement."

7. This section, therefore, in terms authorised the Central Government to enter into an agreement with Pakistan or the United Kingdom, the object of which is to avoid double taxation. That is a stage anterior to the stage contemplated by section 49A where the object is to give relief against tax paid in two different places. Under section 49A, a notification regarding double taxation relief has been issued so far as the United Kingdom is concerned, and of course this notification keeps in mind the statutory requirement that payment of tax in both the places is an essential prerequisite to the granting of any relief against double taxation. Then, we turn to the notification

by which the Agreement for Avoidance of Double Taxation in Indian and Pakistan was published. That agreement was entered into, as the preamble states, in exercise of the powers conferred by section 49AA of the Income-tax Act and corresponding sections of the Excess Profits Tax and the Business Profits Tax Acts, with which we are not concerned for out present purpose; and the relevant article we have to construe are article IV, V and VI.

8. They are 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 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."
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> "Article V. - Where any income accruing or arising without the territories of the Dominions is chargeable to tax in both the Dominions, each Dominion shall allow an abatement equal to one-half or the low amount of tax payable in either Dominion on such doubly taxed income."
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> "Article VI. - (a) For the purpose 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.

(b) Where at the time of assessment in one Dominion, the tax payable on the total income in the other Dominion is not know, the first Dominion shall made a demand without allowing the abatement. but shall hold in abeyance for a period of one year (or such longer period as may be allowed by the Income-tax Officer in his discretion) the collection of a portion of the demand equal to the estimated abatement. If the assessee produces a certificate of assessment in the other Dominion within the period of one year on any longer period allowed by the Income-tax Officer, the uncollected portion of the demand will be adjusted against the abatement allowable under this Agreement; if no such certificate is producted, the abatement shall cease to be operative and the outstanding demand shall be collected forthwith."

9. Now, for the purpose of article IV, the relevant source or category of transactions specified in column I of the Schedule to this agreement is in this case Item No. 8 in the Schedule :

Source of income or nature of transac-	Percentage of income which each Dominion

tion from which income is derived.	is entitled to charge under the agreement.	Remarks.

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8. Dividends	By each Dominion in proportion to the profits of the company chargeable by each Dominion under this agreement.	(As in preceding column).	Relief in respect of any excess income-tax deemed to be paid by shareholder shall be allowed by each Dominion in proportion to the profits of the company chargeable by each under this agreement.	under this

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10. It is these provisions in the Agreement for Avoidance of Double Taxation which we have got to interpret.

11. Now, in the first instance, it appears to us - and counsel at the Bar are also agreed - that the word "their" which we have underlined in article IV is obviously a slip or an error and could in its context have only been "either"; and it is one the basis of the word being "either" that we will deal with the meaning to be attached to article IV. Indeed if the word were "their", it may make it somewhat more difficult than it actually is to interpret article IV.

12. Now, the first thing that emerges from article IV is that there is to be a separate assessment by each Dominion under its own laws and such separate assessments appear to us to be the very basis of the abatement that has to be allowed under this article. Then, the next thing that one has got to do under article IV is to look at any source or category of transactions specified in column 1 of the Schedule which has been brought to tax in the taxable territories. If there is such a source, in respect of this source we must look to the Schedule to find out what was the percentage of income from this source which India was entitled to charge under the agreement; and if the income from this source which has been subjected to tax exceeds such percentage, then there is an "excess" for the purpose of article IV. The third part of article IV is that in respect of such excess, an abatement shall be allowed. The quantum of the abatement is dealt with in the concluding words of article IV. They are "equal to the lower amount of tax payable on such excess in either Dominion as provided for in article VI."

13. Thus, this article confers upon the assessee a right to an abatement in respect of the excess referred to in this article; but it does not contain any machinery for securing the right except as to the quantum of the abatement which is to be the lower amount of tax payable in either Dominion to be ascertained in accordance with article VI.

14. The provisions will become a little clearer if we apply them to the facts before us. We are dealing with an income under the source or category of transactions - dividends. This category is numbered 8 in the Schedule and the percentage of income which each Dominion is entitled to charge under the agreement is stated in the Schedule to be "by each Dominion in proportion to the profits of the company chargeable by each Dominion under the agreement". It known that 6.7 per cent. of the dividend income was chargeable in India and 93.3 per cent. was chargeable in Pakistan. Since the assessee was resident and ordinarily resident in India, the entire dividend was chargeable to tax in India, while according to the agreement only 6.7 per cent. of it should be charged. The excess, therefore, that attracts the abatement is 93.7 per cent. of Rs. 8,000 or Rs. 7,640. We will deal with the quantum of the abatement when we come to article VI.

15. Turning next to article V, it deals with a slightly different case in which also there is a right to an abatement. That case is where any income is chargeable to tax in both the Dominions. Now, it must be realised that all categories of transactions are not enumerated in the Schedule, and, therefore, in respect of every source of income a percentage has not been laid down which is chargeable in either Dominion; and it may well be that under the income-tax laws of both the Dominions the entire income of a person or any portion of that income may attract tax in both the Dominions. To take a very simple case, an assessee may be "a resident" within the meaning of that expression in the Indian Income-tax Act in both the Dominions if he maintains or has maintained for him a dwelling-house in both the Dominions and in fact resides in the Dominion for howsoever short a time. In such a case his entire income may be liable to tax in both the Dominions. We may equally have case when a portion of his income from a particular source or falling under a particular category may be liable to tax in both the Dominions; and it is this class of cases that attracts article V and the abatement is earned by the entire income which is

chargeable to tax in both the Dominions. The quantum of the abatement, according to article V, is one-half of the lower amount of tax payable in either Dominion on such doubly taxed income. Therefore, we have in article IV and article V a provision for an abatement under article IV in respect of "excess" and in article V in respect of income which is chargeable to tax in both the Dominions. In connection with article V, the words "doubly taxed income" which occur therein need to be carefully noted. The article talks of "such doubly taxed income"; and clearly, therefore, the reference is to the income which is described in the earlier part of the article as "chargeable to tax in both the Dominions". In other words, the expression "doubly taxed income" does not connote an income which has been taxed twice over; but the words are equated with income chargeable to tax in both the Dominions"; and it is in this sense that the expression "doubly taxed income" is used in the next article - article VI.

16. Article VI(a) deals with both the cases of abatement covered by article IV and article V, as the opening words of the article itself show, and it deals with determining what is the tax payable in each Dominion on the income which attracts an abatement, in the case of article IV on the "excess" and in the case of article V on the "doubly taxed income", that is on the income chargeable to tax in both the Dominions. The article provides that the tax shall be such proportion of the tax payable on the income that attracts an abatement as such income bears to the total income of the assessee in each Dominion. Again, the position will become a little clearer if we apply this computation rule to the facts before us. The income that bears an abatement in this case is the excess of Rs. 7,640. The total income of the assessee in Indian is Rs. 77,154. Therefore, the tax payable in India on the excess will be 7640 /77,154 X tax on the total income of the assessee in India. When this figure is known, it is equally necessary to known the corresponding figure of tax payable in Pakistan, because it is the lower amount of tax payable in either Dominion which is to be granted as the abatement. The tax payable in Pakistan would only be known if the total income of the assessee in Pakistan and the total tax payable by him has been ascertained. Otherwise, the formula laid down by article VI cannot be worked out. It may be stated that the formula actually provides nothing more than that the tax payable on the income which has earned an abatement, shall be calculated on such income at the average rate of tax on the total income in either Dominion.

17. Keeping this is mind, we next turn to article VI, sub-clause (b); and it is here that the main difficulty of construction and the main dispute between the parties arises. As we have pointed out earlier, until the tax payable in Pakistan on the income that earns the abatement is known, the amount of abatement cannot be finally determined. There may be cases in which it is known and there may be cases in which it is not known. Where it is known, obviously the abatement that is allowable under article IV or article V can immediately be ascertained; but where it is not know, it was essential that there should be some machinery for securing the benefit of the abatement to the assessee subject to such conditions as parties to the Agreement may have agreed to. This is precisely what sub-clause (b) or article VI provides. The time when it comes into operations is the time of assessment in one Dominion, as the opening words of that sub-clause clearly state; and the situation it contemplates is that the tax payable on the total income in either Dominion "is

not known" at that time. The words "is not known" will fall to be interpreted by us on this reference; but we will for the moment use the words as they appeal in the clause in order to understand the rest of the clause. Where the tax payable in either Dominion is not known at the time of assessment in India, what the sub-clause of this article provides it that India shall make a demand without allowing the abatement, but shall hold in abeyance the collection of a portion of the demand. Now, with regard to the portion of the demand, the collection of which is to be held in abeyance, there are two things that are provided by the sub-clause. The amount that is to be held in abeyance is an amount equal to "estimate abatement" and the other is that the demand shall be kept in abeyance for a period of one year or such longer period as the Income-tax Officer in his discretion may allow. Here again, the words "estimated abatement" have created further controversy as to what those words are intended to mean. Having kept the collection of a portion of the demand in abeyance, the latter part of sub-clause (b) provides what is to happen to the portion of the demand that is kept in abeyance. If the assessee produces a certificate of assessment in Pakistan within the period allowed, what is kept in abeyance will be adjusted against the abatement allowable. If no such certificate is forthcoming within the time allowed "the abatement shall cease to be operative and the outstanding demand shall be collected forthwith". Now, this sub-clause deals with a situation in which tax payable in either Dominion "is not known" but it is implicit in it that if that tax is known, then obviously the abatement will be granted as provided in article IV, V and VI (a).

18. Now, turning to the rival contentions with regard to the correct interpretation of the words "is not known", Mr. Joshi for the Department contends that there must be an assessment in the other Dominion, and proof of it before the Income-tax Officer. The Tribunal took the view that the words "is not know" mean in this sub-article "which cannot be easily determined or are incapable of being known", while Mr. Palkhivala for the assessee before us has attempted to canvass a construction which adopts an intermediate position, namely, that the words mean not capable of being determined by reasonable endeavour and without an elaborate enquiry. Taking first the view that appealed to the Tribunal, with respect to the members of the Tribunal, it appears to us that it is a wholly untenable view. In the first instance, the words "is not known" is merely a negative of "is known" and when one talks of anything being known, the reference naturally is to a pre-existing fact. You cannot known what does not exist. Therefore, if the tax payable on the total income in the other Dominion is to be known, it appears to us the there must have been a prior determination of such tax, and the same applies to the total income on which the tax is chargeable in the other Dominions. Secondly, if the view that appealed to the Tribunal was the correct view, it completely negatives the specific provisions of sub-clause (b) of article VI, because there can conceivably be no case in which the Income-tax Office in India cannot determine the tax payable on the total income of the assessee in Pakistan provided he had the requisite authority under the Income-tax Act to obtain information and he would certainly have such authority if he was required by this agreement to determine the tax payable on the total income of the assessee in Pakistan, although such determination may involve an elaborate enquiry. Thirdly, the words "is not known" do not appear to us to import any determination by the Income-tax Officer in India at the time of assessment; and lastly - and this to us appears to be

a very important consideration - that to interpret this sub-clause as the Tribunal has done would cast upon the Income-tax Officer in India too great an obligation, because he would then be bound to be completely familiar with the law of a foreign country - Pakistan - with regard to income-tax and will have to undertake an assessment of the assessee in order to determine what is the total income liable to tax in that Dominion and then to calculate the tax on such income under the Pakistan law. Unless there is clear language which imposes such an obligation on the Income-tax Officer we would be very loath to hold that he was under any such obligation; and far from there being any clear language, there is language which appears to indicate not that the Income-tax Officer has to determine the tax payable on the total income in the other Dominion but that he should have knowledge of what such tax is, which has implicit in it the fact that the tax payable on the total income in Pakistan has been previously determined.

19. Turning next to the interpretation canvassed by Mr. Joshi for the Department, there is no doubt that the normal mode in which the tax payable on the total income in Pakistan would be determined is by an assessment order, and, therefore, it stands to reason that such tax cannot be known until there is an assessment. Of course after there is an assessment, the tax payable on the total income in Pakistan may income known to the Income-tax Officer not necessarily by the production of the assessment order or a certificate of assessment, but it may become known to him by any other admissible evidence; and that is what, in our opinion, is contemplated by the use of the words "is not known". In the context of the provisions of article VI, sub-clause (b), which provides that time should be given for producing a certificate of assessment, one may well say that the normal mode of a making an assessment known to the Income-tax Officer would be by production of such a certificate, and that is what the Income-tax Officer in this case apparently insisted upon; but it appears to us that any other mode of proof allowed by law of what the tax payable on the total income in Pakistan was would suffice so long as there has been in fact an assessment in Pakistan. This interpretation of the words "is not known" has the merit of both simplicity and certainty; but before we adopt this interpretation, we must of necessity consider the argument advanced by Mr. Palkhivala in support of the interpretation which he has canvassed before us. Now, in the first instance we must state that Mr. Palkihavala's interpretation, namely, that the words "is not known" mean that the tax payable on the total income in the other Dominion is not capable of being determined by reasonable endeavour and without an elaborate enquiry has inherent in it the vice that the income may never be assessed to tax in the other Dominion. This appears to us contrary to the entire scheme of the Agreement for Avoidance of Double Taxation, because as we have pointed out earlier, the very opening words of article IV contemplate that each Dominion shall make assessment under its laws. Mr. Palkhivala argues, why not presume that whether or not the assessment has been made in the other Dominion, it will be made in the ordinary course. For one thing, such a presumption may not be justified having regard to the wide evasion of tax which is a matter of common knowledge, and secondly, the scheme of the Agreement for Avoidance of Double Taxation does not contemplate the mere possibility of an assessment in the other Dominion; but it in terms provides that the provision for abatement under article IV comes in when assessment is made in both the Dominions.

20. Then, Mr. Palkhivala argues that if the real construction of the words was as canvassed by Mr. Joshi then such a construction equates the two cases of abatement referred to in article IV and V, namely, in respect of "excess" or "doubly taxed income". This argument rests on the fallacy that the words "doubly taxed income" in article VI mean income which has been subjected to tax twice over; but, as we have pointed earlier, that is not the correct interpretation of the words "doubly taxed income" in article VI. These as words have referred to the meaning they have in article V which as we have pointed out is nothing more or less then "chargeable to tax in both the Dominions".

21. Then Mr. Palkhivala argues that the interpretation canvassed for by Mr. Joshi does not lead to an avoidance of double taxation, and Mr. Palkhivala's argument is that section 49A of the Act deals with cases of relief against double taxation, while section 49A deals with avoidance of taxation, and there can be no avoidance of taxation if in fact the assessee is to be assessed in both the Dominions. This argument again proceeds on an assumed meaning of taxation. It is inherent in this argument that Mr. Palkhivala wants us to interpret taxation as equivalent to assessment, but it appears to us to be clear in the context of section 49A and 49AA that what section 49A deals with is a situation where tax is paid, while what section 49AA covers in its scope is a stage anterior to the stage when tax has been paid. If the claim for tax has not been enforced then there is undoubtedly avoidance of double taxation because tax has not been borne and paid twice over in the two Dominions.

22. Then Mr. Palkhivala bases an argument on the words "estimated abatement" which accur in article VI, sub-clause (b). He says that for the purpose of keeping a portion of the demand in abeyance, there is an obligation on the Income-tax Officer to estimate the abatement, because it is only that portion of the demand which equals the estimated abatement that it to be kept in abeyance. Undoubtedly the words used, namely, "estimated abatement", made such an argument possible; but if one realises, as one must, that the abatement, that is actually allowable is incapable of being estimated until the tax payable in Pakistan in respect of the Income that earns an abatement is known, it becomes clear that an estimate in the strict sense is not possible. But what is possible undoubteldy is that the tax payable in India on the income that earns the abatement either under article IV or article V worked out in the manner set out in article VI, sub-clause (a), is known to the Income-tax Officer. This for all purposes would be an adequate amount of estimated abatement for the purpose of keeping a portion of the demand in abeyance. If it happens ultimately to be lower than the tax payable on the income that attracts abatement Pakistan, that will be the amount of the abatement. If it happens to be higher then the tax payable on the income that attracts abatement in Pakistan, the Income-tax Officer shall have made more than an adequate provisions to grant the abatement to which the assessee is entitled. In other words, the tax payable on the income that attracts the abatement in India is the maximum abatement to which the assessee can be entitled under the provisions of article IV and article V; and where the Income-tax Officer keeps in abeyance a portion of the demand equal to the amount of such tax, he shall, in our opinion, have complied with the provisions of article VI, sub-clause (b), that he shall keep in abeyance a portion of the amount equal to the "estimated

abatement". We do not read in these words any warrant for the suggestion that the Income-tax Officer is under an obligation to sit down and assess the assessee in respect of his income in Pakistan for the purpose of estimated abatement, because, if he were under such an obligation, then the question of an estimated abatement cannot arise. He shall then have determined the abatement itself.

23. Mr. Palkhivala next urges that having regard to the scheme of the Schedule to the Agreement for Avoidance of Double Taxation, there is a bifurcation of income at the assessment stage; part of the income is subjected to tax in India and part in Pakistan. The words of the Schedule on which he relies for this purpose are the heading to columns 2 and 3 which is "percentage of income which each Dominion is entitled to charge under the agreement". Now, no doubt, if these words stood by themselves and were substantive provisions for the purpose of assessment, they may well give rise to an argument that there was a bifurcation of income at the assessment stage. But, in the context of the provisions of the agreement, it is quite clear that these words in the Schedule are intended for a specific purpose only; and that purpose is apparent when one looks once again at article IV which makes a reference to the schedule annexed. The percentages mentioned in the Schedule are material for the purpose of determining what is the "excess" which earns abatement under article IV and not for any other purposes at all; and quite apart from this article IV in terms provides that each Dominion shall make assessments in the ordinary way under its own laws, which clearly shows that no bifurcation of income at the assessment stage was contemplated, but all that was contemplated by the agreement was an abatement in respect of excess income. It was on the footing of this argument that a plea had been raised that the amount of Rs. 7,640 should not have been included in the total income of the assessee at all except for the rate purposes and that forms the subject matter of question No. 1 in this reference. In our opinion, this argument of Mr. Palkhivala cannot be accepted.

24. Then, Mr. Palkhivala points out that the view that Mr. Joshi has canvassed may deprive an assessee of a right of abatement altogether in certain cases. He says that owing to no fault of the assessee it may not be possible for him to produce a certificate of assessment within one year, in which case the abatement shall cease to be operative under article VI(b). That no doubt is true; but if the right to abatement is conditional upon the production of a certificate of assessment, then obviously the right will be lost if the certificate is not produced. If the Income-tax Officer is satisfied that due to no fault of the assessee the certificate cannot be produced within a period of one year, which is to be normally allowed under article VI(b), we have no doubt that in an appropriate case the Income-tax Officer will extend that period as he has the right to do under the sub-clause. If even within the extended period, the certificate cannot be produced, obviously the abatement ceases to be operative; but that is not by virtue of any interpretation that we are asked to put upon the words of sub-clause (b) but by virtue of specific words in the sub-clause itself which provide that the abatement shall ceases to be operative if a certificate of assessment is not produced. Of course, as we have pointed out earlier, if at the time of assessment, an assessment has already been made in the other Dominion, it is not necessary essential to produce a certificate of assessment. It is sufficient if the tax payable on the total income in other Dominion is made

known to the Income-tax Officer by any other mode of proof of the tax as determined by the assessment order in the other Dominion.

25. Then, Mr. Palkhivala also points out that there may be some obvious cases of hardship if the view canvassed for by Mr. Joshi is to be accepted. Taking a simple illustration, there may be an assessee whose only income is from dividends from a company which is a taxable income both in India and in Pakistan. The total amount of the dividend may be less than the minimum amount that is taxable either in India or in Pakistan. In such case, if the assessee applied for a refund of the tax deemed to have been paid by the assessee as a shareholder, if proof of an assessment in Pakistan was an essential condition of the granting of relief, the assessee will fever be subjected to assessment in Pakistan and in any event it would be harsh on the assessee that he should be called upon to produce proof of an assessment in Pakistan. No doubt in the example we have taken there would be a hardship; but the mere possibility of a hardship resulting from what appears to be correct interpretation of the relevant provisions of the agreement cannot deter us from adopting such interpretation. The remedy of the removal of such a hardship may possibly be in the administrative sphere; and indeed our attention has been drawn by Mr. Joshi to a Circular issued by the Central Board of Revenue (No. 37-NII-10D of 1955) dated the 6th of September, 1955, which in fact directs an Income-tax Officer that where the total income of an assessee in India is only from the source "dividends" and is below the super-tax limit, the production of proof of assessment in Pakistan should be dispensed with.

26. Then, Mr. Palkhivala also argues that article VI(b) is an exception to article IV and should be interpreted as such, and it should not be interpreted so as to constitute a condition precedent to the right of abatement conferred by article IV. We find no warrant in the language of the agreement for the submission that article VI(b) is an exception to article IV. Article IV undoubtedly confers the right to abatement. Article VI does not create an exception in respect of any income which has earned the right to abatement under article IV. What it does is, it provides machinery for giving effect to the right to abatement. Such machinery undoubtedly makes the production of a certificate of assessment a condition precedent to the obtaining of relief by way of abatement; but that is only in cases where at the time of assessment the tax payable on the total income in the other Dominion is not known. In our opinion, therefore, we cannot look upon article VI(b) as an exception to article IV. We can merely look upon it as a supplementary provision which deals with the machinery for giving effect to the right of abatement which has been conferred under article IV.

27. Lastly, Mr. Palkhivala argues that if the view canvassed by Mr. Joshi is adopted, the Dominion which taxes first can never give an abatement. We do not see why such a situation should arise. Whichever Dominion sets out to assess an assessee, if at the time of the assessment, the Income-tax Officer comes to the conclusion that an abatement has been earned in respect either of an excess or of a doubly taxed income, then obviously under article VI(b) if the tax payable on the total income in other Dominion is not known, that portion of the demand which represents the estimated abatement will be kept in abeyance until the assessment is made in the

other Dominion. This can equally be done by both the Dominions and there is no reason why either the one or the other Dominion should not be able to give effect to the right of abatement under article IV merely by reason of the fact that it assessees the assessee before the other Dominion does.

28. We must lastly observe that if we accept the interpretation that Mr. Palkhivala has canvassed before us that would leave the law in a very nebulous and uncertain condition, the result which a court must always try to avoid if it is possible to do so on any reasonable interpretation of the provisions of the agreement. In our opinion, the true interpretation of article VI(b) involves that at the time of assessment, there must have been an assessment in other Dominion by which tax payable on the total income in that Dominion has been assessed and this fact may become known to the Income-tax Officer or may be made known to him by any mode of evidence which is permissible under the law. If it is not known, what is to follow is specifically provided for in article VI(b) and does not fall to be determined.

29. This leaves for interpretation a remark made in the remark column in the Schedule against the entry "dividends" which has a bearing not on the question that we have just discussed but on the question of relief in respect of income-tax deemed to have been paid by the shareholder, to which we have referred earlier in our judgment. Now, it is curious that in the Agreement itself, column 4 of the Schedule is nowhere referred to; and it is difficult to see for what purpose the column was included in the Schedule and what particular effect should be given to it. The Schedule appears to be incorporated in the provisions of the Agreement only by article IV and indeed on top of the Schedule itself is mentioned "See article IV"; but that article refers in terms to columns 1, 2 and 3 and not to 4 at all. Therefore, strictly speaking what is stated in column 4 does not appear to be incorporated in the operative provisions of the Agreement at all. But we will assume for our present purpose that the remarks which we have to interpret and which are to be found in column 4 of the Schedule against the entry "dividends" are a binding part of the Agreement. These remarks are : "Relief in respect of any excess income-tax deemed to be paid by the shareholder shall be allowed by each Dominion in proportion to the profit of the company chargeable by each under this Agreement." Now, we must confess that we are quite unable to understand what is meant by "excess income-tax" in this particular context. Article IV talks of an "excess", but that is not excess income-tax; and it is difficult to see what was meant to be conveyed by the draftsmen of the agreement by the expression "excess income-tax". Neither counsel has been able to suggest any interpretation of this expression which can fit in in the context of the rest of the clause. But if we ignore the word "excess" and treat it as non-existent, the remarks appear to make sense, because, then what is provided is that relief in respect of any income-tax deemed to be paid by the shareholder shall be allowed proportionately by both the Dominions, the proportion being the proportion of the profits of the company chargeable to tax in the two Dominions. As we have pointed out earlier, by virtue of the provisions of the Income-tax Act, where a company pays the tax on its income to the extent of the dividend income which is included in the income of the shareholder, proportionate tax shall be deemed to have been paid by the shareholder. Where a shareholder becomes entitled to relief in respect of any such income-

tax deemed to be paid by him, the remark column provides that he shall not get the whole of the relief in respect of any tax deemed to be paid by him from only one Dominion, but he shall get it proportionately from both the Dominions. That proportion is the same proportion as the income chargeable to tax in one Dominion has to the income chargeable to tax in the other Dominion in the profits of the company. This brings about the same result which we have indicated earlier in our judgment that in so far as the dividend included in the income of the assessee is grossed up under section 16(2) of the Act, if the company has grossed up income in both India and Pakistan, credit for tax deemed to have been paid by the shareholder is to be given in each Dominion in respect of such portion of the dividend which has been grossed up in the income of the assessee in that Dominion.

30. Our answers to the issues, therefore, are :

(1) Rs. 7,640 were liable to be included in the total income of the assessee;

(2) Only Rs. 360 were to be grossed up. The assessee is entitled to get a credit for the income-tax deemed to have been paid by the company in respect of this amount only, which is the amount by which the dividend of Rs. 360 was increased of the purpose of grossing up.

(3) In negative, but on the particular facts of this reference, the abatement in respect of income-tax has already become effective by reason of the fact that the Income-tax Officer did not appeal against the order of the Appellate Assistant Commissioner granting such abatement. The assessee to pay the costs.

Desai, J.

31. I agree with the reasons and conclusions mentioned in the judgment just delivered by my brother Tendolkar. I do not, however, propose to express any opinion on the remarks against item 8 in column 4 of the Schedule. Remarks in any schedule annexed to an agreement may well form part of the agreement itself. In the absence of fuller arguments, I do not deem it necessary for me to express any opinion as to the construction to be placed on those remarks.

32. Questions answered accordingly.