

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HONOURABLE MR.JUSTICE THOTTATHIL B.RADHAKRISHNAN
&
THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE**

FRIDAY, THE 23RD DAY OF JANUARY 2015/3RD MAGHA, 1936

ITA.No. 128 of 2012 ()

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(AGAINST THE ORDER IN ITA.NO. 80/COCH/2012 OF INCOME TAX APPELLATE
TRIBUNAL, COCHIN BENCH, COCHIN DATED 20-07-2012)
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APPELLANT/APPELLANT IN ITA:

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TRANS ASIAN SHIPPING SERVICES PRIVATE LIMITED.,
TRANSASIA CORPORATE PARK, SEAPORT AIRPORT ROAD,
CHITTETHUKARA, KAKKANAD, KOCHI-682 037.**

**BY SRI. PORUS KAKA, SENIOR ADVOCATE
ADV.SRI.SABU S.KALLARAMOOLA**

RESPONDENT/RESPONDENT IN ITA:

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COMMISSIONER OF INCOME TAX,
I S PRESS ROAD, ERNAKULAM, KOCHI-682 018.**

**BY ADV. SRI.P.K.R.MENON,SR.COUNSEL, GOI(TAXES)
SRI.JOSE JOSEPH, SC, FOR INCOME TAX**

**THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD
ON 02-09-2014, ALONG WITH ITA.NO. 129/2012, THE COURT
ON 23-01-2015 DELIVERED THE FOLLOWING:**

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APPENDIX

PETITIONER'S ANNEXURES:

- ANNEX A** COPY OF THE ASSESSMENT ORDER DATED 29/12/2007 PASSED BY THE ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE 2(1), ERNAKULAM.
- ANNEX B** COPY OF THE APPLICATION DATED 19/11/2004 (WITHOUT ANNEXURES) SUBMITTED BY THE APPELLANT BEFORE THE JOINT COMMISSIONER OF INCOME TAX, ERNAKULAM.
- ANNEX C** COPY OF THE APPROVAL DATED 31/03/2005 ISSUED TO THE APPELLANT BY THE ADDITIONAL COMMISSIONER OF INCOME TAX, RANGE 2, ERNAKULAM
- ANNEX D** COPY OF THE ORDER DATED 04/11/2009 PASSED BY THE COMMISSIONER OF INCOME TAX, KOCHI
- ANNEX E** COPY OF THE ORDER DATED 20/08/2010 PASSED BY THE INCOME TAX APPELLATE TRIBUNAL, COCHIN BENCH, COCHIN.
- ANNEX F** COPY OF THE ASSESSMENT ORDER DATED 14/12/2010 PASSED BY THE DEPUTY COMMISSIONER OF INCOME TAX, CIRCLE 4 (2), KOCHI
- ANNEX G** COPY OF THE ORDER DATED 15/12/2011 PASSED BY THE COMMISSIONER OF INCOME TAX (APPEALS)-11, KOCHI.
- ANNEX H** COPY OF THE APPEAL MEMORANDUM DATED 13/3/2012 FILED BY THE APPELLANT BEFORE THE INCOME TAX APPELLATE TRIBUNAL.
- ANNEX I** COPY OF THE ADDITIONAL GROUNDS OF APPEAL DATED 14/05/2012 FILED BY THE APPELLANT BEFORE THE INCOME TAX APPELLATE TRIBUNAL.
- ANNEX J** COPY OF THE ORDER DATED 20/07/2012 PASSED BY THE INCOME TAX APPELLATE TRIBUNAL, COCHIN BENCH, COCHIN.
- ANNEX K** COPY OF THE TAX PAYMENT CHALLAN DATED 15/2/08
- ANNEX L** COPY OF THE COMPARATIVE STATEMENT SHOWING THE TAX PAYABLE UNDER THE TONNAGE TAX SCHEME AND THE NORMAL MODE OF COMPUTATION OF INCOME.

RESPONDENT'S ANNEXURES: NIL

/TRUE COPY/

P.S.TO.JUDGE

“CR”

Thottathil B.Radhakrishnan

&

A.Muhamed Mustaque, JJ.

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I.T.A.Nos.128 & 129 of 2012

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Dated this the 23rd day of January, 2015

Judgment

Thottathil B.Radhakrishnan, J.

- 1.Should the ‘slot charter’ operations of a ‘tonnage tax company’ be carried on only in ‘qualifying ships’ to include the income from such operations to determine the ‘tonnage income’ under the ‘tonnage tax scheme’ in terms of the provisions of Chapter XII G of the Income Tax Act, 1961; the “Act”, for short? In other words, is the income derived from ‘slot charter’ operations of a ‘tonnage tax company’ liable to be excluded while determining the ‘tonnage income’ under the ‘tonnage tax scheme’ if such operations are carried on in ships which are not ‘qualifying

ships' in terms of the provisions of that Chapter of the Act and the relevant provisions of the Income Tax Rules, 1962; for short, the "Rules"?

2. Afore-noted is the substantial question of law arising for decision in these appeals. It is formulated on the basis of the submissions of the learned Senior Advocates for the assessee and the revenue whom we have heard focusing on that question of law.

3. The fact that the appellant, whom we hereinafter refer to as the 'assessee', is a 'qualifying company' in terms of Section 115VC and that it owns at least one 'qualifying ship' as defined in Section 115VD is not in dispute.

4. The appeals relate to two assessment years. Appellant operated its 'qualifying ship' and had also 'slot charter' arrangements in other ships during those years. For both those years, the appellant filed returns computing its shipping

income, under Chapter XII G of the Act which contains special provisions relating to income of shipping companies in sections 115V to 115VZC, also reckoning the deemed tonnage in relation to its activities through slot charter arrangements. That did not find favour with the departmental hierarchy. The Income Tax Appellate Tribunal dismissed the appellant's appeals against the orders of the Commissioner of Income Tax (Appeals) holding that in order to avail the benefit of the provisions of Chapter XII G in relation to 'slot charter' arrangements, it is necessary to show that the ships in which the appellant had operations under 'slot charter' arrangements are also 'qualifying ships' and that such operation has to be evidenced by producing valid certificate in terms of Section 115VX(1)(b) of the Act, in relation to each such ship. These findings are pointedly under challenge and the result of these appeals would depend on the question whether those findings on issues of law are in terms of the relevant laws. Pithily

stated, the question is as to whether the appellant is eligible to include the income derived from activities through 'slot charter' arrangements, as relevant shipping income, to determine the deemed tonnage in terms of Rule 11Q of the Rules, to compute the tonnage income in terms of Section 115VG of the Act, without such 'slot charter' arrangements being carried on through 'qualifying ships' as defined in the Act.

5. Making reference to the different provisions contained in Chapter XII G of the Act and the relevant rules and forms in the Rules, the learned senior counsel appearing for the appellant argued that the provisions clearly show that the deemed tonnage computation for slot charters is to be separately computed, independent and in addition to computation for qualifying ships for which the net tonnage certificate is given for ships owned by the assessee. Specific reference was made to Sections 115VA, 115VB and 115VG(4) of the Act and Rule 11Q

of the Rules and Form No.66 under the Rules. Explanatory Notes to the Finance Act, 2004 were also referred to. The statutory form of audit report which should be in Form 66 specifically says that there is no need to mention the name of the ship, income from which is computed on deemed tonnage basis, it is pointed out. The mode in which Rule 11Q and the forms are placed and Note 3 to Form 66 are also pointedly referred to, to argue that the scheme of the Act and Rules never permit an interpretation to hold that to include the income derived from slot charter arrangements, such operations ought to be carried on through qualifying ships. It is further argued that the relevant statutory provisions amount to the inclusion of the concept of slot charter in the form of a deeming provision. It is accordingly argued that it is necessary to assume all those facts on which alone the fiction can operate and a construction which defeats the very object sought to be achieved by the Legislature ought to be avoided. Reference was made to

Commissioner of Income-tax, Delhi v. S.Teja Singh [35 KTR 408 (SC)]. Collector of Customs, Cochin v. State of Kerala [1993 (66) ELT 351 (Kerl)] is referred to support the submission that a fiction has to be given its full effect and the Tribunal cannot impose limitations or conditions which are not found therein. Bajaj Tempo Ltd. v. Commissioner of Income-tax [196 ITR 188 (SC)] is referred to, to point out that taxing statutes providing incentives for growth and development are to be construed liberally and in a way so as to advance the objective and not frustrate it.

6.The learned senior counsel for the department submitted that it is relevant to note the suo motu revisional order of the Commissioner on the basis of which the fresh assessment orders were issued. The argument is that without any variation being brought to that order of the Commissioner, the findings and interpretation of the provisions by the Commissioner are binding on the officer who passed the assessment order. It

is further argued that in order to avail the benefit of Chapter XII G, the assessee has to show that the ship operated by it was a qualifying ship and that could be done only by producing the valid certificate indicating its net tonnage. While the department admits that valid certificates were submitted by the assessee for its own ships, it is argued that the assessee did not submit such valid certificates for the vessels through which it carried out activities under slot charter arrangements. The argument is that to bring slot charter arrangements under the scheme, each ship through which such arrangements are carried, ought to be qualifying ship for which valid certificate has to be produced. It is pointed out that the statutory provisions do not envisage the purchase of slots and even if the calculation of deemed tonnage is not based on the net tonnage of the qualifying ships, the basic condition that the ships should be qualifying ships is not abated in the scheme of deemed tonnage. Reference is made to sub-section 6 of

Section 115VI to say that where a tonnage tax company operates any ship, which is not a qualifying ship, the income attributable to operating such non-qualifying ship shall be computed in accordance with the other provisions of the Act. The decision of the Tribunal does not warrant interference, it is argued.

7. Chapter XII G of the Act, consisting of Sections 115V to 115VZC, was inserted by Finance (No.2) Act, 2004 with effect from 1.4.2005. 'Tonnage tax scheme' is defined in clause (m) of Section 115V to mean a scheme for computation of profits and gains of business of operating qualifying ships under the provisions of Chapter XII G. Section 115V(j) defines 'tonnage income' to mean the income of the tonnage tax company computed in accordance with the provisions of that Chapter and 'tonnage tax company' is a qualifying company in relation to which tonnage tax option is in force - Section 115V(1). The appellant is a qualifying company and is a tonnage tax company. Section

115VE prescribes the manner of computation of income under tonnage tax scheme. Computation of tonnage income is governed by Section 115VG. Sub-section 4 of that Section says that for the purposes of Chapter XII G, the tonnage shall mean the tonnage of a ship indicated in the certificate referred to in Section 115VX and includes the deemed tonnage computed in the prescribed manner. That provision stands with an Explanation to the effect that for the purposes of that sub-section, 'deemed tonnage' shall be the tonnage in respect of an arrangement of purchase of slots, slot charter and an arrangement of sharing of break-bulk vessel. The manner of computing the deemed tonnage for the purpose of sub-section 4 of Section VG is prescribed in Rule 11Q of the Rules. Sub-rule 1 of that Rule provides the manner in which deemed tonnage in respect of an arrangement of purchase of slots and slot charter shall be computed for the purpose of the Explanation to sub-section 4 of Section 115VG. Sub-rule 2 of that Rule deals with the manner of computation of

deemed tonnage in respect of an arrangement of sharing of break-bulk vessel. Both of those sub-rules make specific reference to Form No.66 of the Rules and the illustrative formula given in the relevant Note appearing under that form as regards each of those sub-rules. Thus, the determination of deemed tonnage for computing the tonnage income is to be done having regard to these statutory provisions and the clear terms of the statutory form prescribed for such purpose. Rule 11T of the Rules enjoins that the report of audit of accounts of a qualified company which is required to be furnished under clause (ii) of Section 115VW shall be in Form No.66. At Sl.No.10 of that form is the format in which details have to be provided for computation of tonnage income under Section 115VG. Column No.1 of that format is "name of qualifying ship". It stands with an asterisk that would take us to the foot of the form, just above the Declaration, explaining that "there is no need to mention the name of the ship, income from which is computed on deemed tonnage basis."

8. Reverting to Sections 115VB, 115VC and 115VD, it can be seen that while it is necessary to own at least one qualifying ship for a company to be a qualifying company, operating ships may be either owned or chartered by the company and include slot charter, space charter or joint charter. These provisions clearly show that income derived from slot charter operations of a tonnage tax company is to be included to determine the tonnage income of a tonnage tax company even if such operations are carried on in ships which are not qualifying ships in terms of the provisions of Chapter XII G of the Act.

9. The provision in sub-section 4 of Section 115VG itself explicitly demonstrates that what is included as deemed tonnage computed in the manner prescribed under Rule 11Q is not necessarily referable to the tonnage of a ship. There is nothing in the Act or rules to even faintly indicate that the arrangements which fall within

the basket of the provision 'deemed tonnage' incorporated through Explanation to sub-section 4 of section 115VG would be operative only if such arrangements are carried out through qualifying ships. More importantly, when the Legislature has deemed a particular situation and has created a deeming provision, it is trite law that the said deeming provision should be permitted to permeate to the extent within which the deeming provision stands. S.Teja Singh (supra) and Collector of Customs, Cochin (supra) cited on behalf of the appellant apply on all fours in interpreting the provision in hand.

10. Form 66 under Rule 11T of the Rules is a statutory form. It prescribes a formula for conversion of TEUs into NT (Slot Charter) in Note 3. Note 3.(i) reads as follows:

“3. Formula for conversion of TEUs into NT (Slot Charter)

(i) In addition to loading containers

on their own container vessels, shipping companies also hire slots on container ships (not owned by them) plying on various routes. These slots could be hired for a sector voyage or on long term basis, all round the year, in various vessels and in varying numbers and thus cannot be converted to net tonnage identifying the particular vessel on which the slot is hired. Thus, a formula has been worked out to convert the slots hired into net tonnage. (See the worksheet appearing after this note).”

The worksheet is illustrative of the indisputable conclusion that as per the Act and Rules, the slots hired are converted into net tonnage. This is enjoined by providing a formula since slots are hired for a sector voyage or on long term basis, all round the year, in different vessels and in varying numbers and thus cannot be converted to net tonnage identifying the particular vessel on which the slot is hired. It is therefore that a formula has been prescribed to convert the slots hired into net tonnage. This clinchingly concludes

the issue in favour of the appellant, even going by the Rules and forms. The stand to the contrary as taken by the department is hereby repelled.

11.The argument on behalf of the department as to the conclusiveness of the order of the Commissioner in the suo motu proceedings does not hold good. That order would have been binding on the assessing officer but would not bind the superior tribunals and courts when questions of law arise for consideration; more particularly, when such questions arise as a consequence of the proceedings following the Commissioner's decision. Such decision of the Commissioner to the extent it is contrary to the findings herein, will not stand.

12.For the aforesaid reasons, we answer the question formulated above by holding that the income derived from slot charter operations of a tonnage tax company is not liable to be excluded while determining the tonnage income under the tonnage

tax scheme on the ground that such operations are carried on in ships which are not qualifying ships in terms of the provisions of Chapter XII G of the Act.

Resultantly, the impugned orders of the Income Tax Appellate Tribunal, Cochin Bench in ITA.Nos.80 and 81/Coch/2012 are set aside. Consequentially, the orders of the Commissioner of Income Tax (Appeals) which were challenged before the Tribunal are set aside and the Assessing Officer is directed to modify the assessment orders concerned in conformity with law as stated above.

Sd/-
Thottathil B.Radhakrishnan
Judge

Sd/-
A.Muhammed Mustaque
Judge

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P.S.to Judge