Karnataka High Court V. M. Salgaocar And Brother Ltd. vs Deputy Controller And Others. ... on 27 March, 1990 Equivalent citations: (1991) 93 CTR Kar 49, 1991 187 ITR 381 KAR, 1991 187 ITR 381 Karn JUDGMENT M. P. CHANDRAKANTARAJ URS. J. - These four writ petitions are disposed of by the following common order as the grievances of the petitioners therein are identical and they have sought the same relief. The petitioner in Writ Petitioner in Writ Petition No. 7166 of 1989 is Chowgule and Co. Ltd. Mormugao Harbour, Goa. The petitioner in Writ Petition No. 7273 of 1989 is Sociedade de Formento Industrial Ltd. Margao, Goa. The petitioner in Writ Petition No. 10636 of 1989 is V.S. Dempo and Co. Ltd. Campal, Panji, Goa. All the petitioners are mine-owners, mining, among other things, manganese and iron ores and they are also exporters of the ores to foreign countries mostly to Japan and Korea, it is alleged in the first of the petitions (I propose to go by the facts stated in that petition) that it entered into an agreement with the foreign buyers on credit price for iron and manganese ore and the foreign buyers sent their ships either owned by them or chartered by them and the petitioners loaded their ore stacked at the berth at the port side by mechanical means into the vessel which carried the ore and sometimes it used barges and loaded the ships on the sea when convenient, depending on the size of the ship which was to be loaded, in any event, all the contracts entered into with the foreign buyer were on the basis of "free-on-board". All such contracts provided a clause for detention of a ship in the port for unforeseen reasons and, in that behalf, the exporters, i.e., the petitioners, had to bear the demurrage charges and pay the same to the owner of the ship or the charterer. The practice all along had been to pay such demurrage and subsequently work out details having regard to the requirement of complying with certain formalities; the payments were made after obtaining the necessary permission from the Reserve Bank of India through regular bank channels. It is alleged that, sometime in February, 1988, the first respondent, Deputy Controller, Reserve Bank of India, Exchange Control Department, Panji, Goa, issued circular letters to all exporters requiring them to obtain Income-tax clearance for remittances of demurrage payments, one such specimen of the circular letter is produced a annexure-B to the petition. The substance of that letter is that, on the advice (opinion) of the Central Board of Direct Taxes, the overseas owners vessels chartered by Indian parties attract Income-tax and, therefore, the exporters should ensure that applications for remittances towards demurrage payable on chartered vessels should be duly supported by Income-tax clearance certificates. The second respondent in this petition is the Chairman, Central Board of Direct Taxes, Ministry of finance, New Delhi, by yet another communication dated October 11, 1987, as at annexure-C, all exporters of Goa region have been informed by the first respondent that all demurrage amounts payable in respect of foreign vessels chartered for carriage of goods exported from India under any type of contract, i.e., C&F/CF/FOB, attract Indian Income-tax. Therefore, the exporters were advised to ensure that all applications for remittances towards demurrage payable to foreign vessels to overseas parties should be duly supported by Income-tax clearance certificates or documentary evidence that tax is withheld along with

a no-objection certificate from the Income-tax authorities. These facts have not been disputed. The petitioners feel aggrieved by the circular instructions as at annexures-B and C. Annexure-B, apparently, is based on the opinion formed by the second respondent, Chairman, Central Board of Direct Taxes. The petitioners have impleaded the Commissioner of Income-tax, Karnataka, and the Union of India by its Secretary, Ministry of Finance. As respondents Nos. 3 and 4 as necessary and proper parties. The main contest to the petitions has been entered by the third respondent, the Commissioner of Income-tax in Karnataka. Mr. G. Sarangan, learned counsel appearing for the petitioners, has pleaded and contended that income from shipping of non-resident shipowners or charterers of such ships is covered exclusively by the provisions made in sections 44B and 172 of the Income-tax Act, 1961 (hereinafter referred to as "Act"), and, as such, having regard to the provisions made in the said sections, no other Income-tax procedure is required to be followed and these being self-contained provisions in regard to incidence quantum and procedure for payment of tax, any other method prescribed would be outside the purview of the Act and, on the facts of the cases of the petitioners, the demurrage received by a non-resident shipowner or charterer of a ship is not exigible to Income-tax under the Act inasmuch as in both sections 44B and 172 of the Act, it is only when such a ship as is described in Sub-section (2) of section 44B and Sub-section (1) of section 172 of the Act earns the income by the modes specified in the said Sub-sections that the need to pay tax in accordance with the procedure laid down would arise and not otherwise. The thrust of the argument simply stated is that demurrage paid to the owner of a foreigh ship of the charterer of a foreign ship who is not a resident in India would not be exigible to tax under sections 44B and 172 of the Act. As against that contention, Mr. G. Chandarkumar, appearing for the third respondent, has strenuously contended that, having regard to sections 4, 5, and 9 of the Act, any payment to a foreign shipowner would answer the description of income or income deemed to accrue or arise in India and, therefore, under section 195 of the Act, a person making the payment to a non-resident is liable to deduct Income-tax thereon at the rates in force at the time of payment and as such, the view of the second respondent, Chairman, Central Board of Direct Taxes, on demurrage being exigible to tax and consequent directive issued to exporters as per annexures-B and C are valid and cannot be questioned in law. He has also urged that the relief prayed for may not be granted by this court inasmuch as annexures-B and C are not orders passed under any of the provisions of the Act but only letters addressed to the exporters and grievance, if any arises only if action is taken under the directive contained in the letters at annexures-B and C and in any event, the heirarchy of appeals under the Act would be available to the petitioners only after assessments are concluded. Therefore, he prays that the petitioners only after assessments are concluded. Therefore, he prays that the petitions are premature and they may be dismissed. In the light of these rival contentions, this court has to examine the correctness or otherwise of the stand of the petitioners. To begin with, I will first take up the second contention advanced by Sri Chandarkumar that the petitions are liable to be dismissed in limine as premature. I do not think there is much substance in the contention,

the petitioners have averred that, in the matter of payment of tax to a foreign non-resident shipowner or a charterer under section 44B or section 172 of the Act, as contended by Mr. Sarangan for the petitioners, the question of dismissing the petitions in limine would not arise, unless the court decides whether demurrage is an income falling under section 4, 5 or 9 of the Act. As such, the second contention must be rejected, depending on the conclusion that will be reached by this court in the light of the arguments advanced on the merits of the first contention noticed earlier. In any event, if, as contended, demurrage is not income exigible to tax under other provisions of the Act, the question of initial jurisdiction will come into play and this court must, therefore, decide the issue raised. Section 44B and section 172 of the Act are as follows : "44B,(1) Notwithstanding anything to the contrary contained in sections 28 to 43A, in the case of an assessee, being a non resident, engaged in the business of operation of ships, a sum equal to seven and a half per cent. of the aggregate of the amounts specified in Sub-section (2) shall be deemed to be the profits and gains of such business chargeable to tax under the head"Profits and gains of business or profession." "172.(1) The provisions of this section shall, notwithstanding anything contained in the other provisions of this Act, apply for the purpose of the levy and recovery of tax in the case of any ship, belonging to or chartered by a non-resident, which carries passengers, livestock, mail or goods shipped at a port in India. (2) Where such a ship carries passengers, livestock, mail or goods shipped at a port in India, seven and a half per cent. of the amount paid or payable on account of such carriage to the owner or the charterer or to any person on his behalf, whether that amount is paid or payable in or out of India. Shall be deemed to be income accruing in India to the owner or charterer an account of such carriage. (3) Before the departure from any port in India of any such ship, the master of the ship shall prepare and furnish to the Assessing Officer a return of the full amount paid or payable to the owner or charterer or any person on his behalf, on account of the carriage of all passengers, livestock, mail or goods shipped at that port since the last arrival of the ship thereat : Provided that where the Assessing officer is satisfied that it is not possible for the master of the ship of furnish the return required by this subsection before the departure of the ship from the port and provided the master of the ship has made satisfactory arrangements for the filing of the return and payment of the tax by any other person on his behalf, the Assessing Officer may, if the returns is filed within thirty days of the departure of the ship, deem the filing of the return by the person so authorised by the master as sufficient compliance with this Sub-section. (4) On receipt of the return, the Assessing Officer shall assess the income referred to in Sub-section (2) and determine the sum payable as tax thereon at the rate or rated in force applicable to the total income of a company which has not made the arrangements referred to in section 194 and such sum shall be payable by the master of the ship. (5) For the purpose of determining the tax payable under Sub-ection (4), the Assessing Officer may call for such accounts or documents as he may require. (6) A port clearance shall not be granted to the ship until the Collector of Customs, or other officer duly authorised to grant the same, is satisfied that the tax assessable under this

section has been duly paid or that satisfactory arrangements have been made for the payment thereof. (7) Nothing in this section shall be deemed to prevent the owner or charterer of a ship from claiming before the expiry of the assessment year relevant to the previous year in which the date of departure of the ship from the Indian port falls, that an assessment be made of his total income of the previous years and the tax payable on the basis thereof be determined in accordance with the other provisions of this Act, and if he so claims, any payment made under this section in respect of the passengers, livestock, mail or goods shipped at Indian ports during that previous year shall be treated as a payment in advance of the tax leviable for that assessment year, and the difference between the sum so paid and the amount of tax found payable by him on such assessment shall be paid by him or refunded to him, as the case may be." The thrust of the argument of Mr. Sarangan is that, having regard to the non-obstante clause with which both the sections begin, the sections must be read as excluding the other provisions of the Act in regard to income derived by a non-resident shipowner or charterer and Income-tax only in the manner at the rate prescribed under the other Sub-sections of section 172 of the Act is liable to be paid and not in accordance with the assessment made under section 143 of the Act as in the case of other Income-tax assessees. It is significant to notice that there is this difference between section 44B and section 172 of the Act. In section 44B of the Act, no procedure for assessment and collection of tax is provided, the use of the non-obstante clause refers only to sections 28 to 43A and not to the other provisions of the Act as contemplated under sub-section (1) of section 172 of the Act. Section 28 and the following sections up to section 43A are to be found under the heading "D-Profits and gains of business", in Chapter IV of the Act. In other words, income from shipping accrued or deemed to have accrued to a non-resident shipowner or charterer falls outside the scope of trade and business normally so understood. The incidence of tax under section 44B of the Act is on a non-resident engaged in the business of operation of ships owned or chartered by him or it, and it such income constituted the amounts earned on account of the carriage of passengers, livestock, mail or goods shipped from any port in India and the amount so received or deemed to be received in India by or on behalf of the assessee on account of the carriage of passengers, livestock, mail or goods, etc. In contrast, section 172 of the Act does not refer to a non-resident assessee. It only refers to levy and recovery of tax in the case of any ship belonging to or charted by a non-resident which carries passengers, livestock, mail or goods shipped from a port in India. If this difference is borne in mind, then the want of special procedure for levy and collection under section 44B of the Act becomes patent and obvious. In the result, a non-resident engaged in shipping business subject to the qualification of carrying goods, passengers livestock, mail or goods, etc., being an assessee shall be assessed in accordance with section 143 of the Act and not in accordance with the procedure prescribed for a non-resident shipowner or charterer covered by section 172(1) and (2) of the Act. Therefore, the inevitable conclusion is that the shipowner or charterer in section 2 of the Act. The definition of "assessee" in the Act is as follows : "2(7).assessee means a person by whom

any tax or any other sum of money is payable under this Act. And includes- . . . " and it must be taken notice of in appreciating the arguments advanced by counsel for the parties in support of their respective contentions. A person who is required to be covered and controlled by the provisions contained in section 172 of the Act is, therefore, not an assessee. He is a mere shipowner who is a non-resident or a charterer of a ship, also a non-resident, in other words, the heading under H in Chapter XV assumes some significance in interpreting section 172 of the Act. The court is bound to take notice of it, that heading is as follows : "H-Profits of non-residents from occasional shipping business." That heading denotes the persons intended to be covered by section 172 of the Act. They are persons who are not regularly in the shipping trade or business in India. If it is so understood, then it is not difficult to differentiate between income from shipping business accrued or deemed to have accrued in India in respect of non-resident owners or charters and income derived from occasional shipping business by non-resident owners of whips or charterers of such. Once that distinction is clearly established. Then it is not difficult to come to the conclusion that when section 172 of the Act is attracted, only that procedure which is contemplated under section 172 of the Act under Sub-sections (3) to (7) should be followed and no other. On this point, even Mr. Chandarkumar, learned counsel for the Revenue, does not disagree. Again, Mr. Sarangans contention is that the payment of demurrage does not constitute an income at all attracting the rigour of either section 44B or section 172 of the Act. He contended that, in order to attract the two sections dealing with the income from shipping business, regular or occasional, the incidence of paying tax arises only if the ship carries goods, passengers, livestock or mail from an Indian port and not otherwise, if there is no income from doing any or all of those things contemplated for purposes of carriage in the ship then it does not constitute income. Annexures-A and B patently deal with the procedure required to be followed by exporters of ores in regard to payment of demurrage. At this stage, I must notice the difference between annexures-B and C. In annexure-B, the reference is to charters being Indian parties and not foreign non-resident charterers. In annexure-C, the reference is to foreign vessels chartered for carriage of goods exported from India, in that view of the matter, it is possible to say that the petitioners are not at all affected by annexure-B as, admittedly, they are not charterers. "Demurrage" has the following meaning in New Websters Dictionary (College Edition, at page 418 at right hand column, third entry from the bottom). "The detention of a vessel by a freighter, as in loading or unloading, beyond the time agreed upon; similar detention of a freight train or truck; a charge for such detention." It is normally associated with transportation of goods and the detention of the means of transportation and the compensation paid for such detention. Undoubtedly, the word has been the subject-matter of numerous judicial decisions, in regard to vessels the following is found in Words and Phrases, permanent edition, volume 12, at page 74 : "Demurrage is the compensation provided for in a contract of affreightment for the detention of a vessel beyond the time agreed on for loading or unloading. (Fisher v. Abbel N.Y., 44 How, Prac. 432, 440)" "Demurrage" was originally a term applied

to remuneration to a shipowner for the detention of his vessel beyond a stated period fixed for loading of unloading but, of later years, the usage of exacting demurrage has not been confined to maritime transactions and it may now be regarded as well-settled that a railway carrier may adopt and enforce a reasonable schedule of charges for the detention of its cars beyond a reasonable period for loading and unloading (Tory Wagon Works Co. v. Cincinnati H. and D.R. Co. (16 Ohio Dec, 111, 3 Ohio N.P., N.S., 412)" "Demurrage, in the maritime sense, is charges allowed to vessel for delaying her in unloading, in the nature of compensating her for freight she might have earned, had she not been so delayed. (California and Eastern S.S.Co. v. 1,38,000 Feet of Lumber D.C. Md., 23F. 2d 95, 96)." Thus, the normal meaning and the judicial definition of demurrage does not vary even in the Law Lexicon by P. Ramanatha Aiyar. At page 314, the same meaning is attributed. Similarly, in Strouds Judicial Dictionary, 4th edition, volume 2, at page 738 : "DEMURRAGE. (1) The strict meaning of demurrage is the agreed amount to be paid by the charterer of a ship of each day taken in loading or discharging beyond the respective time fixed for those operations; the word"demurrage" appears to me to be more applicable to delay in time after the expiration of a fixed time than to delay after the expiration of a reasonable time. That is the principal which underlies the authorities; it is that upon which Lockhart v. Falk ([1875] L.R. 10 Ex. Ch. 132) proceeded; and it appears to me to be a reasonable one. I do not think that the term can be easily applied to time after the expiration of reasonable time (per Fry L.J., Dunlop v. Balfour ([1892] 1 QB 507), e.g., where the loading or discharge is to bein the CUSTOMARY manner. But sometimes, - e.g., where a CESSER clause (exonerating the charterer is accompanied by a lien on cargo for freight, dead freight demurrage, and average, or such like demurrage will include detention other than that which is technically demurrage (see per Brett J., Kish v. Cory ([1875] L. R. 10 QB 553. 560) per Bowen L.J., Clink v. Radford and Co. [1891] 1 QB 625, cited CEASE). On the other hand, where the lien is not co-extensive with the charterers liability, the cesser clause will not, under demurrage, include damages for a detention not covered by the lien (Lockhart V. Falk, Dunlop v. Balfour, supra." However, Mr. Sarangan, drew my attention to the decision of the Supreme Court in the case of the Union of India v. Gosalia Shipping (P.) Ltd. [1978] 113 ITR 307. In that case it was held as follows (headnote) : "The amount which the company was required to pay to the owners of the ship was not payable on account of the carriage of goods to the owners of the ship within the meaning of section 172(2) of the Income-tax Act, 1961. The company paid hire charges to the owners of the ship and since it loaded the ship with the companys own goods, the company received nothing on account of carriage of the goods. Neither the owners of the ship nor the company, therefore, received any amount on account of the carriage of the goods. No tax was, therefore, exigible under section 172(2) and the demand notice was rightly quashed. It was true that one could not place over-reliance on the form which the parties gave to their agreement or on the label which they attached to the payment due from one to the other. One must have regard to the substance of the matter and, if necessary, tear the veil in order to see whether the true character of a

payment was something other than what, by a clever device of drafting, it was made to appear, but in this case the real intention of the parties was not something different from what the words used by them conveyed in their accepted sense." Therefore, having regard to the terms and conditions set out between the foreign buyer who had chartered the ship as in the instant cases and the agreement with the mine-owner-shipper in India, payment of demurrage clearly falls outside the amount mentioned in section 44B and section 172(2) of the Act. Thus, it is difficult to hold that it constitutes income. In an earlier case, also relied upon by Mr. Sarangan, the Judicial Commissioner of Goa, in the case of Lima Leitao and Co. Ltd. v. Union of India Represented by the Administrator of Goa, Daman and Diu [1968] 70 ITR 518 analysed in detail section 172 of the Act and came to the conclusion that demurrage was not liable to be subjected to tax under section 172 of the Act. It suffices to state that the learned judge did not more than apply the test of liability arising out of "carriage" of passengers, goods, livestock or mail from an Indian port. In the absence of such carriage, any other payment, he concluded, would not attract section 172 of the Act. Per contra, Shri Chandarkumar, learned counsel appearing for the Revenue, has relied upon the case of Czechoslovak Ocean Shipping International Joint Stock Co. v. ITO [1971] 81 ITR 162 decided by the Calcutta High Court. The learned single judge of that High Court took the view that earnings of a non-resident shipowner could not escape exigibility to Income-tax under the Act, even though he may not be liable under section 172 of the Act, if the income was derived on behalf of such non-resident or foreign shipowner on account of carriage of goods from foreign ports consigned to India. Even if such income was derived or deemed to have been derived in the hands of those who were responsible for such shipowner. He categorically ruled that section 172 of the Act could not exclude the operation of section 5(2) read with section 195(2) of the Act. While it is difficult to agree with the learned judge, that section 172 of the Act does not exclude the operation of the other provisions of the Act, I cannot find fault with the conclusions reached by the learned judge because of the different facts of the case considered by him in Czechoslovak Ocean Shipping International Joint Stock Co,s case [1971] 81 ITR 162 (Cal). Section 172 of the Act relates to income derived by carrying passengers or goods, mail or livestock from Indian ports, it does not deal with income derived on account of bringing any one of those items mentioned in Sub-section (2) of section 172 of the Act to an Indian port from a foreign port. Section 44B of the Act was not at all considered by the learned single judge in Czechoslovak Ocean Shipping International Joint Stock Co.s case [1971] 81 ITR 162 (Cal). Yet another feature that distinguished that case from the cases on hand is that that company was an assessee filing regular returns in India through their shipping agents. In upholding the contentions of the Revenue, the learned judge noticed, at page 165 of the report as follows : "Respondent No. 1 is perfectly justified in asserting that the freight or cargo unloaded at Indian ports and received in India is chargeable to tax under section 5(2). Section 9(1)(i) defines income which is deemed to accrue or arise in India, namely, all income accruing or arising, whether directly or indirectly, through or from any business connection in India or through or

from any property in India, or through or from any assets of source of income in India, or through or from any money lent at interest and brought into India in cash or in kind or through the transfer of a capital asset situate in India. The next section to be considered is section 160 which defines a representative - assessee and such an assessee under clause (i) means in respect of the income of a non-resident specified in clause (i) of Sub-section (1) of section 9, the agent of the non-resident including a person who is treated as an agent under section 163, while Sub-section (2) of that section provides that every representative assessee shall be deemed to be an assessee for the purposes of the Act." Therefore, exhibits B and C do not relate to assessment of representative assessee in terms of the provisions contained in the Act nor are the petitioner non-resident shipowners carrying one shipping business to attract section 172 of the Act. They are mere exporters who are made to pay demurrage which undoubtedly is money received by the ships captain as compensation for detention. Whether that is assessable to Income-tax under section 172 of the Act as representative assessee is not the question before the court. Whether it is not paid for the purpose of carriage of passengers, goods, mail or livestock from an Indian port is the question posed in these petitions and not goods brought to India from foreign ports. If it was so paid for those specified purposes, such income at the rate specified in subsection (2) of section 172 of the Act shall be assessable and recoverable in terms of the Sub-section that follow Sub-section (2) of section 172 of the Act. But the demurrage amount is not paid for carriage of passengers, goods, mail or livestock and, therefore, does not attract section 172 of the Act. In the Calcutta case, the learned single judge has not noticed that section 172 of the Act is specifically meant for ships which touch Indian ports and clear goods, passengers, livestock or mail from Indian ports and which may not again call at an Indian port at all or may call after a long interval. Normally, in shipping parlance, such carries are called "tramps"; they are cargo vessels equipped and fitted to carry livestock, mail passengers, etc. They have no regular ports of call. At any time the ship may pick up goods, passengers, livestock or mail according to the charterers; wishes and the same ship may not be chartered by the foreign buyer to carry ore once again from the petitioners and the like. It is not always that demurrage is paid. If is paid only when the ship is detained. It may not be too often. Therefore, on the probabilities, the ship which leaves the Indian port and only casually visits the Indian port is covered by section 44B of the Act and they will be assessed in accordance with the provisions of the Act applicable at the rate specified in section 44B of the Act and (sic) at any other rate; but for the same purpose indicated in Sub-section (2) section 44B of the Act if the accrual of the income or amount is on that account and not otherwise. Thus, demurrage, though a receipt as compensation for detention, will not, for the purpose of section 172 of the Act, be an income. Therefore, the contention of Mr. Sarangan must be upheld that annexures B and C cannot prescribe a mode of recovery and payment in respect of demurrage paid by exporters from India when the ship in question clearly falls within the ambit of section 172 of the Act. In that view of the matter, the petitioners are not entitled to the relief they have prayed for but only to a declaration of the law in relation to section

172 of the Act. In that view of the matter, the procedure required to be adopted as indicated in the circular as at annexure-C is clearly without the authority of law but this court cannot prevent the Central Board of Direct Taxes from forming a legal opinion as indicated in annexure-c. Annexure-B refers to Indian (resident) charterer and, therefore, the petitioners not being charters, are not affected by the same. However, it is to be hoped, in the light of the reasons I have given to hold that demurrage paid is not income exigible to tax under section 44B or section 172 of the Act. The respondents will not cause undue hardship to exporters in India like the petitioners as, indirectly, such action as is proposed in annexures B and C will affect international shipping. Subject to the observations made above, the writ petitions are disposed of. Parties will bear their own costs.