Karnataka High Court Central Board Of Direct Taxes And ... vs Chowgule And Co. Ltd. And Others on 3 June, 1991 Equivalent citations: 1991 192 ITR 40 KAR, 1991 192 ITR 40 Karn Author: K S Bhat Bench: K S Bhat, R Ramakrishna JUDGMENT K. Shivashankar Bhat, J. 1. The first respondent in each of these appleals is the petitioner who filed the writ petitions. In the writ petitions, two letters dated February 22, 1988, and October 11, 1988, addressed by the Reserve Bank to all the exporters/importers in the Goa Region were sought to be quashed; by those letters, it was pointed out that demurrage charges payable to the overseas owners of vessels chartered by the Indian parties attract income-tax and hence application for remittances towards them are to be duly supported by income-tax clearance certificates; it was further clarified 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/CIF/FOB attract India income-tax and, therefore, the exporters/importers were advised"to ensure that all applications for remittances towards demurrage payable on foreign vessels to overseas parties are 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 letters were allegedly the result of an opinion expressed by the Central Board of Direct Taxes that such demurrage charges attract tax under the Income-tax Act, 1961 ("the Act" for short). 2. The question for consideration is whether demurrage payable to a non-resident owner or charterer of a ship for the delay in loading the ore sold to the foreigner is liable to be taxed under the provisions of the Income-tax Act. 3. The two agreements entered into by the respective writ petitioners reveal that, having agreed to sell the ore, the same are to be loaded into the hip chartered by the purchaser. The agreement of sale requires the petitioners to load the goods sold; thereafter, it is the exclusive responsibility of the purchaser to transport it; the title to the goods obviously vests in the purchaser. The agreement is in the nature of a FOB contract. In case there is delay in loading, the petitioner is liable to pay demurrage at the rates stated in the agreement. The total demurrage payable to the purchaser is quantified subsequently and is to be remitted to the foreign buyer for which purpose permission of the Reserve Bank of India has to be obtained, as the remittances involve foreign exchange; payment of demurrage seems to be independent of the receipt of sale price by the petitioner. It is necessary to note that the seller-petitioner is in no way liable to pay any freight charges, since transportation of the ore is the responsibility of the buyer. 4. The Revenue contends that this demurrage is essentially an extended fright payable towards the carriage of the goods and is taxable in the same manner, as the receipt towards freight is taxed. The Petitioners, on the other hand, assert that the demurrage, here, is nothing but a compensatory payment towards the detention of the ship caused by the delay in loading the goods and it has no connection with freight. Alternatively, the Revenue contends that the demurrage receivable by the foreign buyer is income accruing to the non-resident in India and, therefore, taxable by virtue of section 5(2) of the Act, even if section 172 is inapplicable. 5. The law was declared by the learned single judge (see [1991] 187 ITR 381) in favour of the petitioners who

held that the demurrage in the instant case is not an expended freight at all; that section 172 covered the field of taxing a non-resident owner or charterer of a ship who was not engaged in the business of operation of shipping (the latter subject being covered by section 44B), and section 5 of the Act was inapplicable to the facts of the instant case. 6. Demurrage has several meaning depending on the context. It may be an extended freight, when, the person responsible for payment of freight has to pay, in addition thereto, demurrage for the delay caused by him. It may bean compensation or damages, when demurrage is payable for the delay in taking delivery of goods from a warehouse. It may be an ingredient of hire charges payble by the charterer of the ship for the delay in sailing the ship and delivering it in time; sometimes. It is treated as part penalty. The several meanings are given in "Words and Phrase" (pages 73 to 76) and a few are repeated below : "(1) Demurrage is extended freight (U.S. v. Atlantic Refining Co., D.C.N.J., 112F. Supp. 76, 80). (2) Claim for 'demurrage', which is not a penalty, but earnings improperly lost in detention of carrier's cars longer that necessary to load or unload, is for carriers' 'charges or any part thereof' within Transportation Act, February 28, 1920, s 424, 49, U.S.C.A.S 16, requiring that action therefore be begun within three years from time cause of action accrues. (Philadelphia, B and W.R. Co. v. Quaker City Flour Mills Co., 127 A 845, 846, 232pa. 362). (3) Demurrage charges for failure to load and unload cars within 'free time' permitted by the rules of railroad companies held taxable as a part of the charge for transportation, under Revenue Act, 1917, ss. 500-503, 40 Stat. 314, and Revenue Act, 1918, ss. 500-502, 40 Stat. 1101, imposing a tax in the amount paid for transportation, since 'demurrage' is a terminal charge, a part of the charge for transportation, even if the purpose of demurrage is primarily to prevent the detention of cars, (Proctor and Gamble Co. v. United States D.C. Ohio, 281 F. 1014, 1015). (4) Vessels :- Demurrage is the compensation provided for in a contract of affreightment for the detention of vessel beyond the time agreed on for loading or unloading. (Fisher v. Abeel N.Y. 44 How. Prac. 432, 440). (5) 'Demurrage', in maritime sense, is charges allowed to vessel for delaying her in unloading, in nature of compensation her for freight she might have earned, had she not been so delayed (California and Eastern S.S. Co. v. 138,000 Feet of Lumber, D.C. Md., 23 F. 2d 95,96). (6) Demurrage, as is remarked by Heath J., in Jesson v. Solly (4) Taunt. (53), is only an extended freight, and the liability for freight and for demurrage stands upon the same grounds. Damages in the nature of demurrage, observes Butler J., in Wordin v. Bemis, (32 Conn. 268, 273; 85 Am. Dec. 255) are recoverable for detention beyond a reasonable time in unloading only, and when there is no express stipulation to pay demurrage. They are in the nature of demurrage because they are for the detention of the vessel, and measured by a debt, like demurrage, and are damages because they are recoverable for a breach in an implied contract of the shipper that he will receive the goods in a reasonable time, (Hall v. Baker 64 Me. 339, 343). (7) 'Demurrage charges' on railroad cars are in part compensation and in part penalty and, in full character, they are neither but are sui generis. (lversen v. U.S.D.C., D.C., 63 F.Supp. 1001, 1005)." 7. From the agreements in question, it is clear that the ships are chartered by

the foreign buyer of ore for the purpose of conveying the ores purchased from the seller. The seller is paid price at the rate specified in the agreement and the quantity of the ore is quantified with reference to their loading into the ship. In case there is delay in loading, the seller has to pay demurrage and similarly in case time is saved in loading. The seller is entitled to receive "dispatch money." 8. The three relevant provisions of the Act are sections 5(2), 44B and 172. Section 5(2) is the main charging section governing the levy of tax on the total income of a non-resident. This total income is to be computed in the manner laid down in Chapter IV of the Act. 9. Section 44B is found in Chapter IV and pertains to computation of total income from profits and gains of business or profession. Section 28 identifies the income chargeable to income-tax under the head "Profits and gains of business or profession;" the said income is to be computed in accordance with the provisions contained in section 30 to 43C (vide section 29). Computation of the income derived from various sources, alliances allowable, deductions to be made are thereafter provided in the provisions from sections 30 to 43C (i.e., up to section 44-section 44 governs insurance business). Section 44A to 44D are the special provisions which override other provisions regarding the subjects stated therein. In this scheme, section 44B occurs, and is described as the "special provisions for computing profits and gains of shipping business in the case of non-residents." The section opens with the non-obstinate clause overriding section 28 to 43A. It is applicable to the case of "an assessee, being a non-resident, engaged in the business of operation of ships." It deems particular percentage of the aggregate of the amounts specified in sub-section (2), to be the profits and gains of such business chargeable to tax under the relevant head. Sub-section (2) specifies the amounts to be aggregated. Therefore, in the case of a non-resident assessee, the income chargeable to tax under this head, has to be found out only by applying section 44B. The charge is levied under section 5. The subject of the charge is identified under section 44B. Section 44B is not applicable to all non-resident assessee, but only to a non-resident assessee engaged in the business of operation of ships. In other words, the assessee should have a regularity of business of operating ships as a condition to attract section 44B. 10. Section 44B was introduced with effect from April 1, 1976. Till then, this chargeable income was obviously computed under the other provisions of the Act. 11. The language of section 172 is different. It overrides all other provisions of the Act. It says that the provisions of section 172 only shall govern 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. 12. The applicability of this provision is confined to a limited class of ships which carries passengers, etc., shipped at a port in India; obviously, the purpose of section 172 is to rope in for taxation the income earned by a non-resident by operating a ship from India, but not in the regular course of business. That is why Parliament has provided a complete code for levying and collecting the tax from the income from such a ship as is referred to in section 172. Section 172(1) identifies the subject of the levy. Section 172(2) quantifies the income for taxation, Sub-section (3) provides for the filing of the return; and sub-section (4) prescribes the rate of taxation; other

sub-sections are procedural provisions to safeguard the recovery of the tax. Sub-section (7) provides an option to the owner or charterer of the ship as to the mode of assessing the income. Thus, the provisions of section 172 are a complete code covering all aspects of taxation and its recovery, including identification of the subject of the levy. 13. Mr. Chanderkumar contended that section 172 should be read harmoniously with section 5(2) and the income which does not fall within section 172, can still be charged to tax under section 5. Section 5(2) levies tax on the total income of a non-resident; this provision is subject to the provisions of the Act and, therefore, obviously, subject to section 172. While section 172 operates notwithstanding other provisions of the Act, section 5 is subject to section 172. Thus, the question of reading by the provisions as supplemental to each other does not arise. Learned counsel for the Revenue further argued that the object of the Act is to impose a tax on all incomes accruing in India to any person and, therefore, that subject should not be frustrated by any process of interpretation. 14. Here, the question of interpretation does not arise, the Act is a taxing provision; it has to be understood by reference to its language. No income can be brought to taxation on the basis of the intention or scheme of the Act. The principle is now well settled that : "the subject is not to be taxed without clear words for that purpose; and also that every Act of Parliament must be read according to the natural construction of its words" (words of Lord Simonds quoted by Sri G. P. Singh in his Principles of Statutory Construction, 2nd Edn., p.441). 15. The oft-quoted words of Rowlatt J. again remind us of this principle at p.442. "In a taxing statute, one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be implied. One can only look at the language used." 16. Section 172(1) identifies the subject of taxation. That subject is to be taxed only as provided under section 172(2) to (7). There is no question of any residuary income attributable to that subject being taxed elsewhere. That will be amending section 172(1) by reading into it "supposed intention" of the law-maker; such a course is impermissible. 17. Section 172(1) is not attracted to the case of a non-resident assessee engaged in the business of operation of ships. A non-resident owner or charterer of a ship which carries passengers, livestock, mail or goods shipped at a port in India only, is covered by section 172. 18. Since section 172 is a complete code by itself. The levy and collection of tax in respect of the subject on which the tax is levied thereunder has to be only as provided therein. For whatever reason, the concept of total income of a non-resident person coming within section 172(1) is confined to the specified income under section 172(2). There is no scope at all to travel outside section 172 to impose tax on such a person's income derived in the manner stated in section 172(2). 19. In Union of India v. Gosalia Shipping P. Ltd. [1978] 113 ITR 307, the Supreme Court considered the scope of section 172 to some extent. It was held that the amount payable by a charterer of ship towards the hire charges (for the use and hire of the vessel) was not "on account of" the carriage of goods referred to in section 172; the charterer carried his own goods for which purpose the charterer pays no freight as such. The taxable receipt under section 172, is an income arising

out of the payments made "on account of carriage of goods", etc. At page 310, the subject of section 172 was held to be : "Section 172 occurs in Chapter XV which is entitled 'liability in special cases' and the sub-heading of the section is 'Profits on non-residents from occasional shipping business'. It creates a tax liability in respect of occasional shipping by making a special provision for the levy and recovery of the tax in the case of a ship belonging to or chartered by a non-resident which carries passengers, live-stock, mail or goods shipped at a port in India. The object of the section is to ensure the levy and recovery of tax in the case of ships belonging to or chartered by non-residents. The section brings to tax the profits made by them from occasional shipping, by means of a summary assessment in which one-sixth of the gross amount received by them is deemed to be the assessable profit. Before the departure of the ship, the master of the ship has to furnish to the Income-tax Officer a return of the full amount paid or payable to the owner or charterer on account of the carriage of passengers. Goods, etc., shipped at the port in India since the last arrival of the ship at the port. In the event that, to the satisfaction of the Income-tax Officer, the master is unable so to do, he has to make satisfactory arrangements for the filing of the return and payment of the tax by any other person on his behalf. A port clearance cannot be granted to the ship until the tax assessable under the section is duly paid or satisfactory arrangements have been made for the payment thereof." 20. The question thereafter arose as to whether the payment made by the charterer to the owner of the ship was liable to tax under section 172 because the said ship carried goods shipped at a part in India or whether such a payment was on account of the carriage of goods. The Supreme Court held it was not. At page 311, it was held thus : "In order that it may be said that the amount was payable on account of the carriage of goods, it would be necessary to show that one is the consideration for the other, that is to say, that the payment which the charterers had agreed to make to the owners of the ship was in consideration of the carriage of goods. If the charterers are liable to pay the amount irrespective of whether they carry the goods or not, it would be difficult to say that the amount was payable on account of the carriage of goods. Under the terms of the charter-party, the owners of the ship received the amount as charges for the use and hire of the ship. The character of the payment cannot change according to the use to which the charterers put the ship or according as to whether the ship is loaded with goods in a port in India. What is payable as hire charges for the use of the ship cannot transform itself into an amount payable on account of the carriage of goods, by reason of the circumstance that the ship was loaded with goods in India." 21. Thus, if the payment is to be made not on account of carriage of goods, etc., then section 172(2) is not attracted and, therefore, such a receipt or payment is not taxable under section 172. 22. In the instant case, a perusal of the agreements shows that the demurrage payable is to prevent delay in loading the goods. In other words, the payment is to speed up the activity of delivering the goods to the purchaser in whom the title vests on delivery into the ship. If the seller expedites the delivery and loading, then he gets "dispatch money." While dispatch money is receivable by the seller, i.e., the petitioners, the demurrage is receivable by

the purchaser. The carriage of goods by the ship commences on completion of the loading work. Till then, the goods are in the process of delivery on board the ship. The demurrage payable in the instant case at the most is on account of the delay in the delivery of the goods on board the ship. If so, certainly section 172(2) is inapplicable. 23. It was contended by learned counsel for the Revenue that by this interpretation, vast amounts of income accruing to non-residents in India will escape levy of tax. May be the solution lies in appropriately amending the relevant provision. It is not the function of the court to stretch a taxing statute to rope in the items of income which are not explicitly covered by the relevant taxing provision. Since section 172 is a code by itself, it is not possible for this court to supplement the said provision by reading section 5(2) as covering the income left out of the provisions of section 172(2) so long as the subject of the levy is identified under section 172(1). The decision reported in Czechoslovak Ocean Shipping International Joint Stock Co. v. ITO was relied upon by Mr. Chanderkumar. In the said decision, section 5(2) of the Act was held applicable in cases where section 172 is not attracted. It should be noted that section 172(1) itself was inapplicable to the facts of the said case. Goods were shipped not at any port in India as is made very clear from the facts stated in the opening paragraph of the judgment. The goods were discharged in India and freight was collected in India. At page 167, there is a categorical finding that entire section 172 was not applicable to the facts of the said case; if so, there is no bar to apply section 5(2). Ultimately, having regard to the other provisions, i.e., section 195, the Revenue lost the case to that extent. 24. The decision of the Judicial Commissioner in Lima Leitao and Co. Ltd. v. Union of India, Represented by the Administrator of Goa, Daman and Diu [1968] 70 ITR 518 was cited by learned counsel for the assessee. The learned Judicial Commissioner held that the cargo belonged to the charterer of the ship who had purchased the cargo. The ship was hired on daily rate basis by the foreign buyer-charterer. The Revenue sought in impose tax on the hire charges under section 172. The facts are almost similar to the facts involved in the aforesaid decision of the Supreme Court referred to already. It was held that when a time-charterer carries his own goods in the ship hired, there is no contract for the carriage of goods but only the hiring of the ship itself. What was paid or payable to the owners of the ship, in such a case, is not freight at all, but rent for the use and the hire of the ship. 25. The decision of the Gujarat High Court in CIT v. Pestonji Bhicajee [1977] 107 ITR 837 substantially aids the case of the petitioners herein. It was held that the payment made towards the "dead freight" was not a fright but damages for loss of freight and hence compensatory. Therefore, section 172 was inapplicable. While holding that "dead freight" was not covered by section 172, the principle of interpretation was stated at page 841 thus : "Sub-section (2) of section 172 which enacts a fiction and makes special provision for the levy and recovery of tax from a non-resident ship-owner irrespective of the place where the freight is paid must be construed on its plain language. In a taxing statute of that nature, there is no justification for adding words, a payment made not for carriage of goods but for non-carriage of goods cannot, therefore, be brought within the ambit thereof." 26. Having regard to

the scheme of section 172 and the completeness of its coverage as to taxability of the subject referred to therein, it is unnecessary to consider the several decisions cited at the Bar pointing out the principles of interpretation governing a non-obstinate clause. 27. For the reason stated above, we concur with the declaration of the law made by the learned single judge. The Reserve Bank has not filed any appeal obviously because its circulars were issued at the behest of the appellants before us. However, we make it clear that the impugned circulars cannot be applied to the facts of the cases before us and the demurrage paid or payable under the two agreements referred to in these proceedings cannot be taxed in the manner pleaded by the Revenue. 28. Writ appeals are accordingly, dismissed without any order as to costs.