IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Original Side

Present:

The Hon'ble Justice Arindam Sinha

W.P. no. 457 of 2005
With
W.P. no.458 of 2005

P & O Nedlloyd Ltd. & Ors.

Vs.

Assistant Director of Income Tax

International Taxation –II, Kolkata

For the petitioner : Mr. P. Kaka, Senior Adv.
Mr. V. Kundalia, Adv.
Mr. M. Kanth, Adv.

For the Defendant no.1 : Late D. K. Shome, Senior Adv.
Mr. R.K. Chawdhury, Adv.
Ms. Saswati Joardar, Adv.
Mr. Protyush Chatterjee, Adv.

Heard on : 16.01.14, 27.02.14, 06.03.14, 11.03.14, 25.03.14, 26.03.14, 08.04.14, 29.04.14, 12.06.14, 24.06.14, 25.06.14 & 01.07.14.

Judgment on : 7th November, 2014.

Arindam Sinha, J.

W.P. no.457 of 2005

Two companies, one incorporated under the laws relating to companies in the United Kingdom (UK) and another incorporated under the laws relating to

companies in the Netherlands have filed this writ petition challenging a notice dated 25th March, 2004 issued under section 148 of the Income Tax Act, 1961 to P&O Nedlloyd (Partnership) requiring the partnership to deliver a return in the prescribed form of its income in respect of which it is assessable, chargeable to tax for the Assessment Year 1997-98 which, according to the Revenue, had escaped assessment within the meaning of section 147 of the said Act.

The petitioners pleaded by a deed of partnership dated 31st July, 1997 the petitioner nos. 1 and 2 formed a partnership firm with effect from 1st January, 1997 under the provisions of law relating to partnerships of England and Wales, having its office in the UK to carry on the business of shipping in international waters. It is the petitioners' case in their pleadings the first assessment year subsequent to the formation of the partnership was Assessment Year 1997-98. Since an incomplete return dated 19th May, 1998 was originally filed, the petitioner no. 1 under cover of its letter dated 31st March, 1999 enclosed a revised return. The contents of that letter are reproduced below:-

> "We enclose the Revised Return of Income for the assessment year 1997-98.
>
> With effect from 1st January, 1997 P&O Containers Ltd., U.K. and Nedlloyd Lines B.V. have pooled their business worldwide as both these companies were acquired by P&O Nedlloyd Container Ltd., U.K. The name of P&O Containers Ltd., U.K. was changed to P&O Nedlloyd Ltd. which operates in

India with effect from that date. However, the return for the above assessment year was inadvertently filed in the name of P&O Containers Ltd. reflecting only the freight collected by P&O Containers Ltd., U.K.

Therefore, this Revised Return of Income is being filed in correct name of P&O Nedlloyd Ltd. being the beneficial receiver of freight income earned in India, including the freight earned by Nedlloyd Lines B.V. from 1st January, 1997 to 31st March, 1997.

Please take the above on your records.

Please let us know if you require any further information in the matter."

The returns filed resulted in assessment order dated 30th July, 1999. The said order speaks as under:-

"In this case, return of income was filed on 19/5/1998 showing income at Nil. Subsequently, a revised return was filed on 12/4/1999 showing income at Nil. The revised return was filed in order to claim refund of the taxes paid under section 172(4) to the extent of Rs.25,29,231.

The assessee is non-resident shipping company, engaged in the business of operation of ships in the International Traffic.

In response to notice under section 143(2) of the Income–tax Act, Sri A.K. Basu, FCA, A/R. of the assessee, attended the proceedings from time to time and the case was discussed with him.

During the year under consideration, the assessee has shown gross freight to the extent of Rs.2,41,68,52,588. It has been submitted on behalf of the assessee that in accordance with article 9 of the agreement for avoidance of the Double Taxation between India and U.K., the profit derived by the assessee company from the operation of ships in the International Traffic would be taxable only in the U.K. Accordingly, the sums received in India from the operation of ships including ancillary charges have been claimed as exempted from tax in India. I have perused the double taxation avoidance agreement between India and U.K. I have also considered the submissions made on behalf of the assessee in this context and found the contention of the assessee to be correct. Hence, the gross freight including ancillary charges, received by the assessee company, will not be taxed which implies that the tax payable would be Nil.

Assessed as above u/s 143(3), issue Demand Notice and copy of the order to the assessee."

The petitioners are indignant that in spite of full disclosure having been made regarding their business of operation of ships in international traffic, the impugned notice was issued by the Revenue, that too without disclosing any reasons for the issuance thereof. However, since subsequently reasons were given by the Revenue by intimation thereof being annexure P-7 to the writ petition, received by the petitioner on 17th January, 2005, the objection regarding absence of reasons was not pressed. The reasons for issuance of the impugned notice as would appear from the said annexure are as under:-

> "M/s. P&O Nedlloyd Partnership, UK (PONP in short) filed its Return of Income arising out of shipping business in India, for the A.Y. 2002-03 on 31.10.2002 as '**New Case-1st Yr**.'
>
> Meanwhile, information vide L.No.Addl.DIT (IT-2)/264/2003-04 dated 22.09.2003 has been received that PONP's Indian income from shipping business in earlier years was not disclosed to the Department.
>
> It is noted that the PONP was actually carrying on the shipping business in India. It has realised gross freight of Rs.2,41,68,52,588 from vessels shipped at Indian ports during the period relevant to assessment year 1997-98. This resulted in profit of Rs.18,12,63,944 being 7.5% of gross freight u/s 172(2) of the I.T. Act, 1961. But the same was not offered for taxation by the PONP. Instead this was wrongly shown as income of M/s.

P&O Nedlloyd Ltd. (PONL in short) being PAN: AACCP3162F, which was merely a partner of the PONP, to fraudulently avail of relief under Indo-UK treaty.

Since Partnership is not liable to income tax in U.K., the same is not a 'person' resident in U.K. who is entitled to get relief under Indo-U.K. treaty.

In view of this, I have reasons to believe that income of Rs.18,12,63,944 chargeable to tax for the A.Y.97-98 has escaped assessment due to non-filing of return by the PONP under I.T. Act,1961.

Put up to Addl. DIT (Intl. Taxn.), Kolkata for his kind perusal and for seeking necessary sanction under section 151(2) for issuing notice under section 148 of the I.T. Act, 1961."

Mr. Porus Kaka, learned Senior Advocate appeared on behalf of the petitioners and submitted the income shown under the said revised return amounting to Rs.241,68,52,588/- was the entire partnership income from the joint/pooled partnership business. Therefore, the petitioner no.1 as a partner had already been assessed after exercising its option under section 143(3) of the said Act which assessment order continues to remain valid and has not been altered in any way or proceeding. According to him that assessment order assessed the freight income of both the partners jointly constituting the partnership. Since it is

not disputed the income concerned is from the operation of ships in international traffic, in any event such income was not chargeable to tax in India by reason of the India-UK and India-Netherlands Double Taxation Avoidance Agreements (DTAA). He submitted it was and is accepted both internationally and in India that partnership income and income in the hands of partners is one and the same and double taxation was not permitted. He referred to CBDT Circular no.6 dated 17th March, 1944 as well as, inter alia, Articles 9(1) and 5 of the India-UK Treaty and corresponding Article 8(a) of the India-Netherlands Treaty in this context.

He also cited lack of jurisdiction in the matter of issuance of the impugned notice by submitting the purported reasons for re-assessment was of income under section 172(2) of the said Act, the jurisdiction for which lies solely with the respective port officers where the ships arrive and leave. Without waiving such objection, he submitted, there was full and true disclosure and therefore in the facts and circumstances it cannot be said there were reasons to believe that income of the partnership had escaped assessment for the assessment year under notice. The partners thus were competent to maintain the challenge against the notice where the income of the partnership was already assessed and granted exemption since the provisions of Articles 9 and 8(A) of the India-UK and India-Netherlands

Treaties do not permit taxation of income in India and specifically covers shares of joint business also. There was no failure to disclose and the notice alongwith the reasons to reopen are untenable and ought to be quashed.

The late Mr. Shome, learned Senior Advocate and after him Mr. Ramesh Chowdhury, learned Advocate argued on behalf of the Revenue. The Revenue's case from its pleadings is that when the partnership had come into effect from 1st January, 1997 it was required to file its return for the relevant Assessment Year 1997-98. The notice was duly issued under section 148 of the said Act. The Revenue contended the UK does not consider a partnership as resident for the purpose of Tax Treaties under Article 4 thereof. As such the partnership was not a resident of the UK. Hence, income for the Assessment Year 1997-98 in the hands of the partnership did escape assessment. It was the further contention of the Revenue the partnership not being liable to tax in the UK cannot claim fiscal domicile of that country. The partnership having come into existence on 1st January, 1997 however filed its return for the first time on 31st October, 2002 for the Assessment Year 2002-03 when the partnership, according to the Revenue, was the sole beneficiary of freight income earned in India on and from 1st January, 1997 to 31st March, 1997 and in subsequent years which it failed to disclose. Such income cannot be returned by and be assessed in the hands of the individual partners since

income was earned by the partnership in India. According to the Revenue, the benefit of the India-UK Treaty could be availed of, if admissible, by the partnership only.

Several decisions were relied on by the petitioners. They are as follows:-

"(i) Calcutta Discount Co. Ltd. V. Income Tax Officer, Companies District I, Calcutta And Anr. : 41 ITR 191;

(ii) Director of Income Tax (International Taxation) V. Venkatesh Karrier Ltd. : 49 ITR 124;

(iii) Sunil Krishna Paul And Anr. V. Commissioner of Income Tax West Bengal : 59 ITR 457;

(iv) Madhya Pradesh Industries Ltd. V. Income Tax Officer, Nagpur : 77 ITR 268;

(v) Dunlop Rubber Company Ltd. (London) V. Income Tax Officer "A" Ward, Companies District III And Ors. : 79 ITR 349;

(vi) Commissioner of Income Tax, Calcutta V. Burlop Dealers Ltd. : 79 ITR 609;

(vii) Income Tax Officer, I Ward, Distt. VI, Calcutta, And Ors. V. Lakhmani Mewal Das : 103 ITR 437;

(viii) Ganga Saran And Sons P. Ltd. V. Income Tax Officer And Ors. : 130 ITR 1;

(ix) Commissioner of Income Tax V. Davy Ashmore India Ltd. : 190 ITR 626;

(x) Commissioner of Income Tax V. Taiyo Gyogyo Kabushiki Kaisha. : 244 ITR177;

(xi) Union of India And Anr. V. Azadi Bachao Andolan And Anr. : 263 ITR 706;

(xii) Hindustan Lever Ltd. V. R.B. Wadkar, Assistant Commissioner of Income Tax And Ors. : 268 ITR 332;

(xiii) Amiya Sales And Industries And Anr. V. Assistant Commissioner of Income Tax And Ors. : 274 ITR 25;

(xiv) Commissioner of Income Tax V. Kelvinator of India Ltd. 320 ITR 561;

(xv) Emirates Shipping Line, FZE V. Assistant Director of Income Tax : 349 ITR 493 and

(xvi) Indivest Pte. Ltd. V. Additional Director of Income Tax. And Ors. : 350 ITR 120."

None of the propositions of law laid down by the above decisions were disputed. The parties were ad idem regarding the scope and effect of section 90 of the Income Tax Act, 1961.

The facts as emerged from the above are that the petitioner no.1 under cover of its letter dated 31st March, 1999 had filed a revised return of income for the Assessment Year 1997-98. It appears from that letter the assessment related to P&O Nedlloyd Ltd. U.K., the petitioner no.1. The purport of the letter is the petitioners had pooled their business worldwide as both companies were acquired by P&O Nedlloyd Containers Ltd. U.K. with effect from 1st January, 1997. The name of the petitioner no.1 was changed, which operates in India with effect from

1st January, 1997. However, since return for the said assessment year was inadvertently filed in the erstwhile name of the petitioner no.1 reflecting only the freight collected by it, therefore, the revised return to include the freight earned by the petitioner no.2. This court notices in the matter of filing the revised return there was no mention by the petitioners that they were partners of a partnership firm or what was the name of such firm. It thus becomes clear to this court the petitioner no.1 was a company being assessed and it had filed a revised return showing gross freight to the extent of Rs.241,68,52,588/- earned by both the petitioners, pooled together and acquired by the acquiring company as stated.

The assessment order was made accordingly. The said order says the assessee (petitioner no.1) is a non-resident shipping company engaged in the business of operation of ships in international traffic. Under Article 9 of the India-UK Treaty the profit derived by the assessee company from the operation of ships in international traffic would be taxable only in the UK and was thus exempted from tax in India. Hence, the Revenue found tax payable by the assessee company, that is the petitioner no.1, would be nil on such income from freight.

Further facts are that M/s. P&O Nedlloyd partnership, UK hereinafter referred to as the said partnership, filed its return of income arising out of shipping business in India for the Assessment Year 2002-03 on 31st October, 2002 as 'New Case-1st Year'. Though the petitioners claiming to be partners of the said

partnership did not state as much in their covering letter dated 31st March, 1999 enclosing the said revised return considering the said partnership had came into being on 31st July, 1997, the noting by the Revenue the said partnership was actually carrying on shipping business in India to realise gross freight of Rs.241,68,52,588/- during the period relevant to Assessment Year 1997-98, was not denied. After the said partnership chose to file its return for the Assessment Year 2002-03 on 31st October, 2002 as 'New Case- 1st Year' the petitioners asserted the partnership business carried on by shipping in international traffic out of ports in India had yielded the said gross freight in the hands of the petitioner no.1 as income of the said partnership. In the premises the contention of the Revenue that income of the said partnership had escaped assessment as chargeable to tax necessitating issuance of the impugned notice cannot be brushed aside. This court finds by reason of income of the said partnership having escaped assessment which escapement was noticed subsequently as indicated in the reasons supplied and as the said partnership assessee had failed to disclose fully and truly all material facts necessary for its assessment for the earlier assessment years from 1997-98 onwards, the assessment under section 143(3) made earlier of the petitioner no.1 could not be relied upon as an assessment made of the relevant year relating to the said partnership. Therefore, the assessing officer's reasons to believe that income chargeable to tax of the said partnership for assessment years prior to

the return filed by it for Assessment Year 2002-03 as 'New Case-1st Year' had escaped assessment cannot be said to be perverse. Hence, it is found the notice was not time barred under the first proviso to section 147 of the said Act and thereby saved from the time bar prescribed under section 149 thereof. Whether or not the same income stood already disclosed and exempted from tax as income assessed of the petitioner no.1 as assessee being a partner of the said partnership or such income of the partnership had escaped assessment would be a question to be gone into and answered in the assessment sought to be made pursuant to the issuance of the notice. In the circumstances this court cannot find the said partnership had made full disclosure.

It is the other objection regarding attempt on the part of the Revenue to subject the said partnership to taxation on the ground its income was not saved from the charge of income tax by the India-UK Treaty, that the Revenue has not been able to overcome. In dealing with such objection it is necessary to reproduce below certain clauses, relevant for the purpose, of the India-UK Treaty notified on 11th February, 1944.

"Article 1 - Scope of the Convention

1. This Convention shall apply to **persons** who are residents of one or both of the Contracting States.

Article 3 - General Definitions

1(f) the term "**person**" includes an individual, a company and any other entity which is treated as a taxable unit under the taxation laws in force in the respective Contracting States, but, subject to paragraph 2 of this article, does not include a partnership:

1(h) the terms "enterprise of a contracting state" and "enterprise of the other contracting state" mean respectively an enterprise carried on by a resident of a contracting state and an enterprise carried on by a resident of the other contracting state.

2. A partnership which is treated as a taxable unit under the Income tax Act, 1961 (43 of 1961), of India shall be treated as a **person** for the purposes of this Convention.

Article 4 - Fiscal Domicile

1. For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the law of that State, is liable to taxation therein by reason of his domicile, residence, place of management or any other criterion of a similar nature.

Article 9 - Shipping

1. Income of an enterprise of a Contracting State from the operation of ships in international traffic shall be taxable only in that State.

5. The provisions of this Article shall apply also to income derived from participation in a pool a joint business or an international operating agency."

The effect of the relevant provisions of the India-UK Treaty as reproduced above is the convention applies to persons who are residents of one or both of the Contracting States by operation of clauses 1(f) and 2 of Article 3 of the convention. It is found the said partnership, partners of which are registered in the UK, is not a person treated as a taxable unit under the taxation laws in force in the UK. Under section 2(31) (iv) of the Income Tax Act, 1961, person includes a firm. Under section 2(23)(i) thereof a firm shall have the meaning assigned to it in the Indian Partnership Act, 1932 and shall include a limited liability partnership as defined in the Limited Liability Partnership Act, 2008. The provisions of the Indian Partnership Act, 1932 in particular sections 4 and 69 when applied for the purpose of determining whether the said partnership is a firm within the meaning of the said Act, leads this court to conclude in the affirmative. That obviates the necessity of applicability of the provisions of the Limited Liability Partnership Act, 2008. Once it is found the said partnership is a firm under section 2(23)(i) of the Income Tax Act, 1961, it becomes a person under section 2(31)(iv) of the said Act, attracting the operation of paragraph 2 of Article 3 of the said convention.

Such conclusion is inescapable as the Revenue must bring a charge of income tax against a person under section 4 of the Income Tax Act, 1961. The Revenue in treating the said partnership as an assessee and seeking to assess income of it which had escaped assessment is for the purpose of charging tax on the income of the said partnership, treating it as a person liable to be charged with the levy of income tax under the said section. In doing so the revenue has to treat the said partnership as a person within the definition provided of person under section 2(31)(iv) of the said Act. Thus the Revenue's case the said partnership is not covered by the said convention fails.

In as much as in the facts and circumstances aforesaid it would be unjust to compel the said partnership or the petitioners to submit themselves to the assessment sought by the impugned notice, the writ petition succeeds. The impugned notice dated 25th March 2004 issued under section 148 of the Income Tax Act, 1961 to P&O Nedlloyd (partnership) is set aside and quashed. There will, however, be no order as to costs.

W.P. no.458 of 2005

This writ petition contains challenge to the notices all dated 25th March, 2004 issued under section 148 of the Income Tax Act, 1961 on P&O Nedlloyd

(partnership) requiring the said partnership to deliver returns for their income for assessment years 1998-99, 1999-2000, 2000-01 and 2001-02.

This writ petition stands decided in terms of the judgment delivered in W.P. no. 457 of 2005 (P&O Nedlloyd Ltd. & Ors.) and the impugned notices are set aside and quashed.

Urgent photostat certified copy of this judgment, if applied for, be given to the parties on usual undertakings.

(Arindam Sinha, J.)

Appearance:

Mr. K. Shah, Adv.
….for the petitioner.

Mr. Chowdhury, Adv.
… for the defendant no.1.

The Court:

Mr. Chowdhury, learned Advocate appearing on behalf of the Revenue, prays for stay of operation of the judgment delivered.

The prayer is considered and refused.

(Arindam Sinha, J.)