IN THE HIGH COURT OF DELHI

ITR No.212/80

Date of Decision: 12.12.2000

The Commissioner of Income-tax Delhi-I, New Delhi ..... Petitioner

Through: Mr. Sanjeev Khanna with Mr. Ajay Jha, Advocates.

VERSUS

The State Bank of India, New Delhi (Successor to the National Bank of Lahore, Ltd.) ..... Respondent

Through: None.

CORAM:

THE HON'BLE MR. JUSTICE ARIJIT PASAYAT, CHIEF JUSTICE
THE HON'BLE MR. JUSTICE D.K.JAIN

1. Whether reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes

Arijit Pasayat, C.J.(Oral)

At the instance of revenue, following question has been referred under Section 256(1) of the Income-tax Act, 1961(in short the 'Act') by the Income-tax Appellate Tribunal, Delhi Bench 'B'(hereinafter referred to as the Tribunal), for opinion of this Court:

> "Whether on the facts and in the circumstances of the case, the Tribunal was correct in law in holding that the capital gain arising from the sale of capital assets in Pakistan was not taxable in India irrespective of the fact whether it was subjected to tax in Pakistan or not for the assessment year 1966-67?"

2. Factual position as indicated in the statement of case is as follows:

. Assessee, i.e., State Bank of India was the successor to National Bank of Lahore Ltd.,(hereinafter referred to as the Lahore Bank). For the Assessment Year 1966-67 Income-tax Officer levied tax of Rs.2,51,197/- in respect of certain properties sold in Pakistan holding them taxable under the head "Capital Gains". Assessee's case was that income from capital gains in respect of sale of properties in Pakistan was liable to tax in Pakistan and not in India. This contention was rejected by the Income-tax officer. Assessee preferred an appeal before the Appellate Assistant Commissioner of Income-tax(in short the 'AAC'). The stand before the Assessing Officer was reiterated and it was contended that the income from capital gains in respect of sale of properties in Pakistan was taxable in Pakistan only. AAC confirmed the assessment by rejecting the stand. Matter was brought before the Tribunal by the assessee. Assessee's stand was that according to the "Agreement for Avoidance of Double Taxation"(in short the 'Agreement') between India and Pakistan, income from capital gains arising in respect of capital assets sold in Pakistan was subject to 100% tax by Pakistan and 'Nil' by India.Therefore, no levy was permissible. Tribunal accepted the stand by referring to Entry No.6 in the Schedule to the Agreement. The said Entry reads as follows:

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Source of Income or nature of transaction from which income is derived.	Percentage of income which each dominion is entitled to charge under the Agreement.	Remarks
1	2	3 4
6. Capital gains:		
(a) From sale, exchange or transfer of an immovable capital asset and any rights pertaining there to.	100 percent by the dominion in which the capital asset is situated.	Nil by the other.
(b)From the sale, exchange or transfer of other assets.	100 percent by the dominion in which the sale,exchange or transfer takes place.	Nil by the other.

Tribunal's conclusion was that since capital gains arising from sale of capital assets was not taxable in India it was immaterial whether it was subjected to tax in Pakistan or not. On being moved for reference, the question as set out above has been referred for opinion of this Court.

3. We have heard learned counsel for Revenue. There is no appearance on behalf of assessee in spite of service. Learned counsel for revenue submitted that true import of the agreement has been lost sight of by the Tribunal. According to him it is definitely material to see whether the property in question was subjected to tax under the heading "capital gains" in Pakistan.

4. The Dominion of India and the Dominion of

Pakistan concluded an agreement for the "Avoidance of Double Taxation of income" chargeable under the two Dominions in accordance with their respective laws, and in exercise of powers conferred by Section 49AA of the Indian Income-tax Act, 1922(hereinafter referred to as the 'old Act') and corresponding provisions of the Excess Profits Tax Act, 1940 and Business Profits Tax Act, 1947. A notification was issued on 10th December, 1947, whereby Government of India directed that the provisions of the agreement would be given effect to in the Dominion of India. Relevant Articles are Articles IV, V and VI. They read as follows:

> "Article IV
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> 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
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> 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 of the lower amount of tax payable in either Dominion on such doubly taxed income.
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> Article VI
>
> (a) For the purposes of the abatement to be

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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 such 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 known, the first Dominion shall make 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 or 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 produced, the abatement shall cease to be operative and the outstanding demand shall be collected forthwith."

5. The scope and ambit of Articles IV, V and VI came up for consideration of the Apex Court in C.I.T. v. Mahalaxmi Sugar Mills Co. Ltd., (1986) 160 ITR 920. It was, inter alia, observed that for the purposes of assessment under the relevant statute the income of the assessee must be determined in the ordinary way under the Indian law and in no way can the agreement be construed as modifying or superseding in any manner the provisions of the Indian law in that regard. All that the agreement does is to permit the Dominion to retain the tax recovered by it pursuant to an assessment under its law to the extent that an abatement is not allowed

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under the provisions of the Agreement. Article IV specifically provides that each Dominion shall make assessment in the ordinary way under its own laws. Such assessment includes determination of consequential tax liability. Thereafter the agreement takes over and the Dominion must allow abatement in the degree mentioned in Article IV. Clause(b) of Article VI permits the Dominion to make a demand without allowing the abatement if the tax payable on the total income in the other Dominion is not known, but the collection of tax has to be held in abeyance for a period of one year at least to the extent of the estimated abatement. If the assessee produces the certificate of assessment in the other Dominion, within a period of one year or any longer period allowed by the Income-tax Officer, the un-collected portion of the demand has to be adjusted against the abatement allowable under the agreement. But if no such certificate is produced the abatement ceases to be operative and the outstanding demand can be collected forthwith.

6. It is apparent from the opening sentence of Article IV of the Agreement that each Dominion is entitled to make assessment in the ordinary way under its own laws. In other words, each Dominion can make an assessment regardless of the Agreement. The restriction imposed on each Dominion is not on the

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power of assessment, but the liberty to retain the tax assessed. Article IV directs each Dominion to allow abatement on the amount in excess of the amount mentioned in the Schedule. The scheme of the Schedule is to apportion income from various sources between the two Dominions. This position was highlighted by the Apex Court in Ramesh R.Saraiya v. C.I.T., (1965) 55 ITR 699(S.C.).

7. Above being the position, conclusions of the Tribunal to the effect that whether the sale of capital assets was subjected to taxation in Pakistan or not was in-consequential, is clearly un-tenable. What the Tribunal was required to do is to act in the line indicated above.

8. Therefore,our answer to the question is in the negative, in favour of revenue and against the assessee. However, working out of the quantum of capital gains has to be done by the authorities and the Tribunal shall adjudicate the matter afresh in that light, keeping in view legal position indicated above.

Chief Justice.

12th December,2000
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D.K.Jain, J.