

UNION OF INDIA

v.

GOSALIA SHIPPING PRIVATE LTD., MARGAO, GOA

May 5, 1978

[Y. V. CHANDRACHUD, C.J., P. N. BHAGWATI AND D. A. DESAI, JJ.]

Income Tax Act, 1961, S. 172(2)—Charter party agreement providing for the payment by the Charterers "for the use and hire" of the vessel—Whether the payment can be said to have been made "on account of the carriage of goods" so as to attract the charging provision of S. 172(2) of the Income Tax Act, 1961.

The respondent which is a company incorporated under the Indian Companies Act does the business of Clearing and Forwarding and as Steamship agents. In 1970, respondent acted as the shipping agents of "Aluminium Company of Canada Ltd." which is a non-resident company. The Aluminium company time-chartered a ship "M. V. Sparto" belonging to another non-resident company. Clause 4 of the Charter party provided for the payment by the charterers "for the use and hire" of the vessel at the rate of U.S. 4.50 dollars per ton on vessels' total dead weight carrying capacity per calendar month commencing on and from the date of delivery of the ship, "hire to continue until the hour of the day of her re-delivery". The said ship called at the port of Betul, Goa on March 1, 1970 and loaded 13000 long tons of bauxite belonging to the time-charterers, the Aluminium Co. The ship was allowed to leave the port of Betal on the basis of the guarantee bond executed by the respondent in favour of the President of India undertaking to pay the income tax payable by the time-charterers under Section 172 of the Income Tax Act, 1961. On April 15, 1970, the First Income Tax Officer, Margao issued a demand notice to the respondent for the payment of Rs. 51,191/- by way of income tax under the aforesaid provision. The respondent filed a Writ Petition asking for a mandamus directing the Income Tax Officer to withdraw the notice. The petition was allowed by the Judicial Commissioner Goa.

Dismissing the appeal by Certificate, the Court

HELD : 1. The amount which the time-charterers were required to pay to the owners of the ship was not payable on account of the carriage of goods but was payable on account of the use and hire of the ship. [1977 E-F]

2. It is true that one cannot place over-reliance on the terms which the parties give to their agreement or on the label which they attach 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 is something other than what, by a clever device of drafting, it is made to appear. [1977 F-G]

In the instant case there is no reason to hold that the real intention of the parties was something different from what the words used by them, convey in their accepted sense. The charter party was drawn in a standard form approved by the "New York Produce Exchange" and there is no warrant for supposing that though the payment which the charterers bound themselves to make to the owners of the ship was on account of the carriage of goods, the parties described it as being payable for the use and hire of the vessel, in order to avoid the payment of Indian Income Tax. 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

A of the circumstance that the ship was loaded with goods in India. The time-charterers loaded the ship at Betul, Goa, with their own goods. They did not sub-let the ship for the purpose of carriage of goods nor did they load the ship with goods belonging to a third party in which event they might have earned some freight on account of the carriage of goods. They paid hire charges to the owner of the ship for the use of the ship and since they loaded the ship with their own goods, they received nothing on account of the carriage of the goods. Neither the one nor the other, therefore, received any amount on account of the carriage of the goods. [947 G-H, 948 A, B, F-G]

B 3. A contract by charter party is a contract by which an entire ship or some principal part thereof is let to a merchant who is called the charterer, for the conveyance of goods on a determined voyage to one or more places, or until the expiration of a specified period. The contract in the instant case is of the nature of time-charter-party, whether there is a demise of the ship or not being immaterial. Clause 4 of the charter-party provides for the payment by the charterers "for the use and hire" of the vessel at the rate of U.S. 4.50 dollars per ton on vessel's total dead weight carrying capacity, per calendar month, commencing on and from the date of delivery of the ship, "hire to continue until the hour of the day of her re-delivery". These clauses of the charter-party show that the Aluminium Company took the ship from its owners on a time-charter-party, that the owners were entitled to payment for the use and hire of the ship, that the amount was payable irrespective of what use the ship was put to by the time-charterers or indeed, whether it was put to any use at all and that no part of the payment can be said to have been made on account of the carriage of goods. [948 G-H, 949 D-F]

D CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1735 of 1972.
1972.

From the Judgement and Order dated the 29th October 1971 of the High Court of Goa, Daman and Diu in S.C.A. No. 31 of 1970.

V. S. Desai and Miss A. Subhashini for the Appellant.

E *S. T. Desai, M. V. Shah and R. P. Kapur* for Respondent.

The Judgment of the Court was delivered by

CHANDRACHUD, C.J.—The respondent, Gosalia Shipping Private Limited, which is a company incorporated under the Indian Companies Act does the business of Clearing and Forwarding and as Steamship Agents. In 1970, respondent acted as the shipping agent of 'Aluminium Company of Canada, Limited' which is a non-resident company. The Aluminium Company time-chartered a ship "M. V. Sparto" belonging to a non-resident company called Sparto Compania Naviera of Panama. The said ship called at the port of Betul, Goa, on March 1, 1970 where it loaded 13,000 long tons of bauxite belonging to the time-charterers, the Aluminium Company. On March 20, 1970 the ship left for Alfred port, Canada. The ship was allowed to leave the port of Betul on the basis of a guarantee bond executed by the respondent in favour of the President of India, undertaking to pay the income-tax payable by the time-charterers under section 172 of the Income-tax Act, 1961. On April 15, 1970, the First Income-tax Officer, Margao, Goa, issued a demand notice to the respondent for payment of Rs. 51,191 by way of income-tax under the aforesaid provision. The respondent filed Special Civil Application No. 31 of 1970 in the Court of the Judicial Commissioner, Goa, asking for a writ of Mandamus directing the Income-tax Officer to withdraw the demand notice. By a judgment dated October 29, 1971,

the learned Judicial Commissioner allowed the respondent's Writ Petition and passed an order quashing the demand notice. Having obtained from the Judicial Commissioner a certificate of fitness to appeal to this Court under article 133(1)(b) and (c) of the constitution, the Union of India has filed this appeal.

The question as to whether the respondent is liable to pay the income-tax demanded of it by the Income-tax Officer, depends for its decision on the construction of section 172 of the Income-tax Act, 1961, which read as follows at the relevant time :

"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, live-stock, mail or goods shipped at a port in India.

(2) Where such a ship carries passengers, live-stock, mail or goods shipped at a port in India, one-sixth 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 on 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 Income-tax 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, live-stock, mail or goods shipped at that port since the last arrival of the ship thereat :

Provided that where the Income-tax Officer is satisfied that it is not possible for the master of the ship to furnish the return required by this sub-section 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 Income-tax Officer may, if the return 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 Income-tax Officer shall assess the income referred to in sub-section (2) and determine the sum payable as tax thereon at the

A rate or rates 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.

B (5) For the purpose of determining the tax payable under sub-section (4), the Income-tax Officer may call for such accounts or documents as he may require.

C (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.

D (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 year 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, live-stock, mail or goods shipped at Indian port 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."

F Section 172 occurs in Chapter XV which is entitled "Liability in special cases" and the sub-heading of the section is "Profits of 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 tax in the case of a ship belonging to or chartered by a non-resident which carries passengers, livestock, 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. A

The assessee in this case is the Aluminium Company of Canada which had time-chartered the ship and on whose behalf its shipping agent, the respondent, had executed the guarantee bond. Since the Company is a non-resident and the ship carried goods which were shipped at a port in India, the conditions specified in sub-section (i) are satisfied and the provisions of section 172 will apply for the purpose of levy of tax, notwithstanding anything contained in the other provisions of the Income-tax Act. B

The charging provision is contained in sub-section (2) of section 172, the relevant part of which provides that where a ship belonging to or chartered by a non-resident carries goods shipped at a port in India, one-sixth of the amount paid or payable "on account of such carriage" to the owner or the charterer or to any person on his behalf shall be deemed to be income accruing in India to the owner or charterer on account of such carriage. The ship was delivered to the time-charterers at Betul, Goa, whereupon they loaded it with their own goods to the fullest capacity of the ship. Under the charterparty, the charterer had agreed to pay to the owners of the ship a sum of 4.50 U.S. dollars per ton on the total dead weight carrying capacity per calendar month, commencing on and from the date of the delivery of the ship. The short question for consideration is whether the amount which the time-charterers had agreed to pay to the owners of the ship was payable "on account of" the carriage of goods. C
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If any guidance is to B sought from the terms of the agreement between the parties, the conclusion seems inescapable that the amount which the time-charterers were required to pay to the owners of the ship was not payable on account of the carriage of goods but was payable on account of the use and hire of the ship. F

The charter party provided by clause (4) that the charterers shall pay a sum at the rate of 4.50 U.S. dollars on the total dead weight carrying capacity of the ship, "for the use and hire of the said vessel". It is true that one cannot place over-reliance on the form which the parties give to their agreement or on the label which they attach 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 is something other than what, by a clever device of drafting, it is made to appear. But we see no reason to hold that the real intention of the parties was something different from what the words used by them convey in their accepted sense. The charterparty was drawn in a standard form approved by the 'New York Produce Exchange' and there is no warrant for supposing that though the payment which the Charterers bound themselves to make to the owners of the ship was on account of the G
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A carriage of goods, the parties described it as being payable for the use and hire of the vessel, in order to avoid the payment of Indian income-tax.

B Indeed, the other terms of the charterparty and the general tenor of the document show that the payment was in fact to be made by the time-charterers for use and hire of the ship. Under the agreement, charterers had the "liberty to sublet" the vessel for all or any part of the time covered by the agreement. The Captain of the ship was to be under the orders and directions of the charterers as regards employment and agency. And if the vessel be lost, money paid in advance and not earned was to be returned by the owners to the charterers at once. These terms and conditions of the contract between the parties are not consistent with the theory that the charterers were liable to pay to the owners any amount on account of the carriage of goods. **C** In order that it may be said that the amount was payable on account of the carriage of goods. Under the terms of charterparty, the 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. **D** Under the terms of Charterparty, 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. **E**

It is relevant, for the decision of the question under consideration, that the time-charterers loaded the ship at Betul, Goa, with their own goods. They did not sub-let the ship for the purpose of carriage of goods nor did they load the ship with goods belonging to a third party in which event they might have earned some freight on account of the carriage of goods. They paid hire charges to the owner of the ship for the use of the ship and since they loaded the ship with their own goods, they received nothing on account of the carriage of the goods. Neither the one nor the other, therefore, received any amount on account of the carriage of the goods. **F**

G The weakness of the argument advanced by the appellant's counsel consists in its assumption that the charterparty has to be an agreement for the carriage of something like goods, passengers, livestock or mail. A contract by charterparty, says, B. C. Mitra in his "Law of Carriage by Sea" (Tagore Law Lectures 1972), : "is a contract by which an entire ship or some principal part thereof is let to a merchant who is called the charterer, for the conveyance of goods on a determined voyage to one or more places, or until the expiration of a specified period; in the former case it is called a 'voyage charterparty', and in the latter a 'time charterparty' ". **H** A time charter, according to the

author, is "one in which the ownership and also possession of the ship remain in the original owner whose remuneration or hire is generally calculated at a monthly rate on the tonnage of the ship, while a voyage charter is a contract to carry specified goods on a defined voyage on a remuneration or freight usually calculated according to the quantity of cargo carried." In Carver's "Carriage by Sea" (Eleventh ed., 1963, page 263), it is stated that "all charterparties are not contracts of carriage. Sometimes the ship itself, and the control over her working and navigation, are transferred for the time being to the persons who use her. In such cases the contract is really one of letting the ship, and, subject to the express terms of the charterparty, the liabilities of the shipowner and the charterer to one another are to be determined by the law which relates to the hiring of chattels and not by reference to the liabilities of carriers and shippers." According to Scrutton on Charterparties (seventeenth ed., 1964, page 4), charterparties fall into three main categories: (i) charters by-demise (ii) time charters (not by way of demise), and (iii) voyage charters. Sometimes categories (i) and (ii) are both referred to as time charters as distinguished from category (iii), and they have this in common that the shipowner's remuneration is reckoned by the time during which the charterer is entitled to the use of services of his ship." The contract in the instant case is of the nature of time-charterparty, whether there is a demise of the ship or not being immaterial. Clause 4 of the charterparty provides for the payment by the charterers "for the use and hire" of the vessel at the rate of U.S. 4.50 dollars per ton on vessel's total dead weight carrying capacity, per calendar month, commencing on and from the date of delivery of the ship, "hire to continue until the hour of the day of her re-delivery". These clauses of the charterparty show that the Aluminium Company took the ship from its owners on a time-charterparty, that the owners were entitled to payment for the use and hire of the ship, that the amount was payable irrespective of what use the ship was put to by the time-charterers or indeed, whether it was put to any use at all and that no part of the payment can be said to have been made on account of the carriage of goods. Similies can be misleading but if a hall is hired for a marriage, the charges payable to the owner of the place are for the use and hire of the place, not on account of marriage.

For these reasons we confirm the judgment of the learned Judicial Commissioner and dismiss the appeal with costs.

S. R.

Appeal dismissed.