PETITIONER:
DALMIA CEMENT LTD., RAJASTHAN

Vs.

RESPONDENT:
COMMISSIONER OF INCOME TAX,

DATE OF JUDGMENT: 16/04/1999

BENCH:
Umesh C. Banerjee, M.Srinivasan

JUDGMENT:

BANERJEE, J.

These appeals by the grant of special leave are directed against a common order of the High Court in Income Tax Reference Nos.87 and 88 of 1974 in terms of the order of Reference by the Income Tax Appellate Tribunal, Delhi Branch in respect of Assessment Years 1964-65 and 1965-66. The Tribunal has referred the following two questions to the High Court for the above-mentioned assessment years 1964-65 and 1965-66. For the assessment year 1964-65 the question reads as below: "Whether on the facts and in the circumstances of the case, Income Tax Appellate Tribunal was right in holding that the profit arising from the working of the two cement factories situated in Pakistan for the year 1.10.1962 to 30.9.1963 was taxable in the hands of the applicant company?"

And for the assessment year 1965-66 the question was:

"Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the profit arising from the working of the two cement factories situated in Pakistan for the year 1.10.1963 to 30.9.1964 was taxable in the hands of the applicant company?"

The High Court however, answered the questions in the affirmative for both the assessment years and hence these appeals.

At this juncture, it would be convenient to advert to the contextual facts briefly. The assessee Dalmia Cement Limited, the owner of two cement factories situated in Pakistan, by an agreement in writing dated 24th July, 1962 agreed to sell and transfer to one Maneckji, its properties and assets in Pakistan represented in the two cement factories. The facts depict further that subsequent to the agreement, the parties did enter into a supplemental agreement on 2nd November, 1962. We

would refer to both the agreements presently but before so doing, to conclude the factual aspects be it noted that the assessee in its return of income for the assessment year 1964-65 on 30th June, 1964 recorded the total income as Rs.24,28,675/- but subsequently on a revised return, filed on 20th November, 1968, the total income shown was reduced to Rs.1,40,852/-. Similarly for the year 1965-66, the return filed on 30th June, 1965 recorded the total income of Rs.24,58,314/- but the revised return depicted a loss of Rs.2,45,786/-. The original return however did not include profits from the working of the two Pakistan factories but only the interest income for the two year period from 1.10.1962 to 30.9.1964 which however was deleted in the revised return on the ground of non-receipt of the same. The Income Tax Officer did however reject the contention that the profit from the two factories belong to Mr. Maneckji or his nominee with effect from 1.10.1962 and the income-tax Officer's assessment included the profits of the two companies in the total income of the assessee company for both the years. On an appeal to the Appellate Assistant Commissioner the order of the Income Tax Officer stood confirmed for both the years. Similar is the order of the Tribunal in the appeal by the assesssee by recording a finding that profits arisen after 30.9.1962 and before 30.9.1964 were taxable in the hands of the assessee company. Subsequently the matter came up before the High Court for consideration of the above noted two questions and the High Court as noticed above answered the same in the affirmative. It would be convenient at this juncture however to advert to the terms of the agreement dated 24th July, 1962 which inter alia contained the following: ".....and whereas, the company has agreed to sell and transfer to Mr. Maneckji all its properties and assets in Pakistan pertaining to the said business mentioned briefly in the preceding paragraph and set out in detail hereinafter for the consideration and upon the terms and conditions hereinafter appearing.." ".....The consideration for the said sale shall be ascertained in the following manner and the total sum thereby ascertained (less the deduction of Rs.20,00,000 (rupees twenty lacs) therefrom) is hereinafter called "the purchase price". a) the price to be paid by Mr. Maneckji for all the fixed assets to be more fully described in the Schedule hereinbefore mentioned shall be their value in the books of accounts of the Company on the 30th day of September, 1962 hereinafter called "assessment day" subject to adjustments at book prices for fixed assets bought, sold, damaged or destroyed between assessment day and the date on which the transaction is completd hereinafter called "completion day" (normal) wear and tear excepted); b) the price to be paid by Mr. Maneckji for all stores including firebricks, grinding media, gunny bags, spare parts, general stores, coal and miscellaneous items to be transferred to Mr. Maneckji shall be their value in the books of account of the Company upon assessment day, subject to the adjustment at book prices for the above

items bought, manufactured, in process damaged, sold or destroyed between assessment day and completion day; c) the price to be paid by Mr. Maneckji for all goods in transit, raw materials, in process, clinker (half made cement), manufactured cement, firebricks manufactured by Dandot Factory, shall be their value in the books of account of the Company upon assessment day, subject to adjustment at book prices for the above items bought, manufactured, in process, damaged, sold or destroyed between assessment day and completion day; d) cash shall be transferred at par;" "18.....The completion of the transaction is subject to the approval of the Governmental agencies of both India and Pakistan to the extent of such approvals as may be necessary and required by law for the effectuation of this Agreement and Mr. Maneckji will use his best endeavours to obtain all the said approvals from the Government of Pakistan. The Company hereby undertakes on its part to use its best endeavours to obtain all the said approvals from the Government of India. 19. The transfer of the subject matter of this Agreement shall be completed on or before the 31st December, 1962 and unless otherwise mutually agreed in writing, this Agreement shall expire upon that day. 20. This agreement and/or the subject matter hereof may be transferred to anybody corporate formed and controlled by Mr. Maneckji, if so required and the Company shall be bound to effect the transfer as if such body corporate were a party hereto." It would also be convenient at this juncture to note some of the terms of the Supplemental Agreement as below: "Now therefore it is agreed by and between the parties that: Clause 2 of the said agreement shall be deleted and replaced by the following Clause: "The consideration of the said sale shall be ascertained in the following manner and total sum thereby ascertained (less the deduction of Rs.20,00,000/- therefrom) is hereinafter called the purchase price. a) The price to be paid by Mr. Maneckji for all the fixed assets shall be their value in the books of account of the Company on the 30th day of September, 1962 hereinafter called "assessment day".

..... d) All cash held by the Company in Pakistan as on 30th September, 1962 shall be transferred at par.

e) Investments and Government securities shall be transferred at average market price on assessment day except that the shares held by the Company in Dalmia Cement (Pakistan) Ltd., a wholly owned subsidiary shall be transferred at the net worth of the shares determined with reference to the Balance Sheet of Dalmia Cement (Pakistan) Ltd., as on 30th September, 1962.

f) The price to be paid by Mr. Maneckji for all the Company's loans, advances outstandings and other debts standing to the credit of the Company shall be their value in the books of the Company on assessment day.

The interest payable by Mr. Maneckji at six per cent annum on the purchase price shall be calculated with effect from 1st October 1962 and paid in the manner provided in para 3 (b) of the said agreement.

The profit and loss arising from the operations of the Company during the pe riod subsequent to 30th September, 1962 shall, in the event of the completion of the sale transaction in accordance with the said agreement, be to the account of Mr. Maneckji. The operations of the Company's factories and business in Pakistan shall, however, continue to remain under the full and undisturbed control, and direction of the Company as hitherto, and nothing stated herein shall be construed as permitting in any manner interference on the part of Mr. Maneckji with the conduct of the business and operations of the factories until the same are transferred to Mr. Maneckji on the completion of the transaction.

In supercession of para 5 of the said agreement, it is hereby agreed that the all liabilities of the Company relating to the period uptill 30th September, 1962 which may relate to the properties, assets and premises hereby transferred shall be the sole responsibility of the Company and Mr. Maneckji shall be responsible for all such liabilities in respect of the period commencing 1st October 1962."

Incidentally, be it noted that the Principal Agreement dated 24th July,1962 though had a time limit, the same, by consent of the parties and by way of Supplemental Agreement was extended from time to time and the period of completion of the purchase was extended till 30.9.1964 and it is on that date the parties did enter into a Sale Deed for transfer of rights by the assessee Dalmia Cement Ltd. in favour of Pakistan Progressive Cement Industry.

Mr. Vellapally, the learned Senior Advocate appearing in support of the appeal was rather emphatic in his contention that the High Court was in clear error by reason of its reliance on the fact of physical control of the factories rather than to the ownership or the title to the profits which was entirely a matter of agreement between the buyer and the seller. The factum of non interference by Mr. Maneckji in the conduct of the business and operations of the factory until the same are transferred to Mr. Maneckji on completion of the transaction, it appears has had weightage with the High Court. The Appellant contended that the High Court has otherwise misread and misapplied the law pertaining to accrual of profits by reason of the fact that the supplemental agreement itself records that the profits have to be to the accounts of Mr. Maneckji. The High Court in this context observed: "profits would arise simultaneously by the conduct of business and running of the factories. It is true that as per clause 3 of the Supplemental Agreement dated 2nd November, 1962, profits have to

be to the account of Mr. Maneckji but that would be only in the event of completion of the sale transaction by a particular date which would be an event to take place subsequent to the accrual of the profit." ..... ".....when the business and operation of the factory is to be effected by the assessee Company without any interference by Mr. Maneckji or his nominee and the sale transaction is yet to take place which may take place or may not take place. In such a situation there will be no stoppage of accrual of profits to the assessee company. It is true that cash in hand as well as in the Bank, and all bills and notes of the bank would also stand transferred but that will take place on a future date when the Sale Deed is executed. In respect of an event which is yet to take place overriding title does not come into existence, accrual of profit can only be stopped if an overriding title is created before the accrual of the profits....". While at the first blush the reasoning seems to be rather attractive but on consideration of the issue on a wider perspective the High Court cannot but be said to be in clear error. For the year 1965-66 when the order of assessment was made, the profits were ascertained on 30th September, 1964 and the property was itself transferred, as such question of accrual of profit, on account of the transferred assets, does not and cannot arise. Be it noted that completion of sale transaction ought to be attributed its normal meaning and in this regard contextual facts should also be looked into and considered in the proper perspective. The sale transaction in fact has taken place and as such there being any contingency, as was there at the earlier point of time, does not arise. The event has taken place and the Supplemental Agreement dated 2nd November, 1962 makes the situation clear and categorical. The parties agreed the relevant date to be 30th September, 1962 and not the completion of sale. Clause 3 of the agreement of which, the High Court made a special reference and interpreted that by reason of the contingent event which would be subsequent to the accrual of profits, the profit cannot but be treated to be in the hands of the assessee does not withstand the test of correctness. The High Court has not laid any importance to the event which stands completed by reason of the sale agreement. There is no question of enabling the assesssee to retain the profit in its own hand after the 'sale agreement'. The event as noticed above, has taken place and by reason of the event and in terms of the provisions of the agreement question of tracing the profit in the hands of the assessee does not and cannot arise. In any event profits of a business do not accrue from day to day but at the end of the accounting year. Profits were ascertained on 30th September, 1964 when the property was transferred as such for the year 1965-66 as noted above, question of profit accruing to the assessee does not arise. As a matter of fact the profit stands diverted to the purchaser in terms of and in accordance with the agreement dated 24th July, 1962 read with Supplemental Agreement dated 2nd

November, 1962 and the date of actual transfer of the factory in question which, in fact, has taken place on 30th September, 1964 does not alter the situation. The income stands diverted by an overriding title as a matter of fact even before the accrual.

The concept of diversion of income by an over-riding title has been very lucidly explained by this Court in CIT v. Sitaldas Tirathdas's case [1961 (41) ITR 367] in the manner following:-

"In our opinion, the true test is whether the amount sought to be deducted, in truth, never reached the assessee as his income. Obligations, no doubt, there are in every case, but it is the nature of the obligation which is the decisive fact. There is a difference between an amount which a person is obliged to apply out of his income and an amount which by the nature of the obligation cannot be said to be a part of the income of the assessee. Whereby the obligation income is diverted before it reaches the assessee, it is deductible; but where the income is required to be applied to discharge an obligation after such income reaches the assessee, the same consequence, in law, does not follow. It is the first kind of payment which can truly be excused and not the second. The second payment is merely an obligation to pay another portion of one's own income, which has been received and is since applied. The first is a case in which the income never reaches the assessee, who even if he were to collect it, does so, not as part of his income, but for and on behalf of the person to whom it is payable."

In Travancore Sugars & Chemical's case [1973 (88) ITR 1], this Court reiterated the same test and observed:-

"It is thus clear that where by the obligation income is diverted before it reaches the assessee, it is deductible. But, where the income is required to be applied to discharge an obligation after such income reaches the assessee it is merely a case of application of income to satisfy an obligation of payment and is therefore not deductible."

In this context, reference to a Bench decision of the Calcutta High Court in the case of Commissioner of Income Tax Vs. Jhanzie Tea Association [1989 (178) ITR 296] also seems to be apposite. S.C.Sen, J. (as His Lordship then was) in the last noted decision observed:-

"It is true that the income-tax liability cannot be assigned by any agreement. The Revenue is entitled to proceed against the person who earned the income but where the income has been diverted by an overriding title even before accrual, then the Income-tax Officer cannot proceed to assess the income thus diverted as the income of the transferor. In this case, not only had the tea estates been transferred but the income accruing therefrom had also been transferred to the

purchaser with effect from January 1, 1969. All its manufacturing activities as from that date were on behalf of the purchaser. The income attributable to the manufacturing activity accrued to the purchaser. The income attributable to the manufacturing activity accrued to the purchaser. I fail to see how the income realised from sale of such tea can be assessed as the income of the vendor.

In this connection, reference may be made to the observations made by G.K. Mitter, J. in the case of CIT Vs.Tea Producing Co. of India Ltd. (1963) 48 ITR 200 (Cal), where it was stated that before a person could be assessed under Section 10, it must be shown that it was he who carried on the business, profession or vocation and in the case of a business, it was open to any person to put another person in charge thereof although ostensibly such person appeared to be carrying on the business, in reality the business was that of the person who owned it and under section 10 of the Act such owner of the business would be the assessee. It was observed in that case that (at page 206):

"If a business carried on by A is transferred to B as from a certain point of time, B alone can be assessed to tax in respect of the period subsequent to the change of the ownership. A and B may agree that any profits or loss of the business as from a date anterior to that of the change of ownership will be on B's account. In such a case, A will have to account to B for the income and profits of the business covered by the period of the agreement and A may be held to have carried on the business as B's agent from the agreed date."

Similar is the view expressed by the Bombay High Court in the case of Commisisioner of Income Tax Vs. M.D. Kanoria [1982 (137) ITR 137]. The law thus seems to be well-settled by a long catena of cases to the effect that in the event of their being a diversion of income by overriding title, question of the income being assessed in the hand of the assessee does not and cannot arise. Be it noted here, that at no stage of the proceeding up to the High Court, there was any dispute as regards assessee's contention of diversion by overriding title. The finding of the High Court that issue of overriding title on the basis of an event which is yet to take place, being not available in the facts of the matter under consideration, cannot in our view be said to be a correct appreciation of law, since on the date of assessment, the event has already taken place and an overriding title has in fact been created by operation of law and there is no escape from it and as such we are unable to record our concurrence therewith.

Mr. Vellapally, on the next count contended that the High Court's finding as regards the applicability of Section 60 of the Act is also totally unwarranted having due regard to the language of

Section 60 and Section 63. For convenience sake Sections 60 and 63 are set out hereunder: "Section 60. Transfer of income where there is no transfer of assets- All income arising to any person by virtue of a transfer whether revocable or not and whether effected before or after the commencement of this Act shall, where there is no transfer of the assets from which the income arises, be chargeable to income-tax as the income of the transferor and shall be included in his total income."

"Section 63. "Transfer" and "revocable transfer" defined- for the purposes of Sections 60,61 and 62 of this Section-

(a) a transfer shall be deemed to be revocable if - (i) it contains any provision for the re-transfer directly or indirectly of the whole or any part of the income or assets to the transferor, or

(ii) it, in any way, gives the transferor a right to re-assume power directly or indirectly over the whole or any part of the income or assets;

(b) "transfer" includes any settlement, trust, covenant, agreement or arrangement."

The High Court while dealing with the matter observed: "Section 60 contemplates as to how the income would be chargeable to income tax when there is no transfer of the assets from which income has arisen. Section 63 clause (b) defines the word "transfer" to include any settlement, trust, covenant, agreement or arrangement. If any document of the nature mentioned in clause (b) exists, it would be considered to be a transfer. In the present case, there are agreements between the parties. The agreements between the parties would be considered to be transfer but in fact, transfer of assets had not taken place till 30th September, 1964. So, whatever income has arisen prior to the transfer of assets, Section 60 clearly contemplates that such an income which has arisen before the actual transfer of assets has taken place, would be chargeable to income tax as the income of the transferor and shall be included in his total income.

In the present case, up to 30th September, 1964, there was no transfer of assets and under clause-3 of the supplemental agreement dated 2.11.62, the profits had to be to the account of the transferee on completion of the sale transaction. Even if there is an agreement for diversion of the profits prior to 30th September, 1964, still, in our opinion, in the light of the provisions contained in Section 60, the profits would be taxable in the hands of the assessee company."

It is this finding of the High Court which has been criticised by the appellant and we do find some justification in that regard by reasons of the specific language used by the legislation Section 60 of the Act, has its application only to a case where income accrues to the transferee but the income earning asset or source of income remains with the transferor. As a matter of fact this finding of the High Court that income accrued to the Transferor stands contradicted by the finding that Section 60 has its due application in the facts of the matter under consideration. Incidentally, Section 63 contains a rather special definition of "Transfer" for the purposes of Sections 60 to 62 and inter alia includes an "agreement" and in this case the very existence of the agreement to transfer dated 24th July, 1962 rules out and totally excludes the application of Section 60 of the Act. The Tribunal however recorded a finding different from that of the High Court as regards the issue of applicability of Section 60 of the Act. The Tribunal recorded:- "Nor are inclined to accept the contention of the Departmental Representative that even under Section 60 the profits accruing after 30.9.1962 were chargeable in the hands of the company. For one thing the underlying assumption of this argument would be that income had actually accrued to Maneckji or his nominees whereas for reasons given earlier we are unable to accept this assumption. Moreover, according to our reading of Section 60 it relates to an arrangement or settlement according to which both the transfer of income and the retention of the ownership of the assets form parts of one scheme."

In view of the above, we do feel it expedient to record that the Tribunal's finding as regards the applicability of Section 60 cannot but be ascribed to be otherwise in accordance with the known principles of law, having due regard to language used therein and the High Court unfortunately, we are constrained to record, has in fact misconstrued the provision and thus fell into an error. Significantly, however, the Tribunal while dealing with the matter has recorded in its order "we are painfully aware of the fact that the case of the assessee is a hard one, that the assessee had not received any part of the purchase price so far and that the position regarding the adjustment of profits earned earlier is equally bad. But we have to apply the provisions of law as we find them uninfluenced by the hardships through which though no fault of its own some assessee may have to pass." While we appreciate the sympathy of the Tribunal towards the assessee and record that hard cases do not make bad laws but both the Tribunal and the High Court erred in appreciating the true perspective of the factual matrix of the matter in issue read with the law as noticed above. The other aspect of the matter ought also not to be lost sight of to wit: the assessment of capital gains: There appears to be clear inconsistency between the assessment of capital gains on the

transfer of the factories on one hand and finding on accrual of income since the computation of capital gains was effected by treating the gross amount of consideration as the sale price. The Income-tax Officer thus by implication accepted the profits as belonging to the transferee and not to the Transferor - otherwise, the net amount paid alone ought to have been taken as the sale price. The High Court's judgment therefore, does not only suffer from apparent inconsistency but on a totality of the situation is inherently contradictory. In the contextual facts and having due regard to the provisions of law as noticed above, the High Court's affirmation to the questions raised stands negated and are thus answered in the negative and in favour of the assessee. In the premises the Appeals succeed. The judgment and order of the High Court stand set aside along with the order of the Tribunal as also that of the Income-tax Authorities. The respondent-tax authorities are directed to take steps in accordance with law, having due regard to the observations made herein before in this judgment. There shall, however, be no order as to costs.