

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN

FRIDAY, THE 1ST FEBRUARY 2008 / 12TH MAGHA 1929

WP(C).No. 7398 of 2005(E)

PETITIONER:

**SOUTH INDIA CORPORATION LIMITED,
RANI SEETHAI HALL, 5TH FLOOR, 603, ANNA SALAI,
CHENNAI-600 006, REP. BY ITS WHOLETIME
DIRECTOR, VR. VEERAPPAN.**

**BY ADV. V. RAMACHANDRAN (SR.)
SRI.K.ANAND (A.201)
SMT.LATHA KRISHNAN**

RESPONDENTS:

**1. THE ADDL.COMMISSIONER OF INCOME TAX,
RANGE-2, C.R. BUILDINGS, I.S. PRESS ROAD,
ERNAKULAM, COCHIN-18.**

**2. THE JOINT COMMISSIONER OF INCOME TAX
RANGE-2, C.R. BUILDINGS, I.S. PRESS ROAD,
ERNAKULAM, COCHIN-10.**

**3. UNION OF INDIA, REP. BY THE SECRETARY
TO GOVERNMENT, MINISTRY OF FINANCE,
NEW DELHI.**

**BY ADV. SRI.P.K.R.MENON(SR.),SR.COUNSEL FOR IT
SRI.GEORGE K. GEORGE, SC FOR IT
SMT.MINI R.MENON, ADDL.CGSC**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 17/09/2007, THE COURT ON 01/02/2008 DELIVERED THE
FOLLOWING:**

WP(C) NO: 7398/2005

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1. COPY OF THE APPLICATION DT. 3/12/2004.

EXT.P2. COPY OF THE LETTER DT. 14/1/2005 FROM THE R1 TO THE PETITIONER.

EXT.P3. COPY OF THE LETTER DT. 27/1/2005 FROM THE R1 TO THE PETITIONER.

EXT.P4. COPY OF THE LETTER DT 27/1/2005 FROM THE PETITIONER TO THE R1.

EXT.P5. COPY OF THE EXT. P5 ORDER.

RESPONDENT'S EXHIBITS NIL.

True copy

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THOTTATHIL B. RADHAKRISHNAN, J.

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WP(C).No.7398 of 2005-E

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Dated this the 1st day of February, 2008.

JUDGMENT

1.Arising for decision in this case are certain questions relating to the interpretation of some of the provisions in Chapter XII-G of the Income Tax Act, 1961, the “Act”, for short, providing special provisions relating to income of shipping companies, as per the Finance Act, 2004, hereinafter referred to as the “Finance Act”.

2.Chapter XII-G of the Act provides, among other things, a tonnage tax scheme, which is optional. That Chapter, comprising of Sections 115V to 115VZC, was inserted in the Act, with effect from 1-4-2005.

3.The petitioner opted for the tonnage tax scheme

by making an application in terms of section 115VP of the Act. The first respondent Additional Commissioner issued Ext.P5 decision rejecting that application. This is under challenge.

4. The petitioner company alleges that it acquired four ships between 1995 and 2001 and that it has been regularly assessed to income tax in respect of income earned by it, including the income from the business of operating ships. It has also pleaded the particulars of income earned by it in respect of the business relating to the operation of ships between 1995-1996 and 2003-2004. On the basis of such pleadings, it is asserted that the view taken in the impugned Ext.P5 refusing to accept the option of the petitioner for the tonnage tax scheme is without jurisdiction and that the Joint Commissioner ought to have acted on the option of the petitioner which, it is asserted, is a qualifying company in terms of

Section 115VC of the Act.

5. Learned senior advocate Sri.V.Ramachandran argued on behalf of the petitioner that the effect of the provisions contained in Section 115VA of the Act, whereby the income from the business of operating qualifying ships is available for computation on the basis of option in terms of the provisions of Chapter XII-G, as available to a company, cannot be whittled down by restricting the scope of the term "company" in Section 115VA by applying Section 115VC, which provides that a company is a qualifying company for the purpose of Chapter XII-G if, among other things, the main object of the company is to carry on the business of operating ships. On such premise, it is argued that the concept of "main object", in so far as Section 115VC(d) is concerned, has to be understood in the context of the business of operating qualifying ships and it is not as if a company, which has multi-dimensional business

activities, cannot claim the benefit of option under Chapter XII-G. In support of this contention, it was pointed out that the Finance Minister, introducing the provisions in question as part of the Finance Bill, 2004, stated in the Lok Sabha on 8th April, 2004 as follows:

“The shipping industry has demanded the levy of a tonnage tax to make it internationally competitive. Tonnage tax will also induce more ships to fly the Indian flag. I propose to accept the request. Consequently, the concessional regime under Section 33AC will be withdrawn and shipping companies will now have only an option to pay the tonnage tax or normal corporate tax on profits.”

In the Notes on Clauses appended to the Bill, relating to the provisions in Chapter XII-G, it is stated as follows:

“The proposed section 115VA relating to computation of profits and gains of

shipping business and provides that a tonnage tax company, may, at its option, compute the income from the business of operating qualifying ships in accordance with the provisions of the Chapter and such income shall be deemed to be the income chargeable to tax under the head "Profits and gains of business or profession."

6. On the strength of the aforesaid, it was argued on behalf of the petitioner that, if at all there is any ambiguity in the matter of construing Section 115VC, the statement of the Minister, introducing the Bill, clearly throws light removing it. It was also argued that if among two competing constructions, one results in equity rather than in the injustice that would arise out of the other, then the former, which advances justice, should be preferred to the literal construction. It was argued that the petitioner is a company incorporated way back in 1935 and obviously, had, within the concept of

its Memorandum and Articles, all business activities as could be conceived from the point of view of a company, then established in Madras, during the British Regime and that for determining the "main object of the company", at this distant point of time, mere reference to its Memorandum and Articles is insufficient. It is argued that the real thrust of the business activities that the company carries on at the relevant time, that is, while it seeks option under Chapter XII-G of the Act, has to be reckoned. On the basis of such contention, it is argued that the provisions of Chapter XII-G, having been introduced with effect from 1-4-2005, it ought to have been considered that the petitioner had established that operating ships as contemplated in that Chapter is one of the main objects of the petitioner for the purpose of the said Chapter.

7. On behalf of the department, learned senior

advocate Sri.P.K.R.Menon, argued that though the issue in hand involves the interpretation of two statutory provisions, including the question as to the scope and content of the term “main object” in Section 115VC(d) of the Act, the petitioner has an alternate statutory remedy against the impugned order by way of an appeal under Section 246A(1)(a) of the Act and has, in fact, filed an appeal before the Commissioner of Income Tax (Appeals) against the impugned order on 1-3-2005. It is urged that the assessee having taken recourse to the alternate remedy by filing the appeal, this Court may be disinclined to consider the case on its merits. It is also pointed out that the impugned order has been passed after considering all the factual aspects of the case and by a speaking order.

8.In answer to the question as to the availability of alternate statutory remedy, which has, admittedly, been invoked by the petitioner, the

learned senior counsel for the petitioner relied on the decision of the Apex Court in State of H.P. v. Gujarat Ambuja Cement Ltd. (AIR 2005 SC 3936) and argued that once the fact situation for application of Chapter XII-G is established and the assessee is entitled to opt for the tonnage tax scheme, the statutory authority has no jurisdiction to refuse to act on the company's discretion to opt for the tonnage tax scheme and that, therefore, the impugned order is void and that even on the teeth of the availability of a statutory remedy by way of an appeal, which the petitioner has invoked, it is entitled to sustain this writ petition. It is further argued that, indisputably, the issues raised revolve around the interpretation of the provisions in Chapter XII-G and the answer to the arguments raised would necessarily affect the decision as to the jurisdiction and that, therefore, it is most appropriate that the writ court decides the issue rather than relegate to the statutory authority,

to decide on the question of jurisdiction under the Act. It was also pointed out that this writ petition was admitted on 4-3-2005 and with the passage of time, the availability of an alternate remedy by way of an appeal may not be considered as the sole ground on which the questions of law raised in this writ petition should go undecided by this constitutional court.

9. The impugned Ext.P5 has been issued on the ground that on consideration of the facts and evidence produced by the assessee, it cannot be considered that the main object of the company is to carry on the business of operating ships. The impugned order states that on verification of the annual report for the 2003-2004, it is seen that the assessee is engaged in operation of different divisions, namely, Civil Engineering Division, Clearing and Forwarding Division, Inland Water Transport, Granite Division, Windmill Division, Shipping Division and Textile Division and that

the Profit and Loss Account for the year ended 31-3-2003 and 31-3-2004 would show that out of the gross income of Rs.3,30,39,61,852/- for the year ended 31-3-2004, the ship charter income is Rs.49,57,91,037/- and out of Rs.3,26,32,12,101/- for the year ended 31-3-2003, the ship charter income is Rs.30,84,67,989/-. The first respondent accordingly concluded that as per the details available, it is seen that the income from shipping business and income from the qualifying ship forms only small portion out of the gross income of the company. Adverting to the Memorandum and Articles of Association of the petitioner company, the first respondent has taken it that the business of the petitioner, as shippers, shipping agents etc. is only one of the several objectives and is not the main objective. It is also noticed that though the company was established in 1935, it had not entered into the shipping business until 1995 when it purchased a ship and entered into the

shipping business by diverting company's business activities to buy a second hand bulk carriage. Accordingly, the impugned Ext.P5 was issued.

10. Section 115VA provides that notwithstanding anything to the contrary contained in Sections 28 to 43C, in the case of a company, the income from the business of operating qualifying ships, may, at its option, be computed in accordance with the provisions of Chapter XII-G and such income shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession". For the purpose of that Chapter, a qualifying ship, in terms of Section 115VD, is one which satisfies the three conditions (a), (b) and (c) thereof, but does not include the different categories enumerated thereunder as exclusions. The question as to whether a company is operating a ship, has to be decided with reference to Section 115VB. These provisions will show that

while the net effect of section 115VA is available to a company which operates qualifying ships, what could be computed on the exercise of option under section 115VA, has to result in the income so computed being deemed to be the profits and gains of such business, thereby meaning the business of operating qualifying ships, chargeable to tax under the head “profits and gains of business or profession”. “Tonnage tax company” means a qualifying company in relation to which tonnage tax is in force - See section 115VL. Section 115VP(1) provides that a qualifying company may opt for the tonnage tax scheme by making an application to the Joint Commissioner and under sub-section (3) of that section, the Joint Commissioner shall, on being satisfied about the eligibility of the company to opt for tonnage tax scheme, pass an order in writing approving the option for tonnage tax scheme. By section 115VC, a qualifying company for the purpose of Chapter XII-G, is one which is

an Indian company; with the place of its effective management being in India; owns at least one qualifying ship and the main object of which is to carry on the business of operating ships. The company satisfying the bench mark fixed in Section 115VC would, thus, be treated as a qualifying company to sustain its application under Section 115VP for approval of the option for tonnage tax scheme, which coverage would immediately be referable to Section 115VA. The overwhelming thrust of Section 115VA is the derivation of income from the business of operating qualifying ships. The concept of "the main object of the company" in Section 115VC(d), in the absence of any provision to the contrary in Chapter XII-G, has necessarily to be understood in the manner in which that term is understood in common parlance, without being tied down to any requirement of the Companies Act to classify the objects of a company into principal and ancillary and show them distinctly in the

object clauses in the Memorandum of Association of the company. In the context of business operations by companies having different business activities, the purpose of providing a provision like Section 115VA has to be understood to be one intended to provide a method of computation on tonnage basis, at the option of the assessee. In that view of the matter, the plain meaning of the term “the main object of the company” in Section 115VC(d), does not call for any restriction that the said provision would apply only in cases where the company applying for approval of its option, has to be one which has the business of operating ships enumerated as its main object, going by its Memorandum of Association.

11. The provisions in section 13(1)(c) and (d) of the Companies Act, in terms of the amendment by Act 31/1965, would show that the companies that existed at the commencement of such amendment were not required to classify their objects as is

required of the companies incorporated thereafter. Such classification on the basis of the date of coming into force of the said amendment to the Companies Act, was the effect of the Joint Selection Committee accepting the representation before it, that any effort to re-draft the object clauses of the existing companies would not be commensurate with the results intended by the amendment.

12.As already noticed, the petitioner was incorporated way back in 1935 and its memorandum takes, within its sweep, varied activities that could have been conceived of at that point of time.

13.The shipping industry moved for the consideration of levy of a tonnage tax to make that industry internationally competitive. Tonnage tax was intended also to induce more ships to fly the Indian flag. The Finance

Minister proposed to accept the request. It was as a consequence of such decision, that the provision for option to pay tonnage tax was brought in. The Notes on Clauses appended to the Finance (No.2) 2004 referring to Clause 28 as regards the introduction of Section 115VA specifically stated that the said provision relates to computation of profits and gains of shipping business. The Apex Court in K.P.Varghese v. I.T.O. [(1981) 4 SCC 173], after referring to their Lordships' decisions in Loka Shikshana Trust v. C.I.T. [(1976) 1 SCC 254], Indian Chamber of Commerce v. C.I.T. [(1976) 1 SCC 324] and Addl.C.I.T. v. Surat Art Silk Cloth Manufacturers' Association [(1980) 2 SCC 31], held that the speech made by the mover of the Bill explaining the reasons for introduction of the Bill can be referred to for the purpose of ascertaining the object and purpose for which the legislation is enacted. It was noticed that this is in accord with the recent trend in juristic

thought in the western countries, as also in India, that interpretation of statutes being an exercise in ascertaining the meaning, everything which is logically relevant should be admissible. In Kerala State Industrial Development Corpn. Ltd. v. CIT [(2003) 11 SCC 363], the Apex Court referred to the budget speech of Finance Minister while introducing the Finance Bill to hold that the speech can be relied upon to throw light on the object and purpose of the particular provisions introduced by the Finance Bill even if there is any ambiguity in the matter.

14. In the light of the conclusions arrived at on a plain reading of the provisions, supported by the speech of the Finance Minister introducing the Bill, it has necessarily to be concluded that the decision in Ext.P5 to the extent it holds that the business of operating ships is not a main object of the petitioner company, going by its memorandum, is illegal.

15. However, the question as to whether the main object of the company is to carry on the business of operating ships in the case of companies like the petitioner, who have not classified such activity as a main object in its memorandum, has necessarily to be decided by taking into consideration various aspects, including the ground realities as to the nature of activities and different other aspects, including the comparable turnovers of the different types of business of the company. As regards that, the first respondent has concluded that the details noticed on the basis of the materials placed before him would show that the income from shipping business and the income from the qualifying ship form only a small portion out of the gross income of the company. This finding is one which rests on facts, on the basis of accounts, and it is, therefore, improper to subject it to judicial review in writ

jurisdiction particularly, when the statutory appeals of the petitioner are filed and are pending.

16. In the result, the finding in Ext.P5 that carrying on of the business of operating ships is not the main object of the petitioner, to the extent it is based solely on the object clauses in the Memorandum and Articles of Association of the petitioner Company is quashed and the petitioner is relegated to the statutory appellate authority for adjudication on the other issues, to decide whether the petitioner's option for tonnage tax scheme ought to have been approved. The writ petition is ordered accordingly.

THOTTATHIL B. RADHAKRISHNAN,
JUDGE.

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