

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 11064-65 OF 2017
(ARISING OUT OF SLP (CIVIL) NOS. 3073-3074 OF 2017)

THE ROYAL BANK OF SCOTLAND PLCAPPELLANT(S)

VERSUS

AXIS BANK LIMITED & ORS.
.....RESPONDENT(S)

WITH

CIVIL APPEAL NOS. 11066-67 OF 2017
(ARISING OUT OF SLP (CIVIL) NOS. 5317- 5318 OF 2017)

AND

CIVIL APPEAL NOS. 11068 OF 2017
(ARISING OUT OF SLP (CIVIL) NO. 5383 OF 2017)

J U D G M E N T

A.K. SIKRI, J.

Leave granted.

2) The parties in these proceedings are Income Tax Department (Union of India), Formula One World Championship Limited (FOWC), which is a

U.K. Company, Jaypee Sports International Limited (Jaypee), an Indian Company, Axis Bank, which is an Indian Bank, Lloyds Bank, an international Bank incorporated in U.K. and Royal Bank of Scotland (RBS), another international Bank incorporated under U.K. laws. These three appeals are filed by RBS, Lloyds Bank and Axis Bank in which other parties are impleaded as respondents. Therefore, for the sake of clarity and to avoid confusion, it would be apt to refer these parties by their aforesaid names, rather than addressing them as appellants or respondents.

- 3) Though the nature of grievances of the three appellants in these three appeals is different, the root cause thereof is the same. The issues raised in these appeals have arisen as a result of income tax liability which was disputed by the FOWC (or, for that matter, by Jaypee as well, *albeit* at the behest of FOWC) in respect of income earned by FOWC in India for conducting Formula One races in India, as a result of contractual arrangement between FOWC and Jaypee. Though, it was disputed by FOWC as well as Jaypee that the income generated for conducting such races is not exigible to tax in India because of the provisions contained in Double Taxation Avoidance Agreement (DTAA) between India and U.K., the said controversy has been put to rest by this Court in Civil Appeal Nos. 3849 of 2017, 3850 of 2017 and 3851 of 2017 decided by this Court vide common judgment dated April 24, 2017.

Before we advert to the disputes involved in these appeals, a brief background of the dispute which led to the aforesaid judgment would be necessary.

- 4) FOWC and Jaypee entered into a Race Promotion Contract (RPC) and Artwork License Agreement (ALA), as amended from time to time, under which Jaypee was granted rights to host and promote the Formula One Grand Prix of India to be held at the Buddha International Circuit, Noida and was also given rights to use certain intellectual property for facilitating the organisation of Formula One Grand Prix in India for the consideration and upon the terms and conditions stated therein.
- 5) In order to secure the consideration due and payable to FOWC under the RPC, the Axis Bank, at Jaypee's request, opened four Standby Letters of Credit (LCs) in favour of FOWC which were confirmed by RBS and Lloyds Bank (collectively referred as 'Confirming Banks') for a total sum of 51.35 million US Dollars. These LCs provided that English Law will apply and English Courts will have the jurisdiction. The Formula One race was organised in India for the years 2011, 2012 and 2013. Jaypee made certain payments under the aforesaid arrangements without deducting tax in India. In order to get clarity on issues of income tax payable on the income generated in India, both, FOWC and Jaypee filed References before the Authority for Advance Rulings (AAR).

Untitled Folder During the pendency of the References before AAR, the Tax Department passed an order dated March 10, 2014 under Section 281B of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') provisionally attaching the consideration payable by Jaypee to FOWC under the RPC and ALA.

- 6) Upon Jaypee informing the Tax Department that it had submitted irrevocable LCs in favour of FOWC towards payment of the consideration due under the RPC/ALA, the Tax Department by a letter dated March 21, 2014 informed the Reserve Bank of India (RBI) about the aforesaid attachment order passed by it and requested RBI to take action to ensure compliance of the said attachment order. Axis Bank was also sent the copy of that letter dated March 21, 2014. Acting upon the request of the Tax Department and in view of the aforesaid Attachment Order, RBI by its letter dated April 2, 2014, *inter alia*, directed the Axis Bank not to make any remittance of money to FOWC without the approval of the Tax Department.
- 7) It may be mentioned that on April 30, 2014, one LC (for USD 15,450,000) was to expire. The same was invoked by FOWC on RBS. RBS made the payment to FOWC and, in turn, claimed reimbursement from the Axis Bank with value date of May 7, 2014.
- 8) As per Axis Bank, it resulted in two conflicting demands faced by it. By

its letter dated May 5, 2014, the Axis Bank wrote to RBI, *inter alia*, highlighting various issues regarding the LCs and its obligations therein and also the fact that its failure to honour the invocation thereof by RBS would undermine the international reputation of the Bank in banking circles, and further requested RBI to permit the Bank to make the payment under the LCs. RBI, however, did not issue any communication permitting the Bank to do so.

9) By a letter dated May 6, 2014, the U.K. Solicitors for Lloyds Bank replied to the Axis Bank's letter dated April 5, 2014, and contended that the order dated March 10, 2014 did not apply to the Axis Bank's obligation to make payment under the LCs. By another letter dated May 7, 2014, the U.K. Solicitors for RBS took the same stand and asked the Axis Bank to make payment under the LCs for USD 15,450,000 and also threatened legal action against the Axis Bank in the event of non-payment under the LCs.

10) At that stage, Axis Bank filed the Writ Petition No. 2129 of 2014 in the High Court of Bombay seeking various protective reliefs. FOWC also filed Writ Petition (L) No. 3245 of 2015. In this writ petition, orders were passed from time to time. Even one Review Petition (L) No. 54 of 2015 was filed. Ultimately, with the consent of FOWC and Jaypee, the following arrangements were arrived at disposing of the said review

petition:

- (i) the LCs invoked by FOWC was reversed and not given effect to;
- (ii) the four LCs referred to above were kept alive to be renewed from time to time, pending a ruling by the AAR; and
- (iii) the attachment of the Tax Department was continued till a period of eight weeks thereafter.

11) Thereafter, on August 17, 2016, the AAR gave its ruling, *inter alia*, holding that FOWC had no Permanent Establishment (PE) in India. However, it further held that the consideration paid by Jaypee to FOWC was in the nature of royalty which was chargeable to tax in India. Challenging this order, Tax Department as well as FOWC and Jaypee filed their respective writ petitions in the High Court of Delhi. High Court of Delhi decided these writ petitions vide judgment dated November 30, 2016 thereby reversing the ruling of AAR on both counts. It held that the consideration paid by Jaypee to FOWC was not in the nature of royalty. Instead, it came to the conclusion that FOWC had PE in India and, therefore, the income attributed to the said PE was liable to tax in India. The special leave petitions were filed by FOWC and Jaypee against this judgment in which leave was granted. However, vide judgment dated April 24, 2017, the view taken by the High Court has been upheld and the appeals have been dismissed. The effect thereof is that tax is

payable on the income which is earned by FOWC for conducting the races in India.

12) At this stage, we mention the developments which took place in respect of these cases after the ruling was rendered by AAR.

13) The writ petition which was filed by the Income Tax Department challenging the ruling of AAR was numbered as W.P. (C) No. 9509 of 2016. In that writ petition, the Delhi High Court passed the order dated October 7, 2016 restraining FOWC from drawing up the LCs which order remained operative till the writs were decided by the High Court on November 30, 2016. After the decision in the writ petition by the High Court, Axis Bank was served with a letter from the Tax Department referring to the judgment of the High Court in which the Axis Bank was directed to have the drawing of LCs restricted to the extent of the liability of Jaypee to deduct Tax Deducted at Source (TDS) of FOWC. Similar communications were addressed by the Income Tax Department to RBS and Lloyds Bank as well. Axis Bank informed RBS as well as Lloyds Bank about the aforesaid communication from the Income Tax Department. Essence of these letters was that the Delhi High Court had concluded that FOWC is liable to pay tax on the payments which it had received from the Jaypee under the RPC and, therefore, amount to the extent of said liability had to be secured inasmuch as while making the

payments, Jaypee had not deducted the tax at source which was, otherwise, its obligation under the Act.

- 14) Fearing that FOWC may not get at least part of the amount under the LCs in view of tax liability, FOWC acted hastily by triggering the LCs on November 30, 2016 itself (the date on which judgment was pronounced by the Delhi High Court) and called upon the Confirming Banks i.e. RBS and Lloyds Bank to make payments to it. The Confirming Banks also obliged instantly by releasing the payment under the LCs to FOWC.
- 15) Insofar as Income Tax Department is concerned, it issued fresh Attachment Orders dated December 1, 2016 under Section 281B of the Act by which LCs were attached and Axis Bank was informed accordingly. Copy of this Attachment Order was marked to Jaypee, RBI, RBS, Lloyds Bank as well. Axis Bank informed about the said attachment also to RBS and Lloyds Bank by e-mail dated December 1, 2016.
- 16) On the one hand, Axis Bank was restrained from remitting the amount under the LCs to the extent of tax liability of FOWC and, on the other hand, Confirming Banks had taken the position that once LCs were invoked, they had no option but to make the payment. Axis Bank, faced with this situation, filed Writ Petition No. 11440 of 2016 in the High

Court of Delhi. In this petition, orders dated December 2, 2016 were passed holding that attachment of Tax Department was *prima facie* warranted in law and directed the petitioner not to release any amount pursuant to the said LCs. Even when this order was communicated to the Confirming Banks, they wrote back to the Axis Bank stating that there was no legal ground for the Axis Bank to refuse to pay the amount under LCs. Thereafter, vide communication dated December 6, 2016, Lloyds Bank informed Axis Bank that payment had been made to FOWC under the LCs and Axis Bank was called upon to reimburse the same. Because of these subsequent developments, Axis Bank filed miscellaneous application in W.P. No. 11440 of 2016 seeking to amend the writ petition by including challenge to the Attachment Orders dated December 1, 2016 passed under Section 281B of the Act. The High Court ultimately passed order dated December 21, 2016. By this order, though the amendment was allowed, at the same time, it was also observed that nothing survived in the matter, though the writ petition was not finally decided on that date. The writ petition was finally heard on January 30, 2017 and it was dismissed, holding that the attachment under Section 281B is valid. Challenging that order, SLP(C) No. 5383 of 2015 is filed by the Axis Bank.

- 17) While the aforesaid developments were taking place in the High Court of Delhi, another litigation chapter was opened in the Bombay

High Court.

- 18) As noted above, the Confirming Banks had made payment to FOWC in terms of LCs and these Banks were pressing upon the Axis Bank to honour its commitment as those LCs were opened at the instance of the Axis Bank. Since the payment was not made by the Axis Bank in view of the Attachment Orders passed by the Income Tax Department, the Axis Bank filed Commercial Suit (L) No. 292 of 2016 (re-numbered as Commercial Suit No. 8 of 2017) seeking declaration to the effect that Axis Bank was prevented from making payment under the LCs and/or was not obliged to make such payments and the payments in respect of the LCs by the said Banks to FOWC was wrongful or illegal etc. Some other prayers of similar nature were also made. This suit was filed on December 13, 2016 and along with that Notice of Motion was taken for emergent interim prayers. In the said Notice of Motion (L) No. 233 of 2016 (re-numbered as 10 of 2016), the order dated December 14, 2016 was passed by Bombay High Court *inter alia* restraining the Confirming Banks from taking any coercive steps or measures against Axis Bank from enforcing the LCs. Further, orders dated December 21, 2016 were passed by the Bombay High Court directing the Axis Bank to deposit US\$ 15.45 million in the High Court, being the money payable to RBS. Pursuant to these orders, Axis Bank has deposited the said amount with the *prothonotary* and Senior Master,

High Court of Bombay. Challenging these orders, RBS and Lloyds Bank have filed SLP (C) Nos. 3073-3074 of 2017 and 5317-5318 of 2017.

19) From the aforesaid, it is clear that SLP (C) No. 5383 of 2017 filed by the Axis Bank challenges the order of the High Court of Delhi whereby the attachment made by the Income Tax Department under Section 281B of the Act is held to be valid. Other two appeals are by RBS and Lloyds Bank challenging orders dated December 14, 2016 and December 21, 2016 passed by the High Court of Bombay whereby these Banks are restrained from taking any coercive steps or measures against the Axis Bank from enforcing the LCs and direction of the High Court to the Axis Bank to deposit the amount under the said LCs in the High Court.

20) From the facts narrated above, following position emerges:

- (i) That part of royalty paid by Jaypee to FOWC under the agreement entered into between them, income tax is payable on that portion of the income which is attributable to PE in India. To put it simply, FOWC and/or Jaypee have liability of income tax which needs to be discharged.
- (ii) Exact liability of income tax on the aforesaid account is yet to be ascertained.
- (iii) Pending these proceedings for fixation of this liability, Income Tax

Department has passed attachment orders dated December 1, 2016 under Section 281B of the Act. As per this attachment, Axis Bank is precluded from remitting the amount under LCs to the foreign banks.

(iv) Notwithstanding this attachment and notwithstanding the liability of tax to be discharged by FOWC, FOWC invoked those LCs on the basis of which it has received moneys under these LCs from the Confirming Banks.

21) Confirming Banks, which are foreign banks, were bound under the said LCs to make payments to FOWC. The action in making the payment cannot be treated as illegal.

22) As per the terms of the LCs, once the Confirming Banks have made the payment to FOWC, Axis Bank is under obligation to make the said payment to the Confirming Banks inasmuch as the LCs were open by the Confirming Banks at the instance of Axis Bank. However, at the same time, due to attachment orders dated December 1, 2016, Axis Bank is precluded from making this payment.

23) The position that emerges from the above is that, on the one hand, Axis Bank is supposed to make the payment for the Confirming Banks and, on the other hand, the amount under attachment orders has to be secured thereby protecting the interests of the Revenue as well.

24) There is only one methodology which can be adopted in breaking this impasse or deadlock viz. to direct FOWC to secure the amount. After all, this stalemate is the creation of FOWC. Even when judgment of the Delhi High Court had come on December 21, 2016 fastening liability of income tax on the income generated by FOWC, FOWC tried to play smart by invoking the LCs. This was done by FOWC even after it was made aware of the attachment orders dated December 1, 2016 passed under Section 281B of the Act. No doubt, FOWC had challenged the orders of the High Court by filing special leave petition in this Court. Such a challenge was laid by Jaypee as well. Least that was expected of FOWC was to await the decision of this Court and act thereafter, depending upon the outcome of those proceedings. Fact remains that this Court has upheld the judgment of the Delhi High Court dated December 21, 2016 thereby sustaining the liability of FOWC. The attempt of the FOWC was nothing less than trying to over reach the judicial orders.

25) In the aforesaid scenario, first thing that needs to be determined is as to whether provisional attachment order passed by the Assessing Officer under Section 281B of the Act is valid or not. This attachment order has to be seen in the light of the fact that there is a conclusive finding, upheld by this Court, that FOWC has PE in India and that

taxable event has taken place in India because of which non-resident FOWC is liable to pay tax in India on the income it has earned on this soil. In this context, it is also to be borne in mind that when payments made by Jaypee to FOWC have been held to be business income, Jaypee was required to pay TDS under Section 195 of the Act on those payments, irrespective of the mode of making these payments i.e. whether through LCs or RTGS or NEFT or the outstanding amount has to be retained by the Jaypee in the form of Fixed Deposits or other securities. As per the arrangement between FOWC and Jaypee, the payments to be made to FOWC were secured through LCs. In that sense, these LCs can be treated as assets of FOWC in India. Section 281B of the Act deals with provisional attachment to protect revenue in certain cases and reads as under:

“281B. (1) Where, during the pendency of any proceeding for the assessment of any income or for the assessment or reassessment of any income which has escaped assessment, the Assessing Officer is of the opinion that for the purpose of protecting the interests of the revenue it is necessary so to do, he may, with the previous approval of the Principal Chief Commissioner or Chief Commissioner, Principal Commissioner or Commissioner, Principal Director General or Director General or Principal Director or Director, by order in writing, attach provisionally any property belonging to the assessee in the manner provided in the Second Schedule.”

- 26) Obviously, the aforesaid provision is intended to secure and safeguard the interests of the Revenue. It provides for the provisional attachment of any property belonging to an assessee in accordance with

the provisions contained in the Second Schedule. It has been stated by the Income Tax Department that after the judgment rendered by the High Court, draft assessment order in case of FOWC was passed on January 27, 2017 determining the tax liability of Rs.215,64,70,016/- (USD 31,690,890). FOWC filed objections before the Dispute Resolution Panel on February 28, 2017 and the said proceedings are still pending adjudication. The details of draft assessment orders are as under:

FOWC Draft Assessment Orders for the A.Y. 2012-13, 2013-14 and 2014-15		
Date of Orders	27.01.2017	
Date of Service of Draft Assessment orders	28.01.2017	
Date of objections filed by the assessee (FOWC) in DRP	27.02.2017	

- 27) If the income proposed to be assessed in the draft assessment orders are accepted by the assessee or the Draft Resolution Panel, the income of the assessee and the tax thereon would be as under:

S. No.	Assessment Year	Proposed Income	Proposed Tax + surcharge + Interest (in Rs.)	Proposed Tax + surcharge + Interest (In USD)
1	2012-13	123,13,60,140/-	90,40,44,912/-	13,285,595/-
2	2013-14	88,37,92,350/-	60,08,02,039/-	8,829,221/-
3	2014-15	104,19,03,410/-	65,16,23,065/-	9,576,073/-

	Total	315,70,55,900/-	215,64,70,016/-	31,690,890/-
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28) It is also pointed out that as per the judgment of this Court, even the affiliates of FOWC, namely, Beta Prema 2, Allsport Management and Formula One Management are to pay taxes in India. Whether the liability to pay taxes is ultimately determined as per the draft assessment order or it may get reduced is not the issue. What is significant is that tax liability on FOWC is very much there.

29) It is stated at the cost of repetition, as it needs to be reemphasised, that FOWC had got the indication that there was likelihood of fastening it with liability to pay tax after the pronouncement of the decision by the Delhi High Court. No doubt, the order of Delhi High Court was challenged in this Court. FOWC, however, did not even wait for the decision of this Court (though, ultimately decision of the High Court is upheld). Immediately after the pronouncement of the decision of the Delhi High Court, the department sent e-mail communications on November 30, 2016 itself to Axis Bank, Lloyds Bank and the RBS informing them about the final verdict of the Delhi High Court and called upon Axis Bank not to make payment under the LCs to the extent of the tax liability of FOWC with a copy to Jaypee requesting the banks that the drawing of LCs may be restricted to the extent of the tax liability of FOWC. Axis Bank also communicated this embargo to Lloyds Bank and

RBS. Despite this, on the same day i.e. November 30, 2016, FOWC still invoked the LCs by making a demand on Lloyds Bank and RBS for the encashment of the four LCs.

30) We, therefore, affirm the order of the High Court which has upheld the attachment order made by the Income Tax Department.

31) Having upheld the attachment order, the important moot question that arises is as to how to secure the amount? Whether Axis Bank be restrained from transmitting the amount to the Confirming Banks? Here, we find that insofar as Confirming Banks are concerned, they are under legal obligations to make the payments under the LCs once these LCs are invoked. These banks cannot go by any disputes between FOWC and Jaypee or FOWC and Tax Department in India. Therefore, it may be difficult to restrain Axis Bank from reimbursing the Confirming Banks, notwithstanding attachment orders. Best solution to the whole controversy, in these circumstances, is to direct the FOWC to remit the amount which it has received under the LCs as it is the FOWC which is to discharge the tax liability.

32) In these circumstances, these appeals are disposed of with the following directions:

(i) FOWC is directed to deposit the amount of 15.45 million USD with

the *prothonotary* and Senior Master of Bombay High Court within a period of four weeks from today.

- (ii) Amount deposited by the Axis Bank with the *prothonotary* and Senior Master shall be released to the Confirming Banks. It is made clear that this amount shall be released only after FOWC makes deposit thereof.

.....J.
(A.K. SIKRI)

.....J.
(ASHOK BHUSHAN)

**NEW DELHI;
AUGUST 25, 2017**