1953

Jan. 16.

TURNER MORRISON & CO., LTD.

v.

COMMISSIONER OF INCOME-TAX, WEST BENGAL.

[MEHR CHAND MAHAJAN, DAS, VIVIAN BOSE and BHAGWATI JJ.]

Indian Income-tax Act (XI of 1922), ss. 4 (1) (a), 4 (1) (c), 42, 43—Non-resident company—Sale in India of goods manufactured outside India—Person effecting sales in India—Whether agent of non-resident—Profits received in India from sales—Whether assessable under s. 4 (1) (a) or s. 42—Liability of agent—Scope of s. 43.

The Port Said Salt Association Ltd., a company incorporated in the United Kingdom carried on business in Egypt and had its headquarters in Egypt. It manufactured salt in Egypt and part of the salt so manufactured was consigned to Turner Morrison and Co. Ltd., (the assessee) for sale in India. The assessee effected sales in India through brokers at prices approved by the Association, collected the sale proceeds and received a commission of 2½% generally on all sales. After deducting the expenses and commission the balance was remitted to the Association in Egypt. On these facts the assessee was treated as agents of the Association under s. 43 of the Indian Income-tax Act and assessed to income-tax under s. 4 (1) (a) or alternatively under s. 4 (1) (c) of the Act on the income derived by the Association from the sale of salt in India. The High Court of Calcutta held that the income in question was chargeable to income-tax under s. 4 (1) (a) as income received in India and not under s. 42 of the Act:

Held, (i) that, as the assessee was entrusted with the selling of goods consigned to them for sale, handling the cargoes, issuing delivery orders, collecting the proceeds etc., they were agents of the Association, and did not act merely as a post office;

Pondicherry Railway Co. v. *Commissioner of Income-tax, Madras* (1931) I.L.R. 54 Mad. 691 *referred to.*

(ii) as the goods were neither imported nor sold by the assessees on their own account but on account of the Association the income received by the assessees were received by them on behalf of the Association and not on their own account.

Ex parte White (L.R. 6 Ch. A. 397) *distinguished.*

(iii) As the assessees were authorised not only to sell but to collect the price from the purchasers, the income was received by the assessee as agents of the Association.

Butwick v. *Grant* (L.R. [1924] 2 K.B. 483) *distinguished.*

(iv) The fact that the assessees as agents had a right to retain the expenses incurred by them and their commission out of the proceeds could not make the sale proceeds received by them as agents any the less the property of their principals.

Colquhoun v. *Brooks* (2 Tax Cas. 490) and *Saiyid Ali Imam* v. *King Emperor* ([1925] I.L.R. 4 Pat. 210) *referred to.*

(v) When the gross sale proceeds were received by the agents in India they necessarily received whatever profits and gains were lying dormant in them. If on taking accounts there were income, profits or gains, then the proportionate part thereof attributable to the sale proceeds received by the agents in India was income, profits and gains received by them at the moment the gross sale proceeds were received by them in India, and s. 4 (1) (a) of the Income-tax Act was immediately attracted and the income, profits and gains so received became chargeable to tax under s. 4 (1) (a) read with s. 3.

Grainger & Son v. *William Lane Gough* (L.R. [1896] A.C. 325) *relied on.*

(vi) Where income, profits and gains are actually received in India s. 4 (1) (a) applies and it is no longer necessary for the revenue to resort to the fiction introduced by s. 42, and the assessees were properly assessed under s. 4 (1) (a) and not under s. 4 (1) (c), Section 4(1) (a) applies to all categories of assessees including non-residents.

Hira Mills v. *Income-tax Officer, Cawnpore* ([1946] 14 I.T.R. 417), *Burugu Nagayya* v. *Commissioner of Income-tax, Madras* ([1949] 17 I.T.R. 194) and *Pondicherry Railway Co.* v. *Commissioner of Income-tax, Madras* ([1931] I.L.R. 54 Mad. 691) *relied on.*

(vii) The mere fact that the assessees were treated as agents under s. 43 of the Act did not make it compulsory on the part of the revenue authorities to assess under s. 42, for an appointment as agent under s. 43 is for all the purposes of the Act and not only for the purposes of s. 42.

Imperial Tobacco Co. of India Ltd. v. *Secretary of State for India* ([1922] I.L.R. 49 Cal. 721), *Commissioner of Income-tax, Bombay* v. *Metro Goldwyn Mayer (India) Ltd.* ([1939] 7 I.T.R. 176), *Caltex Ltd.* v. *Commissioner of Income-tax, Bombay City* ([1952] 21 I.T.R. 278) *explained.*

Judgment of the Calcutta High Court affirmed.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 41 of 1952. Appeal from a Judgment and Decree dated 25th July, 1950, of the High Court of Judicature at Calcutta (Sen and Chunder JJ.) exercising Special Jurisdiction (Income-tax) in Income-tax Reference No. 31 of 1949.

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S. Mitra (*S. N. Mukherjee*, with him) for the appellant.

C. K. Daphtary, Solicitor-General for India (*P. A. Mehta*, with him) for the respondent.

1953. January 16. The Judgment of the Court was delivered by

DAS J.—This appeal arises out of six references made by the Calcutta Bench of the Income-tax Appellate Tribunal under section 66(1) of the Indian Income-tax Act, two of them relating to the income-tax assessment years 1943-44 and 1944-45 and the remaining four relating to excess profits tax for the chargeable accounting periods ending on the 31st December of each of the years 1940, 1941 1942 and 1943 respectively.

The relevant facts appearing in the statements of the case are as follows: Messrs. Port Said Salt Association Ltd., (hereinafter referred to as "the Association") is a company incorporated in the United Kingdom and has its registered office there. The Association, however, carries on business in Egypt and its head office is situate in Alexandria where the annual general meetings of its shareholders are held. Not being resident in the United Kingdom the Association pays no British income-tax on its profits. For the purposes of assessment under the Indian Income-tax Act the Association has been considered to be a non-resident. The association manufactures salt in Egypt where it has certain concessions and the salt as manufactured is sent for sale in any country where there is a suitable market. Part of the salt so manufactured by the Association is consigned to Messrs. Turner Morrison & Company Ltd. for sale in India. All shipping operations, *i.e.*, chartering of steamer, loading, insurance etc., are effected in Egypt by the Association who sends the documents to Messrs. Turner Morrison & Company Ltd. Messrs. Turner Morrison and Company Ltd. effect sales in India through brokers at the best price

obtainable at or above the prices approved by the Association. Turner Morrison & Company Ltd. are paid commission at the rate of 2½ per cent. generally on all the sales except in some cases where 1¼ per cent. is paid. All handling of the cargoes when they arrive at Calcutta and the necessary disbursements in connection therewith are carried out and made by Turner Morrison & Company Ltd. The sale proceeds are collected by Turner Morrison & Company Ltd. and credited to the account kept in their own name with the Hongkong and Shanghai Banking Corporation. After deducting the expenses including their commission the balance is remitted by Turner Morrison & Company Ltd. to the Association in Egypt. On these facts the Income-tax Officer treated Turner Morrison & Company Ltd. as the agents of the Association under section 43 of the Indian Income-tax Act and assessed them to income-tax for the two assessment years mentioned above under section 4 (1) (a) or, alternatively, under the first part of section 4 (1) (c). They were also assessed to excess profits tax for the four chargeable accounting periods hereinbefore mentioned.

Turner Morrison & Company Ltd. (hereinafter referred to as the Agents) preferred appeals against the aforesaid assessment orders to the Appellate Assistant Commissioner who, however, dismissed the appeals. The Agents took a further appeal to the Income-tax Appellate Tribunal. The submission of the Agents before the Tribunal was that the assessment under section 4(1) (a) was bad and that the assessment should have been made under section 42 of the Act. The Tribunal, on a consideration of the facts, came to the conclusion that the assessment was properly made under section 4(1) (a) and incidentally the Tribunal also came to the conclusion that the alternative contention of the Income-tax authorities that the assessment should be made under the first part of section 4(1) (c) was also well-founded and that section 42 had no application to the case.

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The result was that the Tribunal confirmed the findings of the Income-tax Officer and the Appellate Assistant Commissioner and dismissed the appeals.

On the application of the Agents made under section 66 (1) of the Act the Appellate Tribunal referred the following questions to the High Court:—

"(1) Whether, in the facts and circumstances of this case, the Tribunal was right in holding that the income, profits and gains derived from the sale of salt in British India are assessable to tax as income, profits and gains received or deemed to be received under section 4(1)(a)?

And if the answer to the first question is in the negative,

(2) Whether, in the facts and circumstances of this case, the Tribunal was right in accepting the contention of the Department that the income accrued or arose or is deemed to accrue or arise in India and is assessable to tax as contemplated by section 4 (1) (c)?

(3) Whether the Tribunal was right in the circumstances of this case in rejecting the contention of the assessee (applicant) that the income, profits and gains are chargeable to tax from the sale of salt in British India under section 42 only?"

The reference came up for disposal before a Bench of the Calcutta High Court consisting of Sen and Chunder JJ. The learned Judges gave the following answers to the questions:—

"Question (1). The answer is in the affirmative so far as income-tax is assessed. Excess profits tax, however, cannot be levied on this basis.

Question (2). The Tribunal was wrong in accepting the contention of the department that the income accrued or arose in India. The Tribunal did not hold that the income is income which should be deemed to accrue or arise in India. The part of the question which states that the Tribunal did so is not in accordance with fact. We find that the income,

profits and gains must be deemed to have arisen or accrued in India so far as excess profits tax is concerned and that section 42(3) of the Income-tax Act applies to the levy of excess profits tax by virtue of section 21 of the Excess Profits Tax Act.

Question (3). The Tribunal was right in rejecting the contention that the income, profits and gains are chargeable to tax under section 42 only. They are also chargeable to income-tax as falling within the purview of section 4 (1) (a) of the Income-tax Act as income received in India on behalf of the assessee company. In such a case section 42 of the Income-tax Act would have no application."

It will be noticed that the Agents succeeded in their contentions so far as they related to the assessment of excess profits tax. The answers given by the High Court, however, went against them in so far as they related to the assessment of income-tax for both the assessment years.

The Agents thereafter made two applications to the High Court under section 66A for leave to appeal to this Court in respect of the income-tax assessments for each of the two assessment years. The High Court certified that the cases were fit for appeal to this Court and granted leave to appeal and directed that the two appeals be consolidated. The Commissioner of Income-tax, West Bengal, however, has not preferred any appeal from that part of the judgment of the High Court which sets forth its opinion on the questions in so far as they relate to the assessment of excess profits tax. This appeal is, therefore, concerned only with the answers given by the High Court to the questions in so far as they relate to the assessments of income-tax only.

The first main contention urged by Mr. S. Mitra appearing in support of this appeal is that no income, profits and gains were received in India by or on behalf of the Association. He seeks to make good this contention on a variety of reasons all of which are not quite consistent with each other and some of

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which may even be mutually destructive. Relying on the decisions in *Narasammal* v. *The Secretary of State for India*(1) and *Pondicherry Railway Company Ltd.* v. *Commissioner of Income-tax, Madras*(2), Mr. Mitra urges that no income, profits and gains were "received" in India at all, for the Agents were nothing but "an animated Post Office". We are bound to reject this reasoning as unsound on the same grounds on which the Privy Council rejected a similar contention in the case of *Pondicherry Railway Company Ltd.*(2). In the language of Lord Macmillan the functions of the Agents far transcended the mere mechanical act of transmitting the sums collected by them to the Association in Egypt. They were entrusted with important duties on behalf of the Association, namely, selling of the goods consigned to them for sale, handling the cargoes, issuing delivery orders, collecting the sale proceeds and then to remit the same after deducting the expenses incurred by them and their own commission. The description of "an animated Post Office" can hardly apply to an agent of this description.

Mr. Mitra thereupon shifts his ground and urges that even if income, profits and gains were received in India, the receipt was not by or on behalf of the Association. The contention is that though the Agents are described as agents, they were not so in fact or in law and reliance is placed on the well known case of *Ex parte White*(3). A perusal of that case will clearly show that there the person to whom goods were consigned, together with a price list, was, by their course of dealings, entitled to sell the goods at any price he liked and that he remitted to the consignor of the goods only the listed price. In other words, although the parties looked upon their dealings as constituting an agency the consignee did not in fact sell the goods as agent of the consignor but did so on his own account and any price realised in excess of the listed price was his own

(1) [1916] I.L.R. 39 Mad. 885.
(2) [1931] I.L.R. 54 Mad. 691; L.R. 58 I.A. 239.
(3) L.R. 6 Ch. A. 397.

profit. On the facts found by the Tribunal, which the learned counsel is not entitled to challenge for the purposes of these proceedings, it is quite clear that the goods were not imported by the Agents on their own account and they never became a purchaser at any stage. They could not sell the goods at any price they liked, for they had to sell them at or above the price approved by the Association. If the sale was at a rate above the approved price the excess was never retained and appropriated by the Agents as their own profits. Mr. Mitra thereupon contends that assuming that the Agents had sold the goods as agents of the Association they did not necessarily have the authority to receive payment of the price. Reliance is placed on *Butwick* v. *Grant*(1) in support of the proposition that an authority to sell does not of necessity imply an authority to receive payment of the price. The argument is then formulated that as the Agents had no authority to receive the price, it cannot be said that the receipt was by or on behalf of the Association. This argument again overlooks the course of business as found by the Tribunal which clearly implies that the Agents were not only agents for selling the salt but also for collecting the sale proceeds.

The third ground urged in support of the first main contention is that the entire amounts collected by the Agents were not receivable by the Association, for the agents were entitled to a portion of it, namely, the amount spent by them in meeting the handling charges and their own commission. On the authority of *Colquhoun* v. *Brooks*(2) and *Saiyid Ali Imam* v. *King-Emperor*(3) Mr. Mitra contends that the sale proceeds collected by the Agents were not so completely under the control of the Association that it could by an act of its own have the entire sale proceeds actually transferred to it in Egypt. This argument is obviously fallacious. The concession that the Agents were

(1) [1924] 2 K.B. 483.
(2) 2 Tax Cas. 490.
(3) (1925) I.L.R. 4 Pat. 210; A.I.R. 1925 Pat. 381.

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entitled to deduct their disbursements and their commission out of the sale proceeds clearly implies that the sale proceeds belonged to the Association, for the Agents could not deduct the dues by the Association from something which did not belong to the Association. Section 217 of the Indian Contract Act gives to an agent the right to retain, out of any sum received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business and such remuneration as may be payable to him for acting as agent. Section 221 also confers a right on the agent to retain the goods, papers and other property of the principal received by him until the amount due to him for commission, disbursements and services in respect of the same has been paid or accounted for to him. The right of retainer and lien conferred on the agent does not make the amount received by the agent on behalf of the principal any the less the property of the principal. The principal is the full owner and has complete control over his properties in the hands of the agent subject only to the latter's statutory right of retainer and lien. It follows, therefore, that the entire sale proceeds received by the Agents in the case before us were received on behalf of the Association and belonged to it subject to the rights of the Agents.

Finally, Mr. Mitra urges that the gross sale proceeds were not really income, for they were only credit items in the account and that several amounts were to be debited in the same account and if there remained any credit balance, such balance alone could be regarded as stamped with the formal impress of the character of income, profits and gains and capable of being dealt with as such and income, profits and gains could be said to have been received only at that stage. We have been referred, in support of this contention, to certain observations in the cases, of *Commissioner of Taxes* v. *The Melbourne Trust Ltd.*(1), *Russell* v. *Aberdeen Town and County Bank*(2), *Re Rogers Pyatt Shellac*

(1) [1914] A.C. 1001 at p. 1011. (2) 2 Tax Cas. 321 at p. 327.

& Co. v. *Secretary of State for India*(1), *Commissioner of Income-tax, Bombay City* v. *Agarwal & Company, Bombay*(2), *In re Govind Ram Tansukh Rai*(3), and other cases. The observations in those several cases have to be read in the light of the facts of those cases and the subject which was then under discussion. So read those observations can have no application to the facts of this case. The case *Morley* v. *Tattersall*(4) also relied on by Mr. Mitra is clearly distinguishable because the liability for the sale proceeds received by the auctioneers continued to exist even after the unclaimed balances were transferred to the account of the partners and, therefore, they could not be regarded as trade receipts. On the other hand, the case of *Grainger & Son* v. *William Lane Gough*(5) will clearly show that the moneys received by an agent on behalf his foreign principal could be regarded as including trade profits within the meaning of section 41 of the English Income Tax Act of 1842 (See per Lord Herschell at p. 337 and Lord Morris at p. 345). The several passages quoted in the judgment under appeal from the cases of *Neilson Anderson & Company* v. *Collins* and *Taru* v. *Scanlan*(6) clearly indicate that the net sale proceeds are included in the gross sale proceeds. The same principle, as pointed out in *Bangalore Woollen, Cotton & Silk Mills Co. Ltd.* v. *Commissioner of Income-tax, Madras*(7) is implicit in the decisions of the Privy Council in *Commissioner of Income-tax, Bombay Presidency and Aden* v. *Chunilal B. Mehta*(8) and *Commissioner of Income-tax, Madras* v. *S. L. Mathias*(9). There can, therefore, be no question that when the gross sale proceeds were received by the Agents in India they necessarily received whatever income, profits and gains were lying dormant or hidden or otherwise embedded in them. Of course, if on the taking of accounts it be found that there was no

(1) [1925] I.L.R. 52 Cal. 1 at p. 31.
(2) [1952] 21 I.T.R. 293.
(3) [1944] 12 I.T.R. 450.
(4) [1938] 3 All E.R. 296.
(5) [1896] A.C. 325.
(6) 13 Tax Cas 91.
(7) [1950] 18 I.T.R. 423 at p. 438.
(8) (1938) 65 I.A. 332.
(9) I.L.R. [1939] Mad. 178; 7 I.T.R. 48.

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profit during the year then the question of receipt of income, profits and gains would not arise but if there were income, profits and gains, then the proportionate part thereof attributable to the sale proceeds received by the Agents in India were income, profits and gains received by them at the moment the gross sale proceeds were received by them in India and that being the position the provisions of section 4 (1) (a) were immediately attracted and the income, profits and gains so received became chargeable to tax under section 3 of the Act. In our opinion, there is no substance in the first main contention adumbrated by Mr. S. Mitra.

Mr. Mitra's second main point is that, assuming that there was receipt of income, profits and gains within India, such income, profits and gains clearly arose through or from a business connection in India and, therefore, the provisions of section 42(1) would apply and such income, profits and gains should be dealt with as income, profits and gains deemed to accrue or arise in India and consequently the inclusion of such income, profits and gains in the total income should be under section 4 (1) (c) for the Association is non-resident. Mr. Mitra urges that the charging under section 3 is to be "in accordance with and subject to the provisions of this Act". Likewise, section 4 (1) is also "subject to the provisions of this Act." This, according to Mr. Mitra, at once attracts section 42 and such income, profits and gains being within section 42 must be included in section 4 (1) (c) and the other alternative, *i.e.*, section 4 (1) (a), is no longer applicable. In other words, according to Mr. Mitra's contention, section 4 (1) (a) becomes a dead letter so far as income, profits and gains arising or accruing to a non-resident are concerned. We are unable to accede to this contention. Section 42 only speaks of deemed income. The whole object of that section is to make certain income, profits and gains to be deemed to arise in India so as to bring them to charge. The receipt of the income, profits and gains being one of the tests of liability,

where the income, profits and gains are actually received in India it is no longer necessary for the revenue authorities to have recourse to the fiction and this has been held quite clearly in *Hira Mills Ltd.* v. *Income-tax Officer, Cawnpore* (1) and in *Burugu Nagayya and Rajanna* v. *Commissioner of Income-tax, Madras* (2). This is also implicit in the decision of the Privy Council in *Pondicherry Railway Company Ltd.* v. *Commissioner of Income-tax, Madras*(3), to which reference has already been made. Section 4(1) (a) in terms is, unlike section 4 (1) (b) or 4 (1) (c), not confined in its application to any particular category of assessees. Section 4 (1) (a) is general and applies to a resident or a non-resident person. The second proviso to section 4 (1), although it relates to the case of a person not ordinarily resident, also indicates that income, profits and gains which accrue or arise to such a person without the taxable territories can be included in his total income if they are brought into or received in the taxable territories and become chargeable to tax under section 3 read with section 4 (1) (a). For reasons hereinbefore stated this contention of Mr. Mitra must be rejected. It may be that the construction we are adopting in agreement with the High Court may operate harshly against non-residents in that income, profits and gains attributable to business operations outside India may also be brought to charge as having been received in India and such consequence may deter non-resident merchants from doing business in India. These indeed are serious considerations but the Courts have to construe the statute according to the plain language and tenor thereof and if any untoward consequences result therefrom it is for authority other than this Court to rectify or prevent the same.

The last main point urged by Mr. Mitra is that as soon as Turner Morrison & Co. Ltd., were treated as agents under section 43, the provisions of section 42 were immediately attracted. In support of this contention Mr. Mitra relies on the decisions in *Imperial*

(1) [1946] 14 I.T.R. 417 at p. 423. (2) [1949] 17 I.T.R. 194.

(3) (1931) I.L.R. 54 Mad. 691 ; L.R. 58 I.A. 239.

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Tobacco Company of India Ltd. v. *The Secretary of State for India* (1), *Commissioner of Income-tax, Bombay* v. *Metro Goldwyn Mayer (India) Ltd.*(2) and *Caltex (India) Ltd.* v. *Commissioner of Income-tax, Bombay City*(3), where it has been held that section 43 is only a machinery for giving effect to section 42. To say that section 43 is really only machinery for giving effect to section 42 is not to say that section 43 has no other purpose. Section 42 refers to income, profits or gains accruing or arising directly or indirectly through or from (i) any business connection in India, (ii) any property in India or (iii) any assets or sources of income in India, or (iv) any money lent at interest and brought into India in cash or in kind or (v) the sale, exchange or transfer of a capital asset in India. All these incomes by virtue of this section have to be deemed to be income accruing or arising within India and where the person entitled to such income, profits or gains is a non-resident such income, profits and gains are made chargeable to income-tax either in his name or in the name of his agent who is to be deemed to be for all the purposes of this Act the assessee in respect of such income-tax. Section 43, however, refers to a person (a) employed by or on behalf of a non-resident, (b) having any business connection with such non-resident or (c) through whom such non-resident is in receipt of any income, profits or gains. A person who comes within one or other of these three categories, may, under this section, be treated by the Income-tax Officer as agent of the non-resident and such person is for all the purposes of this Act to be deemed to be such agent. The third category refers to a person through whom the non-resident is in receipt of any income, profits or gains. The portion of section 43 which refers to the person through whom the non-resident is in receipt of any income, profits or gains does not necessarily attract the provisions of section 42, for the income, profits and gains received by the person

(1) (1922) I.L.R. 49 Cal. 721.
(2) [1939] 7 I.T.R. 176.
(3) [1952] 21 I.T.R. 278.

who is treated as agent under section 43 may not fall within any of the several categories of income, profits or gains referred to in section 42. The language of section 43 will also attract the provisions of section 40, for that section also contemplates a person who is entitled to receive on behalf of the non-resident any income, profits and gains chargeable under this Act and may even attract the provisions of section 4(1)(a). In our opinion there is no warrant for the contention that an appointment of a person as a statutory agent under section 43 only attracts section 42 for such appointment is for all purposes of the Act and not only for the purposes of section 42.

In our judgment, for reasons stated above, the answers given to the questions by the High Court, in so far as they relate to the assessment of income-tax with which alone we are now concerned, are correct and this appeal must be dismissed with costs.

Appeal dismissed.

Agent for the appellant: *P. K. Mukherji.*

Agent for the respondent: *G. H. Rajadhyaksha.*