A **COMMISSIONER OF INCOME-TAX BOMBAY CITY & SUBURBAN DISTRICT, BOMBAY**

v.

HUKAMCHAND MILLS LTD. INDORE

B *July* 21, 1967

[J. C. SHAH, S. M. SIKRI AND V. RAMASWAMI, JJ.]

Income Tax—Company in erstwhile State of Indore making sales in India—Railway Receipts issued to 'self' and endorsed to customers in British India—Handed over to bank to be given to customer on payment of sale price—Whether property passed in British India— C *Whether Indian Income tax leviable.*

The respondent was a limited company incorporated in the State of Indore where it had a textile mill. During the years from 1941 to 1946, it effected sales in British India through canvassing by its own representatives, through brokers or through the purchasers' brokers or representatives visiting Indore. The sales in British India in all categories were made—F.O.R. Indore: the Railway Receipts D were made out in the name of 'self' and were endorsed in favour of the customer concerned and handed over to the Bank for delivery to the customer against payment of the sale price which was received at Indore through the Bank's local branch.

In the course of its assessment to Indian Income-tax for some of the years during the period 1942-43 to 1947-48, the Income-tax E Officer, apart from taxing the income actually received in India, also held that the profits apportionable to all the other sales made in British India accrued or arose in the taxable territories and were therefore liable to Indian Income-tax. He accordingly taxed the same on accrual basis. The Appellate Assistant Commissioner in appeal held that taking into account the facts of the case, it would be fair, on the analogy of Rule 33 of the Indian Income-tax Rules 1922 to attribute 33⅓ per cent of the profits to the activities in British India F and to assess them to Indian Income Tax. The Tribunal confirmed this order but the High Court, on a reference under s. 66 of the Indian Income-tax Act, held in favour of the respondent.

In the appeal to Supreme Court it was contended on behalf of the appellant that on the procedure adopted for the sales, the property in the goods passed in British India in all the categories of sales and that the fact that the goods were sold F.O.R. at Indore did G not make any difference to that position. The High Court had therefore wrongly taken the view that the sales were not taxable in India.

HELD: Allowing the appeal: the income accrued within British India and a proportionate part of it was assessable to Indian Income-tax. [52G-H]

Pushanlal Mansingka (P) Ltd. v. *The Commissioner of Income* H *Tax, Delhi*, Civil Appeal Nos. 557-558 of 1966, decided on May 5, 1967; followed.

Commissioner of Income-tax, Delhi v. *P.M. Rathod & Co.* 37 I.T.R. 145, 150; *Commissioner of Income-tax* v. *Bhopal Textiles Ltd.*, 41 I.T.R. 72, referred to.

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 2178 to 2182 of 1966. A

Appeals by special leave from the judgment and order dated August 28, 1961 of the Bombay High Court in Income-tax Reference No. 5 of 1961.

S. T. Desai, R. Ganapathy Iyer, R. N. Sachthey and *S. P. Nayar*, for the appellant (in all the appeals). B

T. V. Viswanatha Iyer, O. C. Mathur, and *B. Parthasarathy*, for the respondent (in all the appeals).

The Judgment of the Court was delivered by

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Sikri, J.—These appeals by special leave are directed against the judgment of the High Court of Judicature at Bombay answering the following question (Question No. 3) against the Commissioner of Income-tax, Bombay City and Suburban District, appellant before us:

> "3. Whether on the facts and in the circumstances of the applicant's case the Tribunal was right in holding that a proportionate part of the profits determined on sales grouped under Items 3, 4, 5 and 9 in the assessment order by the application of Rule 33 was assessable to Income-tax?" D

The High Court, in view of its answer to this question did not E answer the following question (Question No 2):

> "Whether on the facts and in the circumstances of the applicant's case, the Tribunal was right in holding that in respect of sales of Rs. 14,80,059 the profit was correctly determined by the application of Rule 53 and one-third of the profits so determined could be said to accrue or F arise in British India?"

We are not concerned with the remaining question (Question No. 1) which related to sales to the Government of India, as that question was answered in favour of the appellant.

Relevant facts are as follows: The respondent, Hukamchand G Mills Ltd., Indore, hereinafter referred to as the assessee, is a limited company incorporated in the State of Indore and had a textile mill at Indore. It carried on the business of manufacture and sale of textiles in the calendar years 1941, 1942, 1944, 1945 and 1946. For the relevant assessment years, namely, 1942-43, 1943-44, 1945-46, 1946-47 and 1947-48, the Income-tax Officer H found that the assessee effected certain sales to merchants and others in British India. For the assessment year 1942-43, the Income-tax Officer classified the total sales of Rs. 92,45,151 into four categories. Out of the total sales, sales aggregating to

A Rs. 14,80,059 formed the subject-matter of the two questions reproduced above. The statement of the case details the categories in the following chart:

B	Category of Sales	Total Sales	Sales effected and received in British India	Balance of columns II and III	Sales pursuant to contracts bearing Stamps of Indore State	Balance	
C	(a) Sales in pursuance of business canvassed by company's representatives in British India	10,02,642	3,35,855	6,66,787	20,759	6,46,028	(3)
	(b) Sales to British Indian merchants through brokers and agents in British India	2,91,891	..	2,91,891	..	2,91,891	(4)
D	(c) Sales to British Indian merchants and brokers during their visit at Indore	3,85,214	..	3,85,214	..	2,86,224	(5)
	(d) Sales to British Indian merchants at the time of their own or their brokers' visit at Indore ..	3,13,306	..	3,13,306	57,390	2,55,916	(9)
E		19,93,053	3,35,855	16,57,198	1,77,139	14,80,059	

(The figures at the extreme right show the item numbers used by the Income-tax Officer in para 2 of the assessment order).

F The *modus operandi* for effecting the sales enumerated in the chart referred to above is described as follows in the statement of the case:

G "(a) Sales of Rs. 6,66,787:—The assessee had a paid representative at Bombay who canvassed on behalf of the Company to British Indian Merchants. The orders were sent by such merchants to Indore. On acceptance of orders by the Company at Indore the Company prepared the contracts, signed them and forwarded the same for being signed by the customer. One contract was signed by the customer and returned to the assessee. Thus the Company signed at Indore and the customer signed in British India. The contracts were signed on company's forms. On some contracts there were stamps of Holkar State. On the remainder there were 'British India' stamps. Sales on which Holkar Stamps were affixed aggregated to Rs. 20,759 which were deleted by the Appellate

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Assistant Commissioner from the said sales of Rs. 6,66,787. Sales of Rs. 3,35,855 under this category received in British India by the representative of the assessee at Bombay were taxed on receipt basis and the same was not contested, as stated above. The goods under the contracts referred to hereinabove were delivered F.O.R. Indore. The relevant railway receipt made in the name of 'self' was endorsed in favour of the customer and was handed over to Imperial Bank of India, Indore, for being delivered to the merchant. Sale proceeds were received at Indore through the Imperial Bank of India, Indore.

(b) Sales of Rs. 2,91,891:—The brokers in British India who were described as free lance brokers transmitted the offers to the company. These offers were made on the brokers' own forms and were communicated to the merchants through the brokers. Such orders were placed by the brokers in the normal course of business of these brokers who were not engaged by the Mill as such. The goods were delivered F.O.R. Indore. The relevant railway receipt made in the name of 'Self' was endorsed by the assessee in favour of the merchants and handed over to the Imperial Bank of India.

(c) Sales of Rs. 3,85,214:—These sales were made to British Indian merchants and customers, who came to Indore to negotiate and place orders. The orders were accepted at Indore. On some contracts made for sales under this item, stamps of Holkar State were affixed. Sales pursuant to contracts on which stamps at Holkar State were affixed aggregated to Rs. 98,990 which was deleted by the Appellate Assistant Commissioner from the aforesaid sales of Rs. 3,85,214. The goods were delivered F.O.R. Indore. The railway receipt was made out in the name of 'Self' and was endorsed by the assessee in favour of the customer and handed over to the Imperial Bank of India for being delivered to the party concerned. The sale proceeds were received at Indore as in other cases.

(d) Sales of Rs. 3,13,306:—Sales under this category were made to British Indian merchants on their or their broker's personal visit to Indore. Contracts for such sales were made in the same manner as stated hereinbefore. Such sales, in respect of which relevant contracts bore the Holkar State stamps aggregated to Rs. 57,390 which were deleted by the Appellate Assistant Commissioner from the aforesaid sales of Rs. 3,13,306. The goods were delivered F.O.R. Indore. The railway receipt was made in the name of 'self' and was endorsed in favour

A of the customer and handed over to the Imperial Bank of India for being delivered to the merchants. The sale proceeds were recovered from the Imperial Bank of India, Indore, at Indore as in other cases."

The Income-tax Officer held that profits apportionable on B sales of Rs. 16,57,198 accrued or arose in British India and as such taxed the same on accrual basis. Rs. 3,35,855 having been received in British India were taxed on accrual-*cum*-receipt basis. The Appellate Assistant Commissioner on appeal held that taking into account all facts of the case it would be fair to take 33⅓% of the profits realised on sales amounting to Rs. 16,57,198 as C attributable to activities in British India. Out of this amount he deducted sales totalling Rs. 1,77,139 as the contracts in respect of these were signed at Indore and accepted at Indore. On the balance of sales of Rs. 14,80,059 the Appellate Assistant Commissioner held that, on the analogy of Rule 33 of the Indian Income-tax Rules, 33⅓% profits out of the total profits apportionable to such sales should be attributable to the activities in British D India and as such taxed in the hands of the assessee. The Tribunal confirmed the order of the Appellate Assistant Commissioner. In compliance with the order of the Bombay High Court, the Appellate Tribunal drew up a statement of the case under s. 66(4) of the Indian Income-tax Act, and referred three questions mentioned above. The High Court, as stated above, answered Question E No. 3 in favour of the assessee, and the appellant having obtained special leave, the appeal is now before us.

Mr. S. T. Desai the learned counsel for the appellant, contends that the High Court was wrong in holding that no part of the profits of the sales could be said to have accrued or arisen F in British India. He says that on the facts and circumstances of the case, the property in the goods passed in British India in all the four categories. He says that the method of delivery in the four categories was similar, namely, that the railway receipts were made in the name of 'self' and endorsed in favour of the customers and were handed over to the Imperial Bank of India, Indore, for being delivered to the merchant and sale proceeds were re- G ceived at Indore through the Imperial Bank of India, Indore. He further says that the fact that the goods were to be delivered F.O.R. at Indore does not make the property in the goods pass at Indore. There is considerable force in the learned counsel's submissions. In *Pushanlal Mansinghka (P) Ltd.* v. *The Commissioner of Income Tax. Delhi*,(1), this Court, on similar facts, held that the property H in the goods passed in Part A and Part C States where the delivery was made. This Court further held that the income accrued only

(1) Civil Appeals Nos. 557-558 of 1966; judgement delivered on May 5, 1967.

when the purchaser paid the price through the bank. The method of delivery in that case was as follows: A

> "The appellant consigned the goods to 'self' and the railway receipts alongwith the bills of exchange were presented by the appellant to the Rajasthan Bank, Bhilwara, for collection after endorsing the railway receipts in favour of the Bank. It has also been found that the Rajasthan Bank in its turn endorsed the railway receipts in favour of its branches in Part 'A' and Part 'C' States and that the goods were delivered to the buyers only when they paid the price to the Bank and obtained the railway receipts." B C

We may mention that in *Commissioner of Income-tax, Delhi* v. *P. M. Rathod & Co.*(1) Kapur, J., speaking for the Court, on similar facts, observed:

> "The railway receipts in favour of self could not be delivered to the buyer till the money was paid and although the goods had been handed over to a common carrier the appropriation to the contract was only conditional and the performance was completed only when the monies were paid and the railway receipts delivered." D

This case was followed in *Commissioner of Income-tax* v. *Bhopal Textiles Ltd.*(2). It is true that the Court in these cases was concerned with the question of the receipt of income, but there is no difference in principle as in both cases the question of passing the property in the goods or performance of the contract had to be considered. E F

The learned counsel for the assessee contends that no such point was raised before the Appellate Tribunal and we should not allow the appellant to raise this point at this stage. It seems to us that before the High Court stress was laid on the "formation of the contract and its complete performance" and not on the aspect of the passing of property in the goods. These questions are perhaps relevant to the answering of Question No. 2 but we are unable to regard this aspect as a new question. Following our judgment in *Pushanlal Mansinghka (P) Ltd.* v. *The Commissioner of Income-tax, Delhi*(3) we hold that income accrued within British India and that a proportionate part of the income was assessable to income-tax. In view of this the answer to the question (Question No. 3) must be in the affirmative. G H

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(1) 37 I.T.R. 145, 150. (2) 41 I.T.R. 72.

(3) Civil Appeals Nos. 657-658 of 1966; judgment delivered on May 5, 1967.

A Regarding Question No. 2, the learned counsel for the appellant invited us to answer the question. The learned counsel for the assessee raised a number of points on which the High Court has not expressed its views. Under the circumstances we think it would be proper if we remand the case to the High Court for answering Question No. 2 according to law. In the result the
B appeals are allowed and question No. 3 answered in the affirmative, and the case remitted to the High Court to answer question No. 2 in accordance with law.

The High Court did not allow any costs. Under the circumstances there will be no order as to costs in this Court.

R.K.P.S. *Appeals allowed.*