

PRIVY COUNCIL

Commissioner of Income-tax, Bombay Presidency and Aden

Vs.

Chunilal B.Mehta, Bombay

P.C.A.No.29 of 1987

(Lord Thankerton, Lord Romer, Sir Lancelot Sanderson, CJ. Sir Shadi Lal and Sir George Rankin JJ.)

16.06.1938

JUDGMENT

SIR GEORGE RANKINJ.

1. The High Court at Bombay has answered in favour of the respondent assessee two questions of law formulated and referred to the Court by the Commissioner of Income-tax (Bombay Presidency and Aden) under section 66, Income tax Act, 1922. The assessee is resident in British India and the year of assessment is the year ending 31st March 1934. By order dated 13th December 1933, the Income-tax Officer assessed the respondent on a total income of Rs. 12,95,726, the total demand for income-tax and super-tax being Rs. 7,18,472. This order was confirmed by the Assistant Commissioner on 19th January 1934. By these orders the assessee was held liable to pay tax upon profits derived by him from contracts made for the purchase and sale of commodities in various foreign markets - Liverpool, London, New York and elsewhere outside British India. The assessee disputes his liability in respect of such profits on the ground that they were not profits "accruing or arising in British India." It is conceded that they are not otherwise chargeable: they have not been received in British India nor do they come under any of the provisions whereby they can be deemed to accrue or arise or be received in British India. No question arises as to the details of the transactions or as to the calculation of the tax. Though the transactions appear to have been of a speculative character and of the kind compendiously described as "dealing in futures," it is not now sought to charge the assessee upon the basis of any allegation that his contracts were made by way of gaming and wagering. In case however the place at which the profits accrued or arose should be held to depend upon the facts as to delivery of goods thereunder or intention to deliver the question propounded to the

Court was stated in a double form as follows:

(1) Whether in the circumstances of the case all the profits and gains which accrued and arose to the assessee from the business of future delivery contracts entered into with parties outside British India in which no delivery was ever taken or given or any part of such profits and gains can be said to have accrued or arisen in British India.

(2) Whether as regards that part of the said business of future delivery contracts in which delivery had been actually given or taken outside British India, the profits or gains which accrued can be said to have accrued wholly or partly in British India or otherwise.

2. As it is found that in no case was the taking or the giving of delivery done within British India, the second question is separately stated in the interest of the assessee and on the footing that to it an answer might be given more favourable to him than the answer to the first. This indeed was the view of the Commissioner. In his opinion the answer to the first question should be that all the net profits and gains from these contracts (after payment of the services rendered by the brokers outside British India) accrued or arose in British India. To the second question he answered that part only of the profit and not the whole can be said to have accrued in British India. The learned Judges of the High Court were of opinion that the whole of the profits referred to in both questions accrued or arose outside British India. Their Lordships will confine their attention, in the first place, to the cases mentioned in the first question, postponing the second. The narrative given by the Commissioner in his Letter of Reference to the High Court contains material for a contention that the place at which the assessee entered into the contracts of purchase and sale was Bombay. Before their Lordships this contention was disclaimed by learned counsel for the appellant whose argument took the forms that the exercise of skill and judgment in and the giving of directions for the formation of the contracts took place in Bombay and that Bombay was the place at which the assessee carried on the business which had produced the profit. This leaves little room for dispute as to the facts of the case, which in the circumstances are sufficiently represented by the following extracts from the Letter of Reference:

2. The assessee has been trading in Bombay for several years past as broker and speculator in cotton, silver and other commodities. He has his office in Bombay only. He has also income from properties and dividends on shares in Joint Stock Companies. As regards the speculation business, the assessee does this on his

own account as well as on account of his constituents and he carries on his business not only with parties in British India but also with parties outside British India, e. g. at Liverpool, London and New York. Profit or loss from such business as is done on his own account is his. As regards business done on account of his constituents, he charges brokerage and the profit or loss arising therefrom is theirs.

7. As in this connexion, it is necessary to have some idea of the exact manner in which the assessee does this speculation business, I beg to refer here to an actual transaction to show how it was put through. Taking up the New York Cotton Exchange, on 29th October 1930, the assessee sent a telegram to A. Norden and Co. of New York asking them to "Buy 500 March at the closing." A copy of the telegram is annexed hereto and marked Ex. E. This was done at 11.74 cents per lb (a bale containing 500 lbs.), as appears from the reply telegram of the same date which runs "Bought March 500, 11.74" (copy annexed and marked Ex. F). On 1st December, the assessee sold the 500 bales by sending again a telegram to the above firm asking it to sell. The telegram ran "Sell 600 March" (copy annexed and marked Ex. G). The firm did so at 10.84 cents per lb., as appear from the reply telegram of the same date which ran "Sold March 500. 10.84" (copy annexed and marked Ex. H). A copy of letter dated 1st December 1930, from the above firm confirming the sale is also annexed hereto and marked Ex. I. The difference between the purchase and sale price amounted thus to \$2250 which the assessee had to pay along with the amount of \$90.21 charged by the firm on account of brokerage and other expenses. The assessee neither paid the purchase price nor recovered the sale price nor did he take or give delivery of the said 500 bales. He paid only the difference between the two prices. (This is also what he would do with a broker in Bombay while dealing with a party here.) All that is to be done in a business of this kind is thus merely to issue an order to a broker for forward purchase or sale and then issue another order closing the transaction.

3. It is not necessary to refer to certain documents which in the case of the Liverpool transactions were sent to Bombay for signature, since these bear solely on the contention not now persisted in that the place of formation of the contracts was Bombay; but the following extract from the opinion of the Commissioner may be added as disclosing his view of the facts :

10. As regards question (1), I beg to say that the assessee has got his office here in Bombay alone where he does all the business, the profits of which are to be

taxed. Each and every transaction which ended in these profits has been personally managed by the assessee and has not been left to the discretion of any agent of his abroad. These activities on his part which resulted in the profits or gains sought to be taxed all took place in Bombay and nowhere else, He considered in Bombay the prevailing prices of cotton, silver, etc., at Bombay, London, Liverpool and New York and made up his mind here to enter into each of the future delivery contracts under consideration. . . . There must be two parties to a contract. Hence the assessee being one party thereto had to find another party and for that purpose had to employ brokers outside British India but that cannot be interpreted as meaning that what he earned by his efforts in British India was earned where the brokers were located. The brokers merely helped him in getting into contact with parties willing to enter into a contract with him. Surely the profit which the assessee earned must have accrued somewhere and when everything which he need do to earn it was done by him in Bombay (including employment of brokers which too was done from Bombay), it is difficult to see how the profit could be said to have arisen in London or New York where the assessee never set foot. All the activities on his part which resulted in this profit took place in Bombay and the profit which was the result thereof must be taken to have accrued here and nowhere else.

4. This view, it will be observed, proceeds upon a consideration of the particular transactions and the method by which each transaction was entered into and carried out. But the argument has been heightened or reinforced by maintaining that the profits now in question being profits of a business carried on in Bombay, all the profits of such business become chargeable to tax as accruing or arising in Bombay and that it is not necessary or permissible to discriminate between any of such profits for the purposes of the charge imposed by the Act. Profit in the case of a business- so runs the argument: -is the result of all the transactions whether plus or minus : not to treat them as a whole is illogical and highly inconvenient: they must all accrue or arise in the same place - the place at which the business is directed or controlled, the place at which the assessee exercises his trade. If this doctrine be right, much may depend upon the question whether the assessee has carried on one business or more than one. As the Commissioner has stated that the assessee kept separate books for his transactions with parties in British India and with parties abroad, there may be something here not unworthy of a careful consideration. But their Lordships will assume (without in any way deciding) that, whether in fact or in law, no difficulty arises in regarding all the assessee's foreign dealings as part of his Bombay business. If the profits of the assessee's

speculations on the various foreign markets be regarded distributively as separate transactions the question for decision is not inaptly framed by Beaumont G. J. as follows :

Does the fact that profits arising under contracts made abroad depend on the exercise in Bombay of knowledge, skill and judgment on the part of the assessee and upon instructions emanating from Bombay, involve that the profits arose or accrued in British India ?

5. The words "accruing or arising in British India" may be taken provisionally and in the first place, as an ordinary English phrase which derives no special meaning from the Act. The alternative "accruing or arising in" and the antithesis between these words and the words "received in" or "brought into" afford no safe inference of any special meaning. "Profits . . . accruing or arising in British India" are words which in their ordinary meaning seem to require a place to be assigned as that at which the result of trading operations comes, whether gradually or suddenly, into existence. Though the division is only between British India and the rest of the world, the notion may be difficult to apply to a particular transaction, debits and credits being intangible and not occupying space. But the revenue authorities who have to disclose reasons good in law for affirming that any profits "arose or accrued in British India" have in the present case two things only to put forward-apart, that is, from the argument as to "business" which will be dealt with separately in this judgment. These two things are : (a) the exercise of skill and judgment in Bombay, (b) the giving of the directions from Bombay. It is difficult indeed to see that the place at which a man takes a decision to do something in New York or to ask someone else to do something for him in New York is the place at which arises the profit which results from the action taken in consequence of the decision. and if the place from which he issues his instructions be regarded as a separate element the identity of place is no less difficult to detect. That the profit may be causally attributed to the assessee's decision is reasonable enough : though it be not the proximate cause nor the whole of the cause, it is in the chain of causation the link which most deserves the attention of anyone who desires to explain the success of the transaction. For this, and it may be for other purposes, the selective process which ignores the intermediate links is justified. But is the same selective process justified for the purpose of assigning the place at which the result arose ? Their Lordships think not. It can hardly be maintained that whatever the man decides upon in Bombay and whatever may be done abroad in pursuance thereof, the profit must necessarily arise in Bombay. One must look at the transaction to see what happened in British India and what happened elsewhere. The intermediate links may

be all important. Here the profit is the difference between a sale and a purchase both effected in New York and then set off and so far carried out in New York that a New York broker has money in his hands or under his control which as between himself and the assessee belongs to the assessee.

6. To determine the place at which such a profit arises not by reference to the transactions or to any feature of the transactions but by reference to a place in India at which the instructions therefor were determined on and cabled to New York is, in their Lordships' view, to proceed in a manner which cannot be supported if the transactions are to be looked at separately and the profits of each transaction considered by themselves. There is distinct paradox in the contention that the profits resulting from an order placed in New York would have accrued or arisen in the same place (Bombay) had the order been sent to Liverpool with a like result, but that had the assessee decided on and directed the same New York transaction when in Hyderabad the same profits would have arisen in a different place (Hyderabad). So far therefore their Lordships are in agreement with the High Court and they think that it makes no difference to the result whether the transactions be regarded as dealings in goods or as dealings in differences.

7. The main contention however of the appellant is that the profits of the assessee's "foreign" transactions are but part of the profits of his Bombay business which must be computed as a whole, all profits and all losses having their effect upon the final figure. The clear and able argument of Mr. Tucker did not seek to contest that in computing the profits of any business under Section 10 of the Act, the revenue authorities are only entitled to include such profits as accrue or arise or are received in British India or are to be deemed to be within this class. Section 10 applies indifferently to a business carried on within British India and to a business carried on elsewhere. But it is said, while that is formally true upon the face of Sections 4, 6 and 10, the principle has to be applied in the case of business profits, that loss or profit is the result of the trade as a whole, that the source of the profit is the business as a business and that the ultimate and total profit of the business must be regarded as accruing or arising at the place of direction or control. On this view it seems that a business carried on outside British India could have no profits accruing or arising within British India though it might be liable to tax on different principles. So too a business carried on in British India could have no profits which did not arise or accrue within British India. The result is that by sections of the Act which make no mention of the place where the business is carried on, the tax is really levied upon the whole or

upon none of the profits of a business according as it is or is not carried on in British India. If and only if the owner of a foreign business be not resident in British India, its profits from any business connexion or property in British India are taxable by the special provisions of section 42.

8. Their Lordships do not consider that the Income-tax Act is patient of this construction. They will first deal with the argument based on Sections 4 and 6 that the respondent's business is the source of the profits and that the sections require that the situation of the source should determine the place where the profits arise. This, in their Lordships' view, is a straining of the sections. The effect of Section 6 is to classify profits and gains under different heads for the purpose of providing for each appropriate rules for computing the amount: its language is "shall be chargeable ... in the manner hereinafter appearing." One of the heads is "Business," which as a head of income stands alongside Salaries, Interest on securities, Professional earnings and Other sources. True, the classification of income is according to the character of the source, and it has been held that "income, profits and gains" as distinct from casual receipts and from other forms of receipt or enrichment, involve the idea of a periodical money return from a definite source : *59 IA 206.1*. It may further be said that sub section (1) of Section 4 having used the word or notion "source" the words which follow "accruing or arising" are language in consonance therewith. But the list of "heads" in Section 6 is a list of sources not in the sense of attributing the income to one property rather than another, one business rather than another, but only in the sense of attributing it to property as distinct from employment or business as distinct from investment. Sections 4 and 6 taken together say of business profits that they are taxable on certain conditions stated in Section 4 and in a manner to be laid down in a later section. When one comes to that section (S.10) and not before, a further idea is introduced :

The tax shall be payable by an assessee under the head 'Business' in respect of the profits or gains of any business carried on by him.

9. What is to be learnt from an examination of the language of sub section (1) of Section 4-income profits and gains as described or comprised in Section 6 from whatever source derived-is that Section 6 is intended as describing different kinds of profit and that if the condition "accruing, arising or received in British India, etc.," is satisfied by the profits, they will not escape by reason of any quality or circumstance of the source. There may be room for the view that having regard to the sixth head in Section 6 the words "from whatever source derived" are surplusage : even so, they are

not there as a guide to the place where profits accrue or arise but to make clear that for another purpose source is irrelevant. There is every presumption that in such a section in an Indian Act the Legislature intends the exact language of the section to be the test of liability. To answer the question, "Do these profits accrue or arise in British India?" by asking another, "What in the sense of Section 6 is the source of these profits and is it situate in British India?" is to divert attention from that to which the statute points and to devote attention to what it discards. Nothing could be easier than to say "from whatever source derived if situate in British India" had this been intended. But it would have been by no means easy to apply. The source of salaries, of interest on securities, of professional earnings, is not readily described as situate anywhere though the place where an employment is carried on, or an investment made, or a salary or fees are earned is a familiar notion. There would have been no difficulty in the case of "property" and with the aid of certain rules, little difficulty, it may be, in the case of "business." But the Legislature has chosen a different test and applied it to all kinds of profits-"accruing or arising in British India." It may even have chosen it as fairer because it could be applied distributively to the profits of a single source. However that may be, the profits of each particular business are to be computed wherever and by whomsoever the business is carried on, but only on condition that they are profits "accruing, arising or received in British India," etc. What connexion exists, if any, between place, of direction and place at which the profits arise is a matter not touched by Sections 4,6 or 10. Not only do they lay no stress upon the place at which the business is carried on; they make no mention of it. In these circumstances it cannot be held that it is itself the test of chargeability by virtue of a rule, not mentioned either, that profits arise or accrue at the place where the business is carried on.

10. The argument from the use of the word "source" in the Act is supported by appeal to principle, and cases under the English Act have been referred to on the matter. It would be both unreasonable and ungrateful to complain of the use made by learned counsel on both sides, of the English decisions, but their Lordships have carefully to remind themselves that:

The Indian Act is not in parimateria; it is less elaborate in many ways, subject to fewer refinements, and in arrangement and language it differs greatly from the provisions with which the Courts in this country have had to deal: per Sir George Lowndes in *Commissioner of Income-tax v. Shaw Wallace and Co.*,

11. The English Act has for many years imposed the tax upon all who exercise a trade

within the United Kingdom and observations of English Judges by way of exposition of this policy cannot be authority on the problem under the Indian Act. In any case their Lordships are not satisfied that apart from the dictate of any statute, authority in England has established the proposition that the place at which profit accrues or arises is the place of central control. Cockburn C.J. in *Sully v. Attorney-General*, indeed observed :

Wherever a merchant is established, in the course of his operations his dealings must extend over various places ; he buys in one place and sells in another. But he has one principal place where he may be said to trade-viz., where his profits come home to him. That is where he exercises his trade.

12. But the question here is whether under the Indian Act the place where certain profits did not come home to him is the place at which they accrued or arose. There seems to be no necessity arising out of the general conception of a business as an organisation that profits should arise only at one place. This indeed seems to have been the view of Cockburn C. J. in the case cited (cf. p. 716). Their Lordships have also been referred to an observation by Lord Macmillan in *Robinson Brothers (Brewers), Ltd. v. Assessment Committee*, at page 571 :

In the case where the brewer sells his own beer in the public-house which he rents he no doubt benefits his brewery by having an assured channel for the disposal of his beer, but the profit is actually made where the sales are effected—that is in the public house.

13. No doubt, if it can be held that under the Indian Act profit in the case of a business must be taken so strictly that it is not to be understood distributive at all, the profit of the assessee's business would become an ultimate and single figure, irreducible, and referable only to Bombay. But such high doctrine cannot be read into the Indian statute without violence not only to its language but to its scheme. Profits are frequently if not ordinarily regarded as arising from many transactions each of which has a result—not as if the profits need to be disintegrated with difficulty but as if they were an aggregate of the particular results. In the present case the assessment order has discriminated between the Bombay and the " foreign " business income. To discriminate between all kinds of profits according to the place at which they accrue or arise is a plain dictate of the statute: other discrimination is involved in the exemptions and in such sections as Section 42.

14. The construction or application of the Act for which the appellant contends is seen to involve further difficulty if attention be paid to sub section (2) of Section 4 as it

stood after Act 27 of 1923 and prior to Act 12 of 1933 :

4 - (2) Profits and gains of a business accruing or arising without British India to a person resident in British India shall, if they are received in or brought into British India, be deemed to have accrued or arisen in British India and to be profits and gains of the year in which they are so received or brought, notwithstanding the fact that they did not so accrue or arise in that year, provided that they are so received or brought in within three years of the end of the year in which they accrued or arose.

Explanation.-Profits or gains accruing or arising without British India shall not be deemed to be received or brought into British India within the meaning of this sub-section by reason only of the fact that they are taken into account in the balance-sheet prepared in British India.

15. If this sub-section was solely directed to the case of a person resident in British India being the owner of a business carried on outside British India, no doubt meaning can be given to it without supposing that it was aimed at the foreign part of the business done by persons, firms and companies in India. The reference to the "balance sheet prepared in British India" makes the supposition difficult and their Lordships do not think that the amendment of 1923 was based upon or is consistent with the view that all the profits of a business carried on in British India accrue or arise in British India. So too, even if it be right that a business carried on outside can have no profits which accrue or arise within British India, much of the profits of business done in British India by firms abroad would be taxable under Section 42 (1) as "accruing or arising whether directly or indirectly through or from any business connexion or property in British India". But apart from the difficulty of supposing that all such profits are within the sub-section, there is the important fact that the sub-section does not apply at all where the assessee is resident in British India : such a person owning a foreign business would escape altogether. of course it may be that a resident would be more likely to bring the profits into British India, but even so, if the appellant's view is sustained, a leakage which can hardly have been intended must result. Their Lordships have no hesitation in saying that the sub-section is more readily intelligible as an addition to a provision which catches profits arising in British India to businesses carried on outside. These considerations lead their Lordships to the conclusion that under the Indian Act a person resident in British India carrying on business there and controlling transactions abroad in the course of such business is not by these mere facts liable to tax on the profits of such transactions. If such profits have not been received in or brought into British India, it becomes or may become

necessary to consider on the facts of the case where they accrued or arose. Their Lordships are not laying down any rule of general application to all classes of foreign transactions, or even with respect to the sale of goods. To do so would be nearly impossible and wholly unwise-to use the language of Lord Esher in *Erichsen v. Last*. (They are not saying that the place of formation of the contract prevails against everything else. In some circumstances it may be so, but other matters-acts done under the contract, for example-cannot be ruled out a priori. In the case before the Board the contracts were neither framed nor carried out in British India: the High Court's conclusion that the profits accrued or arose outside British India is well founded.

16. The consideration that the view now taken by their Lordships would appear to have been accepted hitherto in India is one which they mention last as the question is raised as one of construction of a statute. But it would be paying less respect than is due to the decisions of the Indian Courts if mention were not now made of the cases in *Secretary to the Commissioner Salt, Abkari and Separate Revenue, Madras v. Ramanathan Chetty, In re Aurangabad Mills Ltd., Secy. Board of Revenue (Income-tax) Madras v. Ripon Press & Sugar Mills Co Ltd.,; Jiwan Das v. Commissioner of Income-tax, Punjab and N.W.F. Province, Sarupchand & Hukumchand v. Commissioner of Income-tax, Bombay*. These and other cases have been fully considered by the Board. The construction which the appellant seeks to put upon the Act has no direct support from them and the main current of authority in India is inconsistent therewith. No separate consideration of the second of the questions referred to the High Court is required. Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

Cases Referred.

(1932) 19 AIR PC 138=136 IC 742=59 Cal 1343=59 IA 206 (PC).

(1860) 5 H and N 711=29 LJ Ex 464=6 Jur (NS) 1018=2 LT 439=8 WR 472 at p. 717

(1938) 64 TLR 568

1881) 8 QBD 414=51 LJ QB 86=45 LT 703=30 WR 301=46 JP 357 p. 418.

(1920) 7 AIR Mad 344=53 IC 976=43 Mad 75=37 MLJ 663=1 ITC 37 (SB).

(1921) 8 AIR Bom 159=64 IC 9=45 Bom 1286=23 Bom LR 570=1 ITC 116

(1923) 10 AIR Mad 574=77 IC 621=46 Mad 706=44 MLJ 523=1 ITC 202 (FB).

(1931) 18 AIR Bom 236=132 IC 505=55 Bom 231=33 Bom LR 382= 5 ITC 108