E. D. Sassoon & Company Ltd. and Others

Vs

Commissioner of Income-Tax, Bombay City

Civil Appeals No. 3, 30 and 31 of 1953

(S.R. Dass, N.H. Bhagwati, B. Jagannath Das JJ)

14.05.1954

JUDGMENT

BHAGWATI, J. -

These appeals arise out of two judgments and orders of the High Court of Judicature at Bombay in Income-tax References Nos. 23, 24 and 27 of 1951 made by the Income-tax Appellate Tribunal under section 66(1) of the Indian Income-tax Act and section 21 of the Excess Profits Tax Act.

E. D. Sassoon and Company Ltd., (hereinafter preferred to as the Sassoons) were the managing agents of (1) E. D. Sassoon United Mills Ltd. under agreements dated the 24th February, 1920, and the 2nd October, 1934, (2) Elphinstone Spinning and Weaving Mills Company Ltd. under the agreement dated 23rd May, 1922, and (3) Apollo Mills Ltd. under the argument dated the 23rd May, 1922. The Sassoons agreed to transfer their managing agencies of the said companies to Messrs. Agarwal and Co., Chidambaram Mulraj and Company Ltd. and Rajputana Textile (Agencies) Ltd. respectively by letters dated the 3rd September, 1943, 16th April, 1943, and the 27th April, 1943. The consent of the shareholders of the respective companies to the agreements for transfer was duly obtained and the managing agencies were ultimately transferred to the respective transferees with effect from the 1st December, 1943, 1st June, 1943, and 1st July, 1943, respectively. The Sassoons executed in favour of Messrs. Agarwal and Company, Chidambaram Mulraj and Company Ltd. and Rajputana Textile (Agencies) Ltd. formal deeds of assignment and transfer and received from them Rs. 57,80,000, Rs. 12,50,000 and Rs. 6,00,000 respectively on transfers of the managing agencies, and the net consideration, viz., Rs. 75,77,693, received by them on such transfers was taken by them to the "Capital Reserve Account". The accounts of the managing agency commission payable by the respective companies to the managing agents for the year 1943 were made up in the year 1944 and Messrs Agarwal and company received from the E. D. Sassoon United Mills Ltd. a sum of Rs. 27,94,504, Chidambaram Mulraj and Company Ltd. received from the Elphinstone Weaving and Spinning Mills Company Ltd. a sum of Rs. 2,37,602 and the Rajputana Textile (Agencies) Ltd. received from the Apollo Mills Ltd. a sum of Rs. 3,82,608 as any by way of such commission.

For the assessment year 1944-45 and the chargeable accounting period 1st January, 1943, to the 31st December, 1943, the original income-tax and excess profits tax assessments of the Sassoons were made on the 31st May, 1945, at a total income of Rs. 46,48,483. This income however did not include any part of the managing agency commission received by the transferees. The entire amounts of the managing agency commission received by the transferees were assessed by the Income-tax Officer for the assessment year 1945-46 as the income of the transferees. The transferees

appealed to the Appellate Assistant Commissioner who confirmed the orders of the Income-tax Officer. When the matter was taking in further appeal to the Income-tax Appellate Tribunal, the Tribunal by its order dated the 28th December, 1949, accepted the transferees' contention thatthe managing agency commission received by them should be apportioned on a proportionate basis and the transferees should be made liable to pay tax only on the commission earned by them during the period that they had worked as the managing agents of the respective companies.

The Income-tax Officer and the Excess Profits Tax Officer appear to have discovered that the amounts of the managing agency commission earned by the Sassoons prior to the dates of the respective transfers were not brought to tax and therefore issued on the 29th June, 1946, notices under Section 34 of the Indian Income-tax Act and Section 15 of the Excess Profits Tax Act upon the Sassoons on the ground that their income from the managing agency had escaped assessment. The Income-tax Officer and the Excess Profits Tax Officer wanted to include in the assessable income of the Sassoons Rs. 28,51,934 made up of Rs. 25,61,629 in respect of the managing agency of the E. D. Sassoon United Mills Ltd. for the period of 11 months from the 1st January, 1943, to the 30th November, 1943, Rs. 99,001 in respect of the managing agency of the Elphinstone Spinning and Weaving Mills Ltd. for the period of five months from the 1st January, 1943, to the 31st May, 1943, and Rs. 1,91,304 in respect of the managing agency of the Apollo Mills Ltd. for the period of six months from the 1st January, 1943, to the 30th June, 1943, contending that such managing agency commission had accrued to the Sassoons for services rendered so that on the dates on which the Agencies were transferred the Sassoons were entitled to such remuneration from the managed companies in the form of commission for services rendered up to the dates of the transfers. In spite of the objection of the Sassoons the Income-tax Officer and the Excess Profits Tax Officer determined these sums as their escaped incomes and assessed them accordingly. The Sassoons appealed to the Appellate Assistant Commissioner who dismissed the appeals and further appeals were taken to the Income-tax Appellate Tribunal. The Income- tax Appellate Tribunal relied upon its order dated the 28th December, 1949, in the case of the transferees and confirmed the orders of the Appellate Assistant Commissioner. The Tribunal was of the opinion that the managing agency commission was earned for services rendered and therefore it was taxed in the hands of the person who carried on the business of the managing agency and not in the hands of the person to whom it was assigned, and that therefore so far as the Sassoons were concerned the managing agency commission should be apportioned between them and their transferees.

The Sassoons applied under Section 66(1) of the Indian Income-tax Act and Section 21 of the Excess Profits Tax Act requesting the Tribunal to draw a statement of the case and refer the question of law arising out of the orders to the High Court for its decision. On the 12th January, 1951, the Tribunal by its statement of the case referred to the High Court one question of law as arising out of its orders, viz., "whether in the circumstances of the case was the managing agency commission liable to be apportioned between the assessee company and the assignee" observing that in its opinion the question was not when the managing opinion agency commission accrued but the real question was to whom it accrued. This reference was made by the Tribunal in R. A. No. 474 of 1950-51, and R. A. No. 475 of 1950-51 referring the question of law thus framed in regard to the managing agency commission of the E. D. Sassoon United Mills Ltd. and the Elphinstone Spinning and Weaving Mills Ltd., the whole of the managing agency commission having been paid respectively to Messrs. Agarwal and company and to Chidambaram Mulraj and Company Ltd. in the year 1944. This was Income-tax Reference No. 27 of 1951.

The Commissioner of Income-tax/Excess Profits Tax, Bombay City, also required the Tribunal to refer to the High Court the question of law arising out of its order in the appeal of Messrs. Agarwal

and company in which the Tribunal had held as above that the managing agency commission should be apportioned between the Sassoons and the transferees. The statement of the case was accordingly submitted by the Tribunal on the 12th January, 1951, and the same question as above was referred to the High Court. This reference was Income-tax Reference No. 24 of 1951.

A similar application was made by the Commissioner of Income- tax/Excess Profits Tax, Bombay City, for reference in the appeal of Chidambaram Mulraj and Company Ltd. The Tribunal submitted its statement of case also on the same day and referred the very same question to the High Court. This reference was Income-tax Reference No. 23 of 1951.

All these references same for hearing and final disposal before the High Court. Income-tax Referenced Nos. 24 and 27 of 1951 were heard together and one judgment was delivered, answering the question submitted to the High Court in both the references in the affirmative. Following upon this judgment the High Court also answered in the affirmative the question which had been referred to it by the Tribunal in Income-tax Reference No. 23 of 1951. The decision of the High Court was thus against the contentions which had been urged both by the Sassoons and the Commissioner of Income-tax and the Sassoons as well as the Commissioner of Income-tax obtained leave under section 66A(3) of the Indian Income-tax Act and section 133(1) (c) of the Constitution for filing appeals to this Court. The appeal of the Sassoons was Civil Appeal No. 3 of 1953, and it was filed against the Commissioner of Income-tax, Bombay City. The appeals of the Commissioner of Income-tax against Messrs. Agarwal and company and Chidambaram Mulraj and Company Ltd. respectively were Civil Appeal No. 30 of 1953 and Civil Appeal No. 31 of 1953. These appeals have come for hearing and final disposal before us.

All the appeals raise one common question of law, viz., whether in the circumstances of the case the managing agency commission was liable to be apportioned between the Sassoons and their respective transferees in the proportion of the services rendered as managing agents by each one of them and the decision turns upon the question whether any income had accrued to the Sassoons on the dates of the respective transfers of the managing agencies to the transferees or at any time thereafter. This judgment will cover our decision in all the appeals.

It will be convenient at this stage to set out the relevant clauses of the respective managing agency agreements and the deeds of assignment and transfer.

The original agreement with the E. D. Sassoon United Mills Ltd. was entered into on the 24th February, 1920, by Sir Edward Sassoon and others carrying on business in partnership in the style and form of Messrs. E. D. Sassoon and company. The managing agency was transferred with the consent of the company by E. D. Sassoon and company to the Sassoons and another managing agency agreement was executed between the company and the Sassoons on the 2nd October, 1934, appointing and recognising the latter as the agents of the company from the 1st January, 1921, for the residue of the period and upon the same terms and conditions set out in the original agreement dated the 24th February, 1920. Under clause 1 of that agreement the Sassoons and their assigns were appointed the agents of the company for a period of 30 years from the date of the registration thereof and thereafter until they resigned or were removed from office by a special resolution of the company. Under clause 2 the remuneration of the Sassoons and their assigns was fixed at a commission of 7 1/2 per cent. per annum on the annual net profits of the company after making all proper allowances and deductions from revenue for working expenses chargeable against profits, provided however that if in any year no such commission was earned or it fell short of Rs. 1,20,000 the company was a pay to them a sum sufficient to make up the minimum remuneration of Rs.

1,20,000 per annum on account of such commission. The said commission was under clause 2(d) to be due to them yearly on the 31st of March in each and every year during the continuance of the agreement and was to be payable and to be paid immediately after the annual accounts of the company had been passed by the shareholders. Under clause 3 the Sassoons and their assigns agreed with the company that they would be and act as the agents of the company during the said term for the said remuneration and upon and subject to the terms and conditions therein contained. Clause 10 of the agreement provided as under :-

> "It shall be lawful for the said firm to assign this agreement and the rights of the said firm hereunder to any person, firm or company having authority by its constitution to become bound by the obligations undertaken by the said firm hereunder and upon such assignment being made and notified to the said company the said company shall be bound to recognise the person or firm or company aforesaid as the agents of the said company in like manner as if the name of such person, firm or company aforesaid as the agents of the said company and the said company shall forthwith upon demand by the said firm enter into an agreement with the person firm or company aforesaid appointing such person, firm or company the agents of the said company for the then residue of the term outstanding under the agreement and with the like powers and authorities remuneration and emoluments and subject to the like terms and conditions as are herein contained."

The letter dated the 3rd September, 1943, recording the agreement of transfer of the managing agency provided that in the event of the transaction being completed in its entirely as therein stated the transferees would be entitled to receive the commission payable by the company under the managing agency agreement on the profits for the calendar year 1943. The deed of assignment and transfer executed between the Sassoons and Messrs. Agarwal and Company in pursuance of this agreement on the 26th January, 1945, statedthat the Sassoons thereby transferred to Messrs Agarwal and Company as from the 1st December, 1943, their Office as managing agents of the company for the unexpired residue of the term created by the said agreement dated the 24th February, 1920, as also the said agreements dated the 24th February, 1920, and the 2nd October, 1934, and all their rights and benefits as managing agents under the said agreements and Messrs. Agarwal and Company agreed to be the managing agents of the company from the 1st December, 1943, in place and stead of the Sassoons for the said unexpired residue of the term with like powers authorities remuneration and emoluments as were contained in the said agreements. It may be noted that even though the letter recording the agreement of transfer expressly provided that the transferees would be entitled to receive the commission payable by the company under the managing agency agreement on the profits for the calendar year 1943 no such term was incorporated in the deed of assignment and transfer.

The original agreement entered into by the Elphinstone Spinning and Weaving Mills Company Ltd. was with Messrs. Hajee Mahomed Hajee Esmail and Company and was dated the 24th July, 1919. The managing agency was transferred with the consent of the company by Messrs. Hajee Mahomed Hajee Esmail and Company to the Sassoons and on the 23rd May, 1922, another managing agency agreement was executed by the company in favour of the Sassoons, their successors and assigns employing them the agents of the company from the 1st February, 1922, for the unexpired period of the term of 60 years commencing from the 3rd July, 1919. Under clause 3 of the agreement the company was during the continuance thereof to pay to the Sassoons, their successors and assigns by way of remuneration a commission of ten percent on the net profits of the company and a further sum of Rs. 1,500 per month. Under clause 6 the Sassoons, their successors and assigns were to be at

liberty to retain, reimburse and pay them selves out of the moneys of the company inter alia all sums fur to them for commission and otherwise. The deed of transfer executed by the Sassoons in favour of Chidambaram Mulraj and Company Ltd. on the 2nd June, 1943, stated that the Sassoons assigned and transferred the agreement dated the 23rd May, 1922, between themselves and the company for the unexpired residue of the term of sixty years specified therein and the full benefit and advantage thereof together with the benefit of the agency and the office of the agents thereunder and the right to receive the remuneration thereafter to become payable by the company under or by virtue of the said agreement and together with the benefit of all rights, privileges, powers and authorities given andconferred on the Sassoons thereunder.

It is significant to observe that before the Income-tax authorities as also the High Court no distinction was drawn between the provisions of these two agency agreements in regard to the right of the managing agents to remuneration thereunder and the facts in so far as they related to all the managing agencies were treated as similar. The quantum also was not disputed in each case though the principle of apportionment was in dispute.

The Sassoons were assessed for this "escaped income" on the basis that they had earned the income by rendering services as managing agents to the companies for the respective periods that they continued to be and managing agents and the transferees had rendered the services for the balance of the periods completing the full year of accounting and had earned the proportionate commission and therefore the amount of commission which the latter actually received included the Sassoons' share of commission in respect of which they were not liable to tax but the Sassoons. The High Court adopted this test of the services rendered by the Sassoons as well as the transferees during the whole of the year and considered the proportions of the services rendered by the Sassoons and the transferees as the managing agents of the companies as decisive of the portions of the managing agency commission earned respectively by each. The parenthood of the income received by the transferees was considered to be the real test to the apportionability of the amounts of the managing agency commission and the total amount of the managing agency commission was thus apportioned between the Sassoons and the transferees in the proportion of 11 to 12 in the case of the E. D. Sassoon United Mills Ltd. and 5 to 7 in the case of the Elphinstone Spinning and Weaving Mills Company Ltd. the transfers of the managing agencies having been made with effect from the 1st December, 1943, and the 1st June, 1943, respectively. The income was held assessable to tax not on the basis of receipt but on the basis of accrual. The receipt by the transferees was considered of no consequence. What was received by the transferees was treated as including the proportionate shares of the Sassoons in the income which could be attributed to their periods of service as the managing agents of the respective companies and even though actually received by the transferees they were treated as income which had accrued to the Sassoons by reason of their having acted as the managing agents of the respective companies for the respective periods. The Sassoons' shares of the income were thus considered as having been earned by them during the year 1943 and were held on the construction of the deeds of assignment and transfer executed by the Sassoons in favour of the transferees as having been assigned by them to the transferees and even though the transferees received the whole of the managing agency commission payable by the companies to the managing agents under the terms of the respective managing agency agreements, the Sassoons the assignors and not the transferees the assignees were assessed to tax in respect of the proportionate shares of income earned by the Sassoons in the year 1943.

It was urged before us on behalf of the Sassoons that no part of the managing agency commission for the broken periods of 1943 was earned by them. It did not become a debt due by the companies to the Sassoons and it could not therefore be said to have accrued to them. The contract of

employment was an entire and an indivisible contract and the remuneration payable by the companies to the Sassoons thereunder was payable by the companies to the Sassoons thereunder was payable at stated periods. It was a condition precedent tothe Sassoons earning the remuneration that they fulfilled the terms of their employment and completed the period for which the remuneration was payable to them and the service for the particular period was a condition precedent to their earning the remuneration for that period. The stated period was that of a year and no remuneration was payable to the Sassoons till the end of the year and unless and until they completed the period of the year they would not be entitled to any commission or remuneration for the year, much less for the broken period. It was therefore contended that the Sassoons had not earned any commission for the broken periods and that not having earned the same they could not have assigned it to the transferees with the result that when the transferees were paid the commission under the terms of the managing agency agreements, the transferees received the same in their own right even though they had not rendered the services to the company for the whole of the calendar year 1943. It was contended that in any event, whatever be the position as between the companies and the transferees, the Sassoons had not earned any part of the managing agency commission which had been paid by the companies to the transferees and were not liable to tax in respect of the same.

It was on the other hand urged on behalf of the transferees that even though under the terms of the deeds of assignment and transfer they were paid by the companies the whole of the managing agency commission for the calendar year 1943 they had merely earned the commission or remuneration for the period of actual services rendered by them to the company and the portions of the managing agency commission proportionate of the services actually rendered by the Sassoons to the companies had accrued to the Sassoons though it had been ascertained and paid to the transferees in the year 1944. Even though the ascertainment and the payment came later it made no difference to the actual of the income which should be referred back to the period during which the income was earned and accordingly whatever amount was earned by the Sassoons during the respective periods that they had acted as the managing agents of the companies had accrued to them during those periods and was received by the transferees only by virtue of the respective deeds of assignment and transfer. Having been received by the transferees by virtue of the assignment those portions of the managing agency commission received by them none the less constituted income which had accrued to the Sassoons and were liable to tax against the Sassoons the assignors and not against them the assignees.

The position of an employee under an entire contract of service has been thus enunciated in Halsbury's Laws of England (Hailsham Edition) Vol. 22, page 133, paragraph 221 :-

> "When the contract of service is an entire contract, providing for payment on the completion of a definite period of service, or of a definite piece of work, it is a condition precedent to the recovery of any salary or wages in respect thereof that the service or duty shall be completely performed, unless the employer so alters the contract as to entitle the servant to regard it at an end, in which case the whole sum payable under the contract becomes due, or unless there is a usage that the servant is entitled to wages in proportion to the time actually served. But when the contract, though in respect of work terminating at a particular time, is to be constructed as providing that remuneration shall accrue due and become vested at stated periods, such remuneration constitutes a debt recoverable at the end of each such period of service."

Section 219 of the Indian Contract Act also provides that in the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of such act.

One attention was drawn in this connection to the case of Boston Deep Sea Fishing and Ice Co. v. Ansell. In that case the defendant was employed as the managing director of the company for 5 year at a yearly salary. He was dismissed for misconduct before the expiration of the current year and claimed against the company damages for wrongful dismissal and the salary for the quarter which had expired before his dismissal. His claim for salary was disallowed and it was held that having been dismissed for misconduct he was not entitled to any part of the unpaid salary for the current year of his service. Lord Justice Cotton at page 360 posed the question as under :-

> "Can he sue for a proportionate part of the salary for the current year ? What he would have been entitled to if he continued in their service until the end of the year would have been Pounds 800, but in my opinion that would give him no right of action until the year was completed."

Lord Justice Bowen observed at page 364 :-

> "As regards his current salary it is clear and established beyond all doubt on authorities..... that the servant who is dismissed for wrongful behaviour cannot recover his current salary, that is to say, he cannot recover salary which is not due and payable at the time of his dismissal but which is only to accrue due and become payable at some later date, and on the condition that he had fulfilled his duty as a faithful servant down to that later date."

The case of Moriarty v. Regents Garage & Engineering Company Limited was particularly relied upon by the learned counsel for the Sassoons. No question of dismissal or removal for misconduct arose in that case, but the director whose remuneration was fixed "at the rate of Pounds 150 per annum" ceased to be a director on settlement of disputes between himself and the company, the director agreeing to accept payment of all money due to him upon his debentures and the debentures being paid off in the middle of the year. The director sued the company to recover a proportionate part of the Pounds 150 as his fees for the broken period. The Deputy Country Court Judge gave judgment for the company, holding that the director was not entitled to remuneration for a broken part of a year. The Divisional Court reversed the decision of the Deputy County Court Judge and there was a further appeal. It was held by the Court of Appeal that neither under the agreement nor under the articles was the director entitled to the sum he claimed. The question of the applicability of the Apportionment Act was sought to be raised before the Appeal Court but was not allowed to be raised in appeal as it had not been done in the County Court. In arriving at this decision Lord Sterndale, M. R., stated the position as follows at page 774 :-

> "It seems to me that upon the construction of the agreement it must fail. It is a payment per annum, a payment for a year, and unless he serves for the year he cannot get the payment."

The decision in Swabey v. Port Darwin Gold Mining Co. had been cited before the Court of Appeal in support of the proposition that the director was in such cases entitled to his proportionate remuneration for the broken period. The learned Master of the Rolls however observed at page 777 :-

> "There is nothing is Swabey v. Port Darwin Gold Mining Co. in my opinion to oblige us to hold that wherever there is power, mutual or onesided, to terminate an agreement in the middle of the year, there must, as a matter of necessity, be inferred a right to receive payment from day to day, and receive payment for the broken period. I do not think in this case there are circumstances which oblige me or induce me to draw that inference."

These authorities as well as the cases of Mapleson v. Sears, and Sanders v. Whittle, enunciate the well established principle that wages and salaries are not apportionable upon the sudden cessation of a contract of service, which is stated to be still the law in Batt on the Law of Master and Servant, 4th Edn., at page 209, until a hardy litigant successfully seeks in a higher Court a confirmation of the view of McCardie, J., expressed in Moriarty's case as regards the injustice of denying the benefit of the Apportionment Act to a man who may have been guilty of misconduct. This rule applies not only when there is a sudden cessation of a contract of service by the unilateral act of the master or the servant but also when there is such cessation by mutual consent of the parties. In the former event the servant would be deprived of his proportionate wages by his own act or default or he would be able to sue his master for damages for wrongful dismissal, but no claim for proportionate salary or wages would survive under the contract of service. In the latter event the consensus of opinion between the master and the servant would be sufficient to terminate the contract the contract of service and no claim for proportionate wages or salary would survive unless it was made an express term of the agreement thus arrived at between the parties. In either event there would be no question of the servant claiming from his master wages or salary for the broken period.

Learned counsel for the transferees attempted to throw doubt on the correctness of the rule as enunciated above by citing a passage from Palmer's Company Precedents, 16th Edition, Vol. 1, page 583, where the learned author discusses the question of apportionment in the case of director's remuneration payable at so much per annum :-

> "Where the clause provides that a director is to be paid so much per annum, the words 'at the rate of' being omitted, and he vacates office before the end of a current year, the question whether he can maintain a claim for an apportioned part of the remuneration for that year has given rise to some difference of opinion. In Swabey v. Port Darwin Gold Mining Company, in the Court of Appeal, the article was as follows, and not as stated in the report : 'The directors shall each receive by way of remuneration out of the funds of the company in each year the sum of Pounds 200, and the chairman in addition Pounds 100 per annum.' The words 'at the rate of' were not present (as appears from the articles registered at Somerset House). A director resigned in the course of a current year, and was hold entitled to an apportioned part of the remuneration for that year.
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> But in Salton v. New Beeston Cycle Co. where the article provided that 'the directors shall be entitled to receive by way of remuneration in each year Pounds 5,000,' Cozens-Hardy, J., held that a director who vacated office before the end of a current year was not entitled to any apportionment. This case was followed by Wright, J., in McConnell's Claim, the words being 'each director shall be paid the sum of Pounds 300 per annum'; and by Bruce, J., in Inman v. Acroyd and Bert. See also Central de Kaap Gold Mines (Wright, J.). In these four cases the Court no doubt proceeded on the assumption that the report of Swabey's case was correct, and that the article in that case contained the words 'at the rate of.' Certainly Lord Alverstone,

> C.J., acted on this assumption in Harrison v. British Mutoscope, etc., Co. There the words were 'the sum of Pounds 1,500 per annum.' In the meantime Inman v. Acroyd had been taken to the Court of Appeal and affirmed, but on the ground that it was by the articles left to the directors to apportion the remuneration at the end of each year.
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> This case, therefore, really turned on the construction of the particular article, and as it was carefully distinguished from Swabey's case, the authority of that case, on an article omitting the word 'at the rate of', remains unshaken."

Swabey's case was referred to by Lord Sterndale, M. R., at page 777 in Moriarty's case and the learned was nothing in that case which would oblige the Court to hold that wherever there was power, mutual or onesided, to terminate an agreement in the middle of the year, there must, as a matter of necessity, be inferred a right to receive payment from day to day, and receive payment for the broken period. It really depended on the circumstances of each case whether to draw that inference or not. In any event we have not before us under the terms of the managing agency agreements any provision for payment of remuneration "at the rate of" any particular sum a year and the ratio of the four cases referred to by Palmer in the passage quoted above as also the observations of Lord Sterndale, M. R., at page 777 in Moriarty's case set out above are sufficient to enable us to hold that when the remuneration or commission is expressed at so much per annum without anything more it would amount in law to a stipulation for the payment of remuneration per year and the servant would not be entitled to get any remuneration unless and until he has completely performed his contract and such performance would be a condition precedent to the recovery of any wages or salary for that definite period of service. That would be the position even if the remuneration was to accrue due and becomes vested at stated periods and unless the servant performed the condition and fulfilled his duty as a faithful servant down to that stipulated date or the stated period no salary would accrue due and become payable to him until at the end of such period of service.

We shall now examine the terms of the managing agency agreements with a view to see whether the Sassoons were entitled thereunder to remuneration or commission for the broken periods. The agreement between the E. D. Sassoon United Mills Ltd. and the managing agents was for a fixed period of 30 years from the date of the registration of the company and thereafter until they resigned or were removed from their officer by a special resolution of the company and the appointment of the firm of E. D. Sassoon and company and their assigns was for the whole period. E. D. Sassoon and company their assigns covenanted and agreed with the company to be and act as such agents for the remuneration and upon and subject to the terms and conditions therein contained. It was lawful for them to assign the agreement and their rights thereunder to any person, firm or company having authority by its constitution to become bound by these obligations and upon such assignment being made and notified to the company, the company was bound to recognise such person, firm or company as the agents of the company in like manner as if the name of such person, firm or company had appeared in these presents in lieu of the names of the partners of E. D. Sassoon and company into the agreement with the company and the company agreed upon demand to enter into an agreement appointing such person, firm or company the agents of the company for the them residue of the term outstanding under the agreement and with the like powers and authorities remuneration and emoluments and subject to the like terms and conditions as therein contained. These provisions of the agreement showed the continuity of the managing agents who were employed as the agents of the company for this specified period and under the terms and conditions therein recorded. The new or the substituted managing agents were treated as if they had entered into the agreement with the company and their name had appeared in the original agreement in lien

of E. D. Sassoon and company who were in the first instance appointed the agents of the company. These managing agents described as such were to be paid the remuneration specified in clause 2(a) of the agreement which was a commission of 7 1/2 per cent. per annum on the annual net profits of the company with a stipulation in regard to the minimum remuneration of Rs. 1,20,000 per annum. Clause 2(d) specified when the said commission was to become due to the managing agents and it provided that the commission was to be due to them yearly on the 31st March in each and every year during the continuance of the agreement. The commission was thus an annual payment calculated upon the annual net profits of the company and was to be the managing agents yearly on the 31st March in each and every year. Unless and until the annual net profits of the company were determined the 7 1/2 per cent. commission could not be ascertained but the sum none the less became due on the 31st March in each and every year following the close of the accounting year of the company. The amount of such commission did not become a debt owing by the company to the managing agents until the 31st March in each and every year and was to be paid immediately after the annual accounts of the company had been passed by the shareholders. The postponement of the date of payment in this manner however did not prevent the amount of the commission thus ascertained becoming due to the managing agents and it was on the 31st March in each and every year that the amount of commission this calculated at 7 1/2 per cent. per annum on the annual net profits of the company became due by the company to the managing agents. Until and unless the accounting year of the company had gone by and the managing agents had served the company as their agents for the full period no part of the managing agency commission which was payable per year in the manner aforesaid could become due to them and the performance of the service for the year was a condition precedent to the managing agents being entitled to any part of the remuneration, or commission for the accounting year of the company. The managing agency agreement therefore was an entire and indivisible contract stipulating a payment of remuneration or commission per year and enjoined upon the managing agents the duty and obligation of rendering the services to the company for the whole year by way of condition precedent to their earning any remuneration or commission for the particular accounting year.

It was however urged that clause 10 of the managing agency agreement itself contemplated a broken period, because there was nothing therein to prevent the managing agents from assigning the agreement and their rights thereunder at any time in a particular year during the continuance of the agreement. If the managing agents therefore could assign the agreement and their rights thereunder it could not be suggested that neither the transferors who could not complete the year of service nor the transferees who had also not rendered the services as the managing agents for the whole of the accounting year should earn any remuneration or commission which would be payable to the managing agents only of they rendered the services to the company for the whole year. If therefore followed as a necessary corollary that both the transferors and the transferees would be paid their remuneration or commission and both would be entitled to the proportionate commission for the respective periods during which they rendered services as managing agents to the company. This argument however ignores the fact that whatever be the position as between the transferor and the transferee, whatever be their arguments inter se, whatever be the periods of the year during which they might have served the company in their capacity as the managing agents, the managing agents as described in the recitals and clauses 1 and 3 of the managing agency agreement were one entity and no severance of such periods of service during the course of a particular year was ever contemplated under the agreement. On assignment, the transferee became the managing agent as its name had been inserted in the managing agency agreement from the beginning. For the future period the transferor effected itself and the transferee took the place of the transferor and preserved the continuity of the managing agency so that whoever happened to satisfy the description of the

managing agents at the time when the commission for the accounting year became due to the managing agents thus described, which was expressly stated to be due yearly on the 31st March in each and every year, became entitled to receive the debt which thus became due and to the payment thereof after the annual accounts of the company had been passed by the shareholders. The stipulation for the company executing in favour of the new or the substituted managing agents an agreement appointing them the agents of the company for the then residue of the term outstanding underthe agreement was merely consequential upon the earlier provision therein contained which stated in so many terms that the company was bound to recognise such new or substituted managing agents in like manner as if their names had appeared in the said agreement in lieu of the partners of E. D. Sassoon and company and as if they had entered into the agreement with the company. The rights of such new or substituted agents were created by the very terms of clause 10 of the agreement and the formal embodiment thereof in the fresh agreement to be entered into by the company with them merely confirmed the rights which had already been created in them under that clause.

It was further pointed out that at the end of the managing agency agreement if not earlier, during the continuance thereof there would certainly be a broken period because the period of 30 years stipulated in clause 1 of the agreement would certainly expire on some date in February, 1950. The calendar year would expire on the 31st December, 1949, and there would of necessity be between the date of the expiration of the calendar year and the date of the expiration of the term of the agreement a period of about 2 months which would certainly be a broken period and not a full year. What would happen however on the expiration of the period of the managing agency agreement cannot affect the construction of the relevant terms of the agreement which have reference to a year or years during the continuance of the agreement. It is unnecessary to speculate as to whether by reason of the fact that E. D. Sassoon and company must have received the full year's remuneration or commission at the end of the first according year of the company ending with the 31st December, 1920, they might just as well give up, if need be, their remuneration or commission for the last two months on the expiration of the terms of the managing agency agreement. We see nothing in the terms of the managing agency agreement which would compel or induce us to hold that there must as a matter of necessity be inferred therefrom a right to receive remuneration or commission for a broken period.

Learned counsel for Chidambaram Mulraj and Company Ltd. however sought to distinguish the terms of the managing agency agreement of the Elphinstone Spinning and Weaving Ltd. from those of the managing agency agreement of the E. D. Sassoon United Mills Company Ltd. even though as stated before no such distinction was made either before the Income-tax authorities or the High Court. He contended that there was nothing in the agency agreement with the Elphinstone Spinning and Weaving Company Ltd. which corresponded with clauses 2(a), 2(d) and clause 10 of the agreement between the E. D. Sassoon United Mills and their managing agents. The only term which was to be found in the agency agreement of the Elphinstone Spinning and Weaving Company Ltd. was that the company was during the continuance of the agreement to pay to the managing agents who were there described as E. D. Sassoon and Company Ltd. their successors and their assigns by way of remuneration a commission of ten per cent. on the net profits of the company and a further sum of Rs. 1,500 per month. There was besides clause 6 of the agreement which conferred upon the managing agents theright of retainer, and reimbursement in connection inter alia with all sums due to them for commission or otherwise. These terms it was submitted did not constitute the payment of remuneration or commission a payment per annum and it was not possible to argue that the Sassoons were not entitled to any remuneration or commission for a broken period thereunder.

It may however be observed that the managing agency agreement with which we are here concerned was the agreement dated the 23rd May, 1922, between the company and the Sassoons and the managing agents there described were E. D. Sassoon and Company Ltd. on behalf of themselves, their successors and assigns. Clause 1 of the agreement employed the Sassoons, their successors and assigns the agents of the company from the 1st February, 1922, for the unexpired portion of the term of 60 years commencing from the 3rd July, 1919, and it was these managing agents thus described, viz., the Sassoons, their successors and assigns, who were during the continuance of the agreement to be remunerated by a commission of 10 per cent. on the net profits of the company and the company agreed to pay such commission to them. The right of retainer and reimbursement reserved under clause 6 of the agreement would not carry the transferees any further because it was in respect of all sums due to them for commission or otherwise. Unless and until the commission became due to them they had no such right of retainer. It would still have to be determined whether any sum because due to them by way of such commission. Whether any commission became due to them would depend upon the construction of clause 3 of the agreement and under that clause the commission calculated at 10 per cent. of the net profits of the company was to become due to them and was to be paid by the company to them during the continuance of the agreement. We have got to determine what is the full implication of this clause of the agreement, - "the commission of 10 per cent. on the net profits of the company." The word "profits" has a well-defined legal meaning as was observed by Lord Justice Fletcher Moulton at page 98 in The Spanish Prospecting Company Limited :

> "The word 'profits' has in my opinion a well-defined legal meaning, and this meaning coincides with the fundamental conception of profits in general parlance, although in mercantile phraseology the word may at times bear meaning indicated by the special context which deviate in some respects from this fundamental signification. 'Profits' implies a comparison between the state of a business at two specific dates usually separated by an interval of a year. The fundamental meaning is the amount of gain made by the business during the year. This can only be ascertained by a comparison of the assets of the business at the two dates."

This concept of the term was also adopted by Mr. Justice Mahajan, as he then was, in Commissioner of Income-tax, Bombay v. Ahmedbhai Umarbhai and Company, Bombay :

> "Profits of a trade or business are what is gained by the business. The term implies a comparison between the state of business at two specific dates separated by an interval of a year and the fundamental meaning is the amount of gain made by the business during the year and can only be ascertained by a comparison of the assets of the business at the two dates, the increase shown at a later date compared to the earlier date represents the profits of the business."

It was urged before us that there was nothing in the terms of the agreement which provided that the profits were to be ascertained at the end of every year, and there was nothing its accounts and ascertaining the net profits half yearly or quarterly or even every month by preparing trial balance sheets in that manner. Theoretically speaking all this may be possible but we have business people in a business sense. Ordinarily in the case of business or trading concerns accounts of profits are not made except at stated intervals usually separated by a year. Particularly in the case of limited companies incorporated under the Indian Companies Act the accounts are cast every year and the net profits earned by the company are ascertained every year both for the declaration of dividends and for submitting the returns to the Income-tax authorities. Under Section 131(1) of the Indian

Companies Act of 1913 every company was required once at least in every year and at intervals of not more than 15 months to cause the accounts to be balances and a balance sheet to be prepared which was called the annual balance sheet. The first schedule to the Companies Act which contained the regulations by which unless excluded the affairs of the company were to be governed provided under Regulation 106 the preparation once at least every year of the profit and loss account for the period and under the Regulation 108 for the balance sheet to be made out in every year and laid before the company in general meeting. Having regard to the course of business which prevailed in this company also so far as it is evidenced by the fact that the account of the managing agency commission was made up for the calendar year 1943 and was paid to Chidambaram Mulraj and Company Ltd. who became the managing agents in place and stead of the Sassoons in the year 1944, it is reasonable to assume that the accounts of this company were throughout made up at the end of every calendar year. The profit and loss of the company was then ascertained and a commission of 10 per cent. on the net profits of the company was paid to the managing agents of the company for the time being. In the case of limited Companies like those before us we would be justified in presuming that normally the accounts are made up every year and even though there may be a theoretical possibility of the accounts being cast half yearly or quarterly or even every month no such procedure would be adopted by the company. In any event it would be absurd to suggest that the profits of the company could accrue from day to day or even from month to month. The working of the company from day to day could certainly not indicate any profit or loss. Even the working of the company from month to month could not be taken as a reliable guide for this purpose. If the profit or loss has got to be ascertained by a comparison of the assets at two stated periods, the most business like way of doing it would be to do so at stated intervals of one year and that would be a reasonable period to be adopted for the purpose. In the case of large business concerns like these the working of the company during a particular month may show profits and the working in a particular month may show loss. The working during the earlier part of the year may show profit or loss and working in the later part of the year may show loss or profit which would go to counter-balance the profit or loss as the case may be in the earlier part of the year. It may as well happen that the profits which the company may appear to have earned during the earlier months of the year or even during the 11 months of the year may be considerably reduced or even wiped out during the later months or the last months of the year by reason of some catastrophe or unforeseen events. It would be therefore reasonable to assume that the profit or loss as the case may be should be determined at the end every year so that on such calculation of net profits the managing agents may be paid their remuneration or commission at the percentage stipulated in the managing agency agreement and the shareholders also be paid dividends out of the net profits of the company. We are sure that these were the considerations which weighed with the managing agents of this company in not taking up any such contention before the Income-tax authorities and the High Court that the remuneration or commission payable to them under the managing agency agreement was not payable per year and the contention put forward before us in this behalf was a clear after thought. We should be therefore justified in treating the terms and conditions in regard to the payment of managing agency commission in both these managing agency agreements as on a par with each other stipulating for such payment per year on the net annual profits of the companies.

If this be the true construction of the managing agency agreements it follows that the contract of service between the companies and the managing agents was entire and indivisible, that the remuneration or commission became due by the companies to the managing agents only on completion of a definite period of service and at stated periods, that it was a condition precedent to the recovery of any wages or salary in respect thereof that the service or duty should be completely performed, that such remuneration constituted a debt only at the end of each such period of service

and that no remuneration or commission was payable to the managing agents for broken periods.

The question still remains whether the remuneration for the broken periods accrued to the Sassoons and the contention which was strenuously urged before us on behalf of the transferees was that the Sassoons had rendered the services in terms of the managing agency agreement to the respective companies, that the service thus rendered were the source of income and whatever income could be attributed to those services was earned by the Sassoons and accrued to them in the chargeable accounting period though it was ascertained and paid in the year 1944 to the transferees.

The word "earned" has not been used in Section 4 of the Income-tax Act. The section talks of "income, profits and gains" from whatever source derived which (a) are received by or on behalf of the assessee, or (b) accrue or raise to the assessee in the taxable territories during the chargeable accounting period. Neither the word "income" nor the words "is received", "accrues" and "arises" have been defined in the Act. The Privy Council in Commissioner of Income-tax, Bengal v. Shaw Wallace & Co. attempted a definition of the terms "income" in the words following :-

> "Income, their Lordship think, in the Indian Income-tax Act, connotes a periodical monetary return 'coming in' with some sort of regularity, or expected regularity from definite sources. The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall."

Mukerji, J., has defined these terms in Rogers Pyatt Shellac & Co. v. Secretary of State for India :

> "Now what is income ? The term is nowhere defined in the Act..... In the absence of a statutory definition we must take its ordinary meaning - 'that which comes in as the periodical produce of one's work, business, lands or investments (considered in reference to its amount and commonly expressed in terms of money); annual or periodical receipts accruing to a person or corporation (Oxford Dictionary). The word clearly implies the ideal of receipt, actual or constructive. The policy of the Act is to make the amount taxable when it is paid or received either actually or constructively. 'Accrue', 'arises' and 'is received' are three distinct terms. So far as receiving of income is concerned there can be no difficulty; it conveys a clear and definite meaning, and I can think of no expression which makes its meaning plainer than the word 'receiving' itself. The words 'accrue' and 'arise' also are not defined in the Act. The ordinary dictionary meanings of these works have got to be taken as the meanings attaching to them. 'Accruing' is synonymous with 'arising' in the sense of springing as a nature growth or result. The three expressions 'accrues', 'arises' and 'is received' having been used in the section, strictly speaking 'accrues' should not be taken as synonymous with 'arises' but in the distinct sense of growing up by way of addition or increase or as an accession or advantage; while the word 'arises' means comes into existence or notice or presents itself. The former connotes the idea of a growth or accumulation and the latter of the growth or accumulation with a tangible shape so as to be receivable. It is difficult to say that this distinction has been throughout maintained in the Act and perhaps the two words seem to denote the same idea or ideas very similar, and the difference only lies in this that one is more appropriate than the other when applied to particular cases. It is clear, however, as pointed out by Fry, L. J., in Colquhoun v. Brooks [this part of the decision not having been affected by the reversal of the decision by the House of Lords] that both the

> words are used in contradistinction to the word 'receive' and indicate a right to receive. They represent a stage anterior to the point of time when the income become which is more or less inchoate.
>
> One other matter need be referred to in connection with the section. What is sought to be taxed must be income and it cannot be taxed unless it has arrived at a stage when it can be called 'income'."

The observations of Lord Justice Fry quoted above by Mukerji, J., were made in Colquhoun v. Brooks while construing the provisions of 16 and 17 Victoria Chapter 34, Section 2, Schedule 'D'. The words to be construed there were "profits or gains, arising or accruing" and it was observed by Lord Justice Fry at page 59 :

> "In the first place, I would observe that the tax is in respect of 'profits or gains arising or accruing.' I cannot read those words as meaning 'received by.' If the enactment were limited to profits and gains 'received by' the person to be charged, that limitation would apply as much to all Her Majesty's subjects as to foreigners residing in this country. The result would be that no income-tax would be payable upon profits which accrued but which were not actually received, although profits might have been earned in the kingdom and might have accrued in the kingdom. I think, therefore, that the words 'arising or accruing' are general words descriptive of a right to receive profits."

To the same effect are the observations of Satyanarayana Rao, J., in Commissioner of Income-tax, Madras v. Anamallais Timber Trust Ltd., and Mukherjea, J., in Commissioner of Income-tax, Bombay v. Ahmedbhai Umarbhai & Co., Bombay where this passage from the judgment of Mukerji, J., in Rogers Pyatt Shellac & Co. v. Secretary of State for India is approved and adopted. It is clear therefore that income may accrue to an assessee without the actual receipt of the same. If the assessee acquires a right to receive the income, the income can be said to have accrued to him though it may be received later on its being ascertained. The basic conception is that he must have acquired a right him by somebody. There must be as is otherwise expresses debitum in presenti, solvendum in futuro; See W. S. Try Ltd. v. Johnson (Inspector of Taxes), and Webb v. Stenton and Others, Garnishees. Unless and until there is created in favour of the assess a debt by somebody it cannot be said that he had acquired a right to receive the income or that income had accrued to him.

The word "earned" even though it dies not appear in Section 4 of the Act has been very used in the course of the judgments by learned Judges both in the High Courts as well as the Supreme Court. Vide Commissioner of Income-tax, Bombay v. Ahmedbhai Umarbhai & Co., Bombay and Commissioner of Income-tax, Madras v. K. R. M. T. T. Thiagaraja Chetty & Co. It has also been used by the Judicial Committee of the Privy Council in Commissioners of Taxation v. Kirk. The concept however cannot be divorced from that of income accruing to the assessee. If income has accrued to the assessee it is certainly earned by him in the sense that he has contributed to its production or the parenthood of the income can be traced to him. But in order that the income can be said to have accrued to or earned by the assessee it is not only necessary that the assessee must have contributed to its accruing or arising by rendering services or otherwise but he must have created a debt in his favour. A debt must have come into existence and he must have acquired a right to receive the payment. Unless and until his contribution or parenthood is effective in bringing into existence a debt or a right to receive the payment or in other words a debitum in present, solvendum in future it cannot be said that any income has accrued to him. The mere expression "earned" in the

sense of rendering the services etc. by itself is of no avail.

If therefore on the construction of the managing agency agreements we cannot come to the conclusion that the Sassoons had created any debt in their favour or had acquired a right to receive the payments from the companies as at the date of the transfers of the managing agencies in favour of the transferees no income can be said to have accrued to them. They had no doubt rendered services as managing agents of the companies for the broken periods. But unless and until they completed their performance, viz., the completion of the definite period of service of a year which was a condition precedent to their being entitled to receive the remuneration or commission stipulated thereunder no debt payable by the companies was created in their favour and they had no right to receive any payment from the companies. No remuneration or commission could therefore be said to have accrued to them at the dates of the respective transfers.

It was however urged that even though no income can be said to have accrued to the Sassoons at the date of the respective transfers which could be the subject matter of any assignment by them in favour of the transferees, the moment the remuneration or commission was ascertained at the end of the calendar year and became a debt due to the managing agents under the terms of the managing agency agreements it could be referred back to the period in which it was earned and the portions of the remuneration or commission which were earned by the Sassoons during the broken period could certainly then be said to be the income which had accrued to them during the chargeable accounting period.

Reliance was placed in support of this position on Commissioners of Inland Revenue v. Gardner Mountain & D'Ambrumenil, Ltd. The assessee in that case carried on inter alia the business of underwriting agents, and entered into agreements with certain underwriters at Loads under which it was entitled to receive as remuneration for its services in conducting the agency, commissions on the net profits of each year's underwriting. The agreements provided that "accounts should be kept for the period ending 31st December in each year and that each such account shall be made up and balanced at the end of the second clear year from the expiration of the period or year to which it relates and the amount then remaining to the credit of the account shall be taken to represent the amount of the net profit of the period or year to which it relates and the commission payable to the company shall be calculated and paid thereon." The accounts for the underwriting done in the calendar year 1936 were made up at the end of 1938 and the question that arose was whether the assessee was liable to additional assessment in respect of the commission on underwriters' profits from the policies underwritten in calendar year 1936 in the year in which the policies were underwritten or in the year when the accounts were thus made up. The assessee contended that the contracts into which it entered were executory contracts under which its services were not completed or paid for, as regards commission, until the conclusion of the relevant account; that the profit in the form of commission was not ascertainable or earned, and did not arise, until that time and that the additional assessment which was made in the year in which the policies were underwrittenshould accordingly be discharged. The Special Commissioners allowed the assess__ee's contention and discharged the additional assessment. The decision of the Special Commissioners was confirmed on appeal by Macnaghten, J., in the King's Bench Division of the High Court. The Court of Appeal however reversed this decision and a further appeal was ken by assessee to the House of Lords. The House of Lords held that on the true construction of the agreements, the commissions in question were earned by the assessee in the year in which the policies were underwritten, and must be brought into account accordingly and confirmed the decision of the Court of Appeal. It may be noted that the charge was on profits arising in each chargeable accounting period and the profits were to be taken to be the actual profits arising in the chargeable accounting

period. The ratio of the decision was that the commission paid was remuneration for services completely performed in the particular year, that the assessee had at the end of the year done everything it had to do to earn it and that it was remuneration for work done and completely done in the particular year though it was ascertained and paid two years later. Viscount Simon in his speech at page 93 stated that the assessee had acquired a legal right to be paid in future and that the principle was to refer back to the year in which it was earned so far as possible remuneration subsequently received even though it could only be precisely calculated afterwards. Lord Wright in his speech at page 94 said that it was necessary to determine in what year the commission was earned, or in the language of the Act, in what year the assessee's profits arose and observed at page 96 :-

> "I agree with the Court of Appeal in thinking that the necessary conclusion from that must be that the right to the commission is treated as a vested right which has accrued at the time when the risk was underwritten. It has then been earned, though the profits resulting from the insurance cannot be then ascertained, but in practice are not ascertained until the end of two years beyond the date of underwriting. The right is vested, though its valuation is postponed, and is not merely postponed but depends on all the contingencies which are inevitable in any insurance risk, losses which may or may not happen, returns of premium, premiums to be arranged for additional risks, reinsurance, and the whole catalogue of uncertain future factors. All these have to be brought into account according to ordinary commercial practice and understanding. But the delays and difficulties which there may be in any particular case, however they may affect the profit, do not affect the right for what it eventually proves to be worth."

Lord Simonds in his speech at page 110 stated :-

> "It is clear to me that the commission is wholly earned in year 1 in respect of the profits of that year's underwriting. If so, I should have thought that it was not arguable that that commission did not ascertainable until later."

The fact that the account of the commission could not be made up until later did not make any difference to the position that the commission had been wholly earned during the chargeable accounting period and the income had accrued to the assessee during that period.

Learned counsel for the transferees also relied upon the decisions in Bangalore Woollen, Cotton and Silk Mills Co., Ltd. v. Commissioner of Income-tax, Madras and Turner Morrison & Co. Ltd. v. Commissioner of Income-tax, West Bengal, to show that as and when the sale proceeds were received by the company the profits made by the company were embedded in those sale proceeds and if that was so the percentage of the net profits which was payable by the companies to the managing agents as and by way of commission was similarly embedded in those sale proceeds. If the profits thus accrued to the company during the chargeable accounting period the commission payable to the managing agents also could be said to have accrued to them during that period.

It is no doubt true that the accrual of income does not depend upon its ascertainment or the accounts cast by assessee. The accounts may be made up at a much later date. That depends upon the convenience of the assessee and also upon the exigencies of the situation. The amount of the income, profits or gains may thus be ascertained later on the accounts being made up. But when the accounts are thus made up the income, profits or gains ascertained as the result of the accounts are

referred back to the chargeable accounting period during which they have accrued or arisen and the assessee is liable to tax in respect of the same during that chargeable accounting period. "The computation of the profits whenever it may take place cannot possibly be allowed to suspend their accrual....." "The quantification of the commission is not a condition precedent to its accrual." (Per Ghulam Hasan, J., in Commissioner of Income-tax, Madras v. K. R. M. T. T. Thiagaraja Chetty & Co. See also Isaac Holden & Sons, Ltd. v. Commissioners of Inland Revenue, and Commissioners of Inland Revenue v. Newcastle Breweries Ltd.)

What has however got to be determined is whether the income, profits or gains accrued to the assessee and in order that the same may accrue to him it is necessary that he must have acquired a right to receive the same or that a right to the income, profits or gains has become vested in him though its valuation may be postponed or though its materialisation may depend on the contingency that the making up of the accounts would show income, profits or gains. The argument that the income, profits or gains are embedded in the sale proceeds as and when received by the company also does not help the transferees, because the managing agents have no share or interest in the sale proceeds received as such. They are not co-shares with the company and no part of the sale proceeds belongs to them. Nor is there any ground for saying that the company are the trustees for the business or any of the assets for the managing agents. The managing agents cannot therefore be said to have acquired a right to receive any commission unless and until the accounts are made up at the end of the year, the net profits ascertained and the amount of commission due by the company to the managing agents thus determined. (See Commissioners of Inland Revenue v. Lebus).

It is clear therefore that no part of the managing agency commission had accrued to the Sassoons at the dates of the respective transfers of the agencies to the transferees.

The two decisions which were sought to be distinguished by the High Court in the judgments under appeal also support this conclusion. In the unreported decision of the High Court of Bombay in Commissioner of Excess Profits Tax, Bombay City v. Messrs. P. N. Mehta & Sons, the managing agency agreement was couched in the very same terms as that of the E. D. Sassoon United Mills Co. Ltd. The managing agents were to be paid 10 per cent. of the net annual profits made by the company with a guaranteed minimum commission of Rs. 15,000 per annum. The accounting year of the company was the calendar year. The Tribunal had held that the annual profits could only be ascertained when the accounts of the company were made up and it was then that the 10 per cent. commission would accrue to the managing agents. The contention of the Department was that as the managing agents worked as such from day to day and not at the end of the year. This contention was negatived by the High Court :-

> "It is only on the net annual profits that the managing agents are entitled to any commission. A company may have worked for six months at a loss, for the remaining six months it may make a large profit so as to wipe off the loss, and have a net profit to show. It is only as a result of the working of the mills for the whole year that it will be possible to ascertain whether the mills have worked at a loss or at a profit, and what the profit was. Therefore, the managing agents are only entitled to a commission on the result of the working of the mills for a whole year. If the working shows a net annual profit which gives them a commission of more than Rs. 15,000 on the basis of 10 per cent., they are entitled to that amount. If, on the other hand, working does not show a profit which entitles them to a commission of Rs. 15,000 they are in any case entitled to that amount. Therefore, in our opinion, the Tribunal rightly held that the accrual of the commission was at the end of the calendar year,

> which was the year maintained by the mills and not from time to time as contended by the Department."

In the case of Salt and Industries Agencies Ltd., Bombay v. Commissioner of Income-tax, Bombay City, the question for the consideration of the Court no doubt was what was the place where the profits had accrued. In determining the place where the profits had accrued to the assessee and it was however necessary to find when the profits had accrued to the assessee and it was held that what was conclusive of the matter was the consideration as to when the right to managing agency commission arose and when did the company become liable to pay managing agency commission to the managing agents and it was further held that it was only when all the accounts of the working of the company were submitted to the head office in Bombay and the profit was determined that it could be said that a right to receive a commission at the rate specified in the managing agency agreement had arisen and the managing agents became entitled to a certain specified commission. These considerations are germane to the question, which we have to decide in these appeals and support the conclusion which we have already arrived at, that the right to receive the commission would arise and the income, profits or gains would accrue to the managing agents only at the end of the calendar year which was the terminus a quo for the making up of the accounts and ascertaining the net profits earned by the company. We fail to see how these cases which were relied upon by the revenue before the High Court could be distinguished in the manner in which it was done.

We were invited by the learned counsel for the Sassoons to approach the question from another point of view and that was that what had been transferred by the Sassoons to the transferees was a source of income, viz., the managing agency which was to run for the unexpired residue of the term. It was urged that where a source of income was transferred any income which occrued from that source after the date of the transfer was the transferees' income and not of the transferors, and that it was immaterial (a) that at the date of the transfer there was an expectation that at a future date income would occur, (b) that the transferor by the work before the transfer had contributed to create any income which might eventually accrue and (c) that because of the expectation of income a higher price had been paid for the transfer.

Reliance was placed in this connection on the case of Commissioners of Inland Revenue v. Forrest. In that case the assessee purchased certain shares on the 25th November, 1919, and paid an excess price "to cover the portion of the dividend accrued to date." A dividend of 10 per cent. for the period ending on 28th February, 1920, was declared on the 13th May, 1920. The contention of the assessee was that the dividend should be treated as capital in view of the terms of the contract of purchase and not included in the computation of his income. Under the provisions of the Income-tax Act the dividends which were receivable by him were required to be included in the computation of his income. The learned Judges however discussed the legal effect of such a transaction of the purchase of shares. Lord Ormidale observed at page 709 :-

> "The value of the shares had to be determined as a matter of bargain between the parties, and the purchaser thought that it was not unreasonable that he should pay something over par for them because of the possibility, not the certainty but the possibility, of a dividend six months afterwards being paid upon the shares so purchased by him."

Lord Anderson observed at page 710 :-

> "He buys two things with his money. He buys, in the first place, a share of

> the assets of the industrial concern proportionate to the number of shares which he has purchased; and he also buys the right to participate in any profits which the company may make in the future. Now, when a transaction of this nature is entered into during the currency of the financial year of the industrial concern it is obvious that what happens is this, that not only is a part of the assets purchased outright but that a chance is bought as well a chance of sharing in any profits which may be made during the currency of that financial year."

Wigmore (H. M. Inspector of Taxes) v. Thomas Summerson and Sons, Limited, was the case of a vendor of war loan stock bearing interest payable without deduction of tax. The sale was effected on the year April, 1923, with interest rights. The vendor was assessed for the year 1923-24 in respect of the amount of interest said to have accrued on the stock in the period between the last payment of interest and the sale of the stock, it being contended that the price received by the vendor on sale of stock included this interest. The purchases said that they were not liable to tax in respect of the income which had been accruing on the security they had purchased in a period anterior to the date on which they purchased. It was observed that the truth of the matter was that the vendor did not receive interest and interest was the subject-matter of the tax. But he received the price of an expectancy of interest which was not the subject of taxation. It was not argued that the interest accrued de die in diem and the vendor was held not assessable in respect of the interest accrued at the date of the sale of the stock.

Commissioners of Inland Revenue v. Pilcher, was the case of the sale of an orchard inclusive of the year's fruit crop. The assessee had valued the cherries which were on the trees at Pounds 2,500 and had put a man immediately in the orchard after he had purchased it at the auction. He commenced to pick the fruit on the 25th May, 1942, and completed the operations on the 12th June, 1942. He realised Pounds 2,903 as the price of the cherries. This sum was brought into the profit and loss account as a trading receipt and the contention of the assessee was that in computing his profits he was entitled to charge the sum of Pounds 2,500 being the purchase price of the cherries sold for Pounds 2,903 which sum had been brought into credit as a trading receipt. This contention was negatived and it was observed by Lord Justice Jenkins at page 332 :-

> "It is a well settled principle that outlay on the purchase of an income-bearing asset is in the nature of capital outlay, and no part of the capital so laid out can, for income-tax purposes, be set off as expenditure against income accruing from the asset in question."

There is a further passage in the judgment of Jenkins, L. J., at page 335 which is very instructive. It had been contended that the revenue should look at the transaction from the assessee's point of view and should consider it in a manner favourable to him. This contention was death with in the manner following :-

> "One has to remember that this transaction concerned not merely Mr. Pilcher but also the vendor of the orchard. Mr. Pilcher was able to buy the orchard complete with the cherries from the vendor and by that means, according to his own calculation, the cherries stood him in Pounds 2,500. It by no means follows that if he had been minded to buy the cherries from the vendor apart from the land, as a separate transaction, the vendor would have been willing to sell them to him for Pounds 2,500, or at any price. The difference is obviously a material one from the vendor's point of view because, dealing with the matter as he did, he was selling a

> capital asset, and the resulting capital receipt, prima facie would attract no tax. If he sold the cherries separately in the way of trade he would at once have created an income receipt on which, prima facie, tax would have been exigible. Therefore the alteration in the form of the bargain required to make it more favourable to Mr. Pilcher from the tax point of view would have involved an alteration not merely of form but of substance owing to its adverse effect on the tax situation of the vendor, and it cannot be assumed that the bargain thus altered would have been one to which Mr. Pilcher could have secured the vendor's agreement."

These observations throw considerable light on the situation obtaining in the cases before us. It will be remembered that the total amount of Rs. 75,77,693 received by the Sassoons on the transfers of the managing agencies was taken by them to the "Capital Reserve Account". No part of that amount was treated by them as a receipt of income and it is debatable whether any part of the same could have been allocated as a receipt of income even though the transferees had desired to do so. All that the transferees obtained under the deeds of assignment and transfer executed by the Sassoons in their favour was an income- bearing asset consisting of the office of managing agents, the managing agency agreement and all the rights and benefits as such managing agents under the agreements and no part of the consideration paid by the transferees to the Sassoons could be allocated as a receipt of income by reason of their contribution towards the earning of the commission in the shape of services rendered by them as managing agents of the companies for the broken periods. What the transferees obtained under the deeds of assignment and transfer was the expectancy of earning a commission in the event of the condition precedent by way of complete performance of the obligation of the managing agents under the managing agency agreements being fulfilled and a debt arising in favour of the managing agents at the end of the stated periods of service contingent on the ascertainment of net profits as a result of the working of the company during the calender year.

The last case to which we were referred by the learned counsel for the Sassoons was The City of London Contract Corporation Limited v. Styles (Surveyor of Taxes). The part of the business taken over by the assessee in that case consisted of unexecuted and partly executed contracts. The contracts were executed after the date of the purchase by the assessee and the assessee sought to deduct the price paid for the contract from the profits arising from their performance. This deduction was not allowed, because whatever price the assessee paid for the purchase of the business was treated as the capital which had been invested for the purchase of the business was treated as the capital which had been invested for the purpose of acquiring that business and the assessee could not deduct from the net profit of the working of the business after the date of the purchase any part of the capital which had been thus invested by it. This result was achieved even though in the purchase of unexecuted contracts there was included the part of the work done towards the performance of the contracts by the vendors. The assessee derived the benefit from such partial execution of the contracts by the vendors; nevertheless the value of such work was not treated any income which had accrued to the vendors and which the assessee was entitled to deduct from its profits arising from the performance by it of those unexecuted contracts.

Learned counsel on behalf of the transferees contended that all these cases were concerned with the question whether the income derived by the assessee out of the income bearing asset after the date of the purchase could be treated as a capital expenditure so far as it formed part of the consideration paid by the assessee to the vendors and in none of theses cases were the courts concerned with the question that arises before us, viz., whether any part of the income which was actually received by the assessees could be said to have accrued to the vendor. Even though the question did not arise in terms it is done the less involved in the consideration of the question whether the assessee was liable

to pay the income-tax on the whole of the income thus derived by him. As was pointed out by Jenkins, L. J., in Commissioners of Inland Revenue v. Pilcher, quoted above, the vendor's point of view cannot be neglected and once you come to the conclusion that the assessee alone is liable it necessarily follows that the vendor would certainly has nothing to do with the same. If it were otherwise the vendor certainly be liable to tax and no purchaser would miss the opportunity of avoiding his liability for that portion of the income which can be said to have accrued to the vendor. As a matter of fact such a contention was taken by the purchasers in Wigmore (H. M. Inspector of Taxes) v. Thomas Summerson and Sons Limited, where they declined to be assessed for tax in respect of income which has been accruing on the securities they had purchased in a period anterior to the date at which they did purchase. This contention however did not prevail and the vendors were held not assessable in respect of the interest accrued on the date of the sale of the stock.

It is therefore clear that the Sassoons had not earned any income for broken periods nor had any income accrued to them in respect of the same, and what they transferred to the transferees under the respective deeds of assignment and transfer did not include any income which they had earned or had accrued to them and which the transferees by virtue of the assignment in their favour were in a position to collect. If any debt had accrued due to the Sassoons to the respective transferees were merely expectations of earning commission and not any part of the commission actually earned by them or which had accrued to them under the terms of the managing agency agreements, what the transferees received which were thus transferred to them would be their income and no part of such income could ever be said to have accrued to the Sassoons, during the chargeable accounting period.

In view of the above it is unnecessary to deal with the contention which was urged by the learned counsel for the Sassoons that even if there be an assignment of income the assignee and not the assignor would be liable to pay the tax. He referred us to the case of Commissioner of Income-tax, Bombay Presidency v. Tata Sons Ltd., in support of this contention of his and he also referred us to note 'G' at page 209 in Simon's Income-tax, 2nd Edition, Vol. II, where the ratio of Parkins v. Warwick (H. M. Inspector of Taxes), relied upon by the High Court in the judgments under appeal, has been criticised. We do not however think it necessary to go into this question as in our opinion there were no debts due by the companies to the Sassoons which were assigned under the respective deeds of transfer and assignment.

The only question which remains to consider is whether Section 36 of the Transfer of Property Act imports the principle of apportionment in regard to the commission received by the transferees herein. Section 36 of the Transfer of Property Act provides :- "In the absence of a contract or local usage to the contrary, all rents, annuities, pensions, dividends, and other periodical in the nature of income shall, upon the transfer of the interest of the person entitled to receive such payments, be deemed, as between the transferor and the transferee, to accrue due from day to day, and to be apportionable accordingly, but to the payable on the days appointed for the payment thereof." It may be noted that the section applies in the absence of a contract or local usage to the contrary and also applies as between the transferor and the transferee. There is no room for the application of these provisions as between the subject and the Crown. (Vide Commissioners of Inland Revenue v. Henderson's Executors). The contract to the contrary must of necessity be as between the transferor and the transferee and it is only when there is no such contract to the contrary that the rents, annuities, pensions, dividends and other periodical payments in the nature of income become apportionable as between the transferor and transferee, deemed to accrue due from day to day and be apportionable according. The deeds of assignment and transfer executed by the Sassoons in favour of the transferee transferred all the rights and benefits under the agency agreement to the transferees and there was no question of apportionment of any commission between the Sassoons

and the transferee. In fact the transferee claimed to retain and did retain the whole of the commission which had been paid by the companies to them in the year 1944 and the Sassoons never claimed any part of it as having been earned by them. Whatever was their contribution towards the earning of that commission during the whole of the colander year 1943 was the subject-matter of the assignment in favour of the transferee and that was sufficient to spell out a contract to the contrary as provided in Section 36 of the transfer of Property Act.

Section 26(2) of the Indian Income-tax Act also does not help the transferee because it is only when the person succeeded has acquired an actual share of the income, profits or gains of the previous year that he is liable to tax in respect of it and as set out hereinabove no part of the commission actually accrued to or became a debt due by the company to the Sassoons on the dates of the respective transfers of the managing agencies to the transferee. In order to attract the operation of Section 26(2) the person succeeded must have had an actual share in the income, profits or gains of the previous year and on the construction of the agreements the Sassoons cannot be said to have acquired any share in commission for the broken periods.

The whole difficulty has arisen because the High Court could not reconcile itself to the situation that the transferee had not worked for the whole colander year and yet they would be held entitled to the whole income of the year of account; whereas the transferors had worked for the broken periods and yet they would be held disentitled to any share in the income for the year. If the work done by the transferors as well as the transferee during the respective periods of the year were taken to be the criterion the result would certainly be anomalous. But the true test under Section 4(1) (a) of the Income-tax Act is not whether the transferors and the transferee had worked for any particular periods of the year but whether any income had accrued to the transferors and the transferee within the chargeable accounting period. It is not the work done or the services rendered by the person within the chargeable accounting period that is the subject-matter of taxation. That is the proper method of approach while considering the taxability or otherwise of income and no consideration of the work done for broken periods or contribution made towards the ultimate income derived from the source of income nor any equitable considerations can make any difference to the positions of Section 4(1) (a) of the Income-tax Act.

The result therefore is that the question referred by the Tribunal to the High Court must be answered in the negative. All the appeals will accordingly be allowed. But as regards the cost, under the peculiar circumstances of these appeals where the Commissioner of Income-tax, Bombay, has supported the Sassoons in Civil Appeal No. 3 of 1953 the brunt of the attack in Civil Appeals Nos. 30 of 1953 and 31 of 1953 has been borne not by the Commissioner of Income-tax who is the appellant in both, but by the Sassoons, the proper order should be that each party should bear and pay his own costs here as well as in the Court below.

JAGANNADHADAS, J. -

I am unable to agree with the judgment just delivered on behalf of both my learned brothers. It is with considerable regret that I feel constrained to write a separate judgement expressing the reasons for my not being able to agree with them in spite of my profound respect for their views.

These three are appeals against a judgement of the Bombay High Court by leave granted under Section 66A(2) of the Indian Income-tax Act. They arise out of a set of facts mostly common. E. D. Sassoon & Co., Ltd. now in voluntary liquidation (hereinafter referred to as the Sassoons) had the managing agency of three mills (1) E. D. Sassoon United Mills Ltd., (2) Elphinstone Spinning and

Weaving Mills Co., Ltd., and (3) The Apollo Mills Ltd. With the consent of the mill companies and by virtue of clauses in the managing agency agreements enabling thereunto, the Sassoons transferred the managing agency of the three mills to there other companies during the course of the calendar year 1943 as follows : (1) to Agarwal & Co., Ltd. (hereinafter referred to as Agarwals) on the 1st December, 1943, (2) to Chidambaram Mulraj & Co., Ltd. (hereinafter referred to as Chidambaram) on the 1st June, 1943, and (3) to Rajputana Textile (Agencies) Ltd., on the 1st July, 1943. The assessments with which we are concerned are those of (1) Sassoons, (2) Agarwal, and (3) Chidambarams and relate to income by way of managing agency remuneration paid in the year 1944 by the mill companies to the respective assignee-companies for the calendar year 1943. For Sassoons and Agarwals the assessment year was 1944-45 and the accounting year was the calendar year 1943. For Chidambarams the assessment year was 1945-46 and the chargeable accounting period was from 1st July, 1943, to 30th June, 1944. The tax was assessed on the basis not of receipts but of accrual. The Income-tax authorities treated the total remuneration for the entire year 1943 in each case as income which accrued to the assignee-companies in the respective accounting periods. The assignee-companies objected on the ground that part of the remuneration, up to the date of the respective assignment, accrued to the assignor-company, viz., Sassoons, and that they were, therefore, liable to be assessed only in respect of the balance of the remuneration referable to the portion of the calendar year 1943 subsequent to therespective dates of the assignments. The objection was overruled and the assessments were made. On appeals to the Income- tax Appellate Tribunal, their contention was accepted and the assessments were modified. It may be maintained that the Rajputana Textiles (Agencies) Ltd. does not appear to have filed any appeal to the Tribunal. Meanwhile (presumably by way of caution) the Income-tax authorities issued notices to the assignor-company, viz., Sassoons, under Section 34 of the Indian Income-tax Act and assessed it in respect of the proportionate part of the year's managing agency commission up to the date of the respective assignments. The Sassoons objected to this before the Income-tax authorities, but the objection was overruled. It has been stated to us in the case filed by the Sassoons in this Court that the entire net consideration for the three assignments was taken by them into their accounts as capital reserve. But this finds no mention in the Tribunal's statement of the case to the High Court. How the Sassoons made entries in their own accounts is not decisive and has not been relied on before us. On their objection being overruled, the Sassoons filed an appeal to the Income-tax appellate Tribunal. The Tribunal rejected the appeal in view of the decision they had already given in the appeals filed by the two assignee-companies, Agarwals and Chidambarams. The three companies concerned obtained references to the High Court under Section 66 of the Indian Income-tax Act. The question referred by the Tribunal in each of the three cases was the same and is as follows :

> "Whether in the circumstances of the case, was the managing agency commission liable to be apportioned between the assessee company and the assignee (or assignor, as the case may be)."

The High Court answered the question against the Sassoons and in favour of the other two. What the High Court held was in substance that (1) the managing agency remuneration for the year in question accrued as the joint income of both the assignor and the assignee and was apportionable between them, and (2) the assignee-companies received the assignor's share of the joint income by virtue of the assignments of the assignor's share and hence to that extent it was not their taxable income but continued to be the taxable income of the assignor. There are thus three appeals, one by the Sassoons against the Income-tax Commissioner and the other two by the Income-tax Commissioner against Agarwals and Chidambarams respectively. In the first of the appeals, the Income-tax Commissioner supports the position taken up by the Sassoons, while in the other two the

Commissioner is the appellant and contests the position taken by the Agarwals and the Chidambarams. Thus it will be seen that though in form the three appeals are each between the Income-tax Commissioner and one of the three companies, in fact they raise a controversy between the assignor-companies, the Sassoons, on the one side and the two assignee-companies, the Agarwals and the Chidambarams, on the other, the Commissioner supporting the Sassoons and opposing the other two.

The arguments before us covered a wide range and were advanced on the assumption that what the High Court held was that the Sassoons became entitled on the every date of the respective assignments to a proportionate share of the year's remuneration for the managing agency, and that accordingly that share accrued to the Sassoons as their taxable income, then and there, and did not cease to be such notwithstanding the assignment thereof. The case was accordingly debated before us as though the decision turned upon the question weather any income could accrue to the Sassoons on the dates of the respective transfers of the managing agency to the transferee. It is necessary, therefore, to clarify, at the outset, what the question was which was directly raised on the reference made to the High Court and what, in the view of the High Court, was the date when a share of the year's remuneration accrued to the Sassoons as its income. It appears to me that the judgement of the High Court taken as a whole is based only on the view that the entire managing agency remuneration for the year accrued on the completion of the year, i.e., on the 31st December, 1943, and that when it so accrued it accrued both to the assignor and to the assignee together. This appears from the following passage of the judgement of the High Court :

> "In order to levy income-tax it is not enough to inquire when a particular income accrues. What is more important and what is more pertinent is to inquire whose income it is which is sought to be taxed. Assuming that this particular income accrued on the 31st December and till 31st December there was nothing earned, even so, when the income does accrue the question still remains to be answered as to whose income it is which has accrued on the 31st December, 1943."

It appears to me also that it is on the footing of the actual on the completion of the year that the High Court dealt with the question of assignment of the income as appears from the following passage.

> "And clearly one of the rights which E. D. Sassoons & Co. Ltd. had was to receive the managing agency commission (share therein ?) whenit accrued on 31st December..... They transferred that right."

From these passages it appears to me clear that the High Court proceeded on the view that income accrued at the end of the year to both together and that what passed to the assignee under the assignment include a future right of the assignor to a share in the remuneration, when it accrued on the completion of the year, and not on the view that the assignment operated as the transfer of a present right to such a share on the very date of the assignment. It is in view of the assumption that the remuneration for the year accrued only on the 31st December that the Income-tax Appellate Tribunal also took care to say, in making their reference to the High Court, as follows :

> "The question is not when the managing agency commission accrued. The real question is to whom it accrued."

It appears to me, therefore, that it is not correct to approach the consideration of this case as though

the decision therein turns directly upon the question whether any income had accrued to the Sassoons on the dates of the respective transfers of the managing agency to the transferee.

In the arguments before us considerable stress was laid by learned counsel appearing for the Sassoons on the fact that the managing agency agreements with which we are concerned provide for annual remuneration for an year's work. It was pointed out that the remuneration payable was fixed as commission at a certain specified percentage of the net profits of the respective mill companies. So far as the Sassoons United Mills Ltd. are concerned, whose managing agency had been assigned to Agarwals, the commission was in terms stated in the agency agreement to be per annum and on the annual net profits of the company. So far as Elphinstone Spinning and Weaving Mills Co. Ltd. are concerned, whose managing agency was assigned to Chidambarams, the remuneration is merely stated in the corresponding agreement to be a percentage of the net profits of the company, but is not in terms stated to be per annum or on the annual net profits. But there can be no reasonable doubt that as a matter of construction, the remuneration in the latter case also must be taken to be per annum and on the annual net profits, notwithstanding some argument before us to the contrary. Having regard to this basic fact, the following are, in substance, the arguments put forward before us by learned counsel for the assignor Sassoons. (1) The managing agency commission was payable in respect of services for an entire calendar year and not for a portion thereof and therefore no commission became due to the Sassoons for the services rendered by them to the respective mill companies for broken periods of the year up to the dates of the respective assignments. (2) Since no remuneration became a debt due to the Sassoons from any of the mill companies on the dates of the respective assignments, no taxable income accrued to them for the broken periods. (3) By the dates of the respective assignments, the Sassoons had only a bare expectancy, if any to receive remuneration for the broken period and this expectancy could not be the subject-matter of any assignment. (4) The true legal position, therefore, is that what was assigned was an income-bearing asset, viz., the managing agency which was the source of income and which entitled the respective assignees to receive all the remuneration for the year payable under the managing agency agreement subsequent to the respective dates of assignment. Accordingly the same became in its entirely taxable income in the hands of the respective assignees and no portion of it accrued at any time as taxable income of the assignor Sassoons.

In the view that I take of the High Court's judgment as to the date of accrual of the income and as to the scope of the question presented on the reference, the first three of the above arguments do not appear to me to call for any examination. In the present case no question arises as to the enforceability of the claim for a proportionate share of the remuneration by the assignor from the very date of assignment. Nor does any question arise as to the non-payability of remuneration on account of non-completion of the work. The year's work has been completed by the assignee-company in continuation of that of the assignor-company. The total remuneration for the year has in fact been paid into the hands of the assignee-company. The only questions, therefore, are (1) whether the money so received accrued by way of remuneration for the year's work and became taxable income on the 31st December, 1943, (2) if so, whether it was the joint income of the assignor and the assignee or the sole income of the assignee, and (3) whether the assignment operated to transfer the assignor's share of the income on its accrual.

The answer to the first of the above questions seems to me to admit of no doubt. The remuneration was for the year's work. The year's work was completed on the expiry of the year. The right to receive the remuneration became, therefore, vested on the 31st December, 1943. It is true that in Agarwals' case there is a clause in the original managing agency agreement that

> "the managing agency commission shall be due yearly on the 31st day of March, in each and every year and shall be payable and be paid immediately after the annual accounts of the mill company have been passed by the shareholders."

It has been urged, in reliance on this clause, that the accrual of the income, in so far as the case of Agarwals is concerned, is not on the 31st December, but on the 31st March next. In the first place such a contention, in so far as it related to the date of accrual, is not permissible in view of the clarification in the order of reference made by the Tribunal to the High Court and in view of the specific and categorical language of some of the grounds in the statements of the case filed before us both by Sassoons and the Income-tax Commissioner showing 31st December, 1943, as the date of accrual of the entire remuneration. [Vide paragraphs 19 (1), 26 (a) and (g) of the Sassoons' statement, and paragraphs 12, 15 (1), (2) and (5) of the Income-tax Commissioner's statement, in Civil Appeal No. 3 of 1953]. But even if the contention be permissible and granting the view strenuously urged on behalf of the appellant-Sassoons that there is no accrual of income until there exists a right to receive it, I do not think that the clause in question has any relevancy so far as the date of accrual of income is concerned. Accrual of income for purposes of taxation does not depend on the question as to when the income becomes payable. It depends only on when a vested right to receive the income arises. [See Commissioners of Inland Revenue v. Gardner Mountain & D' Ambrumenil Ltd.] The accrual is accordingly complete when the right to the remuneration becomes vested by the occurrence of all the events on which the remuneration depends. A mere clause that the remuneration shall be due at a later date, notwithstanding that all the events on which the remuneration depends have occurred, can only have the effect of postponing the liability for payment and not of postponing the vesting of the right to income. The requirement of lapse of further time after the occurrence of all the qualifying events is not in itself an additional event which imports any element of contingency in the right. It appears to me, therefore, that the above clause which has been relied upon - whatever the reason may be for the distinction which the language seeks to suggest between due and payable - can have no bearing on the date of the accrual and cannot have the effect of postponing the accrual from the 31st December to 31st March. But even otherwise, this does not at all affect the final conclusion in this case reached by the High Court of Bombay. If the view of the High Court is correct that the income accrued both to the assignor and the assignee after the completion of the year's work, it seems to matter little whether that accrual is on the 31st December or on the 31st March next.

The further question as to whether the view taken by the High Court that the assignments operated to transfer to the assignee the assignor's share of the year's remuneration after it accrued to him as his income and whether it continues to remain the assignor's taxable income in spite of the assignment, may also be shortly dealt with. If the High Court be right in its view that the remuneration accrued both to the assignor and to the assignee together, whenever it may be, then it is clear that on the respective dates of the assignment, the assignor had a future right to a share of the remuneration on the completion of the year. If so, there is ample authority for the position that the assignment of such a future right is valid and becomes operative by way of attaching itself to the right when it spring up. (See Bansidhar v. Sant Lal, Misri Lal v. Mozhar Hossain Palaniappa v. Lakshmanan, and Baldeo v. Miller.) The validity of such an assignment as between the assignor and the assignee and the effect thereof on the assignor's future right may also be supported with reference to the principle of estoppelfeeding title which finds recognition in Section 43 of the Transfer of Property Act. For the further position, viz., that a person continues to be liable for tax in a respect of accrued income notwithstanding assignment thereof operating on or after such accrual, there is authority in Parkins v. Warwick. This view is confirmed by the following passages in the Privy Council case in Pondicherry Railway Co. Ltd. v. Commissioner of Income-tax, Madras :

"Profits on their coming into existence attract tax at that point and the revenue is not concerned with the subsequent application of the Profits."

"The destination of the profits or the charge which has been made on those profits by previous agreement or otherwise is perfectly immaterial."

(Quoted out of an extract from the case in Gresham Life Assurance Society v. Styles.)

It appears to me that these passages constitute a clear recognition of the principle that when once income accrues to a person, an assignment operative in respect thereof does not affect his taxability for that income. It may be mentioned that it is not seriously disputed that the consideration for each assignment included the value of the prospective advantage of collecting the remuneration for the entire year, i.e., in the sense that the actual consideration paid was higher than what it might have been if the assignment had taken place at the very commencement of the year.

The only substantial question, therefore, which this case raised is whether the view taken by the High Court, that the remuneration for the year accrued as income both to the assignor and the assignee, is correct. It is apparently as an answer to this question that learned counsel appearing for the Sassoons put forward the argument No. 4 above enumerated, viz., that the assignment of managing agency is the transfer of an income-bearing asset and that all income received subsequent to the date of assignment is entirely the assignee's taxable income. It is the validity of this argument that now requires examination. The cases that have been relied on in support of this argument are the following : Commissioners of Inland Revenue v. Forest, Wigmore v. Thomas Summerson; and Commissioners of Inland Revenue v. Pilcher. Commissioners of Inland Revenue v. Forest is a case of purchase of certain shares and the income derived therefrom and is analogous to the second head of income chargeable to income-tax under Section 6 of the Indian Income-tax Act, viz., securities. The income therefrom is directly referable only to the ownership of the shares or securities. Mere lapse of time makes income payable and the taxation depends on the receipt of the income. Wigmore v. Thomas Summerson is also a case similar to the above. Commissioners of Inland Revenue v. Pilcher is the case of a sale of an orchard inclusive of the year's fruit crop, which by the date of the sale does not appear to have become ripe enough to be treated as a severable item of property. This was a case of property whose ownership itself, in the ordinary course and by lapse of time, gives rise to income and is analogous to head No. 3 of Section 6 of the Indian Income-tax Act. It is interesting to note, that in this case, the learned Judges make a distinction between fructus industriales and fructus naturales and point out that the fruits derived from the orchard being cherries are fructus naturales and not fructus industriales. That the result might have been different if is was fructus industriales appear, clearly, at least so far as Lord Justice Singleton and Lord Justice Tucker are concerned. In the case of fructus industriales the income does not arise by mere ownership but as a result of further investment and labour which may be the effective source of income. These decisions refer only to cases where the sole or effective source of income is mere ownership and taxability depends on receipt of the income.

Another case that has been relied on before us is City of London Contract Corporation v. Styles. That was a case where one company purchased as a going concern the business carried on by another company, as contractors for public works. It was claimed that the assignee-company was entitled to deduction from their taxable income for a portion of the purchase price which may be attributed to the purchase of the right, title and interest to, and the benefit of, certain building contracts of the company, from the execution of which a portion of the net profits of the company

arose. This was negatived on the ground that the entire purchase price was capital investment and that what all was received later on was income derived by the execution of the contracts so purchased. This, so far as it goes, may seem to suggest by implication that there may be a purchase of contracts yet to be executed and that the benefit of the entire profits therefrom is to be treated as income in the hands of the purchaser. The report of this case, however, does not indicate clearly whether the contracts, whose benefit was purchased were partially executed and if so, whether the partial execution was substantial or negligible. The statement of the facts of the case at page 241 of the report shows that the business which was purchased consisted entirely "of partially executed or wholly unexecuted contracts, and of the rights thereunder and the benefits to accrue therefrom." If the business consisted of only unexpected contracts, this case is not an authority for the position contended for on behalf of the Sassoons. But in any case, even if some of the contracts were partially executed there is nothing to show that the execution was of any such extent as to have become is a direct authority only on what is capital expenditure and what is revenue expenditure for purpose of deduction. The point in the form relevant for the present case was not raised there and cannot be taken to have been decided. It is interesting to notice that in Simon's Income Tax, Vol. 2, (1949 Edn.), page 188, paragraph 222, the following passage appears :

> "In City of London Contract Corporation Ltd. v. Styles where the company acquired a business including a number of unexecuted contracts, it was held that the sum paid for the contracts could not be deducted in computing the company's profit, on the ground that the whole of the purchase price of the business was a sum 'employed or intended to be employed as capital in such trade."

Similarly in Spicer and Pegler's Income Tax and Profits Tax (20th Edn.), at page 116 it is stated as follows :

> "Cost of unexecuted contracts taken over with a business (in arriving at the profits from the performance of the contracts)"

and the case of City of London Contract Corporation v. Styles is quoted as authority. These standard text-books also shows that this case has been treated as having reference to unexecuted contracts (and not to partially executed contracts) and as being authority for the question as to what are permissible deduction from taxable income of business concerns.

The above cases, therefore, cannot be treated as in any way supporting the contention put forward by learned counsel for the appellant- Sassoons that in the case of an assignment of managing agency the entire remuneration for the year's work accrues as a matter of law to the assignee and is his sole income, on the ground that the agency is the source of income and that in this respect it is to be treated as an income-bearing asset. No specific authority has been cited before us covering the case of a managing agency nor can the case in City of London Contract Corporation v. Styles be treated as an authority showing that in the case of an assignment of partially executed contracts the remuneration or profits relatable to such partial execution is necessarily the income of the assignee.

The question thus raised has, therefore, to be examined on principle. On such examination it appears to me that the argument advanced in this behalf is based on a fundamental misconception. Income of the kind with which we are concerned in this case does not arise by virtue of any mere ownership of an asset. What produces income is not the ownership of the managing agency but the actual work turned out for the benefit of the principal. It is not the fact of a company having obtained the right to work as a managing agent that produces the income but it is the continuous functioning of the

company, as the managing agent, in terms of the contract of agency, that produces the income. Hence, it is the rendering of the service of the managing agency or the carrying out of the managing agency business, which is the effective and direct source of income. This is not to say that work or service is the subject of taxation. It is the remuneration that is the subject of tax and work is the source of the remuneration. Hence in such a case service or work is the source of income and not the ownership of the right to work. The above legal position has been very succinctly brought out by Lord Finlay, though in other context, in John Smith & Son v. Moore in the following passage :

> "The business makes no profits. The profits are not fruits yielded by a tree spontaneously. They are the result of the operation carried on by the owner of the business for the time being."

Therefore, on principle, apart from authority, it appears to me to be erroneous to treat the managing agency agreement as by itself the direct source of income and to treat it as an income-producing asset.

An examination of the provisions of the Indian Income-tax Act clearly bears out this view. Sections 3 and 4 of the Income-tax Act are the charging sections. The charge is (in so far as it is relevant for purpose of this case) on the income of the previous year (a) which is received by the assessee within the taxable territory, or (b) which accrued or arose within the taxable territory to a resident assessee. As stated at the outset the assessment in the present case is based on accrual and not on receipt. Computation of the taxable income is governed by the provisions of Chapter III of the Act. Section 6 thereof enumerates the following heads of income as being chargeable to income-tax : (1) Salaries, (2) Interest on securities, (3) Income from property, (4) Profits and gains of business, profession or vocation, (5) Income from other sources. The residual item (5) may for the present purposes be left out. Of the other four heads, items (2) and (3) are the only items in which the taxable income is directly related to the ownership of an asset. In the present case the computation of the taxable income has no relation to those items but may conceivably fall under head No. (1) or head No. (4). At this stage, it is necessary to observe that, though, so far, in the above discussion, the managing agency has been referred to as service and the commission therefor as remuneration, for purposes of convenience, the true nature of the functioning of a managing agent, where it is a firm or a company, which so functions, has been recently held by this Court in Lakshminarayan Ram Gopal & Son Ltd. v. The Government of Hyderabad to be a business and the remuneration to be income by way of profits or gains from the business. The income, therefore, falls under head No. (4) and the computation thereof has to be made under Section 10 of the Income-tax Act. Sub-section (1) of that section runs as follows :

> "The tax shall be payable by an assessee under the head profits and gains of business, profession or vocation in respect of the profits or gains of any business, profession or vocation carried on by him."

Now, in computing the taxable income of the assignee, can it reasonably be said that the remuneration for the entire year is the income of the assignee and that it is the profits and gains of the business carried on by the assignee, when as a fact he stepped into the position of the managing agent only on some date in the course of the year by virtue of the assignment. It appears to me that before income can be attributed under this head to an assessee, it must relate to the business carried on by the assessee himself. In the present case, therefore, the profits and gains of the whole year seem to me clearly to relate to the business carried on both by the assignor and the assignee taken together and are hence taxable as income accruing to both and apportionable such between them.

The importance of not overlooking the significance of the phrase "carried on by him" in sub-section (1) of Section 10, though in a different context, has been emphasised by the Privy Council in Commissioner of Income-tax, Bengal v. Shaw Wallace & Co. A recent decision of this court in Liquidators of Pursa Limited v. Commissioner of Income-tax, Bihar, also emphasises this and explains that the phrase "carried on by him" in Section 10 (1) of the Indian Income-tax Act "connotes the fundamental idea of the continuous exercise of an activity as the essential constituent of that which is to produce the taxable income." This phrase appears to me also clearly to connote the idea that the taxable income is that of the very assessee or the combination of assessee whose continuous activity produces the income. Where, as in this case, that continuity is kept up by two persons successively, it appears to me that under this section, the profits and gains are the assessable income of both together.

This is in accord with the well-accepted notion, under the normal law, that if two persons jointly carry out a work or conduct a business, the total remuneration in fact earned for the work or the total gains made on that business to both of them as their joint property and that such property has to be apportioned between them on some equitable basis. This is quite independent of any question as the whether the claim for remuneration for the work or for the emoluments of the business can be individually or jointly enforced as against the person who is liable to pay. It cannot be disputed that in the absence of any specific contract to the contrary between the persons who contribute to the work or business, the fruits of such work or of such business is the joint property of both, when the same has in fact been realised. Nor can it be said that this good only in cases where both the persons concurrently join together to earn the remuneration for the work or the profits of the business. There is no reason in law why the same principle should not be equally applicable where the two together contribute to the total work or to the total business in succession as in this case and not in concurrence. If, what arises on such continuous and successive functioning of two persons is the joint remuneration of both, there can be no doubt that such remuneration would be apportionable between them on some equitable basis on the principle that joint property is normally severable. To such a situation Section 26 (2) of the Income-tax Act would also clearly apply. That section no doubt indicates nothing as to the principle of apportionment. But there is no difficulty in the present case since it is agreed that the apportionment, if any, is to be timewise. This also prima facie is the only equitable way of apportionment on the facts of this case.

At this stage it becomes necessary to notice certain provisions of the relevant managing agency agreements which have been strongly relied on as supporting the view contrary to what I have indicated above. Reliance has been placed on two provisions of the managing agency agreement between the Sassoon United Mills Ltd. and the Sassoons which are relevant only in the appeal relating to the Agarwals. The first of these provisions is the one already noticed in another context, viz., clause 2 (d) of the agency agreement which runs as follows :

> "The said commission shall be due to the said firm yearly on the 31st day of March in each and every year during the continuance of this agreement.....".

It is urged that this term stamps the managing agency agreement with the characteristic of an income-bearing asset which vests solely in the assignee the right to the entire income payable after the date of assignment. But it appears to me that a term of this kind has reference only to the payment aspect of the money which constitutes remuneration and has no bearing on the question as to whose income it is for purposes of taxation. Taxable income must be derived from specified sources indicated in the Indian Income-tax Act. Since the mere ownership of managing agency cannot as a matter of law be treated as the source of income as explained above, any term in the

managing agency agreement between the principal and the agent entitling only the assignee to receive the year's remuneration and negativing to the assignor any direct recourse to his quondam principal for his share of the income, cannot have the effect of denying to the assignor a substantial right to a share in the remuneration, if otherwise he has a vested right thereto. A distinction exists in law between the right to receive or get payment of a certain amount of money may belong to one person. But the beneficial right in that money may belong wholly or partially to another. Benami contracts are familiar examples of such a case. Instances of joint rights in money or money's worth enforceable only at the instance of one out of the persons entitled, in special situations, are easily conceivable. It may be true that there is no accrual of income unless there is a vested right to receive the money which constitutes income. But this proposition has relevance only to the factum or date or accrual but not necessarily to the ownership of the income on such accrual. None of the cases that have been cited before us in support of the proposition that there is no accrual of income unless there is a right to receive this view. In the course of the arguments repeated stress has been laid on the proposition that there is no accrual of income unless there is a right to receive the income. This may be so. But it does not follow that the very person who has the right to receive the money which constitutes the income is the owner of that money or that the income accrues to him alone. That must depend on the substantive rights, if any, applicable to a particular situation. A term in a managing agency agreement between the principal and the agent as to the person to whom the remuneration is payable or is to become due can only have been meant as a protection of the principal in respect of multiplicity of claims against himself and cannot settle the substantive rights between persons who may have contributed to earn the remuneration.

The second provision relied on is clause 10 of the managing agency agreement with which the case of Agarwals is concerned. Clause 10 of the agreement runs as follows :

> "It shall be lawful for the said firm to assign this agreement and rights of the said firm hereunder to any person, firm or company having authority by its constitution to become bound by the obligations undertaken by the said firm hereunder and upon such assignment being made and notified to the said company the said company shall be bound to recognise the person or firm or company aforesaid as the agents of the said company in like manner as if the name of such person, firm or company had appeared in these presents in lieu of the names of the partners in the said firm and as if such person, firm or company had entered into this agreement with the said company and the said company shall forthwith upon demand by the said firm enter into an agreement with the person, firm or company aforesaid appointing such person, firm or company the agents of the said company for the then residue of the term outstanding under the agreement and with the like powers and authorities, remuneration and emoluments and subject to the like terms and conditions as are herein contained."

Stress has been laid on the underlined portion of the above clause. It is urged that this as well as clauses 1 and 3 of the managing agency agreement show that the assignor and assignee are to be treated as one entity and that on assignment the assignee becomes the managing agent as if his name had been inserted in the managing agency agreement from the beginning, and that the continuity of the managing agency was preserved thereby and that whoever satisfies the description of the managing agent at the time when the commission for the year becomes due, is also the person entitled to the amount by way of remuneration - not, as per this argument by virtue of any mutual arrangement between the assignor and the assignee, but - by the very terms of the managing agency which is the source of income. It is urged, therefore, that this feature stamps the managing agency as

an income-bearing asset. In substance, therefore, this argument amounts to saying that by virtue of this clause the service of the assignee subsequent to the date of assignment can be tacked on to the service of the assignee subsequent to the date of assignment can be tacked on to the of the assignor for the earlier portion of the year, so as to constitute it service for theentire yea which earns the remuneration, as the sole property of the assignee, i.e., that the assignment as to be given retrospective operation from the commencement of the year in respect of the work so far done. But if this clause is to be constructed as having such retrospective operation, it must, on the very terms of the underlined portion, become so operative from the original commencement of the agreement itself and not from any particular date or event thereafter. There is no reason to confine such retrospective operation only to the inchoate advantage for remuneration arising from partly finished work of the year. The underlined portion of the clause, if it is to have retrospective effect at all, is comprehensive enough to take within its ambit every other claim which may have accrued but remained unpaid, commencing from the initial state of the agency. On this construction, therefore, the right to every such claim would pass to the assignee. Such a result would obviously be untenable and no reason exist why the retrospective operation, to be imputed to this clause, should be confined to the limited extent which saves the argument put forward in this behalf by the appellant-Sassoons. It appears to me, therefore, quite clear on a fair reading of the entire clause 10 of the managing agency agreement that the only effect thereof is to bring about the result specifically stated in the second portion of that clause (which has been side lined), i.e., that on assignment, the assignee firm shall be entitled to demand and obtain from the principal company a fresh managing agency agreement in its own favour for the residue of the term outstanding and with like powers authorities remuneration and emoluments and subject to the like terms and conditions. In my opinion all that the clause 10 taken as a whole means is no more than that the assignee is entitled to demand a fresh agreement on the same terms and that even without a fresh agreement being formally executed as between the principal mill company and the assignee-company their mutual rights and obligations will be governed by the old agreement for the residue of the term with the assignee-company's name substituted for the assignor-company's name. Such effect can only be prospective and not retrospective.

There can be no doubt, however, that though any mere clause in the managing agency agreement that the employer is to be responsible only to the assignee for the payment of the entire year's remuneration is not by itself enough to vest in the assignee a beneficial right to the remuneration of the year, such a right may arise by virtue of a specific or implied term as between the transferor and the transferee, either as part of the deed of transfer or independent thereof. It may be mentioned that in the Agarwals' case there was such a specific term in the agreement preliminary to the actual assignment. But learned counsel for the Sassoons expressly disclaimed it on the ground that it was not incorporated in the deed of transfer and was, in any case, superfluous and did not rely on it. In his view the right of the assignee to receive the entire remuneration did not depend on any specific term between the assignor and the assignee, but on the fact that what was transferred is an income-bearing asset which carried with it a right to the entire income that falls due after the date of assignment. It is on account of the insistence on this view, that, as I apprehend, learned counsel for the Sassoons disclaimed the above mentioned special term between the assignor and the assignee as being superfluous. He seems to have sought thereby to obviate the consequences of the contention that the assignor's share if remuneration became the assignee's by virtue of the specific assignment thereof operating thereon its accrual and that hence it remained the taxable income of the assignor.

It may be mentioned in this context that clause 10 of the managing agency agreement in Agarwals' case has been relied on by learned counsel for Agarwals to show that while, it may be, that in the normal run of events the contract for remuneration under the managing agency agreement is an

indivisible contract for remuneration under the managing agency agreement is an indivisible contract for a whole year's remuneration on the completion of a whole year's work his clause necessarily implied divisibility of contract and of the remuneration in the year of assignment since the assignment necessarily took place with the consent of the principal mill company. (Vide Section 87-B(c) of the Indian Companies Act). This argument was advanced to support the contention that the Sassoons' share of the year's income accrued on the very date of assignment. Since, however, in my view, that was not the basis of the judgement of the High Court as explained above and since such an argument is not, in my opinion, open, having regard to the statement of the case by the Income-tax Appellate Tribunal as well as of the statements of the appellants and respondents herein, I do not consider it necessary to deal with that argument.

In my view, therefore, the continuous and successive functioning by both the assignor and the assignee under the managing agency agreement was the effective of the year and was the joint income of both the assignor and the assignee. The prior assignments in the course of the year operated as assignments of this future right to a share of the income. It is only by virtue of inter se arrangement between the assignor and the assignee, resulting from the transaction of assignment, that the assignee had the right to collect the entire income. Nevertheless, the share in this income which accrued to the Sassoons and they were rightly taxed Sassoons to counter the above view are based on the insistence that the managing agency is like property which per se produces income and, on ignoring the distinction between right to receive the income and right to the ownership of the income and on treating the former as settling the question of the person on whom income accrues. In my opinion these arguments are unsustainable and the conclusion reached by the learned Judges of the Bombay High Court is correct.

The appeals are, therefore, liable to be dismissed.

I express no opinion on any of the points raised.

Appeals allowed.

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