Aggarwal Chamber of Commerce Ltd.

Vs

Ganpat Rai Hira Lal

Civil Appeal No. 79 of 1954

(B. P. Sinha, J. L. Kapur JJ)

11-11-1957

JUDGMENT

KAPUR, J. -

This is an appeal brought pursuant to a certificate under article 133(1)(c) of the Constitution from the judgment and order of the Division Bench of the erstwhile Pepsu High Court pronounced on 10th March, 1953, modifying in appeal the order of the liquidation judge.

The facts are fully recited in the judgments of the courts below and comparatively a brief recital will be sufficient for the purpose of this judgment. The appellant company was incorporated in 1934 under the Companies Act of the erstwhile Patiala State. It carried on the business of commission agency for dealing in forward transactions in various kinds of grains and other commodities. The respondent - firm Ganpat Rai Hira Lal of Narnaul - besides being a shareholder of the appellant company had dealings with it and entered into several forward transactions of sale and purchase of grain and other commodities. The appellant, acting as a commission agent of the respondent and its other constituents entered into several transactions forward delivery at Hapur with Firm Pyarelal Musaddi Lal, who were carrying on commission agency business at Hapur (and will hereinafter be termed the Hapur firm). The total profits of the transactions entered into by the appellant with the Hapur firm was Rs. 48,250 on Which the Hapur firm paid Rs. 14,730-8-0 as income-tax. The profits accruing on the transactions entered into on behalf of the respondent amounted to Rs. 29,275-2-6 on which the proportionate income-tax claimed to have been paid was Rs. 9,314-13-4. On the 20th May, 1943, the appellant was ordered to be wound up and Udmi Ram Aggarwal, a pleader of the old Patiala High Court, was appointed its liquidator. The list of contributories was settled on 21st October, 1943, and the respondent was placed on that list. Though this matter was challenged in the appeal before the High Court it is no longer in controversy between the parties.

The official liquidator on 18th March, 1944, applied under section 186 of the Patiala Companies Act, for a payment order for Rs. 12,204-12-3 against the respondent and in support of his claim he filed, with this application, copies of the respondent's account in the books of the appellant showing how the amount claimed was due from the respondent. This amount included the sum of Rs. 9,476-13-0, on account of income- tax paid by the Hapur firm for and on behalf of the respondent on the profits of the forward transactions at Hapur and the commission of the Hapur firm. The respondent raised several objections and pleaded inter alia that the Hapur firm with whom the appellant had entered into forward transactions had no right to demand any income-tax from the appellant as no profit had accrued to the appellant which was acting as a commission agent and "was only entitled to the commission." It was also pleaded that as on the total number of transactions entered into between the respondent and the appellant there was a loss, the respondent was not liable to pay any

income-tax and that the respondent had no taxable income in the year under dispute or in any other year. On 23rd May, 1944, the respondent filed an application in which it was submitted that the Hapur firm, who were agents of the appellant at Hapur, had retained Rs. 14,730-8-0, "which was in trust with them under section 42 of the Income-tax Act" and prayed that the official liquidator be directed to apply to the Income-tax authorities for a refund of the amount retained and paid by the Hapur firm, as no tax was really due on the transactions entered into by the appellant with the Hapur firm and none was payable by the respondent.

After evidence was led by both parties the payment order was made by the learned liquidation judge on 18th January, 1949, for a sum of Rs. 8,191-0-9 Which included a sum of Rs. 6,867-9-6, the proportionate amount of income-tax due on the profits accruing on the respondent's transaction. Against this order the respondent took an appeal to the Division Bench and canvassed two points : (1) that the respondent could not be settled on the list of contributories, and (2) that it was not liable for the amount retained for payment of income-tax from out of profits on the transactions entered into in its behalf by the appellant with the Hapur firm and subsequently paid by the latter. The court negatived the former contention and held that the respondent had rightly been settled on the list of contributories and upheld the latter contention and held, following a judgment of the judicial Committee of the Ijlas-Khas of Patiala in Panna Lal Mohar Singh v. Aggarwal Chamber, that the official liquidator of the appellant was not entitled to claim the amount of income-tax paid by the Hapur firm. The Judicial Committee Ijlas-Khas had held :

> "Before the liability of the contributory can be fixed it must be shown that his income was such on which income was assessable..... It is not denied that the contributory was carrying on other transactions in India as it stood before partition through other persons. It was therefore his entire income that was to be taken into consideration to assess his liability to income-tax."

The appellant then applied for a certificate to appeal under article 133(1)(c) which was granted in the following terms :

> "The first question is whether a decision given by one judge of the Judicial Committee can be regarded in law as a decision of the Committee. The second is whether the principle laid down by the learned judge of the Judicial Committee that the Aggarwal Chamber of Commerce was not entitled to recover from its clients the proportionate share of the income-tax paid by it unless it was shown that the total amount of income of the clients was assessable to income-tax, was sound.

Accordingly we allow the petition and grant the certificate."

The first point has not been canvassed before us and in the view that we have taken it would be unnecessary to go into that matter. The sole point for decision is whether the respondent is liable for income-tax, which has been paid by the Hapur firm on the transactions, which were entered into by the appellant with the Hapur firm for and on behalf of the respondent ? There is no finding by the High Court that the respondent had entered into any forward transactions in British India or at Hapur with any firm other than the Hapur firm and this matter was not agitated before us, nor is there any finding as to the total world income of the respondent and there is no material on the record from which it could be determined.

The appellant is a non-resident company and the respondent is a non- resident, residing at Narnaul

in what was the Indian State of Patiala. The appellant entered into forward transactions on behalf of the respondent at Hapur in which there was a considerable amount of profit. The High Court has found that the Hapur firm paid Rs. 6,867-9- 0 on account of income-tax which was payable on the profits made on the transactions entered into with the Hapur firm for and on behalf of the respondent. The respondent challenged its liability to pay income- tax on the ground that it was liable :

> "only on his total earnings during the year under assessment and since, as is clear even from the books of the respondent, he had suffered heavy losses in his business at Narnaul, his total income was not asessable to any income-tax."

The learned liquidation judge held the respondent liable for the amount of the income-tax by applying section 69 of the Contract Act. The Division Bench on appeal disallowed this item on the ground that it had not been shown that the "total earnings" of the respondent were taxable under the Act. Neither of the courts below have discussed the relevant provisions of the Act, not even section 42 which was mentioned by the respondent in his application of 23rd May, 1944, nor have they given a finding as to the jural relationship of the Hapur firm with the respondent. The agency of the Hapur firm was not seriously disputed before us nor repudiated. The case seems to have proceeded on the basis of this agency in the courts below. The Hapur firm was employed by the appellant for forward transaction business of the respondent who has accepted the transactions entered into as also the amount of the profit accruing on those transactions and is only disputing the amount of income-tax deducted, retained and paid on those profits. Under the law the Hapur firm would be an agent of the respondent for that part of the business of the agency as was entrusted to it and "privity of contract arises between the principal and the substitute." Section 194 of the Contract Act : De Bussche v. Alt.

It is now necessary to refer to the relevant provisions of the Income- tax Act in force in the assessment year 1942-43 (hereinafter termed the Act). It is not clear as to what was the signification of the words "total earnings" used by the High Court because it is not used in the Income-tax Act which uses two expressions, "total income" and "total world income" in sub-section (15) of section 2 of the Act. The definition of "total income" comprises two things (i) the total amount of income, profits and gains referred to in section 4(i), and (ii) computation in the manner laid down in the Income-tax Act. "Total world income" includes all income, profits and gains wherever accruing or arising except income to which under the provisions of section 4(3) the Act does not apply.

Thus in the case of the respondent who is a "non-resident", "total income" would comprise income, profits and gains received or accrued in British India or deemed to be received or to accrue in British India. Section 17 of the Act which was relied upon by the respondent's counsel occurs in Chapter III dealing with "Taxable Income". It provides for the determination of the tax payable in certain special cases of which the case of non-resident is one. It provided :

> "Where a person is not resident in British India and is a British subject as defined in section 27 of the British Nationality and Status Aliens Act, 1914 (4 & 5 Geo. V, c. 17), or a subject of a State in India or Burma, or a native of a Tribal Area, the tax, including super-tax, payable by him or on his behalf on his total income shall be an amount bearing to the total amount of the tax including super- tax which would have been payable on his total world income had it been his total income the same proportion an his total income bears to his total world income..."

Section 17 does not deal with or affect the right and liabilities of persons required under the Act to make deductions of income-tax from sums payable to non-residents or the consequences of failure to make such deductions.

The very next Chapter (Chapter IV) deals deductions which the Act requires to be made in regard to different heads of income. Section 18 provides for deduction at the source. Sub-section (3A) of this section was as under :

> "Any person responsible for paying to a person not resident in British India any interest not being 'interest on securities,' or any other sum chargeable under the provisions of this Act, shall, at the time of payment, unless he is himself liable to pay income-tax thereon as an agent, deduct income-tax at the maximum rate."

The proviso to this sub-section made provision for payment of monies without deduction if there was a certificate of the Income-tax Officer to that effect. Under section 18(7) of the Act a person making the deduction was required to pay the amounts so deducted to the Income- tax authorities. In default of such deduction such person became an assessee in respect of the tax.

Chapter V of the Act deals with "Liability in special cases" which includes agents. Section 40(2) dealing with the case of trustees or agents of a person non-resident in British India provided :

> "Where the trustee or agent of any person not resident in British India and not being a minor, lunatic or idiot (such person being hereinafter in this sub-section referred to as a beneficiary) is entitled to receive on behalf of such beneficiary or is in receipt on behalf of such beneficiary of, any income, profits or gains chargeable under this Act, the tax, if not levied on the beneficiary direct, may be levied upon and recovered from such trustee or agent, as the case may be, in like manner and to the same amount as it would be leviable upon and recoverable from the beneficiary if in direct receipt of such income, profits or gains, and all the provisions of this Act shall apply accordingly."

Thus under this section which is essentially a machinery and an enabling section the tax to be realised from a non-resident could be levied upon the agent in the same manner as it could have been leviable upon the recoverable from a non-resident. Section 42(1) of the Act provided :

> "All income, profits or gains accruing or arising, whether directly or indirectly, through or from any business connection in British India, or through or from any property in British India, or through or from any asset or source of income in British India, or through or from any money lent at interest and brought into British India in cash or in kind, shall be deemed to be income accruing or arising within British India, and where the person entitled to the income, profits or gains is not resident in British India, shall be chargeable to income-tax either in his name or in the name of his agent, and in the latter case such agent shall be deemed to be, for all the purposes of this Act, the assessee in respect of such income."

In proviso 2 to this sub-section any such agent who apprehended that he might be taxed as such agent could retain out of any money payable to such non-resident a sum equal to the estimated liability under the sub-section and in the event of any disagreement between the non- resident and such agent a certificate could be obtained from the Income-tax Officer as to the amount to be

retained which shows that the Act had a provision for the determination of the question. As was observed by Viscount Cave in Williams v. Singer :

The fact is that, if the Income Tax Acts are examined, it will be found that the person charged with tax is neither the trustee nor the beneficiary as such, but the person in actual receipt and control of the income which it is sought to reach. The object of the Acts is to secure for the State a proportion of the profits chargeable, and this end is attained (speaking generally) by the simple and effective expedient of taxing the profits where they are found."

See also Archer Shee v. Baker, Executors of Estate of Dubash v. Commissioner of Income-tax.

This has rightly been stated to be the underlying principle of the deduction under section 40, 41 and 42. Section 48 of the Act deals with "Refunds" and if the respondent thought that it was not liable to the payment of any tax it could apply to the Income-tax officer for refund.

Thus the Hapur firm being an agent could be held liable under section 40(2) and 42(1) of the Act as an assessee for income-tax on the profits made on the respondent's transactions at Hapur and was therefore entitled under the proviso to section 42(1) to retain the estimated amount of income-tax payable on the amount of the respondent's profits which in this case was deducted, retained and actually paid. This fact has not been challenged before us. The ground on which this liability is attacked is that the total world income of the respondent was not taxable and therefore, on the profits made on the Hapur transactions, the British Indian tax authorities could not levy any tax. This contention disregards the provisions of and liability arising under section 40(2) and 42(1) and the proviso thereto. It also is cantrary to the principle of taxing statutes that the profits are " taxed where they are found." In this case they were in the hands of the Hapur firm which was in receipt and control of the income. The agent at Hapur, having lawfully and properly paid the tax under the Act that amount has been rightly deducted from the profits accruing on the Hapur transactions.

The judgment of the Judicial Committee of the Ijlas-i-khas on which the High Court has based its decision suffers from the infirmity that it ignores both the provisions of and principle underlying sections 40(2) and 42(1) of the Act and the proviso thereto relating to the liability of an agent under the Act and the law of agency relating to employing of sub-agents by agents. If the Hapur firm rightly paid the tax on the profits, the respondent cannot be allowed to challenge the amount on the ground that his total world income was not taxable and he was entitled to his profits without deductions. That is a question which has to be agitated by the non-resident assessee at the time of his assessment. Those persons who are bound under the Act to make deduction at the time of payment of any income, profits or gains are not concerned with the ultimate result of the assessment. The scheme of the Act is that deductions are required to be made out of "salaries", "interest on securities " and other heads of "income, profits and gains" and adjustments are made finally at the time of assessment. Whether in the ultimate result the amount of tax deducted or any lesser or bigger amount would be payable as income-tax in accordance with the law in force would not affect the rights, liabilities and powers of a person under section 18 or of the agent under sections 40(2) and 42(1). As to what would be the effect and result of the application of section 17 if and when any appropriate proceedings are taken is not a matter which arises in this appeal between the appellant and the respondent nor can that matter be adjudicated upon in these proceedings. That is a matter which would be entirely between the respondent and the Income-tax authorities seized of the assessment.

Out attention was drawn to two cases (1) Commissioner of Income-tax v. Currimbhoy Ebrahim &

Sons. In that case the assessee company had been treated as an agent of the Nizam of Hyderabad who had lent to the assessee company a sum of Rs. 50 lakhs. The assessee company had paid in the assessment year a sum of Rs. 3 lakhs on account of interest and it was held that the interest earned by the Nizam did not accrue or arise to the Nizam through or from any business connection with the assessee company in British India or from any property within British India and therefore section 42 was not applicable. No question of "business connection" was raised in the court below and the argument there proceeded on the basis that the respondent was not liable for this amount on account of income-tax because the "entire income" was not assessable to income-tax. The argument of isolated transactions based on Anglo-French Textile Co. Ltd. v. Commissioner of Income-tax, Madras, is not available to the respondent nor was the foundation for any such argument laid in the courts below or raised in the statement of the case filed by the respondent in this court. Another case on which reliance was placed is Greenwood v. F. L. Smidth and Company. That was a case of a Danish firm resident in Copenhagen. It manufactured and dealt with cement making machinery which it exported to other countries. It had an office in London in charge of a qualified engineer who received enquiries for machinery such as the firm could supply, sent to Denmark particulars of the work which the machinery was required to do and when the machinery was supplied he was available to give the English purchaser the benefit of his experience in erecting it. The contracts between the firm and their customers were made in Copenhagen and the goods were shipped f.o.b. Copenhagen. It was held in that case that the firm did not exercise a trade within the United Kingdom within the meaning of Schedule D of section 2 of the Income Tax Act, 1853, and was therefore not assessable to income-tax. This decision is not relevant to the case now before us as the facts were different and the decision was under a different statute.

In our opinion the Judicial Committee of Ijlas-i-khas was in error in holding that before fixing the liability of a contributory to tax paid by an agent in British India for and on behalf of the non-resident contributory, his liability to pay tax on his "entire income", really total world income, had to be established. Therefore the finding of the High Court that the liquidator cannot claim from the respondent the amount of tax paid by the Hapur firm on transactions entered into by the appellant for and on behalf of the respondent unless it was shown that his total world income was taxable is unsustainable. As between the parties the tax paid by the agent had to be taken into account irrespective of the ultimate result of the assessment of the non-resident.

In the result this appeal is allowed and the judgment and order of the Division Bench of the Pepsu High Court set aside and the order of the learned liquidation judge restored but in the circumstances of this case the parties will bear their own costs in this court and in the courts below.

Appeal allowed.

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