Pushalal Mansinghka (P) Ltd.

Vs

Commissioner of Income-Tax, Delhi, Rajasthan & M. P.

Civil Appeals Nos. 557 and 558 of 1966

(J. C. Shah, S. M. Sikri, V. Ramaswami- I JJ)

05.05.1967

JUDGMENT

RAMASWAMI, J.

These appeals are brought, by special leave, from the judgment of the Rajasthan High Court dated April 29, 1964 in Income-Tax Reference No. 2 of 1963.

The appellant is a private limited company having its mines, factory and Head Office at Bhilwara in Rajasthan which was at the relevant periods in a Part 'B' State. The appellant carried on mining business at Bhilwara and was engaged in the cutting, processing, sorting and packing of mica which was exported by it to Kodarma and Giridih which were situated in Part 'A' and Part 'C' States and sold there to purchasers. the mica was sent almost entirely by railway from Bhilwara to Kodarma and Giridih. The appellant followed the mercantile method of accounting and the assessment year in question are 1950-51 and 1951-52, the corresponding previous years being the years from November 2, 1948 to October 21, 1949, and October 22, 1949 to November 9, 1950 respectively. The total sale proceeds of the appellant during the two assessment years amounted to Rs. 19,77,544/-. The appellant tendered bills to the local branch of the Bank of Rajasthan to the extent of Rs. 15,64,475/-and received payment of that amount at Bhilwara. The appellant claimed that it was entitled to the benefit of rebate in regard to profits from these sales under the Part 'B' States (Taxation Concessions) Order, 1950 and that s. 4(1) (a) of the Income-tax Act, 1922 (hereinafter called the 'Act') was not applicable to its transactions. By his orders dated March 24, 1955 and May 31, 1954, the Income-tax Officer held that the sales took place in Part 'A' and Part 'C' States and therefore no rebate was admissible under the Part 'B' States (Taxation Concessions) Order, 1950. The Income-tax Officer also rejected the claim of the appellant that in regard to some of the sales bills were discounted by the Rajasthan Bank and payment to that extent should be treated as having been received at Bhilwara in the Part 'B' State. It was held by the Income-tax Officer : (1) that the letter for discounting was forged, (2) that even assuming that the appellant tendered some of its bills for discounting the responsibility of the appellant under the conditions stipulated by the Bank in its form did not cease till the Bank realised payment from the purchaser and hence there was no discounting of the bills which were merely handed to the Bank for collection. On appeal, the Appellate Assistant Commissioner by his order dated September 200, 1957 held that the Income-tax Officer was justified in holding that the appellant was not entitled to any rebate under the Part 'B' States (Taxation Concessions) Order, 1950. On further appeal, the Appellate Tribunal held by its order dated August 18, 1958 that the appellant received the sale proceeds in regard to the goods consigned to the purchasers in Part 'A' and Part 'C' States and not in Part 'B' State and therefore the appellant was not entitled to the rebate claimed by it. The Appellate Tribunal thereafter stated a case under s. 66(1) of the Act and referred the following question of law for the opinion of the High

Court :

> "Whether on the facts and in the circumstances of the case, the assessee was entitled to any rebate under the Part 'B' States (Taxation Concessions) Order in respect of income from the mining business for the assessment years 1950-51 and 1951-52 ?"

By its judgment dated April 29, 1964, the High Court answered the question in the negative and against the appellant.

The method of the appellant in making sales was as follows : The representatives of the buyers from Kodarma and Giridih used to visit Bhilwara, inspect the various qualities of mica which the appellant had for sale and entered into written contracts for purchase. The aforesaid contracts are marked as Annexure 'A' to the statement of the case and it is admitted by the parties that they represent all the contracts with which we are concerned in these appeals. These contracts plainly show that the buyers purchased specified qualities of mica. "Bhilwara godown delivery" on the condition that the consignments would be sent to Kodarma or Giridih as the case may be and the railway receipts would be sent "through bank". There is the further stipulation that 25 per cent of the price would be sent by way of an advance, within a week's time, that the packing expenses would be payable by the buyers and that after the consignment left the godown at Bhilwara, they would be entirely at the buyer's risk. Apart from these written terms and conditions of the contract, the Income-tax Appellate Tribunal has recorded the further finding of fact that the appellant consigned the goods to "self" and that the railway receipts alongwith the bills of exchange were presented by the appellant to the Rajasthan Bank, Bhilwara for collection after endorsing the railway receipts in favour of the Bank. It has also been found that the Rajasthan Bank in its turn endorsed the railway receipts in favour of its branches in Part 'A' and Part 'C' States and that the goods were delivered to the buyers only when they paid the price to the Bank and obtained the railway receipts.

Paragraph 4(1) (iii) of the Part 'B' States (Taxation Concessions) Order, 1950 is to the following effect :

> "4. Scope of the main concessions - (1) The provisions of paragraphs 5, 6, sub-paragraph (1) of paragraphs 11, 12 and 13 of this Order shall apply -
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> (iii) in the case of any other assessee who is not resident in the previous year in the taxable territories or in the taxable territories other than Part B States to so much of the income, profits and gains included in his total income as accrue or arise in any Part B State and are not deemed to accrue or arise, or are not received or deemed to be received within the meaning of clause (a) of sub-section (1) of section 4 of the Act, in the taxable territories other than the Part B States."

Section 4(1) (a) of the Act reads :

> "4. Application of Act. - (1) Subject to the provisions of this Act, the total income of any previous year of any person includes all income, profit and gains from whatever source derived which -
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> (a) are received or are deemed to be received in the taxable territories in such year by or on behalf of such person, or"

The question to be considered in this case is :- Where did the income or the right to receive the payment under the contracts of sale accrue or arise? According to the Oxford English Dictionary the meaning of the word "accrue" is "to fall as a natural growth or increment; to come as an accession or advantage". The word "arise" is defined as "to spring up, to come into existence". The word "receive" is not used in the same sense as "accrue" and "arise" in para 4(1) (iii) of Part B States (Taxation Concession) Order. The words "accrue" and "arise" do not mean actual receipt of the profits or gains. Both these words are used in contra-distinction to the word "receive" and indicate a right to receive. In Colquhoun v. Brooks (1) Lord Justice Fry had to construe the expression "profits or gains, arising or accruing" in 16 and 17 Victoria Chapter 34, Section 2, Schedule 'D' and observed in that connection as follows :

> "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 word 'arising or accruing' are general words descriptive of a right to receive profits."

It is clear, therefore, that the income may accrue to an assessee without actual receipt of the same. If the assessee acquires a right to receive the income, the income can be said to accrue to him thought it may be received later on its being ascertained. The basic conception is that he must have acquired a right to receive the income - (See E. D. Sassoon & Company Ltd. v. C. I. T. Bombay City).

As pointed out by the Judicial Committee in C. I. T. Bombay presidency & Aden v. Chunilal B. Mehta(2), it is impossible to lay down any general test to determine the place where the profits of the business accrue. In some cases it may be the place of the formation of the contract, but other matters - for instance the place where the contract is carried out or acts are done under the contract - may be decisive in certain circumstances. When the business consists of buying and selling goods, profits accrue as a general rule at the place where the contract of sale is made or where sales are effected. But the question depends very much upon the facts and circumstances of each particular case. At page 533 of 'the Report the Judicial Committee observed as follows :

> "Their Lordships are not laying down any rule of general application to all classes of foreign transactions, or even with respect to the sale of goods. To do so would be nearly impossible and wholly unwise - to use the language of Lord Esher in Erichsen v. Last(3). They are not saying that the place of formation of the contract prevails against everything else. In some circumstances it may be so, but other matters-acts done under the contract, for example - cannot be ruled out a priori. In the case before the Board the contracts were neither framed nor carried out in British India; the High Court's conclusion that the profits accrued or arose outside British India is well-founded."

In the context of the facts found in this case we are of the opinion that profits accrued to the appellant at the place where the sales were effected; in other words, where the property in the goods passed to the purchasers. The problem in the present case therefore is to determine whether the property in the goods passed to the purchasers at Bhilwara, as claimed by the appellant or at

Kodarma or Giridih, as claimed by the respondent. In the case of a contract for sale of unascertained goods the property does not pass to the purchaser unless there is unconditional appropriation of the goods in a deliverable state to the contract. 23 of the Indian Sale of Goods Act (Act 3 of 1930) states :

> " (1) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express, or implied and may be given either before or after the appropriation is made.
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> (2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract."

Section 25 provides as follows :

> " (1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to a buyer, or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass the buyer until the conditions imposed by the seller are fulfilled.
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> (2) Where goods are shipped and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is prima facie deemed to reserve the right of disposal.
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In the present case, the appellant has reserved the right of disposal over the goods at the time of despatch. The consignment was sent "self", the railway receipt was taken in the name of the appellant and the railway receipt along with the bill of exchange was presented by the appellant to the Rajasthan Bank for collection after endorsing the railway receipt in favour of the Rajasthan Bank. The goods are delivered to the buyers only when they paid the price to the bank and obtained the railway receipts endorsed in their favour. The fact that the goods are, by the bill of lading, made deliverable to the order of the seller or his agent is a prima facie reservation of the right of disposal so as to prevent the property from passing to the purchaser. If the seller deals with, or claims to retain, the bill of lading, in order to secure the contract price as when he sends forward the bill of lading with a bill of exchange attached, with directions that the bill of lading is not to be delivered to the purchaser till acceptance or payment of the bill of exchange the appropriation is not absolute, but until acceptance of the draft, or payment or tender of the price, is conditional only, and until such acceptance or payment or tender, the property in the goods does no pass to the purchaser. - (Mirabita v. Imperial Ottoman Bank) (1). If the seller discounts a draft upon the buyer with a bank, and authorises the bank to hand to the buyer a bill of lading to the order of the seller and endorsed in bank by him upon his acceptance of the draft, the intention to be inferred, according to general mercantile understanding is that the seller intends to transfer the ownership when the draft is

accepted, but intends also to remain the owner until this has been done. So, when the seller draws a hundi or a bill of exchange with a relative railway receipt to his own banker for the purpose of delivery of the railway receipt to the purchaser on his honouring the hundi, the property in the goods cannot be held to pass to purchaser till he pays the price and takes delivery of the railway receipt from the banker. The matter is very clearly put by Lord Sumner in Prinz Adalbert(2) as follows :

"When a shipper takes his draft not as yet accepted but accompanied by a bill of lading, endorsed in this way, and discounts it with a banker, he makes himself liable on the instrument as drawer, and he further makes the goods, which the bill of lading represents, security for its payment.

If in turn, the discounting banker surrenders the bill of lading to the acceptor against his acceptance, the inference is that satisfied to part with his security in consideration of getting this further party's liability on the bill, and that in so doing he acts with the permission and by the mandate of the shipper and drawer. Possession of the indorsed bill of lading enables the acceptor to get possession of the goods on the ship's arrival. If the shipper, being then owner of goods, authorises the directs the banker, to whom he is himself liable and whose interest it is to continue to hold the bill of lading till the draft is accepted to surrender the bill of lading of the draft it is natural to inter that he intends to transfer the ownership when this is done, but intends also to remain the owner until this has been done. The general law infers under these circumstances that the ownership in the goods is transferred when the draft drawn against them is accepted."

It was argued on behalf of the appellant that after the railway receipts had been endorsed in favour of the bank and the appellant got the consideration by discount of the railway receipts the title in the goods had passed from the appellant to the Bank of Rajasthan which became thereafter the agent of the purchaser. We do not think there is any substance in this argument. Before the Appellate Tribunal the case of the appellant was that the railway receipt and the bills were sent by it to the bank for collection from the purchasers from Part 'A' and Part 'C' States. It was held by the Appellate Tribunal that the letter dated July 8, 1948 alleged to have been written by the appellant was a faked document and no instructions, were given to the Rajasthan Bank for discounting the appellant's bills. Even assuming that the bank gave credit of part of the amount of some of the bills to the appellant, it is apparent from the conditions specified in the discount form of the bank that the responsibility of the appellant did not cease till the bank realised payments from the purchaser. The discount form of the bank provided :

> "The bank is sending the goods at the risk of the consignor.... In case the bill is dishonoured by the purchaser..... the responsibility will be that of the consignor and the bank will have the right to recover the amount from him..... In case the amount is not recovered from the purchaser, the bank has the right to debit the same amount to the account of the consignor."

It is clear, therefore that when the appellant negotiated the hundi with the banker, the latter did so only a part of its banking business. Even if there was a purchase of the hundi by the banker it cannot mean that there was a sale of the goods to the banker. In the first place, there was no agreement between the banker and the seller for the sale of goods. Secondly, the banker had only a security over the goods till the price was paid by the buyer. To hold otherwise would mean that the seller committed a breach of contract with the buyer and sold the goods to the banker. That is, however, not the case. The appellant only performed his contract with the buyer in accordance with the usual commercial practice. Therefore if any money was paid by the bank to the appellant as price of the

hundi, it was not the sale price of the goods in any sense and the bank was not acting as the agent of the buyer. On the other hand, the purchase of the hundi by the bank was only a convenient arrangement between the bank and its own customer the appellant to avoid freezing of credit of the latter and it was done in the course of its usual banking transactions. It follows therefore that the price of the goods sold can be held to be accrued only when the purchaser pays the price or enters into an arrangement with the bank which is the endorse of the hundi; for, till then, the latter will have a right to recourse against the appellant became entitled to the purchase money only on the passing of title to the purchasers at Kodarma and Giridih in Part 'A' and Part 'C' States and it must therefore be held that the income accrued to the appellant in Part 'A' and Part 'C' States.

We proceed to consider the next contention of the appellant, namely, that mica was extracted, processed, sorted, packed ad despatched at Bhilwara in Part 'B' State and there was accrual of a part of the income at Bhilwara and the appellant was, in any case, entitled to claim apportionment of the profits accrued. Counsel on behalf of the appellant placed reliance upon the decisions of this Court in C. I. T. Bombay v. Ahmedbhai Umarbhai & Co. and in The Anglo French Textile Co. Ltd. v. C. I. T., Madras, where it was pointed out that in the case of a composite business, for instance where a person carries on a manufacturing and selling business it was not possible to say that the only place where the profits accrue to him is the place of sale. The profits are received by him firstly for his business as a manufacturer and secondly for his trading operations and profit and loss has to be apportioned between these business according to the principles of accountancy. But it is not possible for us to accept this argument in this case, because the appellant did not raise the question of apportionment of profits before the Appellate Tribunal, nor was it considered and decided by it. In C. I. T. Bombay. Scindia Steam Navigation Co. Ltd. it was pointed out by this Court when a question of law is neither raised before the Tribunal nor considered by it, it will not be a question arising out of the order of the Tribunal and the High Court will be acting beyond its jurisdiction in dealing with any such question. We accordingly hold that Mr. Karkhanis is unable to make good his argument on this aspect of the case.

For these reasons we hold that these appeals must be dismissed with costs - one hearing fee.

R. K. P. S.

Appeals dismissed.

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