Commissioner of Income Tax, Calcutta

Vs

T.I. and M. Sales Ltd.

Civil Appeal Nos. 1449-1456 of 1974

(CJI R. S. Pathak, Ranganath Misra JJ)

10.04.1987

JUDGMENT

RANGANATH MISRA J. -

1. These are appeals by the revenue by special leave and are directed against the decision of the Calcutta High Court dated September 15, 1972, rendered upon reference made under section 256(1) of the Income-tax Act of 1961. The Tribunal referred the following six questions for opinion of the court :

> (1) Whether, on the facts and in the circumstances of the case, and on a proper construction of the agreement between the Indian company and the Export Company, the Tribunal was right in holding that the six non-resident companies in Group A had business connection with the Indian company and, therefore, that the Indian Company was correctly treated as an agent of the said non-resident companies under section 163 of the Income-Tax Act, 1961 ?
>
> (2) If the answer to question No. 1 is in the affirmative, then, whether on the facts and in the circumstances of the case, the Tribunal was justified in holding that any profit could be deemed to accrue or arise in India to the six non-residents in the United Kingdom in respect of the goods sold by them to customers in India ?
>
> (3) Whether, on the facts and in the circumstances of the case, and on a proper construction of the agreement dated March 22, 1955, between the Indian company and Crane Packing Ltd. (company in Group-B), the Tribunal was right in holding that the non-resident company had business connection with the Indian company and, therefore, the Indian company was correctly treated as an agent of the said non-resident company under Section 163 of the Income-Tax Act, 1961 ?
>
> (4) If the answer to question No. 3 is in the affirmative, then, whether on the facts and in the circumstances of the case, the Tribunal was justified in holding that any profit could be deemed to accrue or arise in India to the aforesaid non-resident company in respect of the goods sold by it to customers in India ?
>
> (5) Whether, on the facts and in the circumstances of the case and on a proper construction of the agreement dated June, 1, 1954, between the Indian company and Bundy Tubing Co. (Australia) Pvt. Ltd. (non-resident company in Group-B), the Tribunal was right in holding that the non-resident company had business connection

> with the Indian Company and, therefore, the Indian Company was correctly treated as an agent of the said non-resident company under Section 163 of the Income-Tax Act 1961 ?
>
> (6) If the answer to question No. 5 is in the affirmative, then, whether on the facts and in the circumstances of the case, the Tribunal was justified in holding that any profits could be deemed to accrue or arise in India to the aforesaid non-resident company in respect of the goods sold to the customers in India ?

2. The short facts relevant for appreciating the background in which these questions arose are these - T.I.& M. Sales Ltd., assessee-respondent, was assessed to income-tax as a representative assessee of ten non-resident companies. The Tribunal grouped the ten non-resident companies under three heads - six in Group A, three in Group B and one in Group C. In regard to the companies under Group A the assessee had no direct agreement but had dealings by virtue of its agreement with the exporting company. So far as the three companies under Group B are concerned, the assessee had no business connection with them and so far as the only company under Group C is concerned, the assessee's stand was that it had an agreement dated December 16, 1948, with the export company, but no liability accrued under the law in respect of the transactions. The Income-tax Officer referred specifically to the agreement of 1948 and refuted the stand of the assessee by saying :

> The agreement of December 6, 1948 referred to above which continued during the relevant years is a clear authority that the non-resident had employed the Indian company for selling its goods in India on commission. The agreement certainly brings into existence a business connection between the two. The Indian Company is in receipt of commission calculated with reference to the aforesaid valus of goods sent not only by the non-residents, but also by some manufacturers of the T.I. Group in the United Kingdom with which the Indian Company had to direct contract, but which supply goods to India as per orders placed by the Indian Company through the non-residents.

The Income-Tax Officer also found that the Group-A companies belonging to the T.I Group were connected with the Indian Company through the export company.

3.Appeals challenging the assessments were taken to the Appellate Assistant Commissioner. Before him, the assessee tried to establish the actual course of dealing between the Indian Company and the ten non-residents and contended that no liability under the Act accrued. The appellate authority dismissed the contentions of the assessee by holding that "the assessee has produced no proof of its assertions and, on the contrary, has blocked the enquiry by me thereon". Along with the grounds of appeal filed before the Tribunal, an affidavit dated December 27, 1965, of Carol Stuart Cameron was filed. Cameron stated in that affidavit that he was the Secretary of the assessee and was in superintendence of the proceedings relating to the assessments of the assessee as representative assessee of the ten non-residents. In that affidavit, he denied the fact that before the Appellate Assistant Commissioner any obstruction was offered to an attempted probe by the said appellate authority. On the other hand, the affidavit stated that several documents were made available before the appellate authority and were available and actually placed before him and in case the appellate authority wanted any information or further documents to be produced, Cameron was prepared to do so. We shall again refer to the affidavit in its appropriate place later. Before the Tribunal, some argument was raised with reference to the affidavit but ultimately the Tribunal upheld the assessments but referred the questions indicated above for the opinion of the High Court. The High

Court by the impugned judgment T. I. and M. Sales Ltd. v. CIT ((1985) 151 ITR 286 (Cal HC)) referred to the provisions of Sections 4, 42, and 43 of the Indian Income-Tax Act of 1922 corresponding to Sections 5, 9, and 163 respectively of the Income-Tax Act of 1961. In the light of the affidavit of Cameron, it took note of the fact that no attempt had been made by the revenue to traverse the facts stated therein, it referred to and relied upon the decision of this court in the case of CIT v. R. D. Aggarwal & Co. ((1965) 56 ITR 20 (SC) : (1965) 2 SCR 660 : AIR 1965 SC 1526) and came to hold that there was no element of business connection and, there, the assessee was not liable. Question Nos 1, 3 and 5 were thus answered in the negative and against the Revenue and, therefore, questions Nos. 2, 4 and 6 which were required to be answered only if the answer to the other three questions was in the affirmative, did not arise.

4. In CIT v. R. D. Aggarwal & Co. ((1965) 56 ITR 20 (SC) : (1965) 2 SCR 660 : AIR 1965 SC 1526) this Court held :

> The expression business connection undoubtedly means something more than business. A business connection in Section 42 involves a relation between a business carried on by a non-resident which yields profits or gains and some activity in the taxable territories which contributes directly or indirectly to the earning of those profits or gains. It predicated an element of continuity between the business of the non-resident and the activity in the taxable territories : a stray or isolated transaction is normally not to be regarded as a business connection. Business connection may take several forms : it may include carrying on a part of the main business or activity incidental to the main business of the non-resident and the activity in the taxable territories, which facilitates or assists the carrying on of that business. In each case, the question whether there is a business connection from or through which income, profits or gains arise or accrue to a non-resident must be determined upon the facts and circumstances of the case.

A relation to be a "business connection" must be real and intimate, and through or from which income must accrue or arise whether directly or indirectly to the non-resident. But it must in all cases be remembered that by section 42, income, profit or gain which accrues or arises to a non-resident outside the taxable territories is sought to be brought within the net of the income-tax law, and not income, profit or gain which accrues or arises or is deemed to accrue or arise within the taxable territories. Income received or deemed to be received, or accruing or arising or deemed to be accruing or arising within the taxable territories in the previous year is taxable by section 4(1)(a) and (c) of the Act, whether the person earning is a resident or non-resident. If the agent of a non-resident receives that income or is entitled to received that income, it may be taxed in the hands of the agent by the machinery provision enacted in section 40(2). Income not taxable under section 4 of the Act of a non-resident becomes taxable under section 42(1) if there subsists a connection between the activity in the taxable territories and the business of the non-resident, and if through or from that connection income directly or indirectly arises.

5. Whether a relationship would amount to "business connection" as provided in section 163(1)(b) of the Income-Tax Act of 1961 for the purposes of giving rise to a liability under section 9(1) of the Act would depend upon a set of facts arising in a particular case. The High Court, relying upon the facts stated in the affidavit of Cameron, has found that during the hearing of the appeals before the Appellate Assistant Commissioner, Cameron had produced certain records to show the manner in which the business had been carried on and the nature of the transactions. The Appellate Assistant Commissioner in his order indicated :

> The assessee submits that the contracts for the supply of goods ordered by the Indian buyers are accepted in the foreign country, that the property in the goods shipped passes to the Indian buyers at the port of shipment in the foreign country, that the payment for the goods is received by the non-residents in the foreign country, that the sales and purchases are as between principal and principal and, therefore, it cannot be said that the non-residents have either a business connection in India or have any income which could be deemed to accrue or arise in India as attributable to any operation carried out in India. I may here touch briefly on that the assessee has produced no proof of these assertions and, on the contrary, has blocked enquiry by me therein.

The assessee is aggrieved that in the orders under Section 143, the Income-tax Officer assumed ipse dixit that the sales were made in India. It submits that while it is true that the non-resident's products were sold to persons in India, that does not conclude the question and, on the facts of this case, the property in the goods sold passed to the Indian buyers outside India and, therefore, the Income-tax Officer's axiomatic assumption that there were any sales in India is incorrect and if there were no sales in India, there is no income which could be deemed to accrue or arise in India by invoking the provisions of section 9 as no operation is carried out in India.

The order of the Appellate Assistant Commissioner shows that Cameron appeared before him at the hearing on September 3, 1965 and September 4, 1965 and the appeals were dismissed by order dated September 17, 1965.

6. This court's judgment in CIT v. R. D. Aggarwal & Co. ((1965) 56 ITR 20 (SC) : (1965) 2 SCR 660 : AIR 1965 SC 1526), was pronounced on October 6, 1964. The order of the Appellate Assistant Commissioner makes casual reference to this judgment but the ratio thereof had not been put to use in any manner and the same does not appear to have had any perceptible effect on the decision of the Appellate Assistant Commissioner.

7. Along with the memoranda of appeal filed before the Tribunal, the assessee filed the affidavit of Cameron. That affidavit is dated December 27, 1965. The Revenue had notice of it and the Tribunal in its decision has stated along with the grounds of appeal before us, there is an affidavit by Shri Cameron setting out the course of dealing and alleging that several of these representatives files were inspected by the Appellate Assistant Commissioner at the time of hearing of the appeals". The Tribunal, however, did not deal with the affidavit by saying :

For the purpose of a decision as to whether the Indian Company could be appointed agent under Section 163 by virtue of business connection with the non-resident companies, it is not necessary to go into the terms of the affidavit. These facts might have a bearing on the quantum of the income deemed to arise to the non-resident companies from the business connection.

The Tribunal obviously fell into an error in brushing aside the affidavit for the reason it indicated. The facts stated in the affidavit had a direct bearing on the point in issue, namely, whether there was any business connection between the assessee and non-resident companies.

8. In the course of argument of the matter before the High Court, sumptuous reference was made by the counsel for the revenue to the affidavit of Cameron. The judgment of the High Court says :

Mr. Pal (for the Department) submits that the affidavit of Mr. Carol Stuart Cameron, Secretary of

the Indian company affirmed on December 27, 1965, which was filed before the appellate Tribunal contains facts which must be read in the light of the agreement between the parties.

9. This would indicate that there was no objection to the acceptance of the affidavit and use of its contents while dealing with the matter and the High Court relied upon the affidavit and stated ((1985) 151 ITR 286 (Cal HC) :

> In our case, the facts as they appear from the documents on record and the affidavit of Mr. Cameron referred to above (which incidentally has not been traversed by the department) are (a) procuring of raw materials and manufacture of finished goods took place outside the taxable territories, (b) contracts for sale of goods, were entered into outside the taxable territories, (c) price was received by the non-residents outside the taxable territories, and (d) delivery was also made outside the taxable territories. Moreover, Cameron in his affidavit categorically states that the orders which were sent from India were accepted by the non-residents in London and intimation of such acceptance was communicated either to the Indian company or to the Indian customers and the orders became binding contracts only after being accepted in this manner. In other words, the Indian company had no authority to accept any offers on behalf of any of these non-residents whether they belonged to Group A or Group B. The Department, as we have stated, has not adduced any evidence to contradict the facts stated by Cameron either from the course of dealings between the parties or otherwise.

The position, therefore, is that in a case like this there can be no "business connection" unless the Indian assessee has the authority to accept offers or to enter into contracts on behalf of the non-residents. The Tribunal has found that in the case of one company only there was an express prohibition against acceptance of offers. But in the other contracts there was no such express prohibition. The Tribunal has granted relief in the case of express prohibition but has taken a different view with regard to those contracts in which there was no such prohibition. In our opinion, having regard to the facts stated by Cameron and the course of dealings, between the parties, the absence of express prohibition, in the instant case, is immaterial.

It is true that the Indian company was the sole agent of the Group B companies. But it appears from the evidence on record that in spite of being the sole agent, the Indian company had no authority given to it by the Group B companies to accept offers on their behalf. So far as Group A companies are concerned, there was no privity of contract at all either of agency or of any other variety. In these premises, we cannot but hold that the Indian assessee had no business connections with the non-resident companies belonging either to Group A or Group B within the meaning of section 42 of the 1922 Act corresponding to section 9 of the 1961 Act.

Learned counsel for the appellant was very critical about the manner in which the High Court utilised the affidavit and came to its conclusions regarding the facts in dispute. The criticism is not without force. Ordinarily, the High Court should have declined to use the assertions in the affidavit for the purpose of recording findings of fact and if, at all, in its opinion the affidavit was to be utilised, the matter should have gone before the Tribunal for a fresh disposal of the appeals. The facts of this case are, however, somewhat peculiar. Rule 10 of the Income-Tax (Appellate Tribunal) Rules, 1963, provides :

> Where a fact which cannot be borne out by, or is contrary to, the record is alleged, it

shall be stated clearly and concisely and supported by a duly sworn affidavit.

10. It is the stand of the respondent that Cameron's affidavit came within the ambit of rule 10 and had, therefore, been filed along with the memoranda of appeals before the Tribunal. We are satisfied that the revenue had full notice of the affidavit and as pointed out by the High Court, it did not dispute the facts stated in the affidavit by filing objection or counter thereto. The affidavit had not been rejected by the Tribunal but had only been brushed aside by saying that it was not relevant. Before the High Court, counsel for the revenue also used the affidavit. We do not think it would be appropriate at this stage to accept the submission made at the bar on behalf of the appellant and put back the matter to the stage of the second appeal before the Tribunal. The assessments relate to a period about a quarter of a century back and by its conduct, the revenue appears to have waived its right to dispute the facts asserted in the affidavit on the one hand by not challenging its admissibility and on the other, by not disputing the contents thereof. We have been told during the hearing of the appeals that Cameron is not dead. Once the facts stated in the affidavit are accepted, the ratio of the decision of this court in CIT v. R. D. Aggarwal & Co. ((1965) 56 ITR 20 (SC) : (1965) 2 SCR 660 : AIR 1965 1526) would be fully applicable and the High Court has utilised the ratio in that decision to find out whether any business connection between the assessee and the non-resident companies had been established. There is no dispute that unless the matter comes under section 163(1)(a) of the Act, there will be no liability for assessment. In that view of the matter, these appeals have to fail.

11. The appeals are, therefore, dismissed but without any order for costs.

Appeals dismissed.

</html