

# CALCUTTA HIGH COURT

Raleigh Investment Co

Vs

Governor-General In Council

(Derbyshire, C.J.)

09.04.1943

## JUDGMENT

### **Derbyshire, C.J.**

1. This matter originally came before McNair, J., who referred it to the Chief Justice, under rule 3 of Chapter V of the Original Side Rules which is as follows :-

"Where it shall appear to any judge at any stage of a suit, application or other matter, that it involves a substantial question of law as to the interpretation of the Government of India Act, 1935, or any order in council made thereunder, he shall report to that effect to the Chief Justice, who shall constitute a Bench of two or more judges to hear the suit, application or other matter."

Put shortly the plaintiffs claim that certain provisions of the Indian Income-tax Act of 1922 as amended by the Income-tax Act of 1939 are beyond the law making powers of the Indian central Legislature and that in consequence certain money they have paid under protest to the Government of India as income tax under the protest to the Government of India as income tax under the said provision was not legally payable by them; they claim a declaration that the said provision are ultra vires and ask for a return of the money so paid and other reliefs.

The defendants in their written statement have pleaded Section 226 of the Government of India Act, 1935, which in its material part provides :-

"No High Court shall have any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country of the law for the time being in force."

In order to decide whether and to what extent this plea will avail the defendants it is necessary to go into the facts of the case and the relevant provision of the law. There is no difference between

the parties as to the facts. The Governor-General in Council as representing the Government of India is a party to the suit and has appeared through Sir Asoka Roy, the Advocate-General of Bengal, not acting as the Advocate General of Bengal, but as Counsel representing the Government of India; we were informed by Sir Asoka Roy that it was not necessary to give special notice to the Government of India or the Advocate-General of India under Order XXVII-A of the Code of Civil Procedure as they were aware of the case and were represented by him. The suit is brought by the Raleigh Investment Co., Ltd., a joint stock company incorporated under the English Companies Act, having its registered office at 13, Athol Street, Douglas, in the Isle of Man and its main office at Egham, Surrey, England. We are informed from the Bar that the reason for the Company's registration in the Isle of Man was to save registration fees. For all practical purposes it is an English Company. It has no business premises in India, but holds the bulk of the shares in a number of companies which carry on the business of manufacturing and selling tobacco and cigarettes in India. These companies are as follows : (1) The Imperial tobacco Company of India Ltd; and (2) Carriers (India) Ltd. The two above companies which are referred to as "the rupee companies" are incorporation in India under the Indian Companies Act and have their registered offices and business headquarters at 37, Chowringhee, Calcutta, within the original jurisdiction of this Court. (3) The Arcadian Tobacco Co., Ltd.; (4) The Cigarette Manufactures (India) Ltd.; (5) Dominion Tobacco Co., Ltd.; (6) General Advertising Agency (India) Ltd.; (7) Indian Leaf Tobacco Development Co., Ltd.; (8) Peninsular Tobacco Co., Ltd.; (9) Printers (India) Ltd.; (10) Thomas bear and Sons (India) Ltd.; and (11) Tobacco Manufacturers (India) Ltd. The Companies Nos. 3 to 11 inclusive are companies under the English Companies acts and are referred to as "the sterling companies." A statement was put in by the plaintiffs which is agreed by the defendants to be correct and it is as follows :

"The nine sterling companies are controlled in London where the Boards of Directors sit, the share registers are situate, and dividends are declared. The boards in London have constituted local boards which are situate in India. The business in India, where all profits are made, is managed by the local boards. The ultimate control lies with the London boards. No share registers are kept in India. The financial policy of the companies is controlled by the London boards, and in all important matters of business the London boards are consulted. All the the general meetings of the companies are held in England. The registered offices of six of the sterling companies are in the Isle of Man and of three others in London, but all the sterling companies have officer in London."

Copies of Articles 97, 98 and 100 of the Memorandum of Association of the Tobacco Manufacturers (India) Ltd., are exhibited separately. It is agreed that each of the other sterling companies contains similar Articles. These are marked Exhibit B. All the companies above concerned, with the exception of the plaintiffs, have carried on business in India and made profits

here which have been assessed to income tax and super tax under the Indian Income tax laws and those taxes have been paid. Dividends have been declared after payment of Indian Income-tax and super tax by the 11 companies, and the plaintiffs have received such dividends as they are entitled to on their share holdings in those eleven companies. Dividends on the two rupee-companies were paid to a representative of the plaintiff company at 37, Chowringhee, Calcutta. The dividends of the nine sterling companies were declared by them in England and paid by them in England to the plaintiff company in England.

On June 6, 1939, the Income-tax Officer, Companies District III, 3, Government Place West, Calcutta (which is within the jurisdiction of the Original Side of this Court) sent to the plaintiffs a notice under Section 22(2) and 38 of the India Income-tax Act of 1922, as follows :

"1. In pursuance of the provisions of Section 22(2) of the Indian Income tax Act, 1922, you are hereby required to prepare a true and correct statement of the companys total income and total world income during the previous years in the attached form (along with such other particulars as are required to complete the form) and to deliver it to me at may office duly signed by you on behalf of the company on or before 12-7-1939 (or within 30 days of the receipt of the notice should the former dte be less than 30 days after the receipt of the notice).

2. The form contains the instructions required for the preparation of the return. If you desire any further information, you should apply to this office.

A separate form for making this return is annexed."

That notice was addressed to the Raleigh Investment Co., Ltd., at 37, Chowringhee, Calcutta. The plaintiffs have no business premises in India, but the notice was forwarded by some one at 37, Chowringhee to the plaintiff in England who made a return signed by their Secretary on August 18, 1939, giving their address as "Westminster House, 7 Millbank, London SW.I." That return apparently was sent by the plaintiffs from London to 37, Chowringhee, Calcutta, from which address it was forwarded on August 25, 1939, to the same Income-tax officer by one A. S. McAra with the fooling covering letter.

"Dear Sir, At the request of the Raleigh Investment Co., Ltd. I pass on to you herewith their return under Section 22 in respect of the income-tax year 1939-40."

On September 11, 1939, the same Income-tax officer wrote to the plaintiffs at 37, Chowringhee, a letter with regard to the assessment for 1939-40 asking to be furnished with certificate under Sections 20 in respect of dividends received during the year ending March 31, 1939. There was further correspondence in which on each occasion the Income-tax officer addressed the plaintiff at 37, Chowringhee, Calcutta, and eventually obtained replies through replies through 37,

Chowringhee, Calcutta.

On April 3, 1940, the Income-tax Officer wrote a letter to the plaintiffs - C/o Messrs. Imperial Tobacco Co., of India Ltd., 37, Chowringhee, Calcutta. Paragraph 6 of this letter is as follows :-

"You are further requested to let me know that in view of Explanation (3) to Section 4(1) of the Act, the dividends shown in Section D of the return being income accruing or arising in British India and thus liable to be included in total income, it appears that the total income accruing or arising in British India exceed the income arising without British India in the previous year and as such in terms of Section 4A[c] the company is to be treated as resident in British India and as such the entire profits are liable to be taxed."

(the letter is reproduced as put in evidence, the wording is faulty.) Paragraph 7 as follows :-

"You are requested to let me know if you have anything to urge against this."

On June 3, 1940, the plaintiffs replied from Rusham House, Egham, Surrey, to which address they had apparently removed from Millbank, London, as follows :

"Dear Sir, Your letter of the April 3, addressed to this company, care of the Imperial Tobacco company of India, Limited, Calcutta has been forward to us."

The Company contends that dividends declared outside British India are not income accruing or arising in British India on the following grounds :

(a) Explanation (3) to Section 4(1) of the Indian Income tax Act, 1922, as amended by the Indian Income tax Amendment Act, 1939 on its true construction refers to dividends declared within British India but paid outside British India, and not to dividends declared outside British India.

(b) Alternatively, if on its true construction the said Explanation refers to dividends declared outside British India the Explanation is ultra vires the Central Indian Legislature which is not empowered under the Government of India Act, 1935, to income a tax on persons not resident in British India in respect of income which does not arise in British India. Dividends declared outside British India are debts arising outside British India.

It follows that the company cannot be treated as resident in British India as the dividends shown in section C of the Return are not income accruing or arising in British India and cannot be deemed so to accrue or arise, and in consequence, the income to the company arising in British India (shown in Section A of the return) does not exceed its income arising outside British India.

The above deals with paragraphs 1, 2, 6 and 7 of your letter. As regards paragraph 3, I would confirm that Vazir Sultan Tobacco Company and London and Burma Tobacco Company Ltd.,

are not assessed to tax British India.

In reply to paragraph 4 of your letter, the direct profits represent income other than dividends which arose from business carried on outside British India.

Copies of certificates where income tax has been deducted from dividends shown in Section C of the Return asked for under paragraph 5 of your letter, are enclosed herewith, together with profit and loss account requested to be furnished under paragraph 8.

Nothing arises under paragraph 9 as this company has no representative in India."

The contention in paragraph 6 of the letter of the Income-tax officer dated April 3, 1940, that "the total income accruing or arising in British India exceeds the income arising without British India in the previous year and as such in terms of Section 4-A (c) the company is to be treated as resident in British India and as such the entire profits are liable to be taxed" has since been dropped.

It is convenient here to set out Section 4(1)(c) of the Act and Explanation (3) which were added to the Indian Income-tax act of 1922 by the Indian Income-tax (Amendment) Act of 1939 :

"4. (1) Subject to the provisions of this Act, the total income of any previous year of any person includes all income, profits and gains from whatever source derived which -

(c) if such person is not resident in British India during such year, accrue or arise or are deemed to accrue or arise to him in British India during such year."

Explanation is as follows :-

"A dividend paid without British India shall be deemed to be income accruing and arising in British India to the extent to which it has been paid out of profits subjected to income tax in British India."

At this time communications between India and England had become more difficult.

On August 2, 1940, the Income-tax officer sent another notice under Section 22 of the Income-tax Act to the plaintiffs, and on August 3, Mr. Hamilton, an Accountant of the Imperial Tobacco company of India, Ltd., at 37, Chowringhee informed the Income-tax Officer of the difficulty in getting a reply from the Raleigh Investment Company, Ltd., and asked for an extension of time up till October 31, 1940.

On August 6, the Income-tax replied to the Accountant extending the time for the submission of the return to November 4, 1940.

On September 13, the plaintiffs from England wrote to the Income- tax officer direct adding another plea of ultra vires.

On October 15, the plaintiffs wrote from England direct to the Income-tax Officer, who received the letter on December 17, furnishing further returns in respect of Printers (India) Ltd.

On December 23, 1940, the Income-tax Officer made an assessment upon the plaintiffs of Rs. 72,047/- in respect of income-tax and Rs. 3,73,155 - 13 - 0 in respect of super-tax. These assessments were as follows : "The Raleigh Investment Company, Ltd., received the following dividends -

From Imperial Tobacco Co., of India, Ltd.

on 30-9-38 Net.

Rs.

Gross. Rs.

Co., of India, Ltd.

& 29-3-29 11,58,000 13,57,086 Carreras [India] Ltd.

In Sep. 39 and March 39 1,25,000 " 1,46,490 15,03,576."

(The net amounts referred to are net amounts of dividend paid by the rupee companies to the plaintiffs after deducting the income tax and super tax which the two rupee companies had paid on their profits : the gross amount is the amount of the net together with the income-tax and super tax paid by each rupee company added back. The dividends paid by the sterling companies to the plaintiffs amounted to 3,86,648 - 19 - 7 Pounds equivalent to Rs. 51,55,307/-. The income-tax and super tax already paid by these companies on their profits in India was Rs. 8,86,314/-. This was added to the Rs. 51,55,307/- giving a total for Indian Income-tax purposes of dividend received from the sterling-companies of Rs. 60,41,621/-. There was therefore a grand total for purposes of assessment of Rs. 75,45,197/-.) Upon that the plaintiffs were assessed as follows :

Rs.

Rs.

Rs.

"Total Income Rs.

75,45,197 Income-tax @ 30 pies 11,78,937 Tax paid 8,86,314 2,20,576 11,06,890 72,047  
Super tax @ 12 pies 4,71,574 13 Deduct under Sec. 18(3) On 5-5-39 45,943 19-4-93  
5,951 2 3,967 7 42,557 9 98,419 2 3,73,165 13 Total demand 4,48,201 13 On the same  
day a copy of this assessment was sent by the Income-tax officer together with a notice of  
demand under Section 29 of the Indian Income-tax Act to the plaintiffs at 37, Chowringhee  
Calcutta. On January 2, 1941, Mr. McAra writing as a director of the Imperial Tobacco Company  
of India wrote back to the Income-tax officer stating at follows :-

"Dear Sir, On Friday or Saturday last week delivery of a cover addressed to the Raleigh  
Investment Co., Ltd., 37, Chowringhee, Calcutta, from your office was incorrect accepted here.

You have already been advised that the Raleigh Investment Co., Ltd., have no place of business  
nor any representative in this country, and you were informed of the address to which  
correspondence should be sent.

We have, on this occasion and without accepting any responsibility as to the ultimate delivery, re-  
addressed and air-mailed the cover to England; but if the contents called for an urgent replay of  
laid down a time limit within which some action should be performed, we would remind you that  
there is very considerable delay in the transmission of mails between this country and the United  
Kingdom."

On February 19, the plaintiff company from England telegraphed to the Income-tax Officer,  
Calcutta, intimating to him that they would appeal against the assessment and on February 21,  
the Income-tax Officer replied by telegram : "appeal accepted if posted March 19. Arrange  
payment by March 15." On February 24, 1941, the Income-tax officer wrote to the Raleigh  
Investment Co., Ltd., in England as follows :-

"With reference to your cable dated February 19, 1941, I have the honor to enclose herewith a  
copy of computation of assessment for 1938-40 with the request to pay up the demand as early as  
possible."

That was received by the plaintiffs on May 13, 1941. On February 28, the plaintiffs from London  
cabled the Income-tax Officer as follows : "Your cable 22nd requiring payment by March 15.  
Are you prepared to exercise discretion under Section 45. Treat assessee as not in default whilst  
appeal indisposed of."

On March 5, the Income-tax Officer cabled to the plaintiffs in England in reply : "Your cable 28.  
Sorry cannot exercise discretion under Section 45. Arrange payment by March 15."

On or about March 12, 1941, the plaintiffs under protest remitted to the Income tax authorities in

Calcutta by telegraphic transfer from England the amount of the assessment and demand, viz., Rs. 4,45,202-13-0. The plaintiffs said that they paid the sum under protest in order to avoid penalties and other proceedings that might be taken against them as an assessee in default under the provisions of the Indian Income-tax Act.

There are various provisions in Section 46 of the Indian Income-tax Act under which the Income-tax authorities in India might have caused to be attached either the plaintiffs share in the rupee companies or the dividends payable to the plaintiffs on these shares. Doubtless the plaintiffs were afraid there might be such attachment unless they paid and of course they were minded to appeal against assessment. Such an appeal, dated March 11, 1941, when received in India was actually lodged by a Mr. Ryan, a solicitor of 37, Chowringhee on or about June 4, 1941. In the grounds of appeal the plaintiffs letters of June 3 and September 13, 1940, which had been before the Income-tax Officer when he made the assessment. The Income-tax Officer, as the assessment shows, rejected paragraph (a) of the plaintiffs objections in the letter of June 3. He did not deal with the question of ultra vires.

On August 21, 1941, Mr. Ryan wrote to the Appellate Assistant commissioner of Income-tax as follows :-

"In view of certain constitutional questions which are raised by some of the Grounds of Appeal in this case, the Raleigh Investment Co., Ltd., has been advised to take other proceedings to have those questions determined. What form those proceedings should take is now under consideration.

In the meantime, the Raleigh Investment Co., Ltd., does not wish to abandon its rights under the Act respecting the assessment on the constitutional question or on the other grounds raised. In the circumstances, I request that you would be good enough to allow the appeal to remain in abeyance by adjourning it sine die until such time as the Raleigh Investment Co., Ltd., been [Sic] able to decided upon its other course of action."

On November 11, 1941, the Appellate Assistant Commissioner wrote to Mr. Ryan as follows :-

"The request in your letter 21-8-41 is unusual and your proposed proceedings relating to the constitutional issues cannot arise under the Indian Income tax Act under certain provisions of which in am to here and decided the appeal. The procedure under this act has to be followed. If is decide against you, you may go to the Appellate Tribunal against whose order, if advised, you may ask for a Reference to the High Court. I do not propose therefore to keep the appeal in abeyance as you suggest and request you to let me know when Mr. Isaacs will be available in case you want him to appear at all.

On hearing from you I shall try to fix an early date but I am so heavily booked ahead for a long time that I cannot at this stage foresee the date. As Saturdays are High Court holidays, may not a Saturday, if possible this month, suit you and Mr. Isaacs ?"

On November 17, 1941, Mr. Ryan wrote back that Mr. Isaacs was busy and that he was awaiting instructions from England on the question of the appropriate procedure to be adopted by the assesses. He appealed to the Appellate Assistant commissioner not to fix a date for the hearing of the Appeal before the middle of January.

The Appellate Assistant Commissioner replied by giving a notice on November 27 fixing January 17, 1942, for the hearing and final disposal of the appeal.

On December 16, 1941, the plaintiffs gave a written notice to the Secretary to the Central Board of Revenue of the Government of India, New Delhi, setting out the facts and stating that they intended upon the expiration of two months from that date they intended upon the expiration of two months from that date to file a suit in the High Court at Calcutta, against the Governor General in Council claiming the reliefs which have now been claimed. This notice was given pursuant to Section 8 of the code of Civil Procedure. On January 16, 1942, Mr. Ryan on behalf of the plaintiffs gave notice to the Appellate Assistant commissioner in Calcutta that he did not propose to proceed with the appeal against the assessment under the Income-tax Act.

Under the provisions of the Indian Income-tax Act there is an appeal from the assessment by an Income tax officer to the Appellate Assistant Income tax Commissioner under Section 30 of the Act, and from him to an Appellate Tribunal consists of two members, one of whom was judicial experience and is generally an ex District Judge whilst the other is an Accountant. The Appellate Tribunal may state a case for the opinion of the High court functions with regard to such case stated are to advice on the law and from its judgment or opinion there is an appeals to the Privy Council.

On April 17, the plaintiffs began the present proceedings in this court claiming :

(1) a declaration that in so far as explanation 3 and the other provisions of Section 4 of the Indian Income-tax Act purport to authorize the assessment and charging to tax of a non resident company in respect of dividends which have been declared and or paid outside British India upon shares situate outside British India but which have never been brought into British India, the said provisions are ultra vires the legislative powers of the Central India Legislature and that therefore the plaintiff company is not liable to be assessed or charged to income tax or super tax in respect of the said assessment for the year 1938-40 was illegal and wrongful :

(2) an injunction restraining the defendant, his officers, servants or agents from making any

further assessment upon the plaintiff company in any subsequent years in respect of dividends of sterling companies declared and paid outside British India and not brought into British India;

(3) repayment of the said total sum of Rs. 4,35,290-5-0 as income- tax and super-tax illegally levied and/or as money paid under coercion or duress and/or as money had and received by the defendant to the use of the plaintiff company;

(4) interest upon the said sum of Rs. 57,689/- and Rs. 3,73,155-13-0 (portions of the said total sum of Rs. 4,35,290-5-0) under the Interest Act at the rate of 12 per centum per annum as from the December 22, 1941 until judgment, and further interest from the date of judgment until payment upon the whole of the said sum of Rs. 4,35,290-5-0 at the rate of 6 per centum per annum or such other rate as may be allowed by this Court; and (5) such further or other relief as the Court shall deem just.

Referring back to the assessment it will be noticed that the plaintiffs claim the return of Rs. 57,689/- instead of Rs. 72,047/- and Rs. 4,35,290-5-0/- instead of Rs. 4,45,202-13-0 paid. The reason for this is that the plaintiffs do not question the right of the Government to tax them in respect of the rupee-companies dividends which the plaintiffs received in India. We are, therefore, not concerned in this case with the question of taxation of the dividends received from the rupee-companies. The sum of Rs. 57,689/- arises in this way : the dividends received by the plaintiffs from the two rupee-companies and the sterling companies were taxed to income-tax under Finance Act of 1938 at the rate of twenty six pies per rupee and the total of the income tax paid by the rupee companies amounted to Rs. 11,06,890/-. The Government have taxed the plaintiffs in respect of the same amount of income when received by them at the rate of thirty pies per rupee under the Finance Act of 1939. This income-tax amounted to Rs. 11,78,937/-. Section 49B of the Income-tax Act provides :

"Where a shareholder has received a dividend from a company which has paid income tax imposed in British India or elsewhere, he shall be deemed, in respect of such dividend, himself to have paid the income tax [exclusive of super tax paid by the company on so much of the dividend as bears to the whole the same proportion as the amount of income on which the company has paid such income tax bears to the whole income of the company."

There is no similar provision in respect of super tax which is a flat rate tax payable by companies as well as individuals. The consequence is that the income tax authorities gave the plaintiffs credit for the income tax paid by the two rupee and nine sterling companies, viz., Rs. 11,06,890/- against the income tax demanded of the Raleigh Investment Company Ltd., viz., Rs. 11,78,939/-. The difference is Rs. 72,047/- which is a part of the money the plaintiffs paid. Of that amount of tax a certain proportion is attributable to the dividend received from the rupee companies about

which there is now no dispute. The proportionate amount attributable to the sterling companies is Rs. 57,689/-.

As regards the item of Rs. 3,73,155-13-0 this is super tax paid by the plaintiffs in respect of the income received by them from the rupee companies (Rs. 15,03,576/-) and the sterling companies (Rs. 60,41,621/-) in all (Rs. 75,45,197/-). Each of the rupee companies and the sterling companies had already paid super tax on their respective profits at the flat rate before before they paid their dividends to the plaintiffs.

Section 18(3-D) of the Income-tax Act provides that an Income-tax officer, if he has reason to believe that a non resident shareholder would be liable to super-tax, may direct the principal officer of the company to deduct super-tax at the time of the payment of the dividend. Further under Section 18(3-E) it is the duty of such principal officer, even if he receives no direction to deduct super tax from the dividend payable to a non resident share holder, if the amount of such dividend payable is found to have reached the limit at which super tax begins to be chargeable.

The rupee companies made this deduction before paying their dividends to the plaintiffs. The rate of super tax in 1938 when the deduction was made was thirteen pies in the rupee. The rate of super tax in 1939 when the plaintiffs submitted to payment of super-tax on their dividends from the rupee companies was only twelve pies in the rupee. The result is that the plaintiffs were over charged and made overpayment to the extent of Rs. 4,455-10-0. Credit is given for this in the assessment. As regards the sterling companies, although they were paying super tax on their own profits in India, they did not before declaring their dividends make any deduction under Section 18(3-D) and Section 16(3-E). The result is that the plaintiffs have been assessed on their income from the sterling companies (Rs. 60,41,621/-) to super tax for the year 1939 to the amount of Rs. 3,77,601-5-0. Hence the net assessment of the plaintiff company for super-tax for the year 1939 was Rs. 3,77,601-5-0 less the credit from the rupee-companies over-deduction of super-tax Rs. 4,455-10-0, that is, Rs. 3,73,155-13-0. All the profits and gains of the sterling companies in India had already been fully assessed and taxed to super-tax in India before the plaintiffs received their dividends from those profits. The defendants have taxed the plaintiffs and the plaintiffs have paid in all Rs. 57,689/- as income-tax together with Rs. 3,73,155-13-0 as super-tax under the defendants assessment and demand, and their claim is to recover it. On the profits of the sterling companies on which taxes are levied, the proper taxes in India have been paid by the sterling companies before the dividends were declared by the sterling companies.

As this case may well go to other Courts which may wish to have details of these taxes explained to them I asked the Income-tax authorities who were present in Court to be good enough to prepare a table with necessary explanations to show, how the taxes have been arrived at. The table and the explanations are exhibited and marked Exhibit 1.

The written statement put in by the defendant admits in paragraph 2 that the dividends of the sterling companies were declared, paid and received in England and that the plaintiffs were assessed on such a basis. In paragraph 3 the defendant pleads that -

"The plaintiff company is the principal shareholder in all the rupee companies as well as the sterling companies referred to in paragraph 2 of the plaint. As such the plaintiff company controls the business and trade of all the said companies in British India. In any event the plaintiff company has sufficient interest in the capital and assets of the said companies employed in British India and in the trading operations of the said companies in British India to make it liable to Indian Income-tax in respect of income arising out of such trading operations."

This plea has not been developed, but is I believe disposed of hereafter in this judgment. The defendant denies that the sums paid by the plaintiffs were paid under any coercion or duress. He also denies that provisions of Explanation 3 to Section 4(1) of the Indian Income-tax Act are ultra vires of the legislative powers of the Central Indian Legislature as defined by the Government of India Act, 1935.

Lastly, in paragraph 11 of the written statement there is this plea :

"The plaintiff company has no cause of action. In any event the defendant will object and contend that this Court has no jurisdiction to entertain this suit by virtue of Section 226 of the Government of India Act."

Section 226 of the Government of India Act provides :

"(1) Until otherwise provided by Act of the appropriate legislature, no High Court shall have any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force.

(2) A Bill or amendment for making such provision as aforesaid shall not be introduced into or moved in a Chamber of the Federal or a Provincial Legislature without the previous sanction of the Governor-General in his discretion or, as the case may be, of the Governor in his discretion."

Defendants Counsel in this case has argued very strenuously, under instruction of his client through the Central Board of Revenue, that Section 226 of the Government of India Act precluded us from entertaining this suit in any form. This attitude is strange in view of the fact that in two cases which intimately concerned the revenue the plea was apparently not raised. I refer to the case of the Vacuum Oil Co. v. The Secretary of State for India in Council reported in I.L.R. 56 Bom. 313 and the case of the Ford Motor Company of India Ltd. v. The Secretary of

State for India in Council reported in L.R. 65 I.A. 32.

In each of these cases the plaintiffs under protest paid duty levied by the Customs Authorities at Bombay under the Sea Customs Act, 1878, and then brought proceedings in the High Court at Bombay to recover amounts of money which they claimed were illegally levied as duty upon their goods. In each case the suit was brought against the Secretary of State, who stood in the same position as the Governor-General does in this case, on the Original Side of the High Court in Bombay. The Vacuum Oil Company was successful in the Court of first instance, unsuccessful in the Appellate Court at Bombay and successful in the Privy Council. In the other case the Ford Motor Company were substantially unsuccessful in the Court of first instance and also an appeal to the Bombay High Court and in the Privy Council.

There is no evidence of any plea of Section 226 of the Government of India Act, 1935, or its predecessor Section 106(2) of the Government of India Act, 1915, being raised although Sea Customs Duty is just as much revenue as income-tax. However, the matter must be decided according to law.

This particular section, except where it provide for its repeal, substantially re-enacts Section 8 of the Act of Settlement, 1781. This Section was enacted to prevent the Supreme Court in Calcutta from interfering with the East India Companys collection of land revenue. It has been retained in successive enactments and, in particulars, Section 106(2) of the Government of India Act, 1915.

It will be noticed that it is only the exercise of the original jurisdiction of the High Court that is forbidden. The exercise of the appellate jurisdiction of the High Court is not forbidden. Had the offices of the Income-tax Officer been two miles south of where they are now and so outside the ordinary original jurisdiction of this Court (which extends only to the limited part of Calcutta which is bounded by the Circular Road and the river Hooghly but contains the business part) the present proceedings would have been started before a Sub-ordinate Judge in the Alipore Court which is in greater Calcutta and come to this Court to be dealt with on appeal without Section 226 being pleadable.

Both the plaintiffs solicitors office and the Income-tax Office where the money was paid are within the ordinary original jurisdiction of this Court.

Some very severe strictures have been passed by the High Courts in Bombay and Madras on the bar which Section 226 and its predecessors have raised to the original jurisdiction of the High Courts. I can only add my comment that its retention is an impediment to justice being had by those who reside or do business in the city of Calcutta. It is not in the interests of the subject and it is not in the real interests of the State. It has been used in the present case to hinder a British

national who is not resident in India from obtaining a judicial determination of his rights.

It has been argued that the proper and only course for the plaintiffs to have taken to raise this matter was to appeal from the Income-tax Officer to the Appellate Assistant Commissioner, then to the Appellate Tribunal and then by way of a case stated to the High Court under Sections 66 and 66A of the Indian Income-tax Act.

It will be recollected that the plaintiffs raised the question of Section 4(1)(c), Explanation (3), being ultra vires before the Income-tax officer who did not deal with it but made the assessment. It will be remembered that Mr. Ryan on August 21, 1941, mentioned this constitutional question to the Appellate Assistant Commissioner and stated that the form of the proceedings to raise it was under consideration and asked for an adjournment. The Appellate Assistant Commissioner replied : "Your proposed proceedings relating to the constitutional issues cannot arise under the Income-tax Act under certain provisions of which I am to here and decide the appeal."

I think the Appellate Assistant Commissioner, although he, like the Income-tax Officer, is not a lawyer, realised that in giving a decision on the validity of Section 4(1)(c), Explanation (3), he would be going beyond both his authority and legal capacity. He was employed to administer the Act and he had to take the Act as he found it. Section 30(i) says :

"Any assessee..... denying his liability to be assessed under this Act..... may appeal to the Appellate Assistant Commissioner."

In that appeal both parties had to take the Act as they found it, not the Act with Explanation [3] of Section 4[1] [c] treated as in doubt. It appears to me that the Appellate Tribunal, although one of the two members of it is a gentleman with judicial experience, must take the Act as they find it and not call it in question.

Section 66 provides that within sixty days of the date on which he is served with a notice of an order under Section 33[4] the assessee or the Commissioner may require the Appellate Tribunal to refer to the High Court any question of law arising out of such order.

I doubt whether the validity of Explanation [3] to Section 4 [1] [c] would arise out of the order. Moreover raising that question in a reference would present the Court with serious difficulties since it would not have evidence before it but only a statement of facts. If a constitutional question of this sort is to be raised it ought to be raised before a court which can bring every available fact before it to consider the matter in question in the proper way. From the decision of the High Court, as Section 66A [2] provides :-

"An appeal shall lie to His Majesty in Council from any judgment of the High Court delivered on

a reference made under Section 66 in any case which the High Court certifies to be a fit one for appeal to His Majesty in Council."

Section 66A was amended in 1938 after the Government of India Act had been passed. No provision has been made in it for an appeal to the Federal Court. Under Section 205 of the Government of India Act it is provided that an appeal shall lie to the Federal Court from a judgment of a High Court if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Government of India Act, 1935, and it shall be the duty of every High Court to consider in every case whether any such question is involved, and on its own motion give or withhold a certificate accordingly. Section 205[2] provides :

"Where such a certificate is given, any party in the case may appeal to the Federal Court on the ground that any such question as aforesaid has been wrongly decided.... and no direct appeal shall lie to His Majesty in Council, either with or without special leave."

In the present case a very important question as to the law-making powers of the Government of India under Sections 99 and 100 and List 1, Item 54, of Schedule VII of the Act is involved. It is therefore imperative that the appeal from the High Court should be to the Federal Court.

It would seem therefore that appeals from High Courts in cases involving questions of law as to the interpretation of the Government of India Act, 1935, cannot go direct to the Privy Council but must go first to the Federal Court, and as appeals from judgments in references under Section 66 of the Income-tax Act must go to the Privy Council and not to the Federal Court, and as this matter involved basically a decision upon a substantial question of law as to the interpretation of the Government of India Act, 1935, a suit at law and not a reference under Section 66 of the Income-tax Act is the proper procedure.

The plaintiffs claim in this suit is first to have Explanation (3) to Section 4(1)(c) together with relevant words of Section 4(1)(c) declared invalid, and then the return of the money they have paid together with other connected reliefs. A decision in this suit will clearly affect the amount of money the Government will be able to collect as income-tax both in the year in question and in subsequent years. The suit would therefore appear to be one "concerning the revenue". It is necessary however to consider what the word "revenue" means. In 1781, when prohibition against the Supreme Court exercising original jurisdiction in matters concerning the revenue clearly meant income from land, but in 1935, when prohibition against the Supreme Court exercising original jurisdiction in matters concerning the revenue was first introduced into the Act of Settlement, revenue clearly meant income from land, but in 1935, when the same provision was substantially re-enacted, revenue, in view of the provisions of Sections 136 and 138 of the Act of 1935, would clearly include money derived from income-tax.

In the present case the plaintiffs say that the money they have paid as a result of the assessment and demand for income-tax is demanded under an invalid provision of law and therefore the money is not money paid under the law but is an illegal exaction.

If the money is not income-tax money but an illegal exaction it is money to which the Government of India has no legal claim or legal right and in that event it is money which the Government of India ought to repay to the plaintiffs. Is such money revenue ? The Concise Oxford Dictionary defines "revenue" to be : "The states annual income from which public expenses are met." Such definition accords very clearly with the ordinary consumption of revenue.

In the present case the money the plaintiffs paid went into the Governments revenue account about March 15, 1941. In that sense it was, when paid, revenue, as would be all similar subsequent payments when made. As the relevant financial year ended on March 31, 1941, that money in all human probability would have been spent by April 17, 1942, when its return was claimed in this suit. On April 17, 1942, the money was strictly speaking no longer revenue. Whatever the position of this money on April 17, 1942, if it was demanded and obtained without any legal authority, it is the Governments duty to refund it or its equivalent which is the same thing. However, be that as it may, in the present case the Court is concerned with the legal rights and liabilities of the parties and therefore in my opinion the word "revenue" in Section 226 of the Government of India Act, 1935, must be taken to mean what is revenue according to law or shortly "legal revenue" and not illegal exactions.

Thus, before it can be decided that Section 226 of the Government of India Act, 1936, is a bar to the Courts jurisdiction, the Court must decide whether the money the plaintiffs paid was tax imposed under legal authority or illegal exaction. If the money was paid as a result of a demand for income-tax legally imposed. The Court can exercise no original jurisdiction concerning it in a suit. If the money was paid as the result of a demand made without legal authority the money is money illegally obtained and held to the use of the plaintiffs and there is no bar under Section 226 to our exercising original jurisdiction concerning it in this suit, nor under Section 67 of the Indian Income-tax Act.

In order to decide whether the money has been demanded and paid legally the Court must first determine whether the impugned legislation is valid or not. The Court is bound to inquire into and decide this matter to ascertain whether it has jurisdiction or not. Section 99[1] of the Government of India Act provides : "Subject to the provisions of this Act. The Federal Legislature may make laws for the whole or any part of British India or for any Federated State." Federation is not yet in being but the Indian Central Legislature has meanwhile the same law-making powers as those given by the Act to the Federal Legislature : Section 316 of the Act.

Section 99 [2] of the same Act provides :

"Without prejudice to the generality of the powers conferred by the preceding sub-section, no Federal law shall, on the ground that it would have extra-territorial operation, be deemed to be invalid in so far as it applies -

- (a) to British subjects and servants of the Crown in any part of India; or
- (b) to British subjects who are domiciled in any part of India wherever they may be; or
- (c) to, or to persons on, ships or aircraft registered in British India or any Federated State wherever they may be; or
- (d) in the case of a law with respect to a matter accepted in the Instrument of Accession of a Federated State as a matter with respect to which the Federal Legislature may make laws for that State, to subjects of that State wherever they may be; or
- (e) in the case of a law for the regulation or discipline of any naval, military or air force raised in British India, to members of, and persons attached to, employed with or following, that force wherever they may be."

Section 100 provides that the Federal Legislature has power to make laws with respect to any of the matters enumerated in List 1 of the VIIth Schedule.

Item 54 of List 1 reads : "Taxes on income other than agricultural income."

Summing up the Indian Central Legislatures relevant powers in 1939 under Sections 99(1), 100 and Item 54 of List 1, they were "to make laws for the whole or any part of British India with respect to taxes on income other than agricultural income."

Prima facie such laws could have no operation outside British India but Section 99(2) provides that in certain specified cases in respect of certain specified classes of persons in certain areas outside British India either specified or indicated those laws may operate :

- (1) as far as British subjects and servants of the Crown are concerned in any part of India;
- (2) as far as British subjects domiciled in India are concerned, wherever they may be;
- (3) as far as persons on ships or aircraft registered in British India wherever they may be;
- (4) as far as members of and persons attached to or employed with or following naval, military or air force raised in British India, they may be subject to laws passed by the Indian Legislature to regulate or discipline them, wherever they may be.

Again in List 1 of Schedule VII there are the following matters on which the Government of India may legislate :

Item 3. Extradition and expulsion of criminals and other persons to parts of his Majesty's dominions outside India;

Item 22. Declaration and delimitation of ports;

Item 23. Fishing and fisheries beyond territorial waters;

Item 24. Regulation and organization of air traffic;

Item 25. Lightships, beacons and other provisions for the safety of shipping and aircraft.

All these matters contemplate the making of laws which may in some events and to some extent be operative beyond British India.

It is difficult to state the precise effect of the words in Section 99(2) "without prejudice to the generality of the powers conferred by the preceding sub-section...." They are however clearly precautionary and probably mean that laws made for British India, even when they do not come within the cases set out in Section 99(2), may in certain eventualities which are either too numerous or uncertain to specify, have some extra-territoriality; such as in the cases prescribed for in Items 3, 21, 23, 24 and 25 of List I, or where anti-smuggling laws are made as related in *Croft v. Dunphy*. There may be other such cases.

Such extra-territoriality would be of the kind and degree necessary to give efficacy to the legislation as it affected British India—small extensions for such purpose, perhaps into no-man's air or water, or perhaps by agreement with a neighbouring State into that State; all other valid extra-territorial legislation must come within Section 99(2)(a), (b), (c), (d) and (e).

In *Croft v. Dunphy* Lord Macmillan said : "Where a power is conferred to legislate on a particular topic it is important in determining the scope of the power to have regard to what is ordinarily treated as embraced within that topic in legislative practice and particularly in the legislative practice of the State which has conferred the power."

In Vol. 47 of the 2nd edition of Halsbury's Laws of England which deals with England Income-tax law as at April 1, 1935, just before the Government of India Act, 1935, was passed, there is this statement of the English Income-tax Law, at page 11 :

"The income arising abroad to non-resident is not within the charge to tax, and non-residents also enjoy specific exemption in certain cases (set out in footnote :-Interest and dividends of a foreign State or British possession payable in the U.K., through a paying agent)."

It therefore appears that when the Government of India Act, 1935, was passed it was not the legislative practice of Great Britain to tax non-residents upon income received from outside the U.K., or in certain cases from inside the U.K.

As regards the position in British India in 1935 Sir Asoka Roy for the Government of India referred the Court to Section 42 of the Indian Income-tax Act prevailing at the time. It provided as follows :

"In the case of any person residing out of British India, all profits or gains accruing or arising to such person, whether directly or indirectly, through or from any business connection or property in British India, shall be deemed to be income accruing or arising within British India, and shall be chargeable to income-tax in the name of the agent of any such person, and such agent shall be deemed to be, for all the purposes of this Act, the assessee in respect of such income-tax :

Provided that any arrears of tax may be recovered also in accordance with the provisions of this Act from any assets of the non-resident person which are, or may at any time come, within British India."

This section provided for the assessment and taxation of the foreigners India agent, and I doubt if it is extra-territorial in its effect.

The position as regards extra-territorial taxation of a foreigner was considered by the Bombay High Court in 1931 in the case of the Commissioner of Income-tax, Bombay v. Goldie, where the Indian Income-tax Authorities attempted to assess a non resident person in respect of dividends declared in England by companies registered in England but doing business in India. The Court held that the non-resident was not so taxable.

It appears therefore that in 1935, legislation in India did not tax non-residents on income received abroad from companies registered in England although those companies traded in India. Indeed, had such been the position, the present legislation now objected to would probably not have been passed by the Indian Income-tax Amendment Act, 1939.

Reference to the legal position with regard to this matter in England and in India in 1936 does not mean that the Income-tax law in India after 1935 is to remain unchanged and unchangeable, but it does lend some support to the view that where the British Government had refrained from extra-territorial legislation involving taxation of non-residents upon income received by them abroad, it did not in the absence of express enactment intend to confer such power upon the Indian Government by the Act of 1935. Extra-territorial legislation is apt to produce friction between States and this is certainly so where one State takes another States nationals as Lord Esher pointed out in *Colquhoun v. Brooks*. The reactions to the assessment and demand for tax

might have been much different in the present case had the plaintiffs been an American Company instead of a British Company.

The dividends in respect of which tax has been claimed and paid in the present case were all dividends declared abroad by foreign Companies with registered offices, head offices and share registers either in England or in the Isle of Man (and were payable and paid either in England or in the Isle of Man) to the plaintiffs, a company registered in the Isle of Man with its head office in England. The dividends concerned were therefore debts arising abroad and paid abroad by Companies resident out of British India to the plaintiffs, another Company resident out of British India : see *London and South American Investment Trust Ltd. v. British Tobacco Company [Australia] Ltd.*

The effect of the words in Section 4(1)(c) "or are deemed to accrue or arise to him" combined with Explanation (3) "a dividend paid without British India shall be deemed to be income accruing and arising in British India to the extent to which it has been paid out of profits subjected to income-tax in British India" is, as the facts of the present case show, to make liable to tax in British India foreign money measured in a foreign currency paid in a foreign country by one foreign Company to another foreign Company in discharge of a debt which arose and was payable in that foreign country. The condition attached "to the extent to which it has been paid out of profits subjected to income-tax in British India" does not make the money any less foreign money nor does it alter the nature or incidents of the debt. Further the money in question sought to be taxed was derived from the whole of the sterling dividend paying Companies operations and not from any particular part again, if in law the money sought to be taxed could by Explanation (3) to Section 4(1)(c) be attributed to source in British India, that money is the foreign exchange equivalent of money which has (as the Explanation postulates) been already subjected to tax in British India and therefore was received by the foreign dividend paying Company free from liability to tax in British India.

The provision in Section 4(1)(c) and the Explanation which is impugned is not legislation within the extra-territorial powers given in Section 99(2) of the Government of India Act since its operation is not limited to the persons and places named in Section 99(2); it is not legislation dealing with any of the matters mentioned in the Lists of Schedule VII in which some degree of extra-territorial legislation may be assumed were necessary to give efficacy to legislation for British India; it is something beyond all these.

This is a case of the Legislature of British India without specific or apparent authority stretching out its legislative arm and fiscal hands beyond British India into other countries in an attempt to tax persons and property there not subject to its laws. In my opinion, for the reasons given above, the legislation impugned is not authorised by any provision, either express or implied, of the

Government of India Act, 1935, from which statute the legislature of British India in 1939 derived its powers. I am therefore of opinion that the impugned legislation was and is beyond the law-making powers of the Government of India and therefore invalid. Consequently the words "or are deemed to accrue or arise" in Section 4(1) of the Indian Income-tax Act and Explanation (3) thereof are of no legal effect.

The Government of India were only able to obtain the money now claimed in this suit from the plaintiffs because they were in a position to treat, and intended to treat, plaintiffs as defaulter under the Income-tax Act and so collect the money with possible penalties under the provisions of Section 46 of the Act if the plaintiffs did not pay. The plaintiffs had good reason to believe that their property, i.e., the dividends from the rupee-companies in India, would be taken from them or from the companies that were due to pay money to them in India, if they did not yield to the Income-tax Officers illegal demand. In my view the plaintiffs were in the same position as the plaintiff in the case of *Maskell v. Herner* where the plaintiff Maskell sold his goods in Spitalfields Market and had a demand made upon him by the defendant for tolls under the threat of seizure of his goods if he refused to pay. Maskell objected to pay and seizure took place. Maskell then consulted a solicitor and upon learning that other dealers paid tolls he, acting upon his solicitors advice, paid the tolls under protest and did so always thereafter. It was held that the circumstances of the payment and the conduct of the plaintiff throughout showed that he only paid to avoid seizure of his goods and never made payments voluntarily, or intended to give up his right to the sums paid, and that he was entitled to recover those tolls for a period of six years, the earlier payments being barred by the Statute of Limitation. In delivering judgment Lord Reading said :

"If a person pays money, which he is not bound to pay, under the compulsion of urgent and pressing necessity of seizure actual or threatened, of his goods, he can recover it as money had and received. The money is paid not under duress in the strict sense of the term, as that implies duress of a person, but under the pressure of seizure or detention of goods which is analogous to that of duress. Payment under such pressure establishes that the payment is not made voluntarily to close the transaction (per Parke, B., in *Atlee v. Backhouse*). The payment is made for the purpose of averting a threatened evil and is made not with the intention of giving up a right but under the immediate necessity and with the intention of preserving the right to dispute the legality of the demand (per Tindal, C.J., in *Valphy v. Manley*). There are numerous instances in the books of successful claims in this form of action to recover money paid to relieve goods from seizure."

At page 126 of the report Pickford, L.J., said :

"I do not think that the mere fact that a payment is made under protest is enough to entitle the

payer to recover it back, but if it be shown that it was made under circumstances which show that the payer intends to resist the claim and yields to it merely for the purpose of relieving himself of the inconvenience of having his goods sold, the money can be recovered back, and the fact of a protest is some indication that it is so made."

It is inconceivable that the plaintiffs in the present case would under protest have paid money from England in the way they did over four lakhs of rupees - or in English currency over 30,000 Pounds - to the Income-tax Officer in Calcutta but for the fact that the Income-tax Officer held threats of the Income-tax Act over their heads and the fear that he would use powers under Section 46 to take the plaintiffs money coming from the rupee company whether they liked it or not.

Having found that the money now claimed was money paid by the plaintiffs to the Government of India as aforesaid as a result of a demand made under a law which the Government of India had no power to make and so an invalid law, I am of the opinion that the suit does not concern revenue in the sense used in Section 226, viz., legal revenue, and that therefore the provisions of Section 226 of the Government of India Act do not bar our jurisdiction.

I am therefore of opinion that the plaintiffs are entitled to a declaration that the legislation impugned is invalid and to return of the money so paid, viz., Rs. 4,35,290-5-0 - money had and received - together with interest thereon at four per cent. per annum from the date of the notice of claim, viz., December 21, 1942, until payment thereof.

MITTER, J. - The Raleigh Investment Company Limited, hereafter called the company, is a non-resident company. It is the principal shareholder in two companies, for brevity sake called the rupee companies and in seven other companies, for brevity sake called the sterling companies. We are not concerned in this suit with the assessment of the company to income-tax in respect of the dividends it had received from the rupee companies. The suit concerns only with the income-tax assessed on the dividend it received from the sterling companies.

The sterling companies are incorporated in England. Their principal place of business is in England where the share registers are kept. They carry on business operations in British India and other places. Dividends are declared in England. The dividends on which the plaintiffs company has been assessed to income-tax here had been declared in England, paid to it in England, and no part of it had been brought into British India. It was assessed to income-tax by the Income-tax Officer, District C-III, Calcutta, on the basis of Explanation 3 to Section 4 of the Indian Income-tax Act, XI of 1922 (hereafter called the Act), on the December 23, 1940, for the financial year 1939-40. It preferred an appeal on the June 6, 1941, to the Appellate Assistant Commissioner under Section 30 of the Act, but did not proceed with the appeal which was

dismissed for default on the January 17, 1942.

The Income-tax Officer served a demand notice on the company requiring payment of the tax by the March 15, 1941. The company on getting the same cabled to the Income-tax Officer from England on the February 28, 1941, before filing the appeal, for postponement of the payment of the tax till the disposal of the proposed appeal and requested the latter not to treat it in default while the appeal would be pending. The cable was received by the Income-tax Officer on the March 4, 1941, who sent a reply by cable on the same date expressing regret, and at the same time asked the company to arrange for payment by the March 15, 1941. The money was paid by that date. This suit was filed by the company on the Original Side of this Court in April, 1942.

On the pleadings the following five issues have been raised :

1. Has the company any cause of action ?
2. Is the suit barred by reason of the provision of the Indian Income-tax Act ?
3. Has this Court, in the exercise of its original jurisdiction power to entertain the suit in view of Section 226 of the Government of India Act, 1935 ?
4. Is Explanation (3) to Section 4 of the Income-tax Act ultra vires and legislature ? and
5. What relief, if any, is to be given to the company ?

I would take up the fourth issue first.

The charging provisions (Sections 3 and 4) of the Income-tax Act before its amendment by Act VII of 1939 were as follows :-

A person whether residing in or outside British India in the relevant year, was chargeable only in respect of the income (a) which had arisen or accrued to him in the accounting year in British India or (b) which had been received by him in British India. In the case of a resident only income which had arisen or accrued outside British India was to be deemed, subject to some limitations, to have arisen or accrued to him if it was either received or brought into British India. A non-resident could not have been assessed to tax on income which had arisen or accrued outside British India or income received outside British India even though it may have subsequently been brought into British India. The sentence "arises or accrued or received" etc., occurring in sub-section (1) of Section 4 was construed disjunctively. By the amending Act of 1939 Section 4 was in the first place re-arranged. Effect was given to the decisions under the old Act to the effect that two separate ideas had been expressed in sub-section (1) of Section 4, the phrase "arise or accrue" connoting one idea and the word "received" another distinct idea. The

liability to be taxed on income received or deemed to have been received in British India was put under a separate clause (clause (a)) which means that the liability on the ground of receipt in British India would be on a person, be he a resident or non-resident. We are not concerned with that case. The Section then places the assessee under two categories : (1) when he is a resident in British India and (2) when he is not : (clauses (b) & (c)). With regard to residents the general provision is that he is to be assessed on income which had not only arisen or accrued in British India or was deemed to have arisen or accrued in British India but also on income which had arisen or accrued outside British India. With regard to non-residents, however, they can be assessed on income which had arisen or accrued in British India or which is deemed to have arisen or accrued in British India. Explanation (3) to Section 4 which concerns dividends only includes the case where the dividend which did not in fact accrue to a person in British India is deemed to have accrued to him in British India, if it was paid out of profits (and to the extent thereof) of the company in which the dividend producing shares were held if those profits had been subject to income-tax in British India. Whether Explanation (3) is a good piece of legislation in reference to a person who is a resident in British India we are not called upon to decide, for in the case before us the plaintiff is a non-resident company. Income which in fact had arisen or occurred to a non-resident outside British India is brought within the British Indian assessment by this Explanation, for dividend which accrues to a share-holder of a company is income which is quite distinct from the income of the company in which the shares are held, even when the whole of the share capital of the company is held by that share-holder. This follows from the observations of Fletcher-Moulton, L.J., in *Gramophone and Typewriter Ltd. v. Stanley* and of Lord Wrenbury in *Bradbury v. English Sewing Cotton Co.* The property of a person who may be the subject of another independent foreign State and may be a resident of such a State, and over whom the Indian Legislature has no jurisdiction is thus brought under the provision of a taxing statute enacted by the British Indian Legislature. Limiting Explanation (3) to the case of a non-resident, that explanation is a piece of extra-territorial legislation, not by a supreme or paramount legislature but by a subordinate legislature, which derives its authority from Parliament under the Government of India Act, 1935. The question is whether the explanation so far as it affects non-residents is ultra vires the Indian Legislature. The powers of the Indian Legislature during the transitional period are defined in Sections 99 and 100 of the Government of India Act, 1935. Item No. 54 of List I of the Seventh Schedule to that Act is "tax on income other than agricultural income." The subject accordingly falls within the field of legislation by the Indian Legislature.

Under the Government of India Act, 1915, the jurisdiction of the Indian Legislature to legislate was defined specifically. Subject to some exceptions not material for this case, it had power to legislate for all persons and things within British India (Section 65 clause (a)). The Government

of India Act, 1935, contains no provision exactly similar to Section 65(a). Section 99(1) read with Section 100 of the Act of 1935 authorizes the Federal Legislature (Indian Legislature, during the transitional period : Section 316) to legislate for the whole or any part of British India in respect of the subjects specified in Lists I and III of the Seventh Schedule. Sub-section (2) of Section 99 expressly gives it power to legislate extra-territorially over some classes of persons. In respect of item No. 23, and it may be, No. 21 of List I, also the same power exists. That being the position we are to see whether in respect of income-tax the Indian Legislature has power to legislate extra-territorially. In my judgment that question must be answered on general principles keeping at the same time in view the provisions of Section 99.

The Imperial Parliament, being a sovereign legislature, is not subject to any restraint so far as concerns municipal laws. Its power and jurisdiction is so transcendent and absolute that it cannot be confined either for causes or persons within any bounds. According to International Law, however, it is not competent to the British Parliament to enact laws for foreigners out of the British Dominions and beyond jurisdiction or for vessels on the high seas or foreigners beyond the Empire. But if such a statute is passed, the domestic courts - the Courts of the British Isles, of the Dominions and of the Empire - are bound to obey and administer them, it being left to the Government to justify its action with other countries diplomatically. It is a foreign question altogether how for the domestic courts would be able to enforce their decrees or how far those decrees may be recognised by courts of foreign countries. A subordinate legislature is, no doubt, not an agent or delegate of the supreme legislature in respect of legislation on the permitted subject but has plenary powers : *Rex v. Burah*, *Hodge v. The Queen*. That does not necessarily imply that it can legislate on the permitted subject in an extra-territorial manner in the same way as the supreme legislature. If the judgment of Lord Macmillan in *Croft v. Dunphy* be considered in its entirety it cannot be said that his Lordship was laying down by the observations at page 163 of the report, that every subordinate legislature can legislate with extra-territorial effect on the permitted subject just as the Imperial Parliament, for on the next page he observes that a statute violating International Law passed by the Imperial Parliament cannot be challenged as ultra vires in a domestic court but such a statute passed by a subordinate legislature can be challenged as ultra vires in a domestic court on the ground that the Imperial Parliament must not be taken to have granted the power to enact such a statute to a subordinate legislature. In the early part of judgment I have pointed out that Explanation (3) to Section 4 of the Indian Income-tax Act has the effect of drawing in income that may have accrued within the territories of another independent foreign State to a person who may be the subject of, and resident in, the territories of another independent foreign State. In my judgment the general principle is that a subordinate legislature can legislate only within its territorial limits (*Macleod v. Attorney-General for New South Wales*) unless otherwise authorized by the Imperial Parliament, either expressly or by

necessary implication. Such an authority has been expressly conferred on the Indian Legislature in matters mentioned in sub-section (2) of Section 99 and in some of the items of List I, as for instance item No. 23. Whether a power to legislate extra-territorially has been conferred by the Imperial Parliament on a subordinate legislature by implication has to be determined on certain considerations. Before, however, examining what those considerations should be, I may point out that the principle of interpretation expressed by the maxim expression units exclusion alter us cannot be invoked to construe a constitutional enactment, the provisions of which by the very nature of the subject must to a certain degree be worded in elastic forms. I cannot therefore accept the argument advanced on behalf of the plaintiff company that the Imperial Parliament by specifying the subjects over which the Indian Legislature can legislate extra-territorially intended that over all other subjects it was not to have that power.

In deciding the question whether the power to legislate extra-territorially has been conferred on a subordinate legislature by implication the following are the material considerations :-

(1) the legislative practice on that subject in the mother country, *Croft v. Dunphy*, (2) the legislative practice in the territory subject to the jurisdiction of the subordinate legislature at or before the Constitution Act under consideration, *Byramjee Jeejeebhoy v. Province of Bombay* also *In re Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938*, and, (3) nature of the subject-matter of legislation.

In considering the nature of the subject-matter of legislation in reference to the question now before us the guiding principle is that "you can complement a given power but cannot supplement it." If legislation on the permitted subject would not be effective without a provision being enacted having extra-territorial operation a power to legislate extra-territorially will be implied; for instance where the permitted subject of legislation is defence of the territory subject to the jurisdiction of the subordinate legislature, a provision in a statute which deals with that subject would not be considered ultra vires, because the provision has extra-territorial effect, the principle being that the Sovereign Legislature gave the subordinate legislature such a power by necessary implication. The absurdity of limiting the power to legislate within the territorial bounds in such a matter is well expressed by the phrase "Imagine the navy confined to the three mile limit." The cases where the validity of laws of exclusion and expulsion passed by the Colonial or Dominion Legislature were considered also fell within this category : (see *Attorney-General for Canada v. Cain and Gilhula*).

The legislative practice in England in income-tax matters is summarised at pages 27 and 35 of Lord MacMillans Report (*Income-tax Codification Report of 1936*). According to the legislative practice in England a person who is a resident in the United Kingdom is charged upon the whole amount of his profits and gains whether they arose from property in the United Kingdom or

elsewhere. The word "elsewhere" which ordinarily would include the rest of the earth outside the United Kingdom was by judicial decisions given a limited meaning. A person who is now a resident in the United Kingdom is charged only in respect of the profits derived from property situate within the United Kingdom. Lord Herschell summarised the law on the subject as in force in England in *Colquhoun v. Brooks*, thus :

"The Income-tax Acts themselves impose a territorial limit; either that from which the taxable income is derived must be situate in the United Kingdom or the person whose income is to be taxed must be a resident there."

In British India the first Income-tax Act was passed in 1860 (Act XXXII of 1860). Only persons resident in India were charged on annual profits arising from property whether situate in India or elsewhere and from trade, profession or employment whether the same was carried on in India or elsewhere. Non-residents, however, were charged only on profits of property situate in India and on profits of trade, profession, and employment carried on in India. Dividends and interests on money or securities were charged only if they were payable in India. The duration of the Act was for five years. The next Act, IX of 1868, was an Act which imposed tax on professions and trades carried on in India. It did not impose a tax on income but a tax in the nature of licence fees. The next two Acts (IX of 1869 and XVI of 1870) proceed on same lines. Every office or employment of profit in British India and salaries, annuities and pensions paid in British India, the profits of shipping companies trading between British India and outside and profits of companies made in British India were taxed. By the Act of 1871 (XII of 1871) other incomes were brought in the field of taxation, but only the income which had accrued in British India was to be taxed. The next Act, II of 1886, made income which had arisen or accrued in British India or which had been received in British India or salaries paid to a British subject in the Native States by the Government of India or by a local authority could only be taxed. The Act of 1918 (Act VII of 1918) charged all income which arose, accrued or was received in British India or which under the provisions of that Act was to be deemed to have arisen, accrued or to have been received in British India. The only provision in that Act which defined what was to be deemed to have arisen etc., in British India was Section 33 which corresponds to Section 42 of the Act of 1922 (XI of 1922). The last mentioned Act, as it stood in 1935, and before the amendment of 1939, made the income of a resident taxable when the income had accrued, arisen or had been received in British India, or though arising out of British India, has been received or brought into British India within a certain time, but with regard to a non-resident he could be taxed only in respect of income which had accrued or arise in British India or which had been received there. The extending Section was Section 42. The legislative practice in India up to 1935 was not to assess a non-resident who had no business connection in British India, to income-tax in respect of an income which had not arisen or accrued to him in British India or which had not been

received by him in British India. Moreover the nature of the subject of legislation does not necessarily require any legislative provision of extra-territorial operation. I cannot therefore hold that the Indian legislature had been given by implication the power to legislate extra-territorially with regard to income-tax matters. Explanation (3) to Section 4 is accordingly ultra vires to the extent it relates to a non-resident who does not fulfill the conditions of Section 42 in respect of his income which did not in fact arise or accrue to him in British India. I refrain from making any observations with regard to any other case.

The two cases on which the learned Advocate-General has relied strongly are decisions of the Federal Court of Australia. They are *The Colonial Gas Association v. Federal Commissioner of Taxation and Trustees, Executors and Agency v. Federal Commissioner of Taxation*. The first case concerned income-tax and the second succession duty. I have not been able to secure the Australian Income-tax Act but from the summary of its provisions as made by Tomlin, J., as he then was, in *London and South British Investment Trust Co. Ltd. v. British Tobacco Co. Ltd.*, and from Section 20(2)(b) as quoted in the *Colonial Gas Associations* case it appears that a company which carries on business in Australia is taxed by the Australian Statute on so much of its income which it does not distribute amongst its share-holders. The Company is also taxed on what it distributes as dividend to its members who are not residents in Australia, the company being given the right to deduct the tax from the dividend payable to non-resident share-holders. There is therefore no attempt to tax directly an absentee shareholder in respect of income which did not accrue to him in Australia. In the *Colonial Gas Associations* case, where the question was whether the amount paid to a non-resident debenture-holder could be taxed by the Australian Statute, Dixon, J., pointed out that the purpose of that statute was not dependent on the liability of the debenture-holders to pay income-tax to the Australian Government, but its purpose was to impose only upon such companies which derived assessable income from Australia and on no others, an original or independent liability. The liability to the Growth was imposed on the company. No doubt the Australian legislature intended that the incidence of the tax should be ultimately on the absentee debenture-holder. This was sought to be effected by giving the company the right to deduct and retain the amount of tax payable by it on the interest payable to the absentee debenture-holder from the amount payable to them. Dixon, J., however stated in clear words that the company could not escape assessment simply because foreign courts may, by reason of the laws of that foreign country, refuse to recognize the right of deduction so given to the company by the Australian legislature. The majority of the Judges agreed with Dixon, J. In this view as to the scope of the Australian Statute no question of its having extra-territorial effect arises. The Statute was certainly intra vires, as the Australian legislature legislated on a subject which was within the territorial limits of Australia. Evatt, J., however, adopted the reasons which he had given in the earlier case, namely in *Trustees, Executors and Agency v. Federal*

Commissioner of Taxation. In support of his view that the State legislature had power to legislate extra-territorially he gave four reasons :

(i) that the Australian Commonwealth has full self-government and the Commonwealth Parliament has power to legislate extra-territorially, as such a power is an essential part of the conception of self-government;

(ii) that *Croft v. Dunphy* had laid down that the Canadian Parliament had the powers of a full Sovereign legislature, and the observations made therein would apply to the Commonwealth Parliament of Australia;

(iii) that the legislative powers of the States of the Australian Commonwealth regarding extent are the same as that of the Commonwealth Parliament; and

(iv) that the questioned legislation, even if it had extra-territorial effect, would be perfectly valid, if in some aspects and relations it bears upon the "peace, order and good government" of the Dominion or the constituting States, as the case may be, either generally or in respect to specific subjects -

In my judgment the rules laid down by Evatt, J., in *Trustees, Executors and Agency v. Federal Commissioner of Taxation* cannot be the true guide for deciding the question before us. India is not yet a self-governing unit of the Empire. For all practical purposes it is still a dependency. The Indian Constitution is materially different from Canadian and Australian Constitutions, and Evatt, J., was confining his observations to the constitutions of those two countries, where matters of peace, order and good government were entirely the concern of the Dominion Commonwealth or the States. Besides, his observations do to a certain extent go against the general principle laid down by Lord Halsbury in *MacLeods case* and is against the decision of Tomlin, J., in *London and South American Investment Trust Limited*.

Issue No. 1. - The contention of the learned Advocate-General is that the income which has been assessed, e.g., the dividends from the sterling companies did in fact arise or accrue to the plaintiff company in British India. If that be so, the plaintiff company would not be affected by Explanation (3) to Section 4 and so would not have the right to question its validity. Moreover, the suit will have to be dismissed on the merits, if his contention be accepted.

For determining this point the material facts are as follows :-

(i) The sterling companies are incorporated in England;

(ii) The place of central control of those companies is in England;

Their principal place of business is in England. It is from there that their chief operations are controlled, managed and directed;

(iii) The shares of those companies have been issued in England, the share registers are kept in England, dividends are declared in England and paid in England;

(iv) Those companies carry on business in British India and earn profits here. They have been assessed to income-tax in British India on their profits earned in British India;

(v) The Raleigh Investment Company is a non-resident Company;

(vi) The dividends in question had been declared and paid to it in England.

Leaving out the case where income is not received in British India income of a non-resident is assessable in British India only if the income had accrued or had arisen in British India or is deemed to have arisen or accrued in British India. Explanation (3) to Section 4, which deals with dividend only, defines the circumstances under which a class of income actually arising or accruing outside British India is deemed to have arisen or to have accrued in British India. Section 42 which is not relevant to the case before us, for the assessment is not as an agent of the plaintiff company, also mentions the case where income would be deemed to have arisen etc., in British India. For the purpose of this issue we have to leave out those two cases, namely Explanation (3) to Section 4 and Section 42. We are to see, fiction apart, whether the income of the company derived from dividends paid by the sterling companies had in fact arisen or accrued in British India. The cases established the following proposition, namely :-

"the situs of the income is the situs of the fund from which the income is directly derived, that is to say, in the case before us, the situs of the shares held by the plaintiff company would determine the place where the income had arisen or accrued to it."

Regarding the situs of the shares two views have been maintained namely :-

(a) the place of "residence" of the company in which the shares are held determining the situs of the shares : and

(b) the situs of the shares is where the share register of the company is kept.

The main proposition is established by the cases of Commissioner of Income-tax, Bombay Presidency v. Raja Bahadur Bansilal Motilal, and Commissioner of Income-tax, Bombay v. Swarup Chand Hukumchand. This is also the effect of the decision of the Judicial Committee in Income-tax Commissioner, Bombay v. Chunilal Mehta where the place of profit earning was taken to be the situs of the contracts which produced the profit to the assessee.

Regarding situs of the shares the first view is what has been adopted in *Bradbury v. English Sewing Cotton Co.* At page 753, Lord Cave, L.C., observed thus : "A share or a parcel of stock is an incorporeal thing, carrying the right to a share in the profits of a company; and where the company is, there the share is also, and there is the source of any dividend paid upon it." He held that the American Company was resident in England in the three years in question (1914-1915 to 1916-1917), and the dividends received by the English Company by reason of its share-holdings in the American Company were income which had accrued to it in England and not from foreign possessions. According to this view the place of residence of the sterling companies in the relevant year would be the determining factor.

The cases on the subject of residence of companies lay down that the place of incorporation of the company is not a very important factor. The accepted view is that for purposes of income-tax a company must be taken to reside at the place from which its real business is carried on, that is to say, "where the central management and control abides"; *De Beers Consolidated Mines Ltd. v. Howe*, *Bradbury v. English Sewing Cotton Co.* A company may no doubt have, like a natural person, more than one place of residence, but in that case the central management and control must be divided and exercised from more places than one : *Swedish Central Ry. Co. v. Thompson*.

The other view is that the situs of the shares for purposes of taxing statutes must be taken to be the place where the share register is kept, "for the evidence of title to shares is the share register". This is the view taken in *Brassard v. Smith*, and *London and South American Investment Trust v. British Tobacco Co.*

Whichever view be accepted the situs of the shares which the plaintiff company had in the sterling companies would not be in British India but in England. The income in the shape of dividends paid by the sterling companies to the plaintiff company therefore arose or accrued not in British India but in England. The case of the Commissioner of Income-tax, *Bombay v. Major Goldie* is an authority directly on the point. The plaintiff company has assessed to income-tax in British India in respect of those dividends on the basis of Explanation (3) to Section 4 of the Indian Income-tax Act, which made, by a fiction so to say, the income from those dividends, which in reality had arisen and accrued outside British India, to be income which had arisen or accrued in British India. The plaintiff company is accordingly entitled to challenge the legality of that explanation.

Issue No. 2. - The second and third issues must be decided on the basis of the allegation that the assessments is ultra vires, a point on which I have already recorded my finding. Two grounds have been urged in support of the contention that the provisions of the Income-tax Act bar the suit. It is firstly urged that the only manner in which the plaintiff company could proceed to have

relief was by following the machinery provided for in the Income-tax Act; by first appealing to the Appellate Assistant Income-tax Commissioner under Section 30, then, to the Appellate Tribunal under Section 33 and then coming up to the High Court by way of reference under Section 66. Secondly, it is contended that Section 67 of the Income-tax Act expressly bars the suit.

The general principle has been formulated by Willes, J., in *Wolverhampton New Water Works Co. v. Hakesworth*. The third proposition that he laid down is that when a statute creates a new liability-ability not existing at common law-and at the same time gives a special and particular remedy for enforcing it, the remedy provided for in the statute must be followed and the party is not entitled for in the statute must be followed and the party is not entitled to have recourse to an action in the civil court. In *Bhai Sankar v. The Municipal Commissioners of Bombay*, Sir Lawrence Jenkins, C.J., stated the third proposition of Willes J., in a different form. He thus observed : "But where a special tribunal out of the ordinary course is appointed by an Act to determine questions as to rights which are the creation of that Act, then except so far as otherwise expressly provided or necessarily implied, that tribunals jurisdiction to determine those questions is exclusive." These principles have been applied by the other Indian High Court and by the Judicial Committee of the Privy Council in *Secretary of State for India v. Mask & Co.*, a case on which the learned Advocate-General has also relied. In my judgment these principles can be invoked by the defendant for the purpose of defeating the suit before us, only if it can be shown that the point raised in the suit and on the basis of which the plaintiff seeks relief, could have been determined by the special tribunals set up by the Income-tax Act.

Section 30 of the Act create a tribunal to which the assessee dissatisfied with the assessment made by the Income-tax Officer is to go in the first instance. What questions he can raise before that tribunal are indicated in the section itself. He can object to the amount of his income as determined by the Income-tax Officer or to the amount of loss computed under Section 24 or the amount of the tax etc. He can also deny his liability to be assessed under the Act. That phrase to my mind mean that he can only urge before that tribunal that the provisions as they stand in the Act do not make him liable, i.e., exempt his income or a part of his income from assessment. He cannot urge there that though a provision of the Act makes his income or part thereof liable to be assessed, that provision is illegal, being ultra vires the Indian Legislature. The Appellate Assistant Commissioner would not be competent to entertain or decide that question. On the principle that the scope of an appeal cannot be enlarged but must be limited to points which were open for adjudication by the court or tribunal of first instance the Appellate Tribunal functioning under the Act, to which an appeal is taken under Section 33, would have no power to entertain the said question question and deal with it in its order. This court on a reference being made to it under section 66 cannot also deal with such a question, as the reference must be limited to points

arising out of the order passed by the Appellate Tribunal. In accordingly overrule the first ground of attack made by the defendant.

The second ground urged by the learned Advocate-General that Section 67 of the Act bars the suit. To support their respective contentions the learned Advocate appearing for the parties have cited a large number of decisions. One of the cases on which the learned Advocate-General has most strongly relied is Secretary of State v. Meyoppa Chettiar. In that case the plaintiff was assessed to income-tax by the Income-tax Officer on a finding that he was a resident of British India. In the suit he alleged that he was not a resident of British India of but Saigon. He prayed for a declaration that the assessment was illegal and for recovery of the money which he had paid on demand by the Income-tax Officer. Section 67 of the Income-tax Act was successfully pleaded and the suit was dismissed. In the course of his judgment Varadachariar, J., observed that where a statute contains a specific provision limiting or excluding the jurisdiction of civil courts the determination of the ambit of the civil courts jurisdiction must rest upon the language used in the private provision and cases decided on the provisions of statutes couched in different language would be of little assistance. I agree with thou observations to this extent that the language of the private provisions is of prime importance, but I do not agree to the further proposition (if that be its meaning that it would not be legitimate to refer to decisions given on other statutes even when the private provisions are of similar scope. I would not, however, burden my judgment thy reference to the decision in suits brought for declaration that rates imposed under the provisions of the Bengal Municipal Act had not been legally imposed. I would confine myself to decisions in suits relating to income-tax and to decisions in other suits where the private provisions in the statute are of similar scope. The first case is Haji Rahamatulla v. Secretary of State for India in Council. In that case a person, whose place of residence was outside British India, was assessed on profits, which also had accrued outside British India, under the Income-tax Act of 1886 (Act II of 1886). He brought a suit for a declaration that the assessment on him was illegal. Section 39 of the Act II of 1886 which is couched exactly in the same terms as the first part of Section 67 was pleaded as a bar to the suit. The plea was overruled on the ground that if the questioned assessment was ultra vires that Section did not stand in the way of the plaintiff. This case was cited in Meyappa Chettiars case but was distinguished on two grounds : (1) that the Act of 1886 contained no provision corresponding to the second part of the Section 67, and (2) the said Act did not provide the same safeguards, as in the act of 1922, by way of appeal and reference to the High Court with a further right of appeal to the Privy Council. In my judgment Haji Rahamatullas case cannot be put aside on these grounds of distinction. The second part of the Section 67 deals with a different subject altogether. The Act of 1886 contained provisions for revision, firstly to the Collector, and then to the Commissioner of the Division. There was no doubt no provision for a reference to the High Court and for further appeal to the

Privy Council, but in my judgment the scope of a private provision like that contained in Section 39 of Act II of 1886 or in the first part of the Section 67 of the Act of 1922 would neither be enlarged or curtailed by reason of the number of appeals from the assessment order provided for by the statute. The next case of importance is *Raja of Ramnad v. Secretary of State*. The Income-tax Act under consideration was the Act of 1918. Section 52 contained the private provision which is exactly in the same terms as Section 67 of the Act of 1922. At page 17 of the report the learned judges made the following observations : "A civil suit is barred under recession 52 of the Income-tax Act of 1918. If the tax was lived under that Act, no doubt, a suit would be barred, but if the assessment was made in respect of an item of income which is not assessable under the Act civil suit would lie, inasmuch as the officer making the assessment had no jurisdiction to make it. In cases in which the Income-tax Officer has to decide whether a certain item of income is assessable or not, his decision cannot be said to be ultra vires even if it is illegal. But where a certain income is outside the scope of the Act, such as agricultural income or income not earned in or brought into British India, any assessment in respect of such income would be outside the scope of the Act, and a civil suit to recover it would not be barred by reason of Section 52." In my judgment the rule thus formulated is the correct rule, and further it is on the principle indicated in this passage, that *Meyyappa Chettiars* case and other cases cited by the learned Advocate-General, to which I will refer later on, are to be distinguished. The rule of that if the imposition is ultra vires, statutory provisions, which purport to take away the jurisdiction of civil courts would not be considered effective to bar a suit receives support from the decisions of the Judicial Committee in *Secretary of State v. Fahaminnessa Begum*, where in spite of the provisions of Section 6 of Act IX of 1847 it was held that a civil suit was maintainable to declare that the assessment of revenue made by the revenue authorities was illegal on the ground that on a contraction of the provisions of Act IX of 1847 the revenue authorities could not have legally imposed revenue on the land in question. The decision of the Bombay High Court in *Bhag Chand Dagdusa v. Secretary of State for India in Council*, affirmed on appeal in (54 I.A. 338), on a different ground also supports the same view. In that case a large body of shop-keepers of Malegaon filed a suit against the Secretary of State for India for a declaration that a certain notification issued by the District Magistrate, by which compensation for damage caused at a riot and the costs of additional police for keeping order were to be recovered, was illegal and for injunction. A notice under Section 80 of the Code of Civil Procedure was given, but the suit was filed before the expiry of two months from the date of that notice. The Secretary of State raised three substantial questions : (1) that Section 4(f) on the Bombay Revenue Jurisdiction Act (Act X of 1876) barred the suit, (2) that the suit having been instituted before two months of the notice given under Section 80 of the Civil Procedure Code was premature, and (3) the challenged notification was a valid one. The trial Court gave effect to all the three contentions and dismissed the suit. On appeal the Judges of the Bombay High Court were divided on the question as to

whether notice under Section 80 of the Code of Civil Procedure was required, the suit being for injunction. Both of them held that the notification was perfectly valid, but that if the notification had been illegal the suit would not have been barred under Section 4(f) of the Bombay Revenue Jurisdiction Act in respect of the tax relating to additional police charges. Shah, A.C.J., observed thus : "Apart from this ground it is clear that the provision (Section 4(f) of the Revenue Jurisdiction Act) cannot apply where the legality of the order of the Government is questioned. It would apply to a case of rate which is authorised, that is, legally authorised, by the Government. In the present case the legal basis for the action of Government is questioned and I think that the suit is not barred by this clause even as regards the tax relating to additional police charges, provided it is established that the rate is not legal. Thus the objection (about the maintainability of the suit) would apply to police charges, if it be proved that the rate is legally authorised." Section 4(f) of Act X of 1876 runs as follows : "Subject to the exceptions hereinafter appearing no civil court shall exercise jurisdiction as to any of the following matters :

\* \* \*

(f) claim against the Crown to hold land wholly or partially free from payments charged on or payable out of land revenue, or to set aside any less or rate authorized by the Government under the provisions of any law for the time being in force,"

On appeal by the plaintiffs to the Privy Council the suit was dismissed. The Judicial Committee held that the notification so far as it related to the collection of compensation was perfectly valid, but it was not valid so far as it related to the collection of additional police charges. Lord Summer then went on to examine the position as to whether the suit so far as it related to additional police charges was maintainable or not. He held that it was not maintainable in view of the provisions of Section 80 of the Code of Civil Procedure but at the same time did not dissent from the observations made by the Bombay High Court in respect of the scope of Section 4(f) of the Revenue Jurisdiction Act.

The case on which the learned Advocate-Generally has relied are *Forbes v. Secretary of State for India*, *Dr. R. N. Singha v. Secretary of State for India*, *Secretary of State for India v. Forbes* and *Secretary of State for India v. Meyyappa Chettiar*. In none of those cases was the question of ultra vires raised. In all of them the assessment was not outside but under the Income-tax Act and the suits challenged the correctness of findings on points which the Income-tax Officer was competent to determine. In *Secretary of State for India v. Mask & Co.* a case which concerned customs duties, the plaintiff contended that the goods which he had imported were of a different description from what the Customs authorities took them to be and so the proper duty payable was at a lower rate. That case is also of the same type as the first mentioned case. In the suit before us Section 67 is of no avail to the defence as the suit is not for setting aside or modifying

an assessment made under that Act. It is a suit for a declaration that the assessment is unauthorised by the Act and outside the Act as it ought to stand after Explanation (3) to Section 4 is struck out on the ground that it is ultra vires the legislature. I would accordingly answer this issue in favour of the plaintiff.

Issue No. 3. - For deciding the third issue the provisions of Section 226 of the Government of India Act, 1935, have to be considered. It is a section which still stands in the statute book in spite of the fact that the historical reasons for the enactment have long disappeared. It has the effect of taking away the original jurisdiction of this Court in matters in respect of which courts subordinate to this court would have original jurisdiction. It is an anomaly that this Court cannot exercise its functions in the exercise of its original jurisdiction in matters concerning revenue. Be that as it may, we have to give effect to that Section.

The section is divided into two parts, The Court has no original jurisdiction in (1) any matter concerning revenue or (2) in any matter concerning any act ordered or done in the collection of revenue. I do not agree with the interpretation put upon this section in *The Dewarkhand Cement Co. Ltd. v. Secretary of State for India* to the effect that the two parts of the Section express two distinct and mutually exclusive ideas, namely, "the first part refers to preliminary proceedings taken for the purpose of determining the amount of revenue and the second part to the machinery to enforce the payment of revenue." The second part no doubt refers to the machinery for enforcing payment of revenue but I am not prepared to say that the first refers only to preliminary proceedings taken for the purpose of determining the amount of revenue. Such a view would conflict with the decision of the Judicial Committee in *Alcock, Ashdown & Co. v. Chief Revenue Authority, Bombay*. In that case Lord Phillimore laid down that the High Court in the exercise of its original jurisdiction had power, in spite of Section 106 of the Government of India Act, 1915, to interfere by issuing a writ at the stage when the preliminary proceedings were being taken for assessing the amount of income-tax. In my judgment the first part of the Section includes the matter dealt with in the second part of the section. A matter concerning revenue would include a matter relating to the collection of revenue. In my opinion the second part of the section has been enacted to give an indemnity to revenue officers who in the discharge of their duties may have collected or may have made attempts to collect revenue by passing orders or by doing things which may not be strictly according to law but which they bona fide believed to be in accordance with law.

The cases cited by the learned Advocate-General are cases which concerned the collection of what was in fact revenue or was found to be revenue. The first case is the case of *Spooner v. Juddow*. The act that was done there was an attempt to collect quit rent due to the East India

Company by executing a distress warrant. It could not be justified in law, for the distress warrant issued against one person was executed against another and for a liability whip was not fully the liability of the latter. A suit for damages was brought against the Govt., agent who had executed the said warrant. The main defence was that the suit was not maintainable in view of the provision is of sustain 9 of 37 Ego. III, c. 142, which was in the seams terms as Section 226 of the Government of India Act, 1935. In reversing the judgment of the Bombay High Court the Judicial Committee of the Privy Council pointed out that the case cannot be decided on the plain language of the Section. For if the act done was strictly in accordance with law, the Section would be redundant, the Section was accordingly interpreted in the manner which I have indicated above. The cases of Messrs. Best & Co. v. The Collector of Madras Gobindarajulu Naidu v. Secretary of State for India Thin Yen v. Secretary of State for India Dewarkhand Cement Co. Ltd. v. Secretary of State for India Thyagaraja Chettiar v. Collector of Madura and Bhimwandiwalla v. Secretary of State for India are cases which fall within the second part of Section 226. In all the cases except the last the act ordered or done by the revenue authorities related to collection of what was admittedly and beyond question revenue and in the last mentioned cases as also in Spooners case, what was ordered to be collected was found to be revenue by the Court after adjudication. In all those cases the construction given to the second part of the Section in Sooner v. Juddow was reiterated. Spooners case and Bhimwandivallas case, are of importance for the purpose of showing that where there is a dispute as to whether a particular levy is revenue or not, that dispute must be adjudicated upon by the court and only if the court finds that it is revenue, then and then only can the bar of Section 226 be invoked and applied. In my judgment that is the correct approach, as it accords with fundamental principles. The first proposition that is well established is that the condition on which the right of a court of limited jurisdiction to exercise jurisdiction depends must be fulfilled, those conditions may be of various kinds. They may be founded either upon the character of constitution of the tribunal, or upon the nature of the subject-matter of enquiry, or upon certain proceedings which have been made essential preliminaries to the enquiry, or upon the existence of some facts. If there is any dispute as to those facts that Court is not only entitled to adjudicate upon them but must do so. Only its decision on the point would be open for re-examination by a superior four or tribunal : Colonel Bank of Australia v. willan. It follows as a converse proposition that where a court has a general jurisdiction. That is to say, jurisdiction to entertain suits for proceedings of a civil nature, and its jurisdiction over a particular subject-matter, which would otherwise be within its competence, is excluded by a statute, and there is a dispute as to facts, which if established, would oust its jurisdiction, that Court would have not only the power but would be under a duty to give its decision on the said dispute. Unless the private statute plainly prohibits it from adjudicating upon toes disputed facts. In the light of these principles this court has the power to determine whether the subject matter of this suit concerns revenue. If it does, the suit would be

barred, otherwise not. In my judgment on the plaintiff company is or can be called revenue in the popular sense or the defendant gives it that designation. Revenue is that which the State collects from the subject or from the possessions of the State for the purpose of carrying out its administrative and governmental duties. In the first mentioned case it involves the right to levy from the subjects. If the right does not exist in respect of a particular matter, what is assessed or collected would not in my judgment be considered AAC revenue within the meaning of Section 226, although the name of a tax may be given to it. Without a valid act on the part of the State, what is called or designated by its as revenue cannot be revenue. In this view of the matter I agree with the concession that was made by the Advocate-General, Bombay, in *Byramjee Jeebhoy v. Province of Bombay*, that Section 226 of the Government of India Act contemplates a "valid revenue," and with the observation of Beaumont, C., that "before the Section (226) can apply, however, we must determine that the tax which is challenged is legal if it is not. Its imposition does not concern revenue." I accordingly hold that Section 226 is not a bar, the questioned tax imposed on the plaintiff company being illegal, as Explanation (3) to Section 4 is ultra vires the India Legislature.

Issue No. 5. - On the conclusions to which I have arrived at the company is entitled to the relief as prayed for in prayer (b) of the plaint. The company is also entitled to get a refund of Rs. 4,35,290-5-0 which was paid by it. I have already held that Explanation (3) to Section 4 being ultra vires the Indian Legislature, that sum cannot be called revenue, and consequently the second part of Section 226 of the Government of India Act, 1935, places no bar. Even before the Income-tax Officer the company had taken up the position that it was not liable to be taxed in British India on dividends paid by the sterling companies. On a demand notice being served requiring payment of the amount by the March 15, 1941, it pleaded for time by *caval boia* the answer was that time could not be extended and that if the payment was not made by the March 15, 1941, the company would be treated as in default, which implied that a penalty, which may be equal to the amount of the assessed tax, may be imposed. On these facts I hold that not only the payment was made under protest, but it was made under circumstances which would entitle the company to receive it on the basis of Section 72 of the Indian Contract Act as interpreted by the Judicial Committee of the Privy Council in *Seth Kanhaya Lal v. The National Bank of India Ltd.* The company would also be entitled to recover interest on the said amount from the date of demand (December 22, 1941) till recovery. I agree with my Lord Chief Justice that the rate should be 4 per cent. simple.

I do not see my way to grant prayer (c). There is no likelihood that the Income-tax Officer would make any attempt in future to assess the company on dividends from the sterling company, if our judgment to the effect that the assessment is illegal, be upheld on appeal.

LODGE. J. - I am in entire agreement with the opinion expressed by Matter, J., on issues Nos. 2 and 4 as framed by him and with the reasons given, and I have nothing to add to his judgment so far as these issues are concerned.

In placing his argument on issue No. 1, Sir. A. K. Roy enunciated the following propositions :-

The plaintiff Company held shares in the sterling companies, i.e., invested money in the sterling companies. In order to obtain an income, the sterling companies had to do business-the shares would not of themselves earn any income. Therefore the income came through the business operations of the sterling companies carried on in India. The profits of the sterling companies became the subject matter of taxation in British India and were taxed and thereby impressed, as it were, with a label that they were something which had arisen or accrued in British India. The dividends were paid out of those profits. It is normally to be expected that dividends will be declared when profits are made; the profits of the sterling companies constituted the income of the shareholders, though at that stage inchoate. The resolutions of the Boards of Directors declaring dividends did not produce the income; they merely released it. This release was merely the last stage in the process of accrual.

This agreement implies that the income of the Company is in fact the income of the shareholders and that the company is merely the channel through which that income is received. It also implies that money received by way of profits in India retains its identity (as though it were a manufactured product stamped "Made in India") as it subsequently passes from hand to hand.

Mitter, J., has shown in his judgment that there is the highest judicial authority for the view that the income of the share-holders is quite distinct from the income of the Company, even when the whole of the share capital is held by one share-holder. It seems to me that the provisions of the Indian Income-tax Act itself lead to the same conclusion. Under the provisions of that Act a company pays income-tax and super-tax on its profits. Thereafter the share-holder who receives a dividend is assessed to income-tax and super-tax on that dividend. The shareholder is required however to pay income-tax not on the amount of the dividend actually received, but on that amount increased by a proportionate share of the income-tax paid by the company. He is then credited with having paid that proportionate share. As Income-tax. When it comes to super-tax however, no credit is given to the share-holder for the super-tax already paid and he is again required to pay super-tax on the dividend so increased. It follows that either the Shareholder is assessed twice to super-tax on the same income or the income of the share-holder is, for the purposes of the Indian Income-tax Act, regarded as distinct and separate from the income of the company. As the Indian Income-tax Act does not authorise the assessment of a person twice to

super-tax on the same income the second of the above views must be correct.

The second argument that the money received as profits retains its identity when passed on, is in my opinion equally fallacious. If this argument were sound it would follow that the income of employees of the sterling companies, received in the form of salaries in London for work done in London, would have a source or origin in India, and would have to be regarded as accruing or arising in India—a view which seems to me untenable.

For these reasons, and for the reasons given by Mitter, J., in his judgment, I agree that issue No. 1 must be answered in the affirmative.

Issue No. 3. - I am unable to accept the view that Section 226 of the Government of India Act, 1935, is not a bar to our exercising jurisdiction in the matters now before us. That section is a relic of an old quarrel and is founded on consideration is essentially different from those on which provision such as those in Section 67 of the Income-tax Act are based. The jurisdiction of the Civil Courts is excluded by Section 67 of the Income-tax Act and by similar Section in other statutes because under those statutes other tribunals have been established to give the necessary relief to aggrieved parties. But Section 226 of the Government of India Act operates whether the aggrieved person has or has not a remedy under the particular Act, indeed, the very wording of the Section indicates that there may be instances when an aggrieved person will have a remedy in Civil Courts if the cause of action arises outside the territorial limits of the original jurisdiction of the High Court but will have no such remedy if the case of action arises within those limits. For these reasons it seems to me that no assistance to the undertaking of the provisions of this Section can be obtained for the reasoning given in decisions as to the applicability of such provisions as Section 67 of the Income-tax Act.

Section 226(1) of the Government of India Act, 1935, reads as follows :-

"Until otherwise provided by the act of the appropriate legislator, no High Court shall have any original jurisdiction in any matter concerning the revenue, or concerning any Act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force."

The plaintiffs contend that if any provision of the Income-tax Act is ultra vires of the Indian Legislature the giving of a decision that ultra vires is not the exercise of original jurisdiction in any matter concerning the revenue. Nor does it concern any act ordered or done in the collection thereof according to the law for the time being in force.

Mitter, J., in his judgment has pointed out that none of the rulings in which Section 226 of the Government of India Act, 1935, was held to be a bar, is of any assistance to us, inasmuch as in each of those cases the court was concerned with "an act ordered or done in the collection of the revenue according with" an act ordered or done in the collection of the revenue according to the usage and practice of the country or the law for the time being in force.; and there was no question whether the provisions of the Act were ultra vires of the Indian Legislature.

I have no difficulty in accepting the argument that where a proviso of the statute is found to be ultra vires of the legislature, an act ordered or done under the provisions is not an act ordered or done according to the law for the time being in force, and therefore the original jurisdiction of the High Court to determine whether a provision is ultra vires or not, is not excluded by the second part of Section 226(1) of the Government of India Act. The problem is whether that jurisdiction is excluded by the first part of the Section, viz., "No High Court shall have any original jurisdiction in any matter concerning the revenue."

The cases cited, in which this portion of the Section has been considered are three in number. In *Block. Ashdown & Company, Limited v. Chief Revenue Authority, Bombay*, the question in issue was whether the High Court had power to make an order requiring the Chief Revenue Authority to perform his statutory duty of stating a case and referring it to the High Court under Section 51 of the Indian Income-tax Act, 1918. The Judicial Committee observed : "In their Lordships view the order of the High Court to a revenue officer to do his statutory duty would not be the exercise of "original jurisdiction in any matter concerning the revenue", and the latter part of the clause need not be considered, for the proceedings in this case had not to do with the collection of the revenue, but with the preliminary assessment to ascertain what that revenue was."

This decision emphasizes the distinction between two parts of Section 226 (1) of the Govt., of India Act, 1936, and suggests that if the statutory duty in question has to do with the collect of the revenue, and not merely with the preliminary assessment, the power of the High Court to issue a direction to a revenue officer to perform that duty may possibly be excluded by this Section.

But so far as the first part of the Section is concerned, this decision does not suggest that any special or limited interpretation is to be placed on the words any original jurisdiction in any matter concerning the revenue : the decision merely lays down that the issue of an order to a revenue officer to perform his statutory duty of stating a case is not exercise of original

jurisdiction in a matter concerning the revenue.

In *Dayaldas Kushiram v. The Commissioner of Income-tax, Central and Income-tax Officer, Section 11(Central)*, it was held that an order directing a revenue officer to forbear from doing something which he believes wrongly to be his statutory duty, cannot fall within Section 226(1) of the Government of India Act. This decision purports to follow *Alcock, Ashdown & Company Limited v. Chief Revenue Authority, Bombay (1923) L.R. 50 I.A. 227*, and for our present purposes. Does not go further than the earlier authority.

*Sir Byramjee Jeejeebhoy v. The Province of Bombay and Another 3(1940) I.L.R. 1940 Bom. 58; 7 I.T.R. 670; 3 F.L.J.H.C. 23* is the only decision which seems to me to have a direct bearing on the question before us. In that case the question before the court was whether Part VI of the Bombay Finance Act, 1932, as amended in 1939 was ultra vires of the local legislature. Sir Jamshedji Kanga for the plaintiff argued (page 62) "Section 226 of the Govt. of India Act, 1935, should be strictly construed. It only takes away the original jurisdiction of the High Court in any matter concerning the revenue. Before the Section could operate there must exist a valid Act and without a valid Act there can be no revenue. The jurisdiction to determine the validity of the Act is not taken away by Section 226."

The Advocate-General in reply conceded (page 66) the point. He argued that Section 226 contemplates the existence of valid revenue and stated that he was unaware of a case where the jurisdiction of the Court was barred when the validity of the Act imposing the revenue was in question. In delivering judgment Beaumont, C.J, observed : "Before the Section can apply, however, we must determine that the tax which is challenged is legal; if it is not, its imposition does not concern revenue, but it is a nullity. To refuse jurisdiction to try this question would involve dismissing the case against the plaintiff without hearing him, this point was not seriously contested by the Advocate-General." It is clear from the above fact that the point was not seriously contested. For myself, with great respect to the learned Judges, I am not satisfied that that decision was correct.

What is the position in the present case ? The Central Government in an attempt to increase the revenue considers whether it has a right, to tax certain incomes. Believing in good faith that it has the right it obtains the necessary statutory authority from the Indian Legislature. The Income-tax authorities assess the incomes in question, demand payment of the tax. Realism the same and appropriate the money to the revenue of the country. The questions in issue are-Has the Indian Legislature the power to tax these incomes ? Can the Indian revenue be increased in this manner ? Is the amount realised from the plaintiff, which has been claimed as revenue, realised as revenue, and treated as revenue, to continue to be so treated or is it to be deducted from the funds

claimed by the Government as its revenue and refunded to the plaintiff.

It seems to me that if the ordinary meaning is to attach to the words "any matter concerning the revenue" then all these questions are matters concerning the revenue. In other words, a decision that something is not valid revenue concerns the revenue as much as a decision that it is valid revenue.

The argument that Section 26 is a bar only to the exercise of jurisdiction in matters concerning valid revenue seems to me to conflict with the principle laid down in *Spooner v. Juddow* 1(1845-51) 4 M.I.A. 33. The same argument would apply to cases where the revenue officer misunderstood the valid provisions of the Act and assessed to tax incomes not assessable under the Act-because the amount realised would not be valid revenue.

Similarly if the revenue officer by mere mistake in arithmetic demanded and realised from an assessee more than was legally payable, the illegal excess would not be valid revenue, and according to this argument, the jurisdiction of the High Court to grant relief in respect thereof would not be barred. In other words, the jurisdiction of the High Court would be barred under Section 226 of the Government of India Act, 1935, only in those cases where the plaintiff on the merits was not entitled to succeed. In my opinion neither the plain words of the Section nor the decision of the Judicial Committee in *Alcock, Ashdown and Company Limited*, justify such an interpretation.

I am of opinion that Section 226 of the Government of India Act, 1935, is a bar to our entertaining the present suit, and that the plaint should therefore be returned to the plaintiff for presentation to the proper court.

It only remains for me to add that if I were not convinced that the Section 226 of the Government of India Act, was a bar to the exercise of jurisdiction by us in this matter, I should agree with the order proffered by my Lord the Chief Justice.

Order accordingly.