CALCUTTA HIGH COURT

Sutlej Cotton Mills Ltd

Vs

Commissioner of Income-Tax

(Harries, C.J. Chatterjee, J.)

05.09.1949

JUDGMENT

Harries, C.J.

1. This is a Reference made by the Appellate Tribunal, Bombay Bench, under Section 66(1), Income-tax Act stating a case upon the following question:

> "Whether in the circumstances of the case and having regard to the fact that the applicant company is 'Resident in British India,' Section 42 has been validly invoked."

2. The assessee was a limited liability company having its head office at Calcutta and a factory at Okara in British India where cloth was manufactured. The cloth so manufactured was sold by the assessee on a wholesale basis both within and without British India. During the year of account, the assessee had three selling offices in certain Indian States. The goods sold at these centres were sent out from the factory at a profit margin of 9 per cent, on cost.

3. The Income-tax Officer dealing with the assessment for the relevant year came to the conclusion that on the facts which I have set cut the provisions of Section 42, Income-tax Act, were applicable and he made an allocation of profits under Section 42(3) on the basis that 50 per cent, of the profit made on sales effected in Indian States outside British India was attributable to the business operations carried on in British India. (It is to be observed that there is a serious misprint in line 24 at page 1 of the paper-book. "Sales effected in British India" should read, "Sales effected outside British India.")

4. The assessee appealed to the Appellate Assistant Commissioner, but the appeal was dismissed and a further appeal was preferred to the Tribunal. Before the Tribunal it was argued that Section 42(3), Income-tax Act, had no application to the case as that section applied only to "nonresidents," Further it was contended that if the section did apply the proportion of profits allocated to the manufacture in India was too great. The Appellate Tribunal, however dismissed

the appeal holding that Section 42(3) had been correctly applied by the Income-tax authorities. The Tribunal were asked to state a case on two points. First, whether Section 42, Income-tax Act, applied to residents or not, and secondly, that if it did what proportion should have been attributed to operations in India in this case.

5. The Appellate Tribunal was of opinion that the proportion to be applied to operations in India was a pure question of fact and refused to state a case on that point. The Tribunal, however, was of opinion that the question whether Section 42, Income-tax Act, applied to residents, was an important question of law and therefore stated the question which I have set out.

6. The only point this Court has to decide is whether Section 42, Income-tax Act, has any application to residents in India and was therefore properly applied in the present case.

7. Section 42, Sub-section (1), is in these terms: "All income, profits or gains accruing or arising whether directly or indirectly, through or from any business connection in British India, or through or from any property in British India, or through or from any asset or source of income in British India, or through or from any money lent at interest and brought into British India in cash or in kind, shall be deemed to be income accruing or arising within British India, and where the person entitled to the income, profits or gains is not resident in British India, shall be chargeable to Income-tax either in his name or in the name of his agent, and in the latter case such agent shall be deemed to be, for all the purposes of this Act, the assessee in respect of such income-tax."

8. Then follow three provisos. The first proviso deals with persons who are not resident in British India, and the second deals with cases where an agent is assessed. The third proviso deals with the amount recoverable.

9. Sub-section (2) of Section 42 deals with a case where a person not resident or not ordinarily resident in British India carries on business with a person resident in Brinish India.

10. Sub-section (3) of Section 42 is in these terms:

> "In the case of a business of which all the operations are not carried out in British India, the profits and gains of the business deemed under this section to accrue or arise in British India shall be only such profits and gains as are reasonably attributable to that part of the operations carried out in British India."

11. It was urged before the Income-tax authorities and the Appellate Tribunal that Section 42 could not possibly apply to residents of British India and in support of that contention the case of *Commissioner of Income-tax, Bombay v. Western India Life Insurance Co. Ltd.*[1], was relied upon.

This was a decision of a Bench of the Bombay High Court consisting of Kania and Chagla JJ. as they then were. The facts of the case were as follows. The assessee, an insurance company, resident in British India, claimed that under the third proviso to Section 4 (1), Income tax Act, 1922, it was entitled to an exemption of Rs. 4,500 from its foreign income, being interest on securities with a bank in London not brought into British India. The in-come-tax authorities held that as the income could be described as deemed to accrue or arise to the assessee within British India by reason of Section 42, the income fell under Section 4 (1) (b (i) and not under Section 4 (1) (b) (ii) and therefore proviso 3 to Section 4 (1) did not apply. The Bench however held that Section 42 did not apply to the case, that the income should be considered at falling under Section 4 (1) (b) (ii) and not under Section 4 (1) (b) (i) and that therefore the assessee was entitled to the deduction of Rs. 4,500 under proviso 3 to Section 4 (1).

12. There can be no doubt that both the learned Judges dealt with the applicability of Section 42 and both came to the conclusion that Section 42 applied only to non-residents.

13. This decision was upheld on appeal by their Lordships of the Privy Council Com-missioner of Income-tax, Bombay v. Western, India Life Insurance Co. Ltd. . Dealing with this aspect of the case however Lord Oaksey who delivered the judgment of the Board observed at page 128:

> "The question which now arises was not argued in the High Court, the judgments of the learned Judges being based upon the construction of Section 42 of the Act which they held only applied to non-residents and had no application to the present case in which the income in question had clearly accrued to the company outside British India. Their Lordships agree with the High Court that Section 42 has no application but express no opinion upon the question whether the section refers only to non-residents."

14. Though their Lordships of the Privy Council expressed no opinion as to the correct-ness of the decision in the Commissioner of In-come tax v. Western India Life Insurance CO. Ltd. as to the meaning and ambit of Section 42, nevertheless the matter was decided by the two learned Judges and their view is entitled to the greatest respect in this Court.

15. On behalf of the income-tax authorities, Dr. Gupta has contended that this Bombay Bench decision does not lay down good law and he has put forward a number of reasons why we should not follow that decision.

16. The marginal note of Section 42, Income-tax Act, still read "Non-residents" after the amendment in 1939 and some weight appears to have been attached to that fact by the learned Judges of the Bombay High Court. However, a marginal note is no part of a statute and should not be used to explain the meaning of a section. In the case of *Nixon v. Attorney-General*[2] Lord

Hanworth M. R. at p 593 dealt with this matter in these words :

> "One further point was taken upon this Act of 1859, with which it is necessary to deal. The marginal notes of Section 3 refer to 'existing rights' and of Section 12 to 'light.' It was contended that these catch words could be used to explain the meaning of sections against which they appear. For my part, I cannot allow this. As explained by Baggallay L. J. in *Attorney-General v. Great Eastern Ry. Co*[3]*.,* marginal notes are not a part of an Act of Parliament. The Houses of Parliament have nothing to do with them and I agree with the learned lord Justices in that case--Bramwell), James, and Baggallay--that the Courts cannot look at them. Their imperfections, spoken of by Bramwell L. J., are illustrated by the note to Section 9 of this Act."

17. It appears to me therefore that the marginal note cannot assist the Court in arriving at the true meaning of this section. In any event, Section 12 of Act XXII [22] of 1947 provides that the marginal note to Section 42 should be deleted and the words "Income deemed to accrue or arise in British India" be substituted in place thereof.

18. However, it is clear that originally part of this section did apply only to non-residents and the opening words of Section 42 before it was amended in 1939 were "In the case of any person residing out of British India." Had those words remained it would have been clear that Sub-section (1) had no application to residents. But by the amendment in 1939 the words "in the case of any person residing out of British India" were eliminated from the statute and new words were substituted. Sub-section (1) now opens with the words :

> "All Income, profits or gains accruing or arising whether directly or indirectly, through or from any business connection in British India etc."

In the opening part of the sub-section as amended there is now nothing to suggest that the sub-section was intended to apply only to nonresidents. Further, it appears to me that in the latter portion of Sub-section (1) there are words which clearly show that the sub-section applies both to residents and non-residents. After dealing with what income, profits or gains shall be deemed to be income accruing or arising within British India, the sub-section then provides "and where the person entitled to the income, profits or gains is not resident in British India," the income, profits or gains shall be chargeable to income-tax in a certain manner.

19. It appears to me that the inclusion of these words, which were added by the amending Act of 1939, makes it clear that the sub-section applies both to residents and non residents and it is applied to them in a different manner. Further, the first proviso I think makes it clear that the sub-section was applicable to both residents and non-residents, because the first proviso deals with

the cases of persons entitled to income, profits or gains who were not resident in British India. A proviso to a Sub-section or a section is, as a rule, in the nature of an exception and I cannot understand the necessity for the wording of this proviso if Sub-section (1) applied only to non-residents. If, on the other hand, Sub-section (1) of Section 42 applied to both residents and non-residents, then the form in which the first proviso is found was necessary where a distinction was to be drawn between the liability of the two classes.

20. This argument was addressed to the Bombay High Court. But Kania J., was of the view that when Sub-section (1) is read as whole the reasonable construction to give to it was that it applied to non-residents only. Speaking for myself I find it difficult so to construe Sub-section (1) of Section 42. With very great respect to the learned Judge it appears to me that the subsection as amended in 1939 clearly on the face of it applies to both residents and non-residents.

21. The matter however does not rest there because Sub-section (2) only applies to persons not resident or not ordinarily resident in British India, but it is to be observed that the subsection opens with those very words :

"Where a person not resident or not ordinarily resident in British India, carries on business with a person resident in British India, and it appears to the income-tax officer etc."There it is clear that the sub section applies only to non-residents and if it was necessary so to make it clear in Sub-section (2) it appears to me that it was equally necessary to make it clear in Sub-section (1) if that Sub-section was intended only to apply to non-residents. It seems to me that it was more necessary than ever to make the position clear with regard to Sub-section (1) because words which strictly limited the operation of that Sub-section to non-residents had bean deleted by the amendment and general words put in statute in the place of them.

22. Sub-section (3) of Section 42 is in the widest terms and there is nothing whatsoever in that sub-section to suggest that its operation is confined to non-residents. Sub-section (3) merely deals with the case of a business of which all the operations are not carried out in British India and there is nothing to suggest that business must be the business of a non-resident. In fact to hold that Sub-section (3) applied only to nonresidents if the sub-section stood alone would be actually to do violence to the language of the sub-section. However, the argument is, and that appears to have been the view of the Bombay High Court, that as Sub-section (3) is part of a section which deals with non-residents only it must be construed as alga dealing with non-residents and not with residents. However, in my view, only one sub-section of Section 42 is confined to non-residents and that is Sub-section (2). Sub-sections (1) and (3) in my opinion are so framed that it must be held that they cover both residents and non-residents.

23. Dr. Gupta also pointed out that Section 14(2)(c), Income-tax Act, made it clear that Section

42 did apply to residents as well as non-residents, Section 14(2)(c), Income-tax Act, is as follows:

> "(2) The tax shall not be payable by an assessee.
>
> * * *
>
> (c) in respect at any income, profits or gains accruing or arising to him within an Indian State, unless such income, profits or gains are received or deemed to be received is or are brought into British India in the previous year by or on behalf of the assessee or are assessable under Section 42."

24. Dr. Gupta's argument is that Section 14(2)(a) clearly covers residents and exempts such residents in respect of income, profits or gains accruing or arising to them within an Indian State unless the case falls within certain provisions and one of those provisions is that the income, profits or gains are assessable under Section 42.

25. It appears to me that Section 14(2)(c), Income-tax Act, could not have been drafted in the way it has if Section 42(3) had no application to residents. It appears to me clear from Section 14(2)(c) that the framers of the Act already intended Section 42(3) to be applicable to residents as well as to non-residents.

26. With the greatest respect to the learned Judges who decided the Bombay case, I find myself unable to follow that case and I am bound to hold that Section 42(3) does apply to residents as well as non-residents and therefore it could be properly applied in this case in assessing the profits of the assessee. This was a case where all the operations of the assessee were not carried out in British India and therefore the profits and gains of the business assessable in British India could be calculated as on such profits and gains as were reasonably attributable to that part of the operations carried on in British India.

27. That being so, the question submitted to the Court must be answered in the affirmative.

28. The Commissioner of Income-tax is entitled to his costs of this reference. Certified for two counsel.

29. Chatterjee J. -- Learned advocate for the assessee, Mr. A. C. Sen, has asked us to follow the judgment of Kania and Chagla JJ. in Commissioner of Income-tax, Bombay v. Western India, Life Assurance Co Ltd., . The judgment is an authority for the proposition that Section 42 only applies to non-residents. With great respect I beg to differ.

30. There are three grounds which compel me to differ from the view taken by the learned

Judges of the Bombay High Court.

31. The first point is the history of the section itself. Originally Section 42 referred only to persons residing out of British India, that is, to non-residents, but in 1939 the section was amended. It is significant that Sub-section (1) of Section 42 as it stands starts with the words :

> "All income, profits or gains accruing or arising whether directly or indirectly, through or from any business connection in British India etc."

These are comprehensive words which are not confined to non-residents. Kania J. has taken the view that the latter part of that sub-section should be read along with the first part and it should be read as being limited to non-residents. But the latter part of the sub-section itself, namely, the words "And where the parson entitled to the income, profits or gains is not resident in British India"seem to indicate that the former part of the section refers also to persons other than those who are non-residents.

32. The next point is the first proviso to Section 42 (1) which was inserted in 1939. It starts with the words :

> "Provided that where the person entitled to the income, profits or gains is not resident in British India".

These words imply that Sub-section (1) has a more extensive operation than the proviso itself. The effect of a proviso, according to the ordinary rules of construction, is to qualify something already enacted which but for the proviso would be within it : Craies on Statute Law, 4th Edn. p. 196. A proviso excepts out of the earlier part of a section something which but for it would have been within the enacting part: Halsbury's Laws of England, Hailsham Edition, vol. 31, p. 484 ; The M. and S. M. Rly. Co. Ltd. v. Bezwada Municipality .

33. The third point which I want to emphasize is the wording of Section 14(2)(c). The last words in the said cl. (c) cannot be consistent with the view that Section 42 is inapplicable to a resident. The effect of Section 14(a)(c) is that tax shall be payable in respect of income, profits or gains accruing or arising to an assessee within the Indian State when such income, profits or gains (a) are received in British India, or (b) are deemed to be received in British India, or (c) are brought into British India, or (d) are assessable under Section 42. That clearly negatives the view that Section 42 which is in Chap. VB deals with exceptional cases, wholly outside the purview of chap. III dealing with taxable income and providing for certain exemptions in Section 14.

34. Mr. Sen concedes that Section 14 is applicable to a resident. Therefore, the only way that a harmonious construction can be put on this statute so as to makes Section 14 consistent with

Section 42 is to bold that Section 42 is not limited in its application to a non-resident. Otherwise reference to Section 42 would be wholly out of place in Section 14.

35. With the greatest respect to Kania J., it seems that undue emphasis has been laid on the marginal acts in Section 42, "Non-residents". His Lordship pointed out that it should be noted that while amending Section 42 the Legislature had still retained the marginal note "Non-resident" against that section and according to him Section 42 (c) should also be restricted to a non-resident. I should here refer to the judgment of the Judicial Committee in Thakurain Balraj Kunwar v. Jagatpal Singh, 31 I. A. 132: (26 ALL. 393 P. C.). Delivering the judgment of the Board, Lord Macnaughten observed as follows :

> "It is well-settled that marginal notes to the sections of an Act of Parliament cannot be referred to for the purpose of construing the Act. The contrary opinion originated in a mistake, and it has been exploded long ago. There seems to be no reason for giving the marginal notes in an Indian statute any greater authority than the marginal notes in an English Act of Parliament."

36. In any event the marginal note, even if it can be regarded as having been inserted in an Act with the assent or authority of the legislature, cannot control or supersede the plain meaning of the words of a section and are of little aid in the construction of statute.

37. Sub-section (3) of Section 42 provides for the apportionment of the profits and gains of a business and the portion deemed to accrue or arise in British India is liable to tax. This sub-section would become inapplicable to residents, if we accept the contention put forward by the assessee. There is no other provision in the Act, so far as we can make out, providing for apportionment of profits in case of a resident whose operations are partly outside British India. I asked Mr. Sen, who has considerable experience in these matters, to point out if there is any provision in the Act under which that relief can be given in such a case to an assessee who is a resident. Mr. Sen could not point to any, and it seems that there is no section providing for such relief. In an appropriate case, Section 42 (3) may be invoked in the case of a resident and the revenue authorities were justified in applying Section 42 (3) in assessing the profits of the assessee in this case where part of its operations was carried on outside British India.

38. In my opinion Section 42 (1) and Section 42 (3) apply to both residents and non-residents. Any other construction would lead to the anomalous results. It is to be observed that Section 4, Income-Tax Act, is expressly made "subject to the provisions of this Act" which include Section 42. It is to be noted, however, that the marginal note to Section 42 has been changed by Act, XXII [22] of 1947. By Section 12 of that Act for the marginal heading "Non-residents" the following has been substituted--"Income deemed to accrue or arise within British India". It was

obviously done to alter the marginal note which was somewhat misleading.

39. I agree with the learned Chief Justice that the question should be answered in the affirmative and that the respondent should be awarded the costs of this reference.

Cases Referred.

1 (1945) 13 I. T. R. 405 : (A. I. R. (33) 1946 Bom. 185)
2(1930) 1 Ch. 566 : (99 L. J. Ch. 259)
3(1879) 11 Ch. D. 449 at p. 461