

BOMBAY HIGH COURT

Commissioner of Income-Tax

Vs

Metro Goldwyn Mayer (India) Ltd

(Beaumont, C.J.)

02.11.1938

JUDGMENT

Beaumont, C.J.

1. This is a reference made by the Commissioner of Income-tax raising two questions : (1) Whether on the facts of this case, the Assistant Commissioner was right in law in deeming the assessee agents for Culver Export Corporation, and (2) whether on the facts of this case the Assistant Commissioner was correct in law in applying Rule 33 generally. We are told by Mr. Coltman for the assessee that the second question has been adjusted between the assessee and the Commissioner, and, by consent of the parties, that question is struck out and we only have to deal with the first question. The first question is not, I think, very happily expressed, because it seems to raise a question only under Section 43 of the Income-tax Act, whereas it is clear from the terms of the reference that the question raises both under Section 42 and under Section 43. It is only a question under Section 43 it would be merely of academic interest. Section 42 provides :-

"(1) 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 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."

That section requires, first of all, that there should be profits or gains accruing or arising to a person residing outside British India and those profits or gains must directly or indirectly arise from or through a business connection or property in British India. When that happens, an agent can be charged, but of course, there may be that happens, an agent can be charged, but, of course, there may be no agent in British India, and to get over that difficulty Section 43 provides for the appointment by the Income-tax Officer of a statutory agent. But I think Section 43 is really only machinery for giving effect to Section 42, and the mere appointment of an agent under Section

43 would be of no consequence unless tax can be levied under Section 42.

Before looking at the relationship between the parties in this case it is desirable to see exactly what Section 42 comes to. It has been held that property in British India under Section 42 means tangible property, so that if profits or gains accrue to a person resident outside British India from tangible property in British India, those profits can be assessed. The difficulty arises from the expression "through or from any business connection." "I think these words denote some element of continuity in the relationship between the person in India who makes the profits and the non-resident who receives them. A single transaction would, I think, not fall within the section. If a manufacturer of a motor car in England or America sells it to a customer in India, there is no doubts business connection in relation to that sale between the manufacturer and the purchaser, and the manufacturer probably makes a profit, but nobody would suggest that in respect of the profit on that single transaction he is liable to pay British Indian income-tax. I think there must be some element of continuity in the relationship between the parties, and in every case one has to look at the particular facts of the case to see whether it falls within Section 42. Now in the present case the non-resident is Culver Export Corporation of New York and the assessee carrying on business in British India is the Metro Goldwyn Mayer (India) Limited, and both those parties are corporations registered in America. The relationship between them is constituted by a contract of the 1st of September 1931, which is Exhibit A. It describes the parties as vendor and vendee, the non-resident being called the vendor and Metro Goldwyn Mayer (India) Limited, being called the vendee. But the adoption of those descriptions does not effect the nature of the transaction and does not turn the transaction into a sale if in fact it is not a sale. The agreement starts by reciting that the vendor owns the exclusive rights in India, among other places, of the motion pictures therein mentioned and that the vendee desires to purchase the pictures therein mentioned picture rights in the territory on terms and conditions there in after set forth. The agreement starts by reciting that the vendor owns the exclusive rights in India, among other places, of the motion pictures therein mentioned and that the vendee desires to purchase the vendors motion picture rights in the territory on terms and conditions thereafter set forth. The vendor then sells to the vendee for a period beginning from the date thereof and ending on 31st August 1932 (so that the agreement is for a year) sole and exclusive rights to re-sell, exhibit, lease and otherwise exhibit throughout the territory all motion picture productions controlled or purchased by the vendor. Then the vendor enters into contracts under which he has to perform various acts which are intended to have the effect of making the user of these productions by the vendee profitable. He has, for instances to supply negatives and positives, to maintain a publicity department in New York and to supply news items, and so forth. Then the vendee enters into various contracts under which he has to provide sufficient sales force, and he has to pay 70 per cent. of the taking to the vendor and he has to deliver accounts and make remittances weekly with an allowance for bad

debts. He has to take all necessary steps to protect the property of the vendor in respect of the copy right, and so further; he has to advertise, and is not to assign. There is a clause that nothing in the document is to be construed as constituting a partnership; and the learned Commissioner seems to think that the introduction of that clause really suggests that in fact the document does constitute a partnership. In my view, the arrangement between the parties is not a partnership; it is something in the nature of a licence and certainly no, in my opinion, a sale out and out. Taking the document as a whole, it seems to me perfectly plain that there is a business connection between these two companies. Under which the non-resident companies to acquire 70 per cent. of the gains are made by him from or through this business connection. It may be also that the makes profits or gains are made by him from or through tangible property in British India, namely, the negatives and positives of the films, but I think it is more satisfactory and more correct to base the case on the view that the non-resident is receiving profits or gains in respect of a business connection between himself and the assessee. In my opinion, therefore, we must answer the question in the affirmative. Costs on the original side scale less Rs. 100.

Rangnekar, J. - I agree.

Reference answered in the affirmative.