BOMBAY HIGH COURT

Maharaja of Patiala

Vs

Commissioner of Income-Tax

(N.R. Gundil, J.)

24.09.1942

JUDGMENT

N.R. Gundil, J.

Under Section 33 of the Indian Income-tax (XI of 1922) the Inco me-tax Appelleate Tribunal, M. MUNIR, President, N. R. GUNDIL, Judicial Member, and P. N. S. AIYAR, Accounting Member, delivered the follwoing judgment :-
PRESIDENT.

1. "This is an appeal by His Highness Maharaja Yadevindra Singh Maharajdhiraj Bahadur, Maharaja of Patiala, from the order of the Appellate Assistant Commissioner of Income-tax, A Range, Bombay, passed on appeal from the order of the respondent by which he assessed for the assessment yer 1937-38 the income that accrued in Bombay to the appellants father, His Highness Maharahadhiraj Sir Bhupindra Singh, the late Maharaja of Patiala.

2. The late Maharaja being a Ruling Prince was residing not of B ritish India ithin the meaning of Section 42 of the Income-tax A ct. He had some private property in several placesand was derivi ng income from some other soruces in British India, e.g., from dividends, speculation and dealings in shares, and was being ass essed ub the post by different Income-tax Officer in British india different officials of his State.

3. After the Income-tax Officer, Central Circle, Lahore, had determined the case for assessmnt for the year 1936-67, he received from the Commissioner of income-tax, Punjab, N.W.F. and Delhi Pr ovinces, an order to the effect that in consequence of the Allahabad High Courts decision in the case of the Maharaja of B enares, the-files of non-residents should be transferred "to the Income-tax Officers in whose jurisdiction th non-residents own property or in whose jrisdiction the income arises so that thos officers may try to appoint an agent connected with the source of income." On receipt of this order the Income-tax Officer. Central Circle, Lahore,

submittedthe file of this case to this Commissioner for transfer to some other Income-tax Officer, and by the mutual consent of the Commissioner of Income-tax, Punjab N.W.F. and Delhi Provinces, and the Commissioner of Income-tax, Bombay, the file was transferred to the respondent, the Income-t ax Officer, Non-Residents Refund circle, Bombay.

4. On November 23, 1938, the respondent, in keeping with the past practice which had been adopted in th time of the late Maharaja under the instructions of his Private Secretary, addressed the following letter to the Foreign Minister, His Highnesss Government, Patiala :

> "I have the honour to state that all the case papers of His Highness the Maharaja of Patiala have been transferred here from Lahore for information and necessary action. It is not easy to discover what has been done hitherto. So as a start I am sending the usual notices and beg to request that you will be good enough to let me have returns of income of His Highness from all sources in British India for the years ended March 31, 1937 and 1938."

It is admitted that this letter was accmpained by a notice under Section 22(2), Income-tax Act, addressed to "His Highness the Maha raja of Patiala" and required of income from all sources in British India for the financial year ended the March 31, 1937 and the March 31, 1938. After some correspondence the required returns ere filed signed and verified by Mr. D. K. Sen, Foreign Minister on behalf of "His Highness the Maharaja of Patiala," The respondent in due course made the assessment for the year 1938-39 and the year 1937-38, computing for the former year a net loss of Rs. 1,44,700 and assessing for the latter a taxable income of Rs. 3,43,097 and determining Rs. 50,337 to be the tax payable. On Oct ober 11, 1940, the Foreign Minister wrote to the respondent to sa y that there had been a miscalculation in assssing the income for 1937-38 and that the correct amount of the tax due was Rs. 40,861-8 and not Rs. 50,337 as required by the notice of demand to be paid. The letter contained a request for a reconsideration of the assessment and revision of the notice of demand. Being doubtful about the respondents power to revise the assessment the Foreign Minister, simultaneously with the letter of October 11, 1940, and the same grounds as were taken in that letter, appealed to the Appellate Assistant Commissioner,A Range, Bomba y, Claiming as relief the reduction of the tax determined from Rs. 50,337 to Rs. 40,861-8. The respondent, acting under section 35 of the Act, reduced the figure taxable income from Rs. 3,43,097 to Rs. 3,10,461 and made the consequent reduction in the tax payable.

5. The appeal before the Appellate Assistant Commissioner presents a somewhat curious story. As stated above, the appeal dated October 11, 1940, admitted the liability to the tax to the extent of Rs. 40, 861-8 and claimed a reduction of Rs. 9,475-8 on the ground of an error in the calaculations. Being free from a ll legal quibbles it was an honest and dignified document becoming the position of the party whom the respondent by his own wrong had driven for

redress to superior authority. The appeal was not in the orescribed and in the concluding paragraph contained the following prayer :-

> "The notice of demand was received in this office on September 20, 1940. As it will take some time to complete the necessary for mal ities, I request you kindlay to extent the time limit of filing the appeal from 30 days to at least 90 days, failing which this letter may kindly be treated as a regular appeal and necessary taken in the matter."

There is no order of the Appellate Assistant Commissioner on thi s document showing whether the time for filing an appeal in the prescribed from was extended or not, or whether he had decided to treat this document itself as an appeal. Off October 22, 1940, an appeal in the prescribd form, signed and verified by the Foreign Minister, was filed adopting the point raised in the appeal of Octobr as the first ground of appeal and containing th following as the second ground of appeal.

> "Attention is also invited in this connection to the judgment of the Allahabad High Court, vide Aditya Narain Singh Bahadur v. Commissioner of Income-tax (Miscellanious Case No. 52 of 1936 decided on January 24, 1938), which will show that His Highness the Maharaja of Benares as served with a notice about the asessment of tax on his income in British India and the High Court held that as no agent of the Maharaja, a non-resident of Br itish India, had been appointed as required under Section 43 of the Income-tax Act, assessment could not be treated valid under Section 42 of the above Act, because of the defective service. According to this ruling the notice about the assessment of tax on His late Highnesss income should have been served on an agent of His Highness in British India.

6. On February 27, 1941, a document purporting to be a "petition of the Foreign Minister, Patiala, on behalf of His Highness the late Maharaja Patiala" was filed before the Appellate Assistant Co mmissioner containing two more grounds of appeal and asking for the setting aside of the order of assessment. These grounds were :

"3. The income purported to have been assessed wa for the accounting year ended the March 1, 1937, and the proceedings in respect of such income could have been initiated under Section 22(2) of the Indian Income-tax Act, 1922, only during the year ended the Marc h 31, 1938. The Income-tax Officer, Non-Residents Refund Circle, however, initiated such proceedings under Section 22(2) of the Act in November 1938. Further he did not issue and serve on the proper party the requisite notice under Section 4 of the said Act."

> "4. H.H. the late Maharaja of Patiala died at Patiala on the March 23, 1938. The notice under Section 22(2) of the said Act, a ssuming that it was validly issued (it is not

admitted) should have been issued and served upon the executor, administrator, or other legal representative of H.H. the late Maharaja of Patiala. The notice, however, purported to be issued to H.H. the Maharaja of Patiala and was sent to your petitioner with a covering letter dated October 23, 1938. There was, therefore, on proer notice and no proper servie of any notice. Consequently the return for the accounting year ended March 31, 1937 wa submitted blank."

This petition was signed and verified by an officer of the Income-tax Department of the State, who had for his authority a certificate of authorization under Section 61 of the Income-tax Act purporting to have been given by the appellant. The certificate authorizes the officer to produce accounts and documents and to obtain copies. Besides the omnibus clause "his explanation and statement will be binding on me" there is no provi sion in this certificate expressly authorizing the officer to present or to verify an appeal.

7. All the grounds taken from time to time before the Appellat Assistant Commissioner were entertained and gone into by him and thus what was originally a simple and straightforward case was converted into a mere wrangle of technicalities. The Appellate Assistant Commissioner found that the Foreign Ministers original appeal of October 11, 1940 was a good appeal. He threfore reduced the taxable income by Rs. 31,319. The technical objections to the assessment, raised later, found no favor with him and were consequently repelled.

8. From the order of the Appellate Assistant Commissioner there is an appeal before us in which counsel for the appellant has not a word to say on the merits and the only ground for appeal is that the assessment is vitiated by th following irregularties of procedure :-

"(1) that a dead man has been assessed without complying with the provisions of Section 24B(2);

(2) that the assessment has been made without serving a notice under Section 34; and (3) that the appellant not being a resident in British India has been assessed without the appointment of an agent under section 43."

Non-compliance with the provisions of Section 24B(2).

9. The case is government by Section 24B(2) as it was before its amendment by the Amendment Act of 1939. That section is as follows :-

"Where a person dies before he is served with a notice under sub-section (2) of Section 22 or Section 34, as the case may be, the Income-tax Officer may serve on his executor, administrator or other legal represectative a notice under sub-section (2) of Se ction 22 or under Section 34, as the case may be, and may proceed to assess the total income of the

deceased person as if such executor, administrator or other legal representative were the assessee."

10. Just as there cannot be a decree against a dead man, so under the Indian Income-tax Act, a dead man cannot be assessed. If the income of a dead man is to be assessed the procedure laid down by sub-section (2) of Section (2) of Section 24B must be followed. Accroding to that sub-Section, where a dead mans income is sought to be assessed, a notice under Section 22(2) or Section 34, as the case may be, must be served on the executor, administrator or other legal representative of the deceased. It is implied in the sub-section that the notice should infrom the per son to whom it is addresed that the income of the deceased person whose executor, administrator or other legl representative of the deceased. It is implied in the sub-section that the notie should inform the person to whom it is addressed that the income of the deceased person whose executor, administrator or legal representative he is, is intended to be assessed. After service of the notice such person, qua the assesment of the income of the deceased person, becomes the assessee. On a plain reading of the sub-section it appears to me to be clear that its requirements are satisfied where the notie under Section 22(2) is served on the legal representative, and on the service of such notie he understands the real issue, namely, that he is intended to be assessed in respect of a particular years income of the deceased person whose legal representative he is.

11. The appellant is the legal representative os His Highnesss Sir Bhupindra Singh Sahib Bahadur, the late Maharaja of Patiala, whose income was intended to be assessed and has in fact been assessed in this case. The late Maharaja had died on March, 23 1938, whereas the notie under Section 22(2) was not issued before November, 1938. What now has to be seen is whether this notie was in fact served on the appellant and whether he understood that the income of the late Maharaja for the financial year ended March 31, 1937, was intended to be assessed. After considering the facts on record and hearing the arguments of learned Counsel for the appellant I hve little doubt in my mind that both the conditions were satisfied in this case.

12. The notice under Section 22(2) that was issued on November 23, 1938, is admitted to have been addressed to "H. H. The Maharaja of Patiala" and was accompanied by a covering letter addressed to "the Foreign Minister, His Highnesss Government, Patiala" (vide para. 4 of the petition dated February 1941, presented to the Appellate Assistant Commissioner). At the time this notice was issued the appellant was the ruling Maharaja. It is, therefore, fair to presume that the Foreign Minister, on receiving the notice, communicated to the appellant the contents of the notice which concerned the appellant personally and subsequently acted in the matter under the instructions of the appellant. The return that is signed and verified by him purports to be on behalf of "H. H. The Maharaja of Patiala." He could have no information about the personal income of the late Maharaja unless he derived such information from the appellant and he could

hardly ae undertaken the responsibility of filing a return without instructions from the appellant. After the assessment, professing to act on behalf of the appellants, he secured in the first instance from the respondent himself a substantial relief under Section 35 and later on from the Appellate Assistance Commissioner on appeal. In the assessment for the year 1938-39 he obtained not only a finding of no liability for the appellant but a finding of net loss amounting to Rs. 1,44,700. Throughout the proceedings he did not give the slightest indication that he had no concern with the matter and that the respondent should deal with the right person. For these reasons, I think, it must e held that not only the contents of the notice under Section 22(2) were communicated by the Foreign Minister to the appellant but that the former throughout the proceedings acted in consultation with, and under the instructions of, the latter.

13. It is true that though the notice required the income of the financial year ended March 31, 1937, to be returned, it did not expressly state that theincome to be returned was that of the late Maharaja. But it was all along understood both by the appellant and respondent that the income intended to be taxed was of the late Maharaja.At the time the notice under Section 22(2) was issued the respondent did not know the name of the appellant or of his late father. When in the covering letter dated October 17, 1939, that accompanied the return the Foreign Minister described the returned income as that of "His Highness Maharajadhiraj Mahendra Bahadur from all sources in British India for the years ended March 31, 1937 and 1938," and respondent for the firt time felt that the notice had perhaps been misunderstood and that the income of a wrong person had been returned. Therefore, by letter dated December 15, 1939, he enquired from the Foreign Minister whether "Ma haraja Mahendra Singh" was the name of the present Ruler or of his late father because his information related to the income that had accrued to Maharaja Bhupendra Singh in British India. He, however, omitted to notie that the income returned was, as is clear from the statement that was submitted with the return, in fact the income of the appellants father, His Highness Maharajadhiraj Sir Bhupendra Singh. This enquiry by the respondent brought the reply that Maharaja Mahendra Singh was the name of the appellants great grandfather and that the name of the appellant was His Highness Maharajadhiraj Shri Yadevindra Singh Mahendra Bahadur. Notwithstanding this confusion of names, however, the real issue was clearly understood by all concerned, namely, that the income for the year ended March 31, 1937, of the then Maharaja of Patiala was intended to be taxed. The notice under Section 22(2) required such income to be returned and the Foreign Minister acting for the appellant did return such income. Not only that but, as has already been pointed out in an earlier part of this order, the liability to pay a tax of Rs. 40,861-8-0 on an income of Rs. 2,78,535 was expressly admitted not only before the respondent but also before the Appellate Assistant Commissioner. The letter No. 2A-9900/35/95, dated October 11, 1940, by the Foreign Minister to the respondent, and the petition of appeal of the same date to the Appellate Assistant Commissioner show beyond doubt that it was well understood byt the Foreign Minister acting on behalf of the appellant that the

income of the appellants late father was being assessed through the appellant. It is true that in the order of assessment and in the petition of appeal to the Appellate Assistant Commissioner the assessee is described as the appellants father but this is merely a misdescription showing nothing more than that the income of the appellants father has been assessed. If the contention that a dead man has been assessed is correct it is equally correct that there could in that case be no appeal to the Appellate Assistant Commissioner by the Foreign Minister on behalf of the deceased Maharaj and no appeal by the appellant to us. It seems to be clear to me that it was fully understood that the appellant was being assessed in respect of the income of his late father for the year ended March 31, 1937, and that being so, it must, I think, be held that though there has been some confusion as to the manner in which the income of a dead man has to be reached by the tax-collector, the requirements of the law have in fact been fulfilled and the error or confusion, if any, not only does not vitiate the assessment but has not had the slightest effect on it.

Absence of notice under Section 34.

14. Coming now to the objection that a notice under Section 34 was not issued, the position is comparatively simple. The section (the case is governed by the old section) does not require a notice in any particular form. All that the section says is that if for any reason income, profits or gains chargeable to income tax have escaped assessment in any year, the Inome-tax Officer may, at any time within one year of the end of that year, serve on the person liable to pay tax on such income, profits or gains a notie containing all or any of the requirements which may be included in a notice under Section 22(2) and may proceed to assess or re-assess such income, profits or gains.If, therefore, a notice in the form o a notice under Section 22(2), or in any other form is served on the assessee within the time limited and it informs the assessee what income is intended to be assessed or re-assessed, the requirement of the section is satisfied. In this case the covering letter that accompanied the notice under Section 22(2) stated that the respondent could not discover from the record wheter the income for the relevant previous year had been assessed, and the responsdents note in red ink "we can only take action for 1937-38 and 1938-39" on the margin of the order sheet against the entry dated October 10, 1938, in the Miscellaneous Record for 1936-37 shows that after received the record on transfer he did apply his mind to the question whether income for the year 1936-37 could at that time be assessed. The respondent can, therefore, be said to have had reasons to believe that in the year of assessment 1937-38, the income of the Maharaja had escaped assessment. This was sufficient justification for him to act under Section 34. The notice dated November 23, 1938, was served on the appellant within the time limited and this and the accompanying letter and the form clearly informed the appellant that the income of "the Maharaja of Patiala " for the year ended the March 31, 1937, was intended to be taxed. It is settled law that notice under Section 34 need not be in any particular form; it is sufficient if it brings to the attention of the person to whom it is addressed the matters

required to be answered or dealt with or the things required to be furnished. This requirement of the law also, was, therefore, complied with in this case.Non-appointment of an Agent

15. I now come to the last and the most important question in the case. It is contended that the appellant being not a resident in British India within the meaning of Section 42, Income-tax Act, he could, under that section, be only assessed in the name of an agent to be appointed under Section 43. Reliance is placed in support of this contention on a recent decision of the Allahabad High Court in the case of The Maharaja of Benares, which as already stated, was responsible for the transferene of this case from the income-tax Officer, central Circle, Lahore, to the respondent, Income-tax Officer, Non-residents Refund Circle, Bombay. It has been held in this Allahabad case is unmistakable terms that in the case of a non-resident it is the agent alone and not his non-resident principal that can be treated as the assessee, i.e., the person to whom a notice under Section 22(2) shall issue and by whom the tax is payable. The proivisions of Section 42(1), this case proceeds to lay down further, are mandatory and the department is precluded from issuing notices to the principal and from treating him as the assessee except to the limited extent that any arrears of tax may also be recovered from any of his assets which may be found in British India. This is the latest and the most fully argued out ase on the point in which all previous authorities and English law have been disussed. The Appellate Assistant Commissioner has made a vain attempt to distinguish the present case from the Allahabad authority but the reasoning adopted by him in which, I must say, we cannot even seriously consider. If there had been no other authority on the point binding on us, we would have hd no option but to follow the Allahabad case and annul this assessment irrespective of what our personal view in the mater might have been. But we have staring us in the face the fact that in interpreting the law on the point the Allahabad High Court has differed not only from the Madras High Court but also from the Bombay High Court which is the court of reference in this case. A Special Bench of three Judges of the Madras High Court, following the decision of Mathew and Smith, JJ., in Tischler v. Apthorpe, which was approved by the Court of Appeal in Werle & Co. v. Colquhoun, has held that Section 42 of the Act is merely a machinery section by which the tax can be levied where the non-resident himself cannot be got at and does not lay down that the profits or gains are assessable to income-tax only in the name of an agent of the non-resident. This Madras case has been followed by the Bombay v. National Mutual Life Association of Australasia, in which it has been held that a principal can be assessed under Section 42 of the Act without an agent being appointed under the latter part of that section. It is true that the point has not been fully discussed in that case but it did arise directly and the actual decision can be supportd only on this view of Section 42. In this state of conflict of authority it would be presumptuous on my part to discuss the points at any great length. Suffice it to say that as a reference in this case would lie to the Bombay view leaving it to the appellant to seek a revision of that view from that Court itself. But in adopting that course I cannot help remarking that if the matter were res integra I would have taken the same view of

this matter as has been taken in England and by th e Madras and Bombay High Courts in India. If a non-resident assessee wishes to file a return of his income direct and to attend to the assessment proceedings himself, I don not see how the Income-tax Officer could say to him that he cannot assess him direct but must assess some one else for him, however ignorant of the formers various sources of income the latter may be. Yet that would be the precise result if the Allahabad view is correct-for a willing assessee the Income-tax Officer would have to get hold of some one else though he might be completely unaware of the non-resident assessees means of income.

16. I must point out that we are not concerned in this case with the question whether an Income-tax Officer in British India is competent to serve notice under the Income-tax Act on a non-resident while he is out of British India and what are the consequences of non-compliance of such notices. We are dealing with a case where a notice in fact not only been accepted but also gracefully complied with.

17. Before I take leave of this case I must mention that if this case which involves a substantial revenue is being decided in favour of the Crown it is solely due to the appellants own willing attitude in the earlier stages of the case. As far as the Department is concerned, there has been no dearth of irregularities.

> The case had been transfered to the respondent with the direction that he should appoint an agent for the assessee in accordance with the decision of the Allahabad High Court in the case of the Maharaja of Benares. Not the slightest attention seems to have been paid by the respondent to this direction by the Commissioner of the Punjab and N.W.F. and Delhi Provinces. Throughout the protracted proceedings and even after he was apprised of the death of Maharaja Bhupindra Singh he did not give a moments thought to the legal question how the income of a dead man has to be assessed under the law. The way in which he has framed his order of assessment hs provided ground for the argument that he has in fact assessed the deceased Maharaja through an official of the State who is neither his executor or administrator nor his legal representative. Though the case was one for the application of Section 34, not only did he not issue any notice under that section in the usual form but he does not refer to that section at all in any part of the proceedings. The Appellate Assistant Commissioner by permitting several additional grounds of appeal converted a case of admitted liability into a case of contested liability. However wide a discretion an appellate authority may have a permitting new grounds of appeal to be taken before him, it is, in my opinion, not a judicious exercise of that discretion to convert an honest straightforward case into an onslaught of technicalities on the officer making the originl order to which not the slightest reference was made before him. If, therefore, I have ultimately held these proceedings to be regular, I must say, the finding is solely based on the framework of legality that is furnished in this case by the assessees own

conduct and admissions.

18. For the reasons given I would dismiss the appeal.

GUNDIL, Judicial Member. - I agree and have nothing to add. P. N. S. Aiyar, Accountant Member. - I agree."On the application of the assessee under Section 66(1) of the Indian Income-tax Act (XI of 1922) the Appellate Tribunl (consisting of M. Munir, President, and A. L. SAHGAL, Accountant member), referred the case to the Bombay High Court.

Beaumont, C.J.

This is a reference made by the Income-tax Appellate XDAB Tribunal, Bombay, under Section 66(1) of the Indian Income Tax Act, raising XDAC three questions. The questions all arise from certain technical defects XDAD alleged to exist in the order of assessment for the year, 1937-38 of the late XDAE Maharaja of Patiala. The defects suggested are, first, that the terms of XDAF Section 24B of the Indian Income-tax Act were not complied with; secondly, that there was no notice under Section 34; and thirdly that no statutory agent had been appointed under Section 43. The material facts are these.The late Maharaja of Patiala died on March 23, 1938, and the papers relating to the assessment on him were sent by the Commissioner of Income - tax of the Punjab to the commissioner of Income-tax, Bombay, after the date of the Maharajas death because of the decision of the Allahabad High Court, to which I will refer presently, which suggested that the estate of the late Maharaja could not be assessed unless a statutory agent were appointed under Section 43 of the Indian Income-tax Act. After the papers reached Bombay, some correspondence took place between the Income-tax O fficer, Bombay, and a gentleman who is described as the Foreign Minister of the Patiala State, and eventually, in November, 1938, two notices were served on His Highness the Maharaja of Patiala, which in terms were issued under Section 22(2) of the Indian Income-tax Act, one for the year 1937, and the other for the year 1938, requiring the Maharaja (that is, the present Maharaja) to make a return of his income. Returns were made of the late Maharajas income, and on September 16, 1940, assessment orders for the respective years 1937-38 and 1938-39 were passed. In those orders the name of the assessee is stated to be "His Highness Maharajadhiraj Sir Bhupindra Singh," that is, the late Maharaja, and subsequently notices to pay were served on the Foreign Minister on behalf of the late Maharaja in the case of one notice, and of the present Maharaja in the case of the other.I will deal first with the third question, which was first argued on behalf of the commissioner. It is in these terms :

"Whether in the circumstances found by the tribunal in its order under Section 33, the assessment is invalid and can be called in question by the assessee on the ground that it was made without appointing an agent under section 43 ?"In view of the conflict which exist between High Courts

in Indian on the question whether under the Act, before the amendment of Section 42 made in 1939, a foreign resident could be assessed direct upon income chargeable to income-tax under Section 4(1) and Section 42 without appointing an agent under section 43, I shall consider such question, in the first instance, without reference to the Indian cases.Under Section 4(1) of the Indian Income-tax Act before the amendment of 1939 it is provided :

> "Save as hereinafter provided, this act shall apply to all income, profits or gains, as described or comprised in Section 6, from whatever source derived, accruing or arising, or received in British India or deemed under the provisions of this Act to accrue, or arise, or to be received in British India."

That sub-section, it will be noticed, applies to persons wherever resident, provided the income is derived, or accrues, or arises or is received in British India, or is deemed under the provisions of the Act to accrue or arise, or to be received in British India. Then Section 6 provides that "the following heads of income, profits and gains shall be chargeable to income-tax in the manner hereinafter appearing." Then various heads are stated, including "business". Then Section 22 and 23 contain provisions for calling for returns and making assessments which apply to income falling within Section 4(1), whether of a resident or non-resident.Then we come to Section 42, which provides :-

> "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."

Then Section 43 enables the Income-tax Officer to appoint an agent for the purposes of Section 42. The first part of Section 42 appears to be a charging section, when read in connection with Section 4, because Section 4 makes taxable income which is deemed to accrue or arise, or to be received in British India, and Section 42 provides that certain income of a foreign resident shall be deemed to airs or accrue with in British India. That part of Section 42 is a charging section. But the provisions for charging income upon an agent appear to me to be mere machinery, and that was so held by the Calcutta High Court in Rogers Pratt Shellac & Co. v. Secretary of State for India.There is no doubt, reading Section 42 by itself, that at first sight there is a great deal to be said for the view that the only way in which income brought in to tax by that section can be charged in through an agent of the person entitled to it he income, because the words are mandatory and provide that the income referred to shall be chargeable to income-tax in the name of the agent of any such persons, and such agent shall be deemed to be the assessee for the

purposes of the Act.But I think the principle which has been established by certain English cases, Tischler & Co. v. Apthorpe and Werle & Co. v. Col quhoun, , approved by the House Lords in Whiteny v. Inland Revenue Commissioners" applies to the construction of Section 42. The English cases were decided no Section 41 of the English Income-tax act of 1842, and, no doubt, there are distinctions between the wording of that section and the wording of Section 42 and, of course, the whole scheme of the English Income-tax Act is very different from the scheme of the Indian Income-tax Act. I would not rely on English cases for the purpose of construing particular words in the Indian Act, but I think the cases are important as establishing a general principle. The only substantial deferences, as establishing a general principle. The only substantial differences, was far as I can see, between Section 41 of the English Act and Section 42 of the Indian Act, are that Section 41 of makes the non-resident chargeable in the name of he agent, whereas the Indian Act makes the income of the non-resident chargeable through the agent. Furthermore, the English Act say in so many words that the agent shall be deemed to be, for all the purposes of the Act, the assessee although the English Act does provide that the agent is to perform the functions imposed upon an assessee by the Act. But admitting those distinctions, Section 41 of the English Act is a machinery section, and its terms are mandatory, and notwithstanding that, the English Judges, whilst admitting as I have admitted, that at first sight there is a good deal in support of the view that only the agent can be assessed, held that regard must be had to the object of the section, and that in authorising the assessment in the name of an agent the Legislature was giving a particular and additional power designed to met an anticipated difficulty. The Legislature was enabling a foreign resident to be charged to income-tax, and the obvious difficulty, which was likely to arise, was that there would be no means of making the assessment, or of enforcing payment, because the foreign resident could not be got at. To get waver that difficulty the Legislature provided that an agent within the jurisdiction might be assessed and charged to the tax. In the same way the machinery provided by Section 42 of the Indian Act, in my opinion, provides a special and additional power to meet a particular difficulty, and is not intended, and in the absence of clear words of prohibition, should not be construed, to take away existing powers. If the anticipated difficulty of assessing a non resident does not arise, there seems no reason for insisting that the special means of assessment through an agent must be adopted. Suppose a case in which a non-resident, aware of the fact that he has derived income from a business connection in Bombay, and realising that he is liable to be taxed under Section 4 and 42, but anxious to avoid the interruption of an agent, makes an offer to the income-tax officer in Bombay that if the officer will tax him direct, he will fill up the necessary forms, attend the office of the Income-tax officer in Bombay, and produce any book that the officer may require. If the officer were the accept that offer and make the assessment direct on the assessee under the provisions of Section 22 and 23, could it seriously be suggested that the assessment was bad, and that the Income-tax officer was bound to assess through the medium of an agent whom neither he

no the assessee desired to introduce ? That would be a most unreasonable construction to put on the Act, and is not one I am prepared to adopt, unless obliged to do so by clear language. The mandatory terms of the machinery portion of Section 42 present no difficult when once it is reallised that such machinery is additional to the ordinary machinery. If the additional machinery is adopted, its terms must be followed, but it need not be adopted at all.With regard to the authorities in India, the High Court of Madras as long ago the year 1921 in Chief Commissioner of Income-tax v. Bhanjee Ramjee & Co., held that a foreign resident being assessed under Section 42, or rather under the corresponding section of the Income-tax Act of 1918 which applied in that case, could be assessed without the interposition of an agent. That is a direct authority on this point. In commissioner of Income-tax, Bombay v. National Mutual Association of Australasia, Ltd., the question came before a bench of this court of which I was a member. The question we had to consider was whether the Income-tax Officer had sufficient data to noble him to assess the assessee, who was an Insurance Company resident in Australia, without having racourse to a particular rule. The reference made by the Commissioner to this Court dealt only with the assessment under Section 4(1), that is to say, the income had been assessed under Section 4(1) without introducing Section 42. But on the reference the Advocate-General argued that, even if there were sufficient data to enable an assessment to be made under Section 4(1), there was other income which could be assessed under Section 42, and that in respect of that income there was no sufficient data. This Court accepted that argument, and held that there was income of the foreign resident assessable under section 42 in respect of which no sufficient data were supplied, and that was an essential part of our decision, because we thought that in respect of the income assessable under section 4(1) the data were sufficient. It was argued then what no assessment could be made under Section 42, because no agent had been appointed under Section 43, and on that question we followed th e decision of the Madras High Court, and held that an assessment could be made under Section 42 without the interposition of an agent. I myself in my judgment merely noted the decision and followed it with out expressing agreement or disagreement, and it is may practice in construing an all - India statute to follow a decision of another High Court, which has not been dissented from. Mr. Justice Rangnekar expressed agreement with the decision. I may mention that that case subsequently went to the Privy Council, and the Privy Council held that the question under Section 42, not having been raised by he Commissioner, ought not to have been dealt with, and they declined to go into that question. So that, their decision leaves the decision of this Court, so far as it relates to the construction of Section 42, untouched. That was how the matter stood until the year 1938, when the matter came beore the Allahabad high Court in Maharaja of Benares v. Commissioner of Income-tax, and the learned judges refused to follow the rulings of the Madras and Bombay High Courts, and held that, even assuming that Section 42 was a machinery section, the provisions of the section made it compulsory to make an assessment not he non-resident under that section

only through an agent. I have carefully reconsidered the question in the light of the reasoning of the Allahabad High Court, and for the reasons which I have given, I do not agree with the view of that court, which, in my opinion, took too superficial a view of Section 42. Therefore, I think the answer to the third question is that the assessment is not invalid. It may be noticed that the unfortunate position introduced by the Allahabad decision, which results in some construction being put upon Section 42 in the United Provinces and a different one in Madras and Bombay, is only temporary, because under the amended Section 42 an assessment can be made in the name of the assessee or of the agent.I will deal next with the second question, which is :

> "Whether in the circumstances found by the Tribunal in is order under Section 33, the assessment was validly made under Section 34 of the Act ?"

Now, as I have already pointed out in stating the facts, notices were served on the Maharaja of Patiala under Section 22(2) expressly, one notice in respect of the year 1937-38, and another in respect of the year 1938-39. The notice for the year 1937-38, not having been served until November 1931, was beyond time, as is admitted by the Tribunal; but the Tribunal think that being beyond time that notice can be construed as a notice under Section 34, for which it was within time, although unquestionably the notice in precisely the same form and served at the same time for 1938-39 cannot be construed as a notice under Section 34, partly because the year had not expired in that case, and partly because in the year 1938-39 there was a loss, and, therefore, there was no question that income had escaped assessment in that year. Now, I agree with the Tribunal that it is not necessary that a notice under Section 34 should assume any particular form, but it must give notice to the assessee that in the opinion of the Income-tax Officer some income has escaped assessment, and, as was held by the Privy Council in a recent case, Commissioner of Income-tax, Bengal v. Mahaliram Ramjidas in order to justify a notice under Section 34, the Income-tax Officer must be bona fide of opinion that some income has escaped assessment. It is perfectly plain from the covering letter which accompanied the notices under Section 22(2), that in point of fact the Income-tax Officer knew nothing whatever about the matter, and did not consider the question whether any income had escaped assessment, and he had no more reason to believe that income hand escaped assessment for 1937-38 than for 1938-39. For aught he knew both years might have resulted in a loss.Mr. Setalvad argues on behalf of the Commissioner that we can not takes that view, because the Tribunal have found, as a fact, that the income tax Officer had reason to believe that the income for the year had escaped assessment. That finding high be challenged on the ground that there was no evidence to support it; but, apart from that I am certainly not disposed to hold as a matter of law that, when a notice is given in terms under Section 22(2), which subsequently turns not be a bad notice under that section because it is out of time, it can be held automatically to be a good notice under Section, 34 although there is no reason of supposing that the Income-tax Officer ever considered the

question under Section 34. It seems to me quite clear that the notice in this case was to a notice under Section 34 and I decline to treat it as such. The second question, therefore, must be answered in the negative.

In view of that answer, the assessment is illegal, and the first question is really of only academic interest. The first question is :

> "Whether in the circumstance found by the Tribunal in its order under Section 33, the assessment was not made in accordance with the provisions of Section 24B of the Indian Income-tax Act and is for that reason invalid ?"

I observe to passing, with regret, that it seems from the wording of this question and others which have been submitted to us by the Tribunal that the Tribunal are adopting the practice followed by sobered date judges of tracing issues in the negative, a practice which I have often condemned as inconvenient. A simple question "Is the assessment valid" can be answered "yes" or "No". If the question be "Is the assessment not valid" or "not invalid." ? a simple answer either in the affirmative or see what is meant. The question here is whether the assessment was not made in accordance with the provisions of Section 24B. If the question is answered in the negative, thus introducing a double negative, would it mean that the assessment was made in accordance with the section ? I hope that the Tribunal will abandon this practice of stating questions in the negative before it becomes a habit, however, I take the question an being whether the assessment was made in accordance with the provisions of Section 24B. Now, Section 24B deals with the assessment of a deceased person. In this case the person to be assess notice under section 22, and, therefore, the provisions of Section 24B(2) apply, and the Income-tax officer was entitled to serve on the executor, administrator or other legal representative of the deceased Maharaja a notice under section 22(2) or under Section 34 as the case might be, and then proceed to assess the total income of the deceased Maharaja as if such executor, administrator or other legal representative were the assessee. As observed by the president of the Tribunal in his judgment, the Income-tax Officer made me attempt to observe the provisions of that sub-section. He served the notice on the present Maharaja, without showing in what capacity. But the Tribunal have found, as fact, that the present Maharaja is the obviously have been better so to describe him in the notice, I am not prepared to say that the notice was bad, if it was that it was served in that capacity. It should have been stated that it was served on the legal representative of the late Maharaja, and that the return required was of the late Maharajas income. It was not so stated, and the present Maharaja himself may have had table in come for the years in question; but I thin there is a good deal of force in the contention of the Tribunal that any irregularities in this respect were waived by the Maharaja, because returns of the late Maharajas income were made by the Foreign Minister on behalf of the Maharahja, and then subsequently correction were made in the assessment the instance of the Maharaja. There is no doubt that the present Maharaja knew

perfectly well that what was being assessed was the income his predecessor.Then when one comes to the actual assessment, it is made o n the deceased Maharaja. It is, of course, wholly irregular to assess a deceased person. The assessment should have been made on the legal representative in respect of the income of the deceased. However, there again, the Patiala authorities seem to have accepted the view that it was an assessment made on the agent in respect of the income of the deceased person, because they have actually appealed against the assessment, and if the assessment was an assessment on a dead man, it was obviously morality, and there is noting to appeal from.On the whole, though I certainly do not wish to give any count name e to the idea that the provisions of Section 24B need not be strictly complied with, in the particular facts of this case, and having regard to the facts also that the question is merely of academic interest, having regard to the answer to the second question, I am prepared to say that the assessment, though not strictly made in accordance with the provisions of Section 24B, is in the circumstances valid so far as that section is concerned.

Kania, J.

In this matter the accounting year is 1936-37 and the assessment year is 1937-38. The questions referred to us arise out of the income of the late Maharaja Sir Bhupindra Singh of Patiala. From the facts now on record it appears that His Highness had done certain business in shares and had also recovered certain dividend in respect of shares held in British India, in particular, in Bombay. The late Maharaja died on March 23,1938. The late Maharaja had some properties in the Punjab and in respect of the income from the same the Income-tax Officer, Central Circle, Lahore, was making assessment orders. By virtue of a decision of the Allahabad High Court in Maharaja of Benares v. Commissioner of Income-tax, the Income-tax Officer, Central Circle, Lahore, thought that it was improper for him to make the assessment order as according to that judgment he had no jurisdiction to do so. He, therefore, referred the matter to his superior officer, the Commissioner of Income-tax, Punjab and N.W.F. and Delhi Provinces. He point out that difficulties had arisen because of the decision of the Allahabad Court and requested that as it appeared that the late Maharaja had some income in Bombay, the papers may be sent to Bombay so that an agent may be appointed and the assessment proceedings adopted in Bombay. On that the commissioner of Income-tax, Delhi, sent over the papers to the Commissioner of Income-tax , Bombay Presidency, Sind and Baluchistan, and they were evidently received here on or about November 14, 1938. The Commissioner of Income-tax , Bombay, sent the file to the senior Income-tax Officer, Bombay, who, on November 23, 1938, wrote the following letter to the "Foreign Minister, His Highnesss Government Patiala" :-

> "I have the honour to state that all the case papers of His Highness the Maharaja of Patiala have been transferred here from Lahore for information and necessary action. It is not easy to discover what has been done hitherto. So, as a start I am sending the usual notices

and bets to request that your will be good enough to let me have the returns of income of His Highness from all sources in British India for the years ended March 31, 1937, and 1938."

Along with that he had sent two printed notices which were headed "under Section 22(2) and Section 38 of the Income-tax Act." They were addressed to "His Hihghness the maharaha of Patiala," and by paragraph 2 the addressee was called upon to send a return of the total income form all sources during the previous year, i.e., twelve months ending March 31, 1937, and in the other notice for twelve months ending March 31, 1938. Two returns signed by the foreign Minister in response to those notice were sent to Bombay. The return for 1937 was blank; the other for 1938-39, had certain figures written against item No. 5, viz., business, trade, commerce, manufacture of dealing in property, shares or securities, etc. At the foot of the first return it was stated "This period also is covered by the attached return" (i.e., the other return). Subsequent correspondence followed in which at the request of the Bombay Income-tax Officer items were disclosed to show what was the income during 1937-38 and what was the income (which in fact was the loss) during 1939-39. Following these, two assessment orders, dated September 10, 1940, were passed. Against the name of the assessee in both of them is written" His Highness Maharaja sir Bhupindra Singh late Maharaja of Patiala." The notice (which is the usual thing printed on the from part) is addressed to the foreign minister on behalf of His Highness the late Maharaja of Patiala.Subsequent representations were made by the Foreign Minister to the Income-tax Officer to reduce the amount assessed on the ground of mistake and an appeal was preferred to the Assistant Commissioner for a further reduction of the amount. In both of these there was a partial success. On October 22, 1940, the Foreign Minister sent the grounds of appeal in the prescribed form in which the raised in effect the three questions which are now before the Court. The matter was first considered by the Tribunal, and in the course of their judgment the Tribunal held that there was gross irregularity in the matter of this assessment, but as in fact substantial justice was done, they recorded their finding against the assessee.The first question is in respect of application of Section 24B. That section gives rise to two considerations : (1) whether the notice required to be served was served on the legal representative of the deceased assessee; and (2) whether the assessment was made on the total income of the Maharaja as such legal representative of the assessee. On the first question on looking at the notice it is clear that it is addressed only to His Highness the Maharaja of Patiala. It does not on its face disclose whether it was intended for the plate Maharaja or for the ruling Maharaja. It does not refer at all to any legal representative of any party. On behalf of the Commissioner it was argued that the section requires that a notice should be served on the legal representative and it was not necessary that on its fact it should be addressed to the legal representative. It was contended that it was therefore sufficient if it was in fact served on the legal representative and was understood by the party receiving it as served on him in that character. I think there is considerable force in that

contention particularly in the percent case as on the facts on record the present Maharaja had not disputed the validity of the notice till the matter finally came before the Tribunal. The second point, however, appears to be more difficult to get over at first sight. The assessment order clearly discloses the name of the late Maharaja Sir Bhupindra Singh as the assessee, and that is certainly bad. But the notice directing payment is addressed to the Foreign Minister and thereafter proceedings were adopted by the Foreign Minister evidently under instruction from the present Maharaja. In the matter of this assessment having regard to all the circumstances, although there is gross irregularity, if other things were against the assessee, on this ground alone I would not have perhaps disturbed the assessment order. I must however put on record my opinion that the issue of the assessment order in the name of the late Maharaja was highly irregular and should not in the ordinary course and circumstances be validated lightly.The second question relates to Section 34 of the Act, and the question is whether the notice given to the Maharaja on November 23, 1938, was in fact a notice under that section. It may be noted that two notices were sent on the same day to the same party. They are on exactly similar printed forms and there is nothing to show as between the two, that one was under Section 22(2) as appears printed on the top of the notice, while the other with the same things printed on the top of the notice was served as a notice under Section 34. I should point out that the two printed notices are correctly the only notices which are issued under the act and the covering letter in this connection which is addressed to the Foreign Minister and not the Maharaja should be disregarded. However if the covering letter is also looked at, it does not assist the Commissioners case. That letter without any distinction between the notices given for the assessment years 1937-38 and 1938-39 calls upon the addressee to send the returns. The commissioners argument is that simply because the notice in respect of the assessment year 1937-38 was sent after the expiry of one year the Court must hold that it was a notice under Section 34. I am not prepared to accept that argument. There is no justification for assuming that a notice which on the top of it states that it was under Section 22(2) and 38 should, because it is served after a year, be treated by the assessee as a notice under Section 34, when the officer issuing the notice had given no indication that it was a notice under Section 34. If the Income-tax Officer porposes to act under Section 34, when the notice is served on him the assessee is entitled to know that the Income-tax Officer is taking steps under that section. That can certainly not be conveyed by a service of a printed notice only headed under Section 22(2) and 38. In my opinion, therefore, on a construction of the words of this printed notice read if necessary along with the covering letter, the Commissioners argument that a notice under Section 34 was served is unsound.Mr. Setalvad relied on certain observations in Jawala Prasad v. Commissioner of Income-tax. In that case the question for the Courts consideration was, "whether, having regard to the fact that Section 34 of the Act requires particulars to be stated in the notice and that he notice is the basis of the proceedings under the said section, the Income-tax Officer was competent in law to go behind the particulars as

specified in the notice." In dealing with the point Costello, J., observed (p .303) :

"Therefore, so long s it brings to the attention of the person to whom it is served the matters referred to be answered or dealt with or the things required to be furnished it is sufficient."From this it was argued that if a notice containing all the particulars under Section 22(2) was served on the assessee, the assessee had notice of what he was required to give by way of information and therefore the X2HBE notice was sufficient. I am unable to read the observations of that learned Judge with such meaning at all. The learned Judge was dealing with the question whether a notice clearly given under Section 34 requiring certain particulars to be given conveyed to the assessee what particulars were called for. The observations are not general, and in my opinion it is wrong to read them in the general sense without reference to the context. In view of this finding the assessment made on the footing of this notice is invalid, and the answer to that question must be as stated in the judgment of the learned Chief Justice.The third question gives rise to a somewhat intricate question of law on which there has been a difference of opinion in India. Section 4 of the Act states what incomes are liable to be assessed. Section 42 (first part) ropes in certain further income of a non-resident, who is liable to be assessed. Then that section (by the second part) provides that the income shall be chargeable to income-tax in the name of the agent of such person and the agent shall be deemed to be for the purposes of the Act the assessee in respect of such income-tax. From these words it is argued on behalf of the assessee that the nonresident assessee is not liable to be taxed directly in any circumstances and it is obligatory on the taxing officer to assess the agent only. In reply to the question, "What happens if there is no agent ?" it is suggested that under Section 43 the taxing officer has jurisdiction to appoint an agent. At first sight there appears to be considerable force in this contention, but a closer scrutiny shows that the contention not correct. We have to construe the section before its amendment in 1939. The first part of Section 42 is a charging section, according to the decisions of all Courts. If one reads that section as an independent section, to put at its highest according to the assessees contention, only for that income the agent would be exclusively taxable. The result therefore would be that in respect of a non-residents income liable to be taxed under Section 4 he himself can be taxed, while in respect of the income covered by the first part of Section 42 the agent alone will be liable to tax. In the normal course such an interpretation should be avoided. If a person is himself available for taxation, it will require a very clear provision of law to hold that although he is present and willing to be taxed, his agent alone should be taxed. In fact that will be taking away from the principal his elementary right, when he is the party who is liable to pay and compelling him to appoint an agent when he may be unwilling to do so all along. The proviso to the section is relied upon as supporting the contention, but in my opinion that argument is unsound. The proviso only deals with the contingency of no fund being found from which the tax could be recovered. In such a case it will be open to the taxing officer to recover the tax from funds which may be subsequently found with in British India belonging to the assessee.As

regards the judicial interpretation of this section the Madras High Court in Chief Commissioner of Income-tax v. Bhanjee Ramjee & Co., held that this section was only a machinery section, to recover tax on income which a non-resident was liable to pay, and it did not exclude the liability of the non-resident himself to be taxed if the taxing officer could reach him. That view was approved by Rangnekar, J., expressly in Commissioner of Income-tax, Bombay v. National Mutual Association of Australasia Ltd. In terms the learned Chief Justice has not recorded his approval but the basis of the decision can be assumed to be the approval of that interpretation. In Rogers Pratt Shellac & Co. v. Secretary of State for India, the later part of the section was considered a machinery to recover the tax. In Maharaja of Benares v. Commissioner of Income-tax, (the decision under which the records of this case were sent over from Lahore to Bombay) the Allahabad High Court, differing from the view of the Madras High Court, held that in respect of non-residents, under Section 42 the agent alone had to be taxed and they relied in particular on the concluding words of Section 42. This Court has repeatedly affirmed that in the matter of interpretation of an All-India Act if other High Courts have a adopted a particular construction it is desirable to adopt that even if the Court had some doubt about its correctness. But here there is a divergence of view between the Allahabad and Madras High Courts. This Court has adopted the interpretation of the Madras High Courts in Commissioner of Income-tax, Bombay v. National Mutual Association of Australasia Ltd.Apart from the decisions I think that the interpretation put on the words of this section by the Madras High Court and expressly adopted by Rangnekar, J., is correct. Although considerable stress was laid in the course of argument advanced on behalf of the assessee on the distinction between the English Act and the Indian Act, and it was pointed out that the schemes of the two Acts were different, and that there were no words in the section of the English Act corresponding to the concluding words in Section 42, it seems to me that far stronger words are required to deprive the taxing authorities of their rights to resort to the ordinary machinery of taxing which is permissible to be adopted in respect of the income under Section 4. As pointed out in the cases referred to by the learned Chief Justice, the English Courts for over forty years had affirmed that the corresponding section in the English Act was a machinery section. It is also held that it is an enabling section and gives an additional power to the Crown to collect the assessment. It is not a disability as contended by the assessee in this case. That principle of construction, irrespective of the actual words used, appears to be sound and I do not think that by the use of words differently placed in this section that principle is given a go-by by the Indian Legislature in framing Section 42. I, therefore, respectfully differ from the view of the Allahabad High Court and adopt the interpretation put on the construction of Section 42 as noted by the Madras and the Calcutta High Courts and accepted by Rangnekar, J. It may be noticed that the amended section adopts this view. The answer to the third question therefore will be as stated in the judgment of the learned Chief Justice.PER CURIAM. - With regard to costs, the Tribunal has raised three questions, one of which, and the one no doubt which

occupied most time, is answered in favour of the Commissioner, another of which is answered against him, and the third of which is answered in his favour, though with considerable criticism as to the conduct of his department. The net result is that the assessee succeeds, because on the answer to the one question in his favour the assessment will have to be set aside.In dealing with the costs of a reference made by the Tribunal, we must have regard to the number of questions raised, their complexity, the evidence involved, and the conduct of the parties. The ultimate effect of the answers is not our concern. In the present case we cannot ignore the fact that two of the questions raised were necessitated by the conduct of the Income-tax Officer in ignoring the terms of the Act, and though the Commissioner has succeeded on two questions out of three, we think it right to make no order as to costs; each side to pay its own costs.

Reference answered accordingly.