

# **BOMBAY HIGH COURT**

Commissioner of Income-Tax

Vs.

Agarwal and Co.

Income-tax Ref. Nos. 24 and 27 of 1951

(Chagla, C.J. and Tendolkar, J.)

12.09.1951

## **JUDGMENT**

1. Facts of the case are given in the judgment. The following question was referred to the High Court at the instance of E. D. Sassoon and Co. Ltd. :

"Whether in the circumstances of the case, was the managing agency commission liable to be apportioned between the assessee company and the assignee?"

The Commissioner of Income-tax referred the same question which arose out of the facts stated above, namely the question :

"Whether in the circumstances of the case, was the managing agency commission liable to be apportioned between the assessee firm and the assignor?"

Both these references were heard together.

### **Chagla, C.J.**

These two references raise the same question of law which arises out of an assignment made by the managing agents of the E. D. Sassoon United Mills Ltd. in favor of the assessee company, and the question relates to the managing agency commission received by the assessee company.

2. The facts briefly are that Sir Edward Sassoon and some others constituted a firm, and as a firm they were appointed the managing agents of the E. D. Sassoon United Mills Ltd. on February 24, 1920. This firm at a later date constituted itself into a private limited company, and, therefore, a fresh agency agreement was arrived at between the Mills and the limited company on October 2, 1934. This agreement was substantially on the same terms as the agreement of February 24,

1920. There were negotiations for the transfer of the managing agency between the private limited company, namely, Messrs. E. D. Sassoon and Co. Ltd., and one Mr. Tansukhrai M. Karandia, a partner of the assessee firm, and the terms of the transfer of the agency were agreed upon in a letter dated September 3, 1943, written by E. D. Sassoon and Co. Ltd. to Mr. Tansukhrai. In this agreement, the transaction which was to be entered into was set out and it was provided that, in the event of this transaction being completed in its entirety, the assessee firm would be entitled to receive the commission payable by the Mills under the managing agency agreement on the profits for the calendar year 1943. E. D. Sassoon and Co. Ltd. assigned the managing agency under a deed dated January 26, 1945, but the managing agency itself changed hands from December 1, 1943. The managing agency commission for the year 1943 amounted to Rs. 27,94,504, and this amount was paid to the assessee firm in 1944. The question that arises is whether the firm of Messrs. Agarwal and Co., to whom the managing agency was transferred, is liable to pay tax on the whole of this agency commission, namely, Rs. 27,94,504, or whether the tax is payable both by Messrs. Agarwal and Co. and by E. D. Sassoon and Co. Ltd. on a proper apportionment being made between the firm and the limited company of the amount of Rs. 27,94,504 received by Messrs. Agarwal and Co.

3. Now, turning to the managing agency agreement between Sir Edward Sassoon and others and the company, dated February 24, 1920, the relevant provisions are that the period of the agency agreement was fixed at 30 years and a commission of 7-1/2 per cent. per annum on the annual net profits of the company, after making all proper and necessary allowances and deductions from revenue for working expenses chargeable against profits, was fixed as the remuneration of the firm as managing agents. But it was provided that if, in any year, no such commission was earned or if it fell short of Rs. 1,20,000, the company would pay to the firm a sum sufficient to make up the minimum remuneration of Rs. 1,20,000 per annum on account of such commission. In calculating the net profits of the company, the agreement provided that no reduction should be made with regard to payment of taxes, etc. Then it was provided that the commission shall be due to the said firm yearly on the 31st March in each and every year during the continuance of the agreement and shall be payable and be paid immediately after the annual accounts of the company have been passed by the shareholders. Clause 10 of the agreement empowered the firm to assign the office of managing agents, and Clause 11 empowered the firm to assign the whole or any portion of their earnings under the agreement without thereby in any way affecting their appointment as such agents. By the deed of assignment dated January 26, 1945. E. D. Sassoon and Co. Ltd. assigned to Agarwal and Co. all the rights and benefits as managing agents under the agreement dated February 24, 1920. Now, the contention put forward by Mr. Joshi on behalf of the Department is that under the managing agency agreement, no commission arises or accrues to the managing agents till the end of the year and on the ascertainment of the net profits. It is urged that the income of the managing agents is dependent upon a particular event, and that event is the ascertainment of profits at the end of every calendar year, and till the calendar year has expired and till the net profits have been ascertained, no income whatever has been earned by the managing agents. It is, therefore, submitted that the sum of Rs. 27 lacs and odd received by Agarwal and Co. constituted wholly the income of that firm, and that, as they were appointed the

managing agents from December 1, 1943, the managing agency commission accrued to them only on December 31, 1943, when the profits were ascertained, and it was determined that the commission was payable to them in a particular sum. It is further urged that, when the managing agency agreement was transferred by E. D. Sassoon and Co. Ltd. on December 1, 1943, it was impossible to predicate that any commission had been earned at all, because, even though the Mills might have made a profit for a period of 11 months, in the twelfth month there might have been heavy losses which would have had to be set off against the profits and no commission whatever would have been due to the managing agents except the minimum guaranteed under the managing agency agreement. It is, therefore, strongly urged that the income which is sought to be taxed by the Department accrued only at the end of the calendar year, and, therefore, Agarwal and Co. should be taxed in respect of the whole of that income. Now, there is an obvious fallacy in the argument advanced by Mr. Joshi. In order to attract the provisions of the Income-tax Act, and in order to levy income-tax, it is not enough to enquire when a particular income accrues. What is more important, and what is more pertinent, is to enquire whose income it is which is sought to be taxed. Assuming that this particular income accrued on the 31st of December and till the 31st of December there was nothing earned, even so, when the income does accrue, the question still remains to be answered as to whose income it is which has accrued on December 31, 1943. The fact that the income was received by Agarwal and Co., to my mind, is entirely irrelevant. Receipt by itself is not sufficient to attract tax; it is only receipt as "income" which can attract tax. And, therefore, what we have to decide is whether, when Agarwal and Co. received Rs. 27,94,504 from the company, they received it as their income, or they received it as someone else's income, or they received it partly as their income and partly as the income of someone else. It is indisputable that, if they received the sum of Rs. 27,94,504 not as their income but as someone else's income, then the mere fact that they received it is not sufficient to bring them within the ambit of the Income-tax Act.

Another proposition which should also seem to me to be indisputable is that, if an income is assigned by a person to another, in respect of that income it is not the assignee who is liable to pay tax but the assignor. The reason again is obvious. The assignee receives the income not by reason of the fact that it is his income, but he receives it by virtue of the assignment. His title to the income arises not by reason of the fact he has earned it, but by reason of the fact that there is an assignment in his favour. If these principles are borne in mind, then the solution of the problem which faces us in this reference should not be very difficult.

4. Now, E. D. Sassoon and Co. Ltd. worked as the managing agents of the E. D. Sassoon United Mills for a period of 11 months; Agarwal and Co. worked as the managing agents for one month. The contract of managing agency was a contract of employment by which the E. D. Sassoon United Mills employed E. D. Sassoon and Co. Ltd. as their managing agents, and under that contract of employment E. D. Sassoon and Co. Ltd. were under an obligation to render certain services to the Mills. It is impossible, in my opinion, to say that, when the commission was paid to Agarwal and Co., in respect of the calendar year 1943, no part of it was earned by E. D. Sassoon and Co. Ltd., although they had served as the managing agents for 11 months. The

commission was the result of the services rendered by the managing agents and was brought about by the work done by them which had resulted ultimately in the profits from which the commission had to be ascertained. The mere fact that the ascertainment of the quantum of the income was to be postponed till the 31st of December or the mere fact that the income was not to accrue till the 31st of December every year, does not necessarily lead to the conclusion that the income which was ultimately ascertained and which ultimately accrued was the income of the person to whom that income accrued. It is quite possible that an income of A may, under certain circumstances, accrue to B; but the mere fact that it accrues to B does not make it the income of B : it still remains the income of A. As I said, it may accrue to B or it may even be received by B; but still, for the purpose of the Income-tax Act, the pertinent question that has got to be asked is as to whose income it is. The difficulties which have been suggested by Sir Jamshedji are really difficulties more about apportionment than as to the principle that we have to apply to this case. It may be that, in a particular case, it may be very difficult to apportion a managing agency commission between two managing agents who have worked for that year. In this particular case, fortunately, the Tribunal has pointed out that there is no difficulty, and they have apportioned it rateably. But the difficulty with regard to apportionment cannot, and should not, preclude us from accepting and giving effect to the correct principle which has been accepted by the Tribunal.

5. Now, the authorities relied on by Mr. Joshi - and I shall presently deal with them briefly - are all authorities which deal with either the place of accrual or the time of accrual. In this case, we are not concerned with either: there is no dispute as to either the place or the time of accrual of this income. But what is in dispute - and that is the only point really which is material - is by whom the income was earned.

Now, the first case relied on by Mr. Joshi is an unreported decision of this Court in '*The Commissioner Of Excess Profits Tax v. P. N. Mehta and Sons*<sup>1</sup>', In that case, the contention of the Department was that the commission accrued from time to time and it should be ascertained as accruing periodically. That contention was rejected by us, and we held that the commission accrued at the end of the calendar year. There also the managing agents were entitled to commission at the rate of 10 per cent. of the net annual profits made by the company. Now, that case clearly laid down the principle as to the time when the commission accrued to the managing agents. The other case relied upon is '*Salt and Industries Agencies v. Commissioner Op Income-Tax*<sup>2</sup>', There we were considering the place where the profits accrued, and the test we applied in order to determine where the profits of a company accrued or arose was to find out where the actual business of the company was done which yielded the profits which were sought to be taxed. and the question that fell to be determined was whether a certain sum representing the assessee's commission was attributable to the Salt Works where the business of the company was carried on at Kandala outside British India, or whether it arose in British India. We held that the profits arose in British India because we came to the conclusion that only after the accounts were submitted at the head office in Bombay and the profits were determined could it be said that the right to receive commission at the rate specified in the managing agency agreement had arisen

and the managing agents had become entitled to a certain specified commission. The third case relied on by Mr. Joshi is again a judgment of this Court in '*Hiralal Kalyanmal v. Commissioner Of Income-Tax, Bombay*<sup>3</sup>', That case also dealt with the place of accrual and the question that fell to be considered by Beaumont, C. J., and Mr. Justice Kania, as he then was, was whether the commission agency accrued where the sale took place or where the sale proceeds were received. The Court came to the conclusion that the commission agency accrued where the sale took place, because the sales were the source from which the commission was earned. The next case on which Mr. Joshi relied was '*Rownson Drew and Clydesdale, Ltd. v. The Commissioners Of Inland Revenue*<sup>4</sup>', In that case, Mr. Justice Rowlatt, at page 604, was dealing with two specific sums to which the assessee company was entitled under an agreement with the Ministry of Munitions, and those two sums were really in the nature of a solatium for any shortage of the turnover; and, with respect, Mr. Justice Rowlatt

<sup>1</sup> ITR No. 19 of 1950 (Bom)

<sup>3</sup>45 Bom LR 115.

<sup>2</sup>52 Bom LR 84

<sup>4</sup>(1931) 16 Tax Cas 595

rightly held that these two sums cannot be treated as earned rateably over the whole period of the agreement. Now, in this case, nothing was to be done by the assessee company in order to earn these two sums; all that had to be done was that a certain shortage or deficit was to be discovered and on that a certain solatium was permissible to the assessee company. This is entirely different from the case we have before us, where the managing agents, in order to earn the commission which was to be ascertained at the end of the calendar year, had to earn it by means of working as agents every day of the calendar year. Sir Jamshedji has strongly relied upon a passage in this judgment, where Mr. Justice Rowlatt reproduces the argument of Sir Patrick Hastings and considers his answer to be conclusive. What Sir Patrick Hastings said about these sums was that it was not accruing, but you had to wait until the last moment and see what has happened, and that it comes to birth at that moment and it is not susceptible of apportionment over a period. Sir Jamshedji says that these remarks apply to the facts of this case, because you have got to wait till the 31st December and see what has happened, and it is only on the 31st of December that the commission, as it were, comes to birth. That may be so, but Sir Patrick Hastings does not tell us in his remarks as to whose commission it is when the commission comes to birth, or who is the father of the commission. In this case, the parenthood of the commission must be attributed both to E. D. Sassoon and Co. Ltd., and to Agarwal and Co. Sir Jamshedji wants to throw the credit of the parenthood entirely on Agarwal and Co., which I do not think is justified. Mr. Palkhiwalla relied on an English case in '*Parkins v. Warwick*', (*H. M. Inspector of Taxes*<sup>5</sup>), which clearly brings out the distinction between the income earned by A, the income assigned to B, and the assigned income being received by B; and the person who was held liable to tax was A and not B to whom the income was assigned.

6. Now, in this case, it must be borne in mind that what was assigned for a good consideration by E. D. Sassoon and Co. Ltd., was all the rights and benefits under the managing agency. And, clearly, one of the rights which E. D. Sassoon and Co. Ltd., had was to receive the managing agency commission when it accrued on December 31. In order that it should accrue, they had already worked for 11 months and they transferred the right and the obligation of managing

agents to the assignees for the remaining period of one month. Therefore, the consideration of Rs. 57,80,000 paid by Agarwal and Co., obviously and clearly included the right to receive this commission when it was ascertained and when it accrued at the end of the calendar year. Therefore, this is a clear case of the assignment by E. D. Sassoon and Co. Ltd., of part of the income which they had already earned by working as managing agents for 11 months. When the income did accrue and was paid to Agarwal and Co., the question then fell to be determined as to how the income should be apportioned between the two managing agents : one who had worked for 11 months, and the other who had worked for 1 month. But, in my opinion, it is wholly erroneous to say that the income was brought about or was earned only by Agarwal and Co., and that E. D. Sassoon and Co. Ltd., had nothing whatever to do with the production of that income.

7. We would, therefore, answer the question submitted to us in both the questions raised in the two references, which are identical, in the affirmative.

8. In Reference No. 24, the Commissioner to pay the costs; and in Reference No. 27, the assessee to pay the costs.  
<sup>5</sup>(1943) 25 Tax Cas 419

Answers in the affirmative.