BOMBAY HIGH COURT

Caltex (India) Ltd

Vs.

Commissioner of Income-Tax

Income-tax Ref. No. 32 of 1951

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

18.09.1951

JUDGMENT

Chagla, C.J.

1. The California Texas Oil Company Ltd., was treated as a non-resident company for the purposes of the Indian Income-tax Act, 1922, and assessed through its statutory agent, Caltex (India), Ltd., under Section 43 of the Act for the assessment years 1943-44 to 1947-48, the accounting years being 1942 to 1946. The India Company as well as the California Company were incorporated in the Bahama Islands. The California Company held 100 per cent. of the shares of the India Company either directly or through its nominees. The California Company was supplying oil to the India Company during the relevant accounting years. The California Company was not at any time a producing company, but functioned as a distributing company for the Bahrein Petroleum Company and other associated producing companies. The California Company discontinued supplying oil to the India Company as from 1-1-1947. The California Company also made payments of staff leave salaries when drawn in the United States of America and arranged for the purchase of equipments, etc., from the United States of America, on behalf of the India Company. The India Company dealt in petroleum products making purchases from California Companies and selling those products in India. The India Company paid dividends to the California Company in New York. The dividends though declared and paid in New York were paid out of the profits of the company earned from its business carried on in British India. The dividend income was assessed by the Income-tax Officer as falling within the purview of Section 4 (1) (c) read with Explanation 3 of the Act.

The following questions of law were referred to the High Court :

> (1) Whether the provisions contained in Expln. 3 of Section 4 (1) (c) Income-tax Act, 1922, are ultra vires the Indian Legislature?

(2) Whether on the facts and in the circumstances of the case, the India Company can be legally appointed as the agent of the California Texas Oil Co., Ltd., under Section 43, Income tax Act, 1922, for each of the five assessment years?
(3) Whether the dividend income of the California Company is assessable in the hands of the India Company?
(4) Whether the dividend income can be deemed under Section 42 of the Act to accrue to the assessee company in British India?
(5) If the answer to Question No. (3) is in the negative, whether the India Company can be assessed in respect of the dividend income as agents of the California Company?

Chagla, C.J.

The assessee company is incorporated in the Bahama Islands. It deals in petroleum products and sells its produce in India. Another company, the California Texas Oil Co., Ltd., (hereinafter called the California Company), is also incorporated in the Bahama Islands and this company holds all the shares of the assessee company. The assessee company made profits, and out of its profits it declared dividends which were paid to the California Company. These dividends were assessed to tax, and the question that arises on this reference is whether the tax was rightly levied. What was attempted to be done was to assess the dividend income of a non-resident company, and the assessment was not against the non-resident company, but against the assessee company who were declared the statutory agents of the California Company, under Section 43 of the Act. Now, the liability of a non-resident to pay tax is governed by Section 4 (1) (c) which provides for tax to be paid by such person who is not resident in British India during such year in respect of income, profits and gains which accrued or arose or were deemed to accrue or arise to him in British India during such year. Therefore, the California Company would have been liable to tax under this provision with regard to all profits which accrued or arose, or were deemed to accrue or arise to them within the year of account. There is a special provision with regard to dividends, and that provision is to be found in Expln. 3 which provides that a dividend paid without British India shall be deemed to be income accruing and arising in British India to the extent to which it has been paid out of profits subjected to income-tax in British India. Therefore, by reason of this explanation if dividends are paid out of profits which have been subjected to Income-tax in British India, they are put in the same class as profits winch accrue or arise, or are deemed to accrue or arise within the meaning of Section 4 (1) (c). So the department proceeded to tax the California Company in respect of dividends received by them under this provision of the law. The contention of the department was that profits had been made by the assessee company in British India, that these profits had been subjected to tax, and dividends had been paid out of those profits to the California Company, and therefore, that Company was liable to tax.

2. The first contention that has been urged before us by Sir Jamshedji is that the Expln. 3 to Section 4 (1) (c) is ultra vires the Central Legislature. It is contended that this provision of the law does not fall within Entry 54 of List I, Schedule VII, Government of India Act, 1935,

inasmuch as this is not a tax on income as provided in that entry. Now, "tax on income" was construed by the Privy Council in *Wallace Brothers and Co. Ltd. v. Commissioner of Income-tax, Bombay*[1], and the Privy Council laid down that in order to determine which persons can be made liable to tax on income it was necessary to decide that there, was a sufficient territorial connection between the taring country and the person upon whom the tax was levied. The view of the Privy Council was that it was not competent to the Legislature is tax the income of every person who was not a resident

[1]75 Ind App 86 (PC)

within British India. The competency was confined to cases where a nexus was established between the asseseee and the taxing country. In that particular case, where the income of a foreign company was sought to be taxed, the Privy Council came to the conclusion that there was a territorial nexus, and, therefore, the principle that we have to apply in deciding whether Explanation 3 was within the competency of Indian Legislature is to consider whether there is any nexus or territorial connection between the assessee company who is sought to be taxed in respect of its dividend income, and India, which is the country which is seeking to tax the assessee company. Now, Sir Jamshedji points out that Explanation 3 is so widely worded that it is possible not only to tax a dividend declared for the first time by a company out of the profits earned in British India but also it would apply if that company which has received the dividends declared dividends to its own shareholders, and if those shareholders also happen to be limited companies, then the dividends declared by these companies would also fall within the ambit of this explanation. According to Sir Jamshedji either there is no territorial connection at all or the territorial connection is so slender and remote that it must be looked upon as purely illusory.

3. Now, the first question that we have to decide is whether there is any territorial connection at all between the taxing country and a shareholder, who is a foreigner and non-resident in British India, who receives dividends which are paid out of profits made in British India. Sir Jamshedji says that the California Company is registered in the Bahama Islands and the situs of the share is outside British India and, therefore, there is no territorial connection at all between the California, Company and British India. Sir Jamshedji says that the only territorial connection is between the assessee company and and British India because the assessee company earns its profits in British India. But when we come to the dividends, the mere fact that dividends are paid by the assessee out of the profits which it has earned in British India does not constitute the necessary territorial connection between the assessee company and British India which country is taxing the assessee company. In order to decide this question one important fact has got to be borne in mind and that is that the dividend income of the California Company arises out of the very profits which have been made by the assessee company in the British India. The profits made by the assessee company may have changed their complexion in the sense that after they were declared as dividends they were paid to its shareholders. But both the dividends and profits made by the assessee company arise from the same source. Therefore, the question is whether the fact that an income is derived from a particular source situated in a particular country does or does not constitute a territorial nexus between the person receiving the income and the country in which

the source is situated from which the income is derived. Even if the matter was res integra I should have found it difficult to accept Sir Jamshedji's contention that there is no territorial connection between a share-holder who is dependent for his dividend upon the profits made in India and the country where these profits are earned, so as to constitute the necessary territorial connection which has been emphasized by the Privy Council. It may be that the dividends are receivable by the shareholders at the instance of the company after the company has declared part of the profits as payable as dividends; but even so, one must not forget that a shareholder would receive no dividends at all unless the company in which he is a shareholder makes a profit. and if that company makes a profit in a particular country, it is that source which ultimately is productive of the shareholder's dividends. It is not true to say that the source of the dividend is not the profits made in British India. Possession of shares is merely a right which the shareholder has to receive dividends declared by the company, but whether the shareholders receive dividends or not depends upon the company making a profit. But fortunately for us the matter we are considering is not res integra. The high authority of the Federal Court has pronounced a considered and careful opinion on the validity of Explanation 3. The case is that of Governor-General in *Council v. Raleigh Investments Co., Ltd*[2]. There this very question came up for the consideration of the Federal Court. A suit had been filed in the Calcutta High Court for a declaration that the words "or are deemed to accrue or arise" in Section 4 (1) (c), Indian Income tax Act and Explanation 3 to Section 4 (1) were ultra vires the law-making power of the Indian Legislature. In that case the plaintiff was a joint stock company incorporated in England under the English Companies Act. It had no business premises in India but held the bulk of shares in eleven companies which carried on business of manufacturing tobacco and cigarettes in India. Dividends were declared by the Indian companies and were received by the plaintiff company, and the dispute was, as in this case, as to whether the Indian Government had a right to levy income-tax and super-tax on the dividends paid to the company by the Indian companies. The High Court of Calcutta held that Explanation 3 was ultra vires the Indian Legislature. The Governor-General in Council went in appeal' to the Federal Court. The Federal Court considered the competency of the Legislature to enact Explanation 3 and came to the conclusion that the legislation was intra vires. The Federal Court also held that the suit filed by the company was not maintainable by reason of Section 226 of the Government of India Act, 1935, as it related to a matter concerning revenue. Now Sir Jamshedji's contention is that inasmuch as the Federal Court held that the suit filed by the plaintiff company was bad under Section 226 of the Government of India Act, and was liable to be dismissed, any other opinion expressed by the Federal Court is obiter and not binding upon us. Spence, C.J., points out that (p. 246) :

> "As the case has however been fully argued before us on the merits and we have come to the conclusion that the appellant's contention must succeed even on the point as to the legality of the assessment, we proceed to deal with it, as it would be embarrassing to the Government in the administration of the income-tax law if we should at this stage dispose of the suit merely on the preliminary ground."

Therefore, we have here not a passing remark made in the course of a judgment, bat a careful and considered opinion given in order to help the Government in the administration of the income-tax law. It would not, therefore, be open to us (even if we were of a different opinion, which we are not to ignore the decision of the Federal Court on the validity of Explanation 3, and in my opinion, unless that decision has been reversed or a higher Court has taken a different view, the opinion of the Federal Court is binding upon us and we must accept the view taken by that Court that Explanation 3 is intra vires of the Indian Legislature. It may be pointed out that in the judgment of the learned Chief Justice the approach to the question is the same as the approach made by the Privy Council in Wallace Bros.'s case 75 Ind App 86. Sir Jamshedji says that the Federal Court never applied its mind to entry No. 54 in List II to Schedule VII of the Government of India Act. It is true that that entry is not in terms referred to in the judgment, but when you look at the whole of the judgment the question that the Federal Court was considering was whether there was sufficient territorial connection between the

[2](1944) 6 FCR 229

plaintiff company and the taxing country, India, to justify the levying of income-tax on the dividends received by the plaintiff company. The view taken by the Federal Court is that when you have a source from which income is derived in a particular country that source does constitute a sufficient territorial connection, and the learned Chief Justice cites with approval the observation of *Lord Herschell in Colquhoun v. Brooks*[3], where the learned Law Lord says (p. 504) :

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

There, two clear territorial connections are emphasized by the learned Law Lord, one, the residence of the assessee in the taxing country; or, the other, the source from which the income is derived being situated in the taxing country. If either of these two factors are present, then the legislation is a competent legislation. A question is again posed by the learned Chief Justice at (p. 231) :

> " . . . . The company can declare dividends only when it has earned profits: the real question therefore is where has the money out of which the dividends are declared been earned ?"

Sir Jamshedji has quarrelled with an observation made by the learned Chief Justice on the same page following upon the statement I have quoted above viz.,

> "How exactly this question is to be answered when the dividends have passed through more than one company will depend upon the circumstances of each case. No such difficulty arises here."

Sir Jamshedji says that when you construe a section it must be construed objectively and not with reference to the particular facts that arise for the Court's determination in the case; a definite construction must be put upon the section itself and the section according to that interpretation must be applied to all cases that come up before the Court for adjudication. It must be borne in mind that what was urged before the Federal Court, and what is being urged before as, is that the Indian Legislature was not competent to tax dividends received by a nonresident. Both before the Federal Court and before us a specific case has arisen which does not deal the with other case contemplated by Spens, C.J., of dividends passing through more than one companies. It is open to the Court to say that it would put a narrower construction upon Explanation 3 so as to embrace the particular case it is dealing with. Whether another case which is merely contemplated would, or would not, fall within the section so construed, really would not arise for decision. It is unnecessary for us to decide (just as Spens, C.J., refused to decide in the case of Raleighs) whether in a case where dividends have passed through several companies the territorial connection would be sufficient or would have become illusory.

As far as this particular case is concerned, there is a clear territorial connection and it falls within the ambit of Explanation 3. Although it is not necessary, yet I would be prepared to hold that a construction must be placed upon Explanation 3 which would bring this provision of law within: the legislative competence of the Legislature rather than a

[3](1889) 14 AC 493

construction, which would attribute to the Legislature an ignorance of the limits of its own legislative powers. Therefore, if a case of dividends passing through more than one companies results in there being no sufficient territorial connection, then the explanation must be read to mean only the first dividend paid by the company out of the profits made in this country, and, as I have said, before even on the narrower construction of Explanation 3 the present assessee company is liable to tax under the Explanation.

4. Sir Jamshedji has emphasized the fast that by Act 20 of 1948 the Legislature has now qualified "the dividend paid" as being paid by an Indian Company; and he contends that this was done because the Legislature became conscious of the fact that Explanation 3 sought to tax extraterritorial income which was not warranted and, therefore, it brought the law within the legislative competency of the Legislature. Frankly, I do not know why Explanation 3 is now restricted to dividends paid by Indian companies. It has really nothing to do with the point urged by Sir Jamshedji, because the dividend paid may be to a share-holder who is outside British India and would be liable to tax provided the dividend has been paid out of the profits subjected to tax in British India. The reason might be considerations of a high policy which might have influenced the Legislature in exempting from tax dividends paid by non-Indian companies to share-holders outside British India. But, this amendment does not help us in any way to construe Explanation 3 as it stood before the amendment. It is pointed out by Sir Jamshedji that the judgment of the Federal Court has been impaired both by the decision of the Privy Council in Wallace Bro's case (75 Ind App 86) and that of the Supreme Court in *Wadia A.H. v.*

Commissioner I.T., Bombay[4], Now, neither of these two cases in terms deal with the validity of Explanation 3, and as I said before, the approach of the Privy Council is not materially different from the approach of the Federal Court in deciding the legislative competence of the Legislature to legislate a tax on income. Turning to the Supreme Court case, that Court was dealing with the provision of Section 42 which brought within the scope of the charging section interest earned out of money lent outside, but brought into British India, and it was held by a majority of the Judges that the provision was not ultra vires of the Indian Legislature. The view accepted by the majority was that there was a territorial connection because the provision in Section 42 (1) should be read to mean that there was an arrangement between the lender and the borrower by reason of which arrangement moneys borrowed outside British India were brought into British India in order to earn profits. It was also the view of the majority that this provision was inserted in order to defeat any subterfuge by which a borrower and a lender by merely arranging to get the loan outside British India would defeat the taxing authorities although the arrangement was that interest on the loan was to be paid out of the profits earned in British India. Any observation made in this judgment must be appreciated in the light of what the Supreme Court was called upon to decide. Sir Jamshedji particularly relies upon the observations of Sastri, J., who along with Fazl Ali, J., delivered the minority judgment that in determining the validity of a provision of law the facts of the particular case before the Court should be disregarded as being irrelevant. But as against that Mahajan, J., at p. 316 points out that normally a person who raises money at interest outside British India (when he intends to bring) and brings it in British India it may be presumed that he does so with the object of earning profit and paying interest out of that profit. The learned Judge goes on to say (p. 316) :

[4]51 Bom LR 287 FC

> ". . . Some exceptional cases may not fall within the presumption on the basis of which the impugned clause of Section 42 has been enacted. But that fact would not mate the clause ultra vires."

Therefore, Mahajan, J., expressly takes the view which was taken by Spens, C.J., in Raleigh's case (1944-6 FCR 229) that the mere fact that every conceivable case may not fall within the purview of a section is no ground for holding that the section is ultra vires, if a proper construction can be put upon that section which brings within its ambit the case the Court is considering and cases which are reasonably likely to happen. It may be pointed out that all the judgments have emphasized the question of the territorial nexus. According to the majority view there was a sufficient nexus between the lender and the taxing country when the loan was made under an arrangement with the borrower that the loan should be utilised in British India. It is difficult to see how this decision of the Supreme Court in any way impairs the validity of Raleigh's case decided by the Federal Court. In our opinion, the approach of all the three Courts, Privy Council's in Wallace Bros.' case, Federal Court's in Raleigh's case and Supreme Court's in Wadia's case, is the same, and that approach is that in order to give effect to what might be called extra-territorial legislation the Court must be satisfied that there is a territorial nexus between the person who is sought to be taxed and the country which seeks to tax. In deciding whether Expln.

3 is intra vires or ultra vires, our approach, with respect, is the same as the approach of the Federal Court, and we have accepted it not only because it is binding on us but also because, again with respect, we think it is the correct approach, and an approach which has been approved of both by the Privy Council and by the Supreme Court.

5. The next question that arises is whether in respect of these dividends the assessee company is liable to be taxed. Under Section 4 (1) (c) read with Expln. 3 the liability to pay tax would be upon the California Company. It is only by reason of Sections 42 and 43 that the assessee company which has not received the dividends has been made liable to tax in respect of these dividends. The scheme of Sections 42 and 43 is that Section 43 provides the machinery for appointment of a statutory agent of a person liable to tax, who is a non-resident within British India. The Department has to recover tax and the only way it can recover tax from a person who is not subject to their jurisdiction is to discover someone who is within their jurisdiction and who can be constituted a statutory agent as provided by Section 43. But as pointed out by Beaumont, C.J., in *Commissioner of Income tax, Bombay v. MetroGoldwyn Meyer (India) Ltd*[5]*.,* at p. 383 Section 43 is only a machinery to give effect to Section 42; because whereas Section 43 merely deals with the appointment of an agent, Section 42 makes the agent liable to pay tax. Therefore, the liability of the assessee company to pay tax on dividends arises not by reason of Section 43 but by reason of Section 42. Having been appointed agent under Section 43, its liability is still to be determined under Section 42, and, therefore, without any liability under Section 42 the mere fact that it has been appointed an agent under Section 43 would not make the asseseee liable to tax. Turning to Section 42, it deals with income accruing or arising within British India to a person non-resident in British India, and it enables the taxing authorities to charge tax either in the name of the non-resident or in the name of his agent; and if the agent is charged, he is deemed for the purposes of the Act an assessee in respect of the tax. Now, in order that this section should apply, income, profits or gains

[5]41 Bom LR 379

should accrue or arise under four heads and the section provides that they may arise either directly or indirectly. The four heads are that they may arise through or form (1) any business connection in British India, (2) any property in British India, (3) any asset or source of income in British India, or (4) any money-lent at interest and brought into British India. Now, in this case we are concerned only with the third head : and the question is whether the dividends of the California Company are income, profits and gains which accrue or arise either directly or indirectly through or from any source of income in British India. Sir Jamshedji's first contention is that dividends do not accrue or arise from the profits earned in British India. According to him dividends may be derived from profits; but inasmuch as the legislature has not used the expression "derived" but used the expression "accruing or arising", dividends are not within the ambit of this section. He says that profits arising or accruing to an Indian Company having once arisen cannot arise again when dividends are paid to the share-holders. Now I do not see why if a share-holder receives a dividend from a company it cannot be said that the dividend arose from the profits made by the company. If the source from which his dividend emanates is the profits

made by the company, then undoubtedly the dividend that he receives is an income which arises from that source. The argument really is the same as we had to consider when we were dealing with Section 4 (1), Explanation 3. If I am right in what I have stated about that explanation that the profits made in India by the assessee company are the source from which the dividends arise, then on the same parity of reasoning under Section 42 the assessee company would be liable as an agent in respect of the dividends which have been paid to the nonresident company, the California Company, of which the assessee company has been appointed an agent under Section 43.

6. The other contention of Sir Jamshedji is that the expression " indirectly" in Section 42 is ultra vires of the Legislature. His contention is that if income, profits or gains do not accrue or arise directly through or from the four heads which I have mentioned in Section 42 but only arise or accrue indirectly, then the territorial connection is only illusory and in attempting to tax a non-resident to whom income arises indirectly the legislature is going beyond its competence Now, is my opinion the case with which we are dealing is a case where income, profits or gains arise directly and not indirectly. We are not concerned with a case where the dividend has passed through several companies. We are dealing with a case where the California Company is the share-holder and as such is directly paid dividends by the assessee company out of profits which it has made in British India. As in my opinion this is a case of income, profits and gains arising or accruing directly from a source of income in British India, it is unnecessary to consider what is the true construction to be put on the expression "indirectly" or whether that expression is ultra vires the legislature. When we do have a case of income arising indirectly, it will be time enough to consider whether the legislature was competent to tax a non-resident by reason of income accruing to him indirectly.

7. The tribunal has pointed out the difference between the language used in Section 42 and that used in Section 43 as far as business connection is concerned. In Section 43 the business connection that is necessary need not be in British India whereas under Section 42 the business connection has got to be in British, India. Now, it is not disputed by Sir Jamshedji that California Company holding shares in the assessee company has a business connection although the business connection is not in India, and to the extent that there is business connection, Section 43 is satisfied. But as far as Section 42 is concerned and to the extent that the business connection has got to be in British India, Sir Jamshedji's contention is that a shareholder cannot be said to have a business connection with the company of which he is a shareholder by reason of the fact that he holds shares in that company. Sir Jamshedji says that the situs of the shares is outside British India; the California. Company is registered outside British India and the mere fact that the California Company is a shareholder of the Indian Company does not constitute a business connection. It is unnecessary to decide this question because we have held that the case of the assessee company falls under the third head of Section 42.

8. The questions raised by the tribunal do not really bring out clearly the controversy between the

parties, and, therefore, to the extent that it is necessary we think that the questions will have to be reframed.

> Question No. 1 is in order and we answer it in the negative.
> Question No. 2 : I have already pointed out that there is no dispute between the parties at all that the assessee company was properly appointed as the agent of the California Company. Therefore, in our opinion the question does not arise and it is not necessary for us to answer it.

In our opinion Question No. 4 should come before question No. 3. We answer question No. 4 in the affirmative, but we will reframe the question by adding the words "as agent" after the words "assessee company" in that question. Question No. 3 : In the affirmative.

> Question No. 5 : Unnecessary.

9. At the instance of Sir Jamshedji we raise a further question No. 6, viz.,"
Whether the provision of Section 42, Income-tax Act to the extent that it concerns income, profits and gains accruing or arising indirectly is ultra vires of the legislature"?
Having raised that question we answer it by saying that it is unnecessary to answer that question strictly the question does not arise out of the order made by the tribunal, but as Sir Jamshedji challenges the validity of the very provisions under which the tax has been charged, the question is implicit in the order of the tribunal. Sir Jamshedji says that this point was urged before the tribunal although no reference has been made to it in the judgment. Having raised this question, in our opinion, it is unnecessary to decide it on the facts of this case.

10. Assessee to pay the costs of the reference. No order on the notice of motion; no order as to the costs of the notice of motion.
Reference answered.