(1944) 08 BOM CK 0015

Bombay High Court

Case No: Income Tax Reference No. 2 of 1942

SARUPCHAND HUKAMCHAND, IN RE. — APPELLANT

Vs

RESPONDENT

Date of Decision: Aug. 20, 1944

Acts Referred:

- Income Tax Act, 1961 - Section 66(2)
- Partnership Act, 1932 - Section 58(b)

Citation: (1945) 13 ITR 245

Hon'ble Judges: Kania, Acting C.J.

Bench: Division Bench

Judgement

KANIA, AG. C.J. - This is a reference made by the Commissioner of Income Tax u/s 66 (2), Income Tax Act, before its amendment in 1939. The assessee are a partnership firm doing money-lending business. Their firm is registered in British India. If the certificate of registration the principal place of business is stated to be Bombay. Their other place of business is stated to be Calcutta. It appears from the reference that the assesses do business at Indore also. The assessee contend that the Indore firm is the principal firm, and the principal place of business in British India is Bombay. For the assessment year 1935-36 they have been assessed to Income Tax and supertax for Samvat year 1991 (20th October 1933 to 7th November 1934). In the total income assessed by the Income Tax Officer, which was ultimately reduced, a sum of Rs. 69,590 was treated as the assessees income in British India u/s 4 (2) of the Act. That was the excess of remittances by the Indore firm to their Bombay firm and was considered by the Income Tax Officer as profits received from Indore in the first question which arose for consideration was whether the assessee firm were residents in British India. The second question was whether the amount was remitted into British India from Indore, and the third was whether the same was profits or capital. In the reference there was no finding about the assessees being

residents in British India. The matter was therefore sent back to the Commissioner for making hid report on that question. By his letter dated 11th February 1944, the Commissioner has sent his finding to the Court with the reasons for his conclusion. His finding is that the assessees during the year of assessment were residents in British India. It was contended on behalf of the assessee that that finding was not warranted, as there was no evidence for the same. After hearing counsel on both sides we decided to raise the additional question whether there was evidence to support that finding. In his letter the Commissioner has relied on the following facts for his conclusion : (1) Registration certificate if the firm which is annexed as Exhibit 4 to his letter. (2) Earlier assessment records, in which it is alleged that the assessees were described as residents in British India. (3) The evidence of Sir Sarupchand Hukamchand in Suit No. 1938 of 1931 filed in this Court. (4) The power of attorney in favour of the Bombay Municipality which is annexed as Exhibit 2 to the letter. (5) The contents of the Chithi Nondh produced by the assessees.

The registration certificate describes the principle as Bombay (Bhuleshwar Fire Brigade Station). In the letter the Commissioner has stated that on behalf of the assessees it was urged that the principle place of business mentioned in the certificate of registration was only the principle place of business in British India, but the principle place for the world business was at Indore. It was therefore contended that the central control and management of the firm, which in law would make the firm resident in British India, was at Indore. The Commissioner did not accept this contention. On the fact of the registration certificate there is nothing to show that this firm had any outside place from which the firms activities were controlled. u/s 58 (b) and (c) and 60, Partnership Act, it is necessary for a firm, which is registered in British India, to state its principal place of business, and when there is any change to intimate that fact to the Registrar. The result is that the registration certificate contains an admission of the assessee firm. Even on the footing that the assessee firm has its place of business at Indore and that may be the principal place, in law there is nothing to prevent a firm from having two places of residence, as understood in law. This point is made clearing Swedish Central Ry. Co. v. Thompson. It was there held that a registered company can have more than one residence for the purpose of the Income Tax Act. The facts of that case were stronger. A limited company was formed for constructing and working a railway in Sweden. The registered office was in London. The company leased the railway to a traffic company for 50 years at an annual rent, which was to be paid to the company in England. The companys articles were thereafter altered for the purpose of removing the control and management of the companys business from England to Sweden, and it was admitted that the business had since been and at the relevant date controlled and managed from the head office at Sweden. In 1925 a committee was appointed to transact more or less administrative business in the United Kingdom, such as dealing with transfers of shares in the United Kingdom, affixing the seal of the company to share and stock certificates, and signing cheques on the London

banking account of the company. Since that year no meeting of the company had been held in the United Kingdom, all dividends had been declared in Sweden and no profits had been transmitted to the United Kingdom, except in payment of dividends to the shareholders in the United Kingdom. The annual rent under the lease was also paid to the company in Sweden. It was held that while the business of the company was controlled and managed from Sweden, the company was a person residing in the United Kingdom for the purposes of Income Tax. In Egyptian Delta Land and Investment Co. v. the question of residence of a company came to be considered. It was held that the fact that the company was registered in the United Kingdom, though not the sole deciding factor, was a material fact to be taken into consideration.

The assesses relied on Commissioner of Income Tax, Madras v. T. S. Firm, where, in respect of a partnership, the Court accepted the principle laid down in De Beers Consolidated Mines, Ltd. v. Howe. In that case it was held that the test of residence was, where the central management and control of the whole of its business abided. The Court also recognized that there may be two such places of residence, but the second residence must not merely have a delegation of management of some portion of the partnership business but should be a delegation of some portion of the management of the business as a whole. It was observed that the actual residence of the individual partner was an irrelevant consideration in determining the place of residence of the firm. In the Madras case the question was in respect of receipt in British India of the profits earned in the Malay States. On the facts of the case the Court found that no portion of the control of the business was from British India therefore the residence of the partnership was not in British India. Applying those tests to the facts here, it is clear that, apart from the statement in the affidavit filed on behalf of the assessee that their principal place of business is at Indore and the central control is from Indore, there is no material evidence to displace the statement of the assessee on which the registration certificate was issued. That is a very material piece of evidence on which the Commissioner was entitled to rely. It is therefore impossible to say that, for his finding, the Commissioner had no evidence before him.

I may mention that the earlier assessment records in the office cannot be relied upon because it is not shown that the assessees were aware of the contents of the same. The evidence of Sir Sarupchand in the High Court suit relates to a period which is different from the relevant period we have to consider in this reference. The power of attorney is also not helpful because it was given by Sir Sarupchand himself and not by the firm. It is dated 1925 and is in respect of business carried on by Sir Sarupchand in his individual capacity. One entry in the Chithi Nondh is relied upon by the Commissioner in his letter recording the finding. That suggests that the magnum in Bombay had effected a transaction without receiving instructions for the same from Indore. It was sought to be argued from that that the munim had full power to do business in Bombay without any control from Indore and the

contention of assessees was not correct. In the course of discussion it was pointed out that there were telephone calls between Bombay and Indore and it need not be assumed that this business was done by the munim without instructions from Indore. Before leaving this part of the case it must be pointed out that the Commissioner was not right in adopting the attitude of not pointing out to the assessees passages from the evidence of Sir Sarupchand on which he ultimately relied for his conclusion. The question whether a person in a resident in British India or not is a question of fact. In fairness and in law, I think, it is the duty of the authority entrusted with the task of recording its finding, to give every opportunity to the other side to meet the case which the authority thought was in existence. Without giving such opportunity to the assessees it is not proper to rely on any evidence or any fact which he ultimately takes into consideration for arriving at his conclusion.

The original order made by the Court when sending back the reference for the Commissioner to record his finding on the question of residence, through inadvertence, was worded so as to suggest that the finding was to be recorded in respect of the assessment year 1935-36. A perusal of the judgment shows that the Court wanted a finding in respect of the relevant year. Before us Mr. Setalvad, who appeared for the Commissioner, intimated that the Commissioners finding is the same in respect of the accounting year and the reasons for his finding are the same as stated in his letter sent to the Court. The additional question raised by the Court, at the instance of the assessees, must therefore be answered in the affirmative. The registration certificate is a piece of evidence, which is material and relevant on which the Commissioner was entitled to rely. It is for the Commissioner to decide the question of fact and on the materials on record the Court has no reason to disturb it. On the reference the Commissioner had submitted three questions for the Courts decision :-

"1. Assuming that Rs. 58,599 is the correct amount of the excess remittance from Indore to Bombay, whether there was evidence before the Income Tax Officer on which he could treat the amount as a remittance from income for profit ?

2. Whether there was evidence before the Income Tax Officer on which he could include in the net amount of remittance from Indore to Bombay, the said sum of Rs. 89,000 debited to the assessees creditors and credited to their Indore shop account ?

3. Whether there was evidence before the Income Tax Officer on which he could hold that no portion of the said amount of Rs. 2,26,816 on the debit side of the Indore account was of the nature of a remittance from Bombay to Indore ?"

The third question is not pressed by the assessee and no answer is therefore given in respect of the same. For the second question the relevant facts are these : In the Bombay books two persons of the name of Pannalal Khupchand and Parasram

Dulichand were creditors of the firm. The accounts of these two creditors were started in the Bombay books in Samvat year 1989-90 and at the beginning of the year of account in question Rs. 81,603 and Rs. 38,145 respectively stood to their credit. On 27 December 1933, their accounts were debited with Rs. 80,000 and Rs. 9,000 respectively by havalas passed on that date and corresponding amounts were credited to the Indore shop account. In the journal the entries were made as follows : "Debited to your account as per your instructions and credited to the Indore shop." These creditors were paid at Indore the said two sums out of the cash of the Indore firm. In addition to these facts, the Commissioner has pointed out in the reference that on 29th November, 1933, a sum of Rs. 85,000 in currency notes was sent by the Bombay firm to the Indore firm and on 5th February 1934, another sum of Rs. 50,000 was similarly sent from Bombay to Indore. The question is whether in these circumstances the two sums of Rs. 80,000 and Rs. 9,000 are to be treated as profits arising without British India to persons resident in British India and received or brought by them into British India. The question of residence is decided against the assessees. The material question therefore is whether these were received or brought into British India by the assessees. The second question submitted by the Commissioner does not being out the real question between the parties. We settle in thus : "Whether the two sums of Rs. 80,000 and Rs. 9,000 being payments made to the two creditors at Indore, as stated in the statement of case by the Commissioner, were, under the circumstances of the case, received in or brought into British India."

On behalf of the assessees counsel strongly relied on In re Multanchand Johurmal. In that case the assessees, an undivided Hindu family firm, carried on business in Calcutta and at two places in the State of Coochbihar, outside British India. There were remittances to and from these places and in the books of the Calcutta firm these remittances were shown as loans carrying interest. There were also other entries in the books entered as remittances from those two places which were in fact mere books entries covering payments by the Coochbihar firm to one J. K. on behalf of the Calcutta firm for moneys due to J. K. by the Calcutta firm. A question arose whether the payments made by the Coochbihar firm to J. K., on behalf of the Calcutta firm for moneys due to J. K. by the Calcutta firm, amounted to remittance in the British India by the firm at Coochbihar. Rankin, C.J., held that they did not amount to receipts in British India at all. It was sought to be argued that they were constructively received in British India; but that argument was also negatived. On behalf of the Commissioner reliance was placed on certain Madras decisions (some of which I shall presently refer to) but they were all distinguished. The other Judges agreed with that conclusion. The short point which was decided was that as the money was lying in Coochbihar and paid to creditors in Coochbihar no portion thereof was received in British India. The facts of that case are exactly similar to the present case. Mr. Setalvad frankly conceded that he is unable to distinguish the facts in the present case.

That case came to be considered by the Madras High Court in Commissioner of Income Tax, Madras v. Murugappa Chettiar, and was followed by that Court. In that case the assessee resided in British India and carried on money-lending business in British India and at Okkham in Burma and also at Mallaca, in the year of account. He had remitted $ 6,290 out of Mallaca profits to one s, who resided in the Pudukotah State, by hundies which were delivered to S in that State and cashed there. It was found that S had deposited Rs. 19,692 with the assessees business and the Income Tax authorities accordingly treated the sum $ 6,290 as a remittance of foreign profits to British India which discharged in part the assessees indebtedness to S. It was held that the remittance was made out of foreign profits, and as the amount was remitted to the Pudukotah State, and was not remitted to or received in British India, it was not assessable to tax in British India. The material fact to be noticed is that the remittance was to a resident in Pudukotah State by a hundi which was delivered to the individual in the Pudukotah State and cashed by him there. In the course of argument, it was contended that inasmuch as the liability of the assessee to S in British India was reduced by $ 6,290 it must be taken that this money had come into India, but the learned Chief Justice expressly negatived that contention. He pointed out that the money was paid out of the profits of Mallaca branch but they were never received in British India. They were paid to S in Pudukotah State and it was not suggested that S transferred the money to the assessee in British India. He stated, "Unless profits made abroad are received in British India there can be no question of taxation here." He relied on In re Multanchand Johur Mal cited above.

Counsel for the Commissioner relied in that case on L. C. T. S. P. Subramaniam Chettiar v. Commissioner of Income Tax, Madras. In that case the assessee carried on business in Tinnavelly in British India and in Penang outside British India. To discharge the debt of his Tinnavelly shop he issued two hundies at Tinnavelly on his Penang shop and the Penang shop paid the amount to the creditor at Penang. The transactions were recorded in the Penang folio of the Penang shop were also sufficient to cover the payment. On a reference by the Commissioner, it was held that the said sum was income received in British India and was assessable to Income Tax u/s 4. In giving judgment Madhavan Nair, Offg. C.J., (as he then was) observed as follows (p. 350) :-

"What happened here was that the indebtedness in British India was discharged by the issue of a hundi drawn on the Penang shop. Discharge of a debt by issuing hundies is well-known in commercial circles as the discharge of a debt. In the circumstances of the case the debt remained an Indian debt and it was discharged by the issue of a hundi in India."

The Court the proceeded to state that the petitioner made available to him in British India money lying in Penang and this, in the Courts opinion, amounted to a receipt in India by the assessee of his account outside British India. It is significant that in

that case the hundi was given by the debtor to the creditor who was in British India. This case has been distinguished in Commissioner of Income Tax, Madras v. Murugappa Chettiar (cited above), on that very ground. In distinguishing the case the Court observed as follows (p. 306) :-

"There the creditor and the debtor both resided in British India and the creditor was paid by a hundi delivered to him in British India."

In the latter case, as I have already pointed out, and as the Court emphasized in that case, S was paid by hundi delivered outside British India and money was paid outside British India. Money never came into British India and therefore the case of money coming into British India is considered on a different footing. In the same way in Manickam Chettiar v. Commissioner of Income Tax, Madras, the assessee who resided in British India owned a money-lending business in Penang. This business had dealing with a firm M in Penang whose proprietor also resided in British India. On settlement of accounts, it was found that M owned $ 11,200 for which the assessee took a promissory note. In the year of account the decree which the assessee took a promissory note. In the year of account the decree which the assessee had in the meanwhile obtained on the promissory note was satisfied by the debtor giving to the assessee in British India jewels worth a certain amount and an assignment of a decree obtained by a third person against the assessees brother-in-law for a larger amount. These amounts were credited to the assessees head-quarters accounts towards the debt due by M. The Income Tax authorities held that the transaction amounted to a receipt by the assessee of these two sums in British India and made an assessment on that footing. That was a converse case of a debtor paying in British India debt which was due outside. The payment was in the shape of jewels and a money decree which was executable in British India. It seems to me clear that the case does not help the Commissioner. In that case tangible assets were received in British India, and therefore, although they were not received in cash, the commissioners contention of the amount being received in British India was rightly upheld.

Mr. Setalvad further relied on Narayana Chettiar v. Commissioner of Income Tax, Madras. In that case the assessee was a partner in a money-lending business carried on at K in the Federated Malay States, in which M was the principal partner. M was also a partner in a business at R in which the assessee had no interest. In 1931 the K business made considerable profits and the assessees share of profits amounted to at lease Rs. 30,000. In that year Rs. 30,000 were remitted by the firm at K to the firm at R (in British India) and placed in the suspense account. In 1932 M transferred the money to the credit of the assessees account in the books of the R firm and it was then utilised in discharge of the assessees indebtedness to the R firm. The assessee protested against this conduct, but in 1935 agreed to the arrangement. It was held that in 1935 the amount should be considered as received in British India by the assessee. The facts clearly show that the amount was actually

received from outside British India. It was not considered as received on account of the assessee in 1931, because it was received in that year by a firm in which he had no interest. In 1935 he agreed to the amount so received being treated as validly utilised in the discharge of his liability, and therefore the amount, which was actually received in 1931, was considered as received on account of the assessee in British India in 1935. I do not see how that case which was a case of actual receipt of money from outside British India helps the Commissioner in the present case. In the same way Chidambaram Chettiar v. Commissioner of Income Tax, Madras, which was also relied upon by Mr. Setalvad, does not help the Commissioners contention. In that case the assessee who carried on business at K in Burma entered into an agreement with one S who carried on business at Penang for the purchase of a house site belonging to S in British India. On 3rd April 1929, a sum of Rs. 50,000 was paid to S at Penang by the assessee K firm towards the price and the assessee was debited with this amount on that day. The sale deed was executed on 8th amount should be considered as received on 3rd April or on 8th May. This was a case of tangible assets in the shape of a house in British India being purchased and paid for by money which was outside British India. The actual payment of cash was outside British India but the house site in British India charged ownership as a result of that payment. It is therefore clear that the amount must be considered as received in British India.

On the other hand, our High Court in Commissioner of Income Tax, Bombay v. New India Assurance Co., Ltd. has decided that receipt of the amount is a material factor to be considered, and the fact that it is shown as income in the books in British India and action taken by assessee on the footing of that income does not amount to receipt of the amount in British India. In that case the assessee company which had investments in England and United States of America showed in its balance sheet two items which the company had earned by way of interest and dividends on the investments so made. They brought these two amounts to their account in British India, and in making up the account of the total profits included these two items and arrived at a total. On the footing of that total the company declared a dividend. It was argued that as the amount was brought into the balance sheet and as on the footing of that money being so included in the profits the company had declared a dividend, the company should be considered as having brought this money into British India. The contention was negatived by the Court. In the course of his judgment Beaumont, C. J., observed as follows :-

"If, for example, it were shown that a sum representing income received abroad had been exchanged by appropriate book entries, for an asset in India, and had been applied as income in India, I should say that the foreign income had then been received in Indian."

I have noticed this sentence in particular because it brings out clearly what is intended to be conveyed by the word "received" in the section. It does not amount

to merely "lessening of liability in British India" as contended by the Commissioner. It means "receipt in British India of the amount, or by appropriate book entries, of an asset, which can be pointed out as resulting from the receipt". In my opinion therefore In re Multanchand Johurmal cited above is not distinguishable. All the Madras cases cited on behalf of the Commissioner have either the facts of the amount being paid by a hundi in British India or tangible assets received in British India. Following the general principle adopted by this Court that in the interpretation of an All-India statute, as far as possible, considered opinion of another High Court should be followed unless for Court cannot conscientiously accept that view, the answer to the question must be in the negative. In my opinion, the Calcutta case was rightly decided and it correctly brings out the true of Section 4 (2) of the Income Tax Act before its amendment in 1939. We answer the second question as settled by us, in the negative.

The Commissioners reference to the remittance in cash of two sums on 29th November and 5th February is not relevant to decide this question. The first remittance was on 29th November while the payment was on 27th December. There is nothing to indicate or connect the dates or figures of the remittances. The second remittance of 5th February was over two months later and in no event can be considered as having anything to do with the payment made at Indore. In my opinion, therefore, these facts have no bearing on the question whether the sum of Rs. 89,000 was remitted in British India to the assessees firm in Bombay. The first question is based on the assumption that the amount was remitted in British India. In view of our finding on the second question, it is not necessary to go into that question and therefore we do not propose to answer it. Having heard the parties on the question of costs we order that the Commissioner should three-fourths of the costs of this reference throughout. The costs of the hearing and of the application, which were received by the judgment delivered on 21st September 1942, are made costs in the reference.

CHAGLA, J. - I agree. In order to attract the application of sub-section (2) of Section 4 before it was amended in 1939 two conditions have got to be satisfied : (1) that income, profits or gains accruing or arising out of British India must be a person resident in British India, and (2) they must be received in or brought into British India. Now with regard to the first question of residence the Commissioner has found that the assessees were during the relevant year resident in British India. That is a finding of fact and the question is whether that finding could be justified on evidence placed before him. In the case before us the assessees are not individuals but a firm, and it has been laid down that in the case of a firm the residence is where the central management and control of the firm abide. To use the language of Lord Loreburn the firm cannot as in the case of an individual eat or sleep but it does keep a house and does business, and the question is whether in this case the firm kept a house and did business in Bombay and whether the central control and management of the firm abided in Bombay. The Commissioner has rightly relied on

the certificate of registration which states that the principal place of business of assessee firm is Bombay. Now it has been laid down both in Swedish Central Ry. Co. v. Thomson and Egyptian Delta Land and Investment Co. v. Todd that the registration of a company by itself is not decisive of its residence, though in both the cases the learned law Lords have pointed out that registration is a material fact which the Court would take into consideration in determining the question of residence. The certificate on which the Commissioner has relied as not merely a certificate of registration of the firm. If it had merely shown that the firm was registered in Bombay probably much importance need not have been attached to it. But it contains an important representation by the assessees and that is that the principal place of business of the assessees was in Bombay. To my mind it is impossible to contend that if the principal place of business of the assessees was in Bombay or that that firm did not keep house and do business in Bombay. Even assuming that business was carried on at Indore and control was exercised from there, still, as the authorities clearly show, just as in the case of an individual, there might be a dual residence of a firm.

On the second question, the decision depends upon whether the payment by the Indore shop of Rs. 89,000 at Indore to the two creditors of the assessee firm amounts in law to the receipt by the assessee firm in Bombay of the profits of the Indore shop. Mr. Setalvad for the Commissioner has conceded that in this case there has not been an actual receipt of profits of the Indore firm into British India nor have actual profits been brought into British India, but what Mr. Setalvad contends is that in this case there has been a constructive remittance and u/s 4 (2) it is not necessary that there should be an actual receipt and even a constructive receipt would be sufficient. To my mind on a plain reading of that sub-section that contention is not tenable. It is true that as the sub-section is worded, it is not necessary that the income, profits or gains need be received or brought into British India in specie. They may be brought into British India either in cash or in the shape of assets which are reliable. There is not a single case cited before us which goes to show that the Court has ever held that although no profits were received in British India in specie or in the form of tangible assets, on the theory of constructive remittance the assessee was made liable. The principle of the two cases relied upon by the assessees, In re Multanchand Johurmal and Commissioner of Income Tax, Madras v. Murugappa Chettiar is clear, namely, as the profits were never received in British India the assessee was not liable. If one turned to the cases relied on by the Commissioner, one would find in L. C. T. S. P. Subramanyam Chettiar v. Commissioner of Income Tax, Madras, the debt was discharged by payment of a hundi which must be considered a realisable asset, because a hundi is negotiable and can be cashed in British India. In Manickam Chettiar v. Commissioner of Income Tax, Madras, we had a case of a degree which was assigned and jewellery which was given to the assessee. The learned Judges in that case specifically stated that these were realisable assets received in British India. Similarly in Chidambaram Chettiar v.

Commissioner of Income Tax, Madras, the asset there received by the assessee was a house site which was also a realisable asset.

Mr. Setalvad very strongly relied on L. C. T. S. P. Subramanyam Chettiar v. Commissioner of Income Tax, Madras, referred to above, but, to my mind the distinguishing feature between that case and In re Multanchand Johurmal is that in the former case the hundi was given to a debtor in discharge of a debt in British India and Madhavan Nair, Offg. C.J., has relied on that distinguishing feature in arriving at the decision. He emphasizes the fact that the debt remained an Indian debt and it was discharged by the issue of a hundi in India. As I have pointed out, the hundi is a negotiable instrument and it can be stated with considerable force that that asset was paid to the debtor in British India and to that extent profits from the foreign firm were received in British India. But the case of our own High Court to which the learned Chief Justice has referred is a very strong case which completely answers the arguments advanced by Mr. Setalvad. In that case, Commissioner of Income Tax, Bombay v. New India Assurance Company Ltd., interest accruing to the assessee on investments outside British India was shown in the balance sheet and in declaring the dividend that interest was taken into consideration. In short the interest which was lying outside British India was made available for the payment of dividends to the shareholders in British India. The whole of Mr. Setalvads argument is that in this case the Indore shop made available to the Bombay shop assets or funds for the payments of debts due to the creditors of the Bombay shop. If that argument is a good one, it applies equally to the facts of the case I have just referred to, because not only the interest was shown in the balance sheet as a part of the assets of the company, but as I have pointed out in declaring the dividend that interest was taken into consideration. I, therefore, agree with the learned Chief Justice that the question raised by the Commissioner and as amended by us should be answered as suggested by the learned Chief Justice.

Reference answered accordingly.