(1942) 09 BOM CK 0024

Bombay High Court

Case No: Income-tax Reference No. 5 of 1942

His Highness Yadavindra Singh, Maharajadhiraj of Patiala		APPELLANT
	Vs	
The Commissioner of Income Tax (Central)		RESPONDENT

Date of Decision: Sept. 24, 1942

Acts Referred:

- Income Tax Act, 1961 - Section 22(2), 24B, 43

Citation: AIR 1943 Bom 102 : (1943) 45 BOMLR 143

Hon'ble Judges: Kania, J; John Beaumont, J

Bench: Division Bench

Judgement

John Beaumont, Kt., C.J.
This is a reference made by the Income Tax Appellate Tribunal, Bombay, u/s 66(1) of the Indian Income Tax Act, raising three questions. The questions all arise from certain technical defects alleged to exist in the order of assessment for the year 1937-38 of the estate of the late Maharaja of Patiala. The defects suggested are, first, that the terms of Section 24B of the Indian Income Tax Act were not complied with; secondly, that there was no notice u/s 34; and, thirdly, that no statutory agent had been appointed u/s 43. The material facts are these.

2. 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 Maharaja''s 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 u/s 43 of the Indian Income Tax Act. After the papers reached Bombay, some correspondence took place between the Income Tax Officer, 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 u/s 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 Maharaja''s 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 Maharaja Dhiraj Sir Bhupinder 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.

3. 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 u/s 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 u/s 43 ?

In view of the conflict which exists between High Courts in India 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 u/s 4(1) and Section 42 without appointing an agent u/s 43, I shall consider such question, in the first instance, without reference to the Indian cases.

4. u/s 4(i) 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 Sections 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.

5. Then we come to Section 42, which provides :

In the case of any parson 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 arise or accrue within 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 Re Rogers Pyatt Shellac & Co. v. Secretary of State for India. (1924) ILR 52 Cal. 1

6. 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 is through an agent of the person entitled to the 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 person, and such agent shall be deemed to be the assessee for the purposes of the Act.

7. But I think the principle, which has been established by certain English cases, Tischler & Co. v. Apthorpe (1885) 52 L.T. (N.S.) 814 and Werle & Co. v. Colquhoun (1888) 20 Q.B.D. 753 approved by the House of Lords in Whitney v. Inland Revenue Commissioners, [1926] A.C. 37 applies to the construction of Section 42. The English cases were decided on 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 differences, as far as I can see, between Section 41 of the English Act and Section 42 of the Indian Act, are that Section 41 makes the non-resident chargeable in the name of the agent, whereas the Indian Act makes the income of the non-resident chargeable through the agent. Furthermore, the English Act has no provisions for appointing an agent such as are contained in Section 43 of the Indian Act; nor does 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 meet 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 over 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 Sections 4 and 42, but anxious to avoid the interposition 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 books that the Officer may require. If the Officer were to accept that offer, and make the assessment direct on the assessee under the provisions of Sections 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 nor 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 difficulty when once it is realised 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.

8. With regard to the authorities in India, the High Court of Madras as long ago as the year 1921 in Chief Commissioner of Income Tax v. Bhanjee Ramjee & Co. (1921) ILR 44 Mad. 773 held that a foreign resident being assessed u/s 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. ILR (1933) 57 Bom. 519 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 enable him to assess the assessee, who was an Insurance Company resident in Australia, without having recourse to a particular rule. The reference made by the Commissioner to this Court dealt only with the assessment u/s 4(1), that is to say, the) income had been assessed u/s 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 u/s 4(1), there was other income which could be assessed u/s 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 u/s 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 u/s 4(1) the data were sufficient. It was argued then that no assessment could be made u/s 42, because no agent had been appointed u/s 43, and on that question we followed the decision of the Madras High Court, and held that am assessment could be made u/s 42 without the interposition of an agent. I myself in my judgment merely noted the decision and followed it without expressing agreement or disagreement, and it is my 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 u/s 42, not having been raised by the 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 before the Allahabad High Court in Maharaja of Benares v. Commissioner of Income Tax [1938] All. 432, 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 on the 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 s, 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 one 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.

9. I will deal next with the second question, which is :

Whether in the circumstances found by the Tribunal in its order u/s 33, the assessment was validly made u/s 34 of the Act ?

Now, as I have already pointed out in stating the facts, notices were served on the Maharaja of Patiala u/s 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, 1938, 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 u/s 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 u/s 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 u/s 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, The Commissioner of Income Tax Vs. Mahaliram Ramjidas, in order to justify a notice u/s 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 s, 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 had escaped assessment for 1937-38 than for 1938-39. For aught he knew both years might have resulted in a loss.

10. Mr. Setalvad argues on behalf of the Commissioner that we cannot take 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 might 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 u/s 22.(2), which subsequently turns out to be a bad notice under that section because it is out of time, it can be held automatically to be a good notice u/s 34, although there is no reason for supposing that the Income Tax Officer ever considered the question u/s 34. It seems to me quite clear that the notice in this case was not a notice u/s 34, and I decline to treat it as such. The second question, therefore, must be answered in the negative.

11. 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 circumstances found by the Tribunal in its order u/s 33, the assessment was not made in accordance with the provisions of s, 24-B of the Indian Income Tax Act and is for that reason invalid ?

I observe in 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 Subordinate Judges of framing 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 in the negative becomes ambiguous, and one has to look at the reasons to 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 as 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 assessed was the late Maharaja, who had died before he was served with any notice u/s 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 u/s 22(2) or u/s 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 no 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 a fact, that the present Maharaja is the legal representative of the deceased Maharaja, and although it would 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 served on the legal representative, merely because it omitted to state 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 Maharaja''s income. It was not so stated, and the present Maharaja himself may have had taxable income for the years in question; but I think 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 Maharaja''s income were made by the Foreign Minister on behalf of the Maharaja, and then subsequently corrections were made in the assessment at the instance of the Maharaja. There is no doubt that the present Maharaja knew perfectly well that what was being assessed was the income of his predecessor.

12. Then when one comes to the actual assessment, it is made on 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 stem 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 a nullity, and there is nothing to appeal from.

13. On the whole, though I certainly do not wish to give any countenance to the idea that the provisions of Section 24-B need not be strictly complied with; in the particular facts of this case, and having regard to the fact 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.

14. 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 dividends 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 [1938] All. 432, the Income Tax Officer, Central Circle, Lahore, thought that it was improper for him to make the assessment orders 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 pointed 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 Highness''s 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 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 Highness the Maharaja of Patiala", and by paragraph 2 the addressee was called upon to send a return of the total income from 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 notices 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 or 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 office items were disclosed to show what was the income during 1937-38 and what was the income (which in fact) was the loss) during 1938-39. 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 Bhupindrasing late Maharaja of Patiala." The notice (which is the usual thing printed on the front part) is addressed to the Foreign Minister on behalf of His Highness the late Maharaja of Patiala.

15. 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 he 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 findings against the assesses.

16. 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 late 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 face 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 present 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 instructions 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.

17. 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 u/s 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 u/s 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 Commissioner''s 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 Commissioner''s 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 u/s 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 Sections 22(2) and 38 should, because it is served after a year, be treated by the assessee as a notice u/s 34, when the officer issuing the notice had given no indication that it was a notice u/s 34. If the Income Tax Officer proposes to act u/s 34, when the notice is served on him the assessee is entitled to know that the Income Tax office is taking steps under that section. That can certainly not be conveyed by a service of a printed notice only headed under Sections 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 Commissioner''s argument that a notice u/s 34 was served is unsound.

18. Mr. Setalvad relied on certain observations in JAWALA PRASAD CHOBEY Vs. COMMISSIONER OF INCOME TAX, BENGAL., In that case the question for the Court''s consideration was, "whether, having regard to the fact that Section 34 of the Act requires ''particulars'' to be stated in the notice and that the 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 as it brings to the attention of the person to whom it is served the matters required 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 s, 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 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 s, 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.

19. 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 non-resident 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 u/s 43 the taxing office 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 is 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 assessee''s contention, only for that income the agent would be exclusively taxable. The result therefore would be that in respect of a non-resident''s income liable to be taxed u/s 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 office to recover the tax from funds which may be subsequently found within British India belonging to the assessee.

20. As regards the judicial interpretation of this section the Madras High Court in Chief Commissioner of Income Tax v. Bhanjee Ramjee & Co. (1921) ILR 44 Mad. 773, S.B. 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. ILR (1933) 57 Bom. 519. 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 Re Rogers Pyatt Shellac & Co. v. Secretary of State for India (1924) ILR 52 Cal 1 the later part of the section was

considered a machinery to recover the tax. In Maharaja of Benares v. The Commissioner of Income Tax [1938] All. 432 (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, u/s 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 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 Court in Commissioner of Income Tax, Bombay v. National Mutual Associalion of Australasia Ltd.

21. 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 right to resort to the ordinary machinery of taxing which is permissible to be adopted in respect of the income u/s 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.

22. 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.

23. 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.