The Commissioner of Income Tax Vs Bombay Trust Corporation Ltd.

Court: Bombay High Court

Date of Decision: March 12, 1928

Acts Referred: Income Tax Act, 1922 â€" Section 4, 40, 43

Citation: AIR 1928 Bom 448 : (1928) 30 BOMLR 1172 : 113 Ind. Cas. 593

Hon'ble Judges: Kemp, J; Amberson Marten, J

Bench: Division Bench

Judgement

Amberson Marten, Kt., C.J.
This Income Tax reference arises on assessments for the financial years 1925-26 and 1926-27 of the

Bombay Trust Corporation Limited (whom I will call ""the Bombay Company"") as agent of the Hongkong Trust Corporation Limited (whom I will

call ""the Hongkong Company""). Having regard to Section 3 and the definition of ""previous year"" in Section 2(11) of the Indian Income Tax Act

1922, the profits assessed are alleged profits for the years ending March 31, 1925, and March 31, 1926, respectively.

2. The Crown claims that the Bombay Company has a ""business connection"" with the Hongkong Company and is accordingly the latter''s agent

within the meaning of Section 43 of the Act, and consequently be assessed in the name of that agent u/s 42. The Bombay Company disputes the

alleged ""business connection"" and says that in any event it is necessary, having regard to Section 40 of the Act, for the alleged agent to be in receipt

on behalf of the Hongkong Company of any income chargeable under the Act, and that consequently the Bombay Company is not liable, as

Sections 40, 42 and 43 must be read together and not disjunctively. Alternatively, they say that the Hongkong Company itself may be directly

liable u/s 4 of the Act, and that consequently an assessment ought not to be made on the Bombay Company, more especially as the Bombay

Company has no power of deduction u/s 18 of the. Act, and as Section 19 provides that in other Corporation cases the tax should be paid by the

assessee direct.

3. The material facts appear to be shortly as follows. The Bombay Company was incorporated in Bombay in September 1920. The Hongkong

Company was incorporated in Hongkong in July 1921. The latter''s memorandum of association, Exhibit A, shows that it was a financing company

as was also mainly the Bombay Company, as shown by its memorandum, Exhibit B. As regards their respective financial operations we have to

deal with very large figures. It appears from para. 3 of the ease that the paid up capital of the Hongkong Company was eight crores of rupees and

that it had at its disposal about another seven to eight crores, thus making an aggregate sum of about fifteen to sixteen crores of rupees. The

nominal capital of the Bombay Company was eight crores, and we are told by counsel that their paid-up capital was one crore. Then in the years

1924-25 business took place between the two companies on an enormous scale. It took the form of the Hongkong Company lending deposits to

the Bombay Company at five and a quarter per cent, fixed interest. Those deposits amounted to about fifteen to sixteen crores in each of the years

1924 and 1925. Translating these figures into English currency, one finds that the Hongkong Company thus lent to the Bombay Company about

ten millions sterling per year. This was about double the nominal capital of the Bombay Company, and about sixteen times its paid-up capital.

Moreover, such yearly advances were double the paid-up capital of the Hongkong Company and they also absorbed its remaining available

deposits, The interest on these deposits amounted to over Rs. 88 lacs in 1924, and to over Rs. 82 lacs in 1925 payable by the Bombay Company,

So far as appears from the papers before us, no security was taken for these huge deposits. The tax now claimed for the two years amounts itself

to over Rs. 18 lacs.

4. The general terms of business are exemplified by the extract, Exhibit C, from the minutes of the Hongkong Company dated May 20, 1924, viz.,

The Secretary (Hongkong Company) was instructed to offer B.T.C. deposit (s) for one year at 5 1/4 per cents interest accrued to be remitted to

Hongkong through E.D.S. & Co. Ltd."" In this extract ""B.T.C."" stands for the Bombay Company and ""E.D.S. & Co. Ltd,"" stands for E.D.

Sassoon & Co. Ltd. whom I will call ""Sassoons"". As to the modus operandi by which that interest is stated to have been remitted by the Bombay

Company through Sassoons to the Hongkong Company, I may refer to Exhibit J for example. There is, first of all, a letter of instructions from the

Bombay Company to Sassoons of Bombay directing them to remit to the Shanghai house of Sassons a sum of Rs. 2,625 and to ""debit the same to

our account."" Secondly, the Bombay Company writes to the Shanghai house of Sassoons advising them of that remittance and asking them ""to

place it to the credit of the Hongkong ""Company at your end."" Thirdly, the Bombay Company write, to the Hongkong Company, saying:

We have advised Messrs. E.D. Sassoon & Co. Ltd. Shanghai to credit your account at their end with Rs. 2,625 being the interest on your deposit

of Rs. 50,000 due today"". These three letters are all dated September 6, 1925. We also had put in evidence a statement as to the reverse process,

viz., a letter of May 12, 1928, from the Secretary of the Hongkong Company to the Bombay Company with reference to an original advance of

money. It ran as follows:Ã¯Â¿Â½

I am instructed to inquire whether or not you will agree to accept Ea. 1,25,00,000 (rupees one crore and twenty-five lacs) from us on call as from

June 1 next at 5 1/4 per annum interest. If you are prepared to accept this sum on the above-mentioned terms, instructions have been given to our

Bombay BankersÃ¯Â¿Â½Messrs. E.D. Sassoon & Co. LimitedÃ¯Â¿Â½to pay you this amount), in exchange for which please send us your

acknowledgment.

5. We were informed by counsel for the assessee that there was no written acceptance of this particular offer and that the acceptance was by

conduct. There is, however, another letter of advice of the same date from the Hongkong Company to Sassoons of Shanghai in effect directing

them to transfer Rs. one and a quarter crores from the current account of the Hongkong Company with them to the Bombay house of Sassoons,

and adding ""Please advise your Bombay House that you hold this sum to their credit in rupees current account as on June 1, 1926.

6. As regards the composition of these three companies, it is not suggested that any one of them is a mere creature of the other. But, on the other

hand, it is common ground that various members of the Sassoon family are interested in one or other of the three companies. Thus, Capt. E.D.

Sassoon is one of the signatories to the memorandum and one of the three first directors of the Bombay Company. Similarly, Mr. H.W. Sassoon is

one of the two signatories to the memorandum of association of the Hongkong Company. We were also told by counsel for the Bombay Company

that the offices of the Bombay Company and Sassoons are in the same building in Bombay.

7. Counsel for the Bombay Company submitted to us that in order to decide the five formal questions referred to us by the Commissioner, we

ought to decide the following two questions, viz. (1) Is the non-resident Hongkong Company carrying on an assessable business within British

India, and (5) If so, can the present assessee, the Bombay Company, be sued in respect of such non-resident? I think these two questions really

involve the main points we have to decide, and I will accordingly proceed to deal with them.

8. As regards the first question, in my judgment the Hongkong Company is carrying on an assessable business within British India. It is lending

money regularly in British India from time to time, and is receiving interest in respect of such money-lending operation. It is to be noted that it sends

its offers to Bombay which are accepted in Bombay. Its own moneys are paid in Bombay, and its interest thereon is earned in Bombay. Therefore,

in my judgment, there is an income accruing or arising in British India within the meaning of Section 4 either from ""the business carried on"" there by

the Hongkong Company within the meaning of Section 10, or else under another heading of Section 6 viz., Sub-section (vi) ""other sources.

9. The case then is very different from Greenwood v. F, L, Sinidth & Co. [1921] 3 K.B. 583. There a Danish butter company was held not to

carry on any trade in England, as all contracts and deliveries were made outside the United Kingdom. So, too, the present facts would seem to

satisfy what Lord Herschell says in Grainger & Son v. Gough [1896] A.C. 325 :Ã¯Â¿Â½

Does he, then, exercise his trade within the United Kingdom? It has been sometimes said that it is a question of fact whether a person so exercises

his trade. In a sense this is true; but, in order to determine the question in any particular case, it is essential to form an idea of the elements which

constitute the exercise of a trade within the meaning of the Act of Parliament, In the first place, I think there is a broad distinction between trading

with a country and carrying on a trade within a country. Many merchants and manufacturers export their goods to all parts of the world, yet 1 do

not suppose any one would dream of saying that they exercise or carry on their trade in every country in which their goods find customers.

But that again was a case where at most the foreign merchant canvassed for orders through agents in the United Kingdom, but all contracts for sale

and all deliveries were made abroad. In saying this I appreciate the distinction pointed out in Rogers Pyatt Shellac & Co. v. Secretary of State for

India I.L.R (1924) Cal. 1 in commenting on The Board of Revenue v. The Madras Export Company I.L.R (1922) Mad. 360 that the basis of this

taxation is different in India from England. In India it is on income ""accruing or arising or received in Bombay British India"" or deemed so to be (see

Board of Revenue, Madras v. Ramanadhan Chetty I.L.R (1919) Mad. 75. In England it is mainly on a trade or business carried on there,

supplemented (inter alia) by General Rules 5, 6 and 7 with reference to the agents of non-residents. But the first two cases I have cited are

nevertheless useful on the limited point as to the meaning in Section 10 of carrying on business.

10. Whether on my above finding the Hongkong Company could be assessed directly under Sections 3 and 4 it is unnecessary to decide. The

assessees here are the Bombay Company and not the Hongkong Company. But I may note in passing that under the recent decision of the House

of Lords in Whitney v. Commissioners of Inland Revenue [1926] A.C. 37 it has been held that a valid notice may be sent to a foreigner by

registered post requiring him to make a return, and that on failure to do so he may be properly assessed by the Inland Revenue Commissioners

under the English Income Tax Act. As to whether that decision would apply to our Indian Income Tax Act I say nothing.

11. I now turn to the second question, and this is the one which involves the real difficulty in the cass. As to this, there are at least two competing

views arising on the true operation of Sections 40, 42 and 43. Are they to be read together, as was held with reference to the sections in the 1918

Act corresponding toss. 40 and 43 in the 1922 Act by the majority of Judges in the Imperial Tobacco Company of India Ltd. v. The Secretary of

State for India I.L.R (1922) Cal. 721 or are they to be read disjunctively, as was held in the dissenting judgment of Mr. Justice Ghose? The

practical difficulty is this, All three (sections deal with the agents of non-residents, but Section 40, the primary section, necessitates the agent in

question ""being in receipt on behalf of"" the nonresident of the income sought to be charged, Section 42, however, makes no express reference to

the agent being in receipt of the income.

12. We have heard full arguments on this point, and in the result I respectfully agree with the judgments of Mr. Justice Woodroffe and Mr. Justice

Greaves so far as they are applicable, and would hold that these sections should be read jointly and not disjunctively. I will assume for the moment

that any person who is deemed to be an agent within the meaning of Section 43 is also an Income Tax agent for the purposes of Section 40.

Stopping there, it is, I think, clear that such agent, so far as Section 40 is concerned, must be in Trust On behalf of the non-resident of the income

in question. Then in the view which I take Section 42 is directed to extending or explaining the profits of a non-resident mentioned in Section 40,

so as to make it clear that they include ""all profits or gains accruing or arising to "the non-resident" whether directly or indirectly through or from

any business connection or property in British India"".

13. So, too, Section 42(2) contains certain provisions for assessing the profits of a non-resident foreign subject on a true basis where the

Commissioner has reason to believe that owing to the course of business arranged between the resident and the non-resident, ""the business done

by the resident in pursuance of his connections with the non-resident produces to the resident either no profits or less than the ordinary profits

which might be expected to arise in that business"".

14. Next if one turns to Section 43 there the word ""agent"" in Section 40 is in effect extended to include ""any person employed by or on behalf of a

person residing out of British India, or having any business connection with such person, or through whom such person is in the receipt of any

income, profits or gains"", provided the Income Tax Officer has served on the resident a notice to that effect, and the resident has been given an

opportunity of being heard as to his alleged liability. I may here notice that if these conditions are fulfilled, then the resident is to be deemed to be

the agent of the non-resident ""for all the purposes of this Act"". Accordingly I think it clear that the word ""agent"" in Section 40 will include what I

may call this statutory agent in Section 43.

15. My interpretation of the three sections will accordingly involve this that while in Section 40 the term ""agent"" is extended by Section 43, and

income, profits or gains"" are extended by Section 42, yet the condition that such agent should be ""in receipt on behalf of"" the nonresident of the

income in question still remains. If, on the other hand, a contrary construction be adopted, then one gets this result that an ordinary and undisputed

business agent cannot be made liable u/s 40 unless he is in the receipt of income, but that, on the other hand, a statutory agent u/s 43 is to be made

liable u/s 42 as an asseseee, although he may not have any income on behalf of the non-resident.

16. This seems to me to be a startling conclusion to arrive at. It is one thing to make a man liable for a non-resident, if he is in the receipt of income

on behalf of such non-resident. But it is quite another thing to make him liable if he has no such income out of which to pay the tax in question. In

this connection I may draw attention to Section 18 of the Act as regards deductions. The loans in the present case do not fall within that section,

Consequently, there is no power of deduction in the Bombay Company when it pays the interest due on the loans. On the contrary, Section 19

provides that in all cases other than those mentioned in Section 18 ""the tax shall be payable by the assessee direct.

17. The case then for the Grown, even when put at its highest, is, I think, one where in effect it is sought to impose a new liability on residents

which did not previously exist, namely, as statutory agents under Sections 43 and 42 as opposed to agents in the ordinary meaning of that term,

and that there is a serious doubt as to whether Section 42 is intended to impose a personal liability on any alleged agent who is not in the receipt of

income on behalf of the non-resident. Indeed, as I have already stated, the majority of the learned Judges in Imperial Tobacco Company of India,

Ltd. v. The Secretary of State for India I.L.R (1922) Cal. 721 have already held expressly that Sections 31 and 34 in the 1918 Act corresponding

to Sections 40 and 43 in the present Act must be read jointly and consequently that receipt of income is necessary by a statutory agent u/s 34. I

should also infer that those learned Judges considered that the old Section 33 corresponding to the present Section 42 put the Crown in no better

position. I appreciate that since the 1918 Act the words ""or property"" have been added to Section 33 and the definition of ""agent"" in Section 34

has been somewhat extended, But that does not, I think, affect the main ground of the decision which was that the agent in question must be in the

receipt of income on behalf of the non resident. I also appreciate that the specific questions then submitted to the Court had reference (i) to Section

34, and (ii) to the propriety of the assessment generally (See page 722). On the other hand, in his dissenting judgment Mr. Justice Ghose says at p.

726 : ""Then comes Section 33, Sub-section (1) of which has an important bearing on the present question,"" So it is clear that the effect of Section

33 was fully before the Court. Indeed Mr. Justice Ghose held that Section 34 ought to be read with Section 33 rather than with Section 31, and

that as the receipt of income was not mentioned in Section 33, the assessee was liable.

18. Under the above circumstances I am of opinion that the general principles referred to by Lord Buckmaster in Greenwood v. F.L. Smidth &

Co [1922] 1 A.C. 417 may fairly be called in aid. He says (p. 423) :

It is I think, important to remember the rule, which the Courts ought to obey, that, where it is desired to impose a new burden by way of taxation,

it is Corporation essential that this intention should be stated in plain terms. The Courts cannot assent to the view that if a section in a taxing statute

is of doubtful and ambiguous meaning, it is possible out of that ambiguity to extract anew and added obligation not formerly cast upon the taxpayer.

Sub-a 2 here is at the best a subjection of an extremely doubtful character....

And if in the present case it be said that the construction which I would adopt would lead to some redundancy, the observations of Lord Sterndale

in the same case in the Court of Appeal reported in 1921 S K.B. 583 would seem to be in point. He says (pp. 591-92):Ã¯Â¿Â½

...and it would be very strunge if another subjection of the same section imposed an entirely new charge not within the schedule at all. 1 agree with

Rowlatt J. that such a thing, if intended, should be carried out with the greatest clearness, and that if a reasonable meaning can be given to the

subsection without producing that effect such a meaning should be given.""... Redundancy however is not unknown in legislation. I think it is better

to impute such redundancy than to hold that such an important alteration has been made in the basis of taxation as the abolition of the condition of

exercise of trade within the United Kingdom before a person not there resident can be taxed. To take the latter course would, I think, be to violate

the well-known canon of construction of taxing Acts, that no one is to be taxed except by express words.

19. That, then, being my view of the construction of the Act, was the Bombay Company ""in receipt on behalf of"" the Hongkong Company of any

income profits or gains chargeable under the Act? In my opinion they were not. It is not suggested that they were agents in the ordinary sense of

that word for the Hongkong Company. At most they were agents within the extended meaning given to that word by Section 43. But in my

judgment they never were in receipt of any interest on the loans on behalf of the Hongkong Company. On the contrary, it was their duty to pay that

interest and not in any way to receive it. On the facts before us they had indeed no power to give a receipt, nor were they in any sense the trustees

of the interest which was due from them.

20. So far then as I can see, the relations between them were that of a debtor and creditor, As regards payment, for instance, the course of

business as exemplified in Exhibit J shows that the debtor in Bombay instructed his bankers in Bombay to debit his Bombay account and credit his

Shanghai account with the amount requisite to pay the interest, and that then there followed a direction to the Shanghai branch of his Bombay

bankers to credit that money in Shanghai to the Hongkong Company. This is mere payment of interest and nothing else. There is no receipt by the

Bombay Company.

21. In his dissenting judgment in Imperial Tobacco Company of India, Ltd. v. The Secretary of State for India I.L.R (1922) Cal. 721 Mr. Justice

Ghose states (p. 727) that, it ""would be to support an anomaly that a parson receiving his income through an agent in this country would be

assessed, but if he asks his debtor to remit the income direct to him he would escape liability to pay the tax, a thing which this section was intended

to remove"". With all respect there seems to me a vast difference between the relations of mere debtor and creditor, and those of principal and

agent. Nor am I prepared to concede that the Hongkong Company would necessarily escape assessment on my construction of the Act. On the

contrary, as I have already pointed out, it may be that they could be assessed directly under Sections 3 and 4 after notice served on them by

registered post.

22. I may here mention one further argument by counsel for the Bombay Company. He said that on the hypothesis that the Hongkong Company

were carrying on business within British India and earning profits there on that business, they would be directly liable u/s 4, and consequently it

would be unnecessary to invoke Section 42, for the income thereby earned would be the income actually arising and not income ""deemed to arise

within British India. Consequently he argued that if once you found the principal directly liable, you could not also fix an alleged agent with the same

liability. It is unnecessary to decide that point because, as I have already indicated, my decision on the true construction of Sections 40 and 42 is in

his favour. But as at present advised I am disposed to think that in the case of a non-resident the Crown may pursue whichever remedy they

prefer. I would, accordingly, respectfully agree with the decision of Sir John Wallis to that effect in Chief Commissioner of Income Tax v. Bhanjee

Eamjee & Co. I.L.R (1921) Mad. 773. which was cited to us in The Commissoner of Income Tax, Bombay Vs. The Remington Typewriter

Company (Bombay) Limited, heard next after this one. I of course appreciate that Sections 3 and 4 are the main charging sections. On the other

hand, to determine what income is to be charged in certain cases one has to turn to Sections 40 to 43.

23. So, too, my above finding on the true construction of Sections 40 and 42 renders it unnecessary for me to determine whether there was a

business connection"" between the Hongkong Company and the Bombay Company within the meaning of Section 43. Or whether within the

meaning of that section the Bombay Company was a person ""through whom"" the Hongkong Company was in receipt of the income. for the

purposes of my main decision, I have been content to assume that the Bombay Company is to be deemed to be an agent within the meaning of

Section 43. But as full arguments were addressed to us on the point, I may state that on the facts of the present case I. would hold that the

Bombay Company had a business connection with the Hongkong Company. 1 do not propose to define the words ""business connection"" as used

in Sections 42 and 43. For the purposes of the present case it is unnecessary to do so. On the other hand, I am not prepared to accede to the

argument presented to us by counsel for the Bombay Company to the effect that you must confine the expression ""business connection''1 to a

connection in the business of a resident person which gives rise to a pecuniary interest in the assets of that business, as, e. g., a share in the profits.

But the facts here are most exceptional. We are dealing in enormous figures, and substantially the Bombay Company was being financed to the

extent of fifteen or sixteen times its paid-up capital by a fairy god-mother in the shape of the Hongkong Company who was prepared to lend them

almost unlimited sums at five and a quarter per cent, interest without security, and in its turn the Hongkong Company was risking double the

amount of its paid-up capital and all its available deposits.

24. Under those circumstances it seems to me that there was a strong business connection between the two companies. The business interests of

the Hongkong Company were practically entirely wound up in the business welfare of the Bombay Company. The failure of the latter would have

involved the ruin of the former. Consequently, I need say nothing as to the fact that behind these strong financial ties there was the family house of

E.D. Sassoon & Company Limited ns the banker intermediary. Nor need I in any way lay stress on such family connections an there might be

between the. various share-holders or directors of the three companies. The case can be decided quite apart from that, and I have dealt with it on

that basis.

25. As regards the further question as to whether in any event the Bombay Company was a person through whom the Hongkong Company was in

the receipt of income, I am inclined to think that the word ""through"" should not be construed as meaning Ã¯Â¿Â½from."" In other words, I do not think

that that section was intended to include any person who might have to transmit Bombay moneys to a non-resident, whether or no he knew that

such moneys represented the income, profits or gains of the non-resident.

26. I may add that as regards the decision in Imperial Tobacco Company''s case to the effect that the agent charged must be in receipt of income,

there has been no subsequent alteration made in Sections 40 to 43 on that point, apart from the addition of the words ""or property"" in Section 42,

and the alteration I have already referred to in Section 43. But, on the other hand, Sections 57 and 68 have been amended so as to necessitate the

deduction of super-tax as well as Income Tax; on dividends. That, however, is another point. Up to now the Legislature has not altered the general

construction which the majority of the Judges in Imperial Tobacco Company''s case placed on Sections 31 and 34 of the 1918 Act. It has met the

finding in that ease that the company was not in receipt of its dividends on behalf of its shareholders, and consequently not within Section 81, by

extending the section for compulsory deduction of tax from such dividends.

27. As regards the meaning of the word ""property"" in Section 42, 1 think there is much force in the contention of counsel for the Bombay

Company that it must be confined to the heading ""property"" in Sections 6(iii) and 9, and would, therefore, be limited to Immovable property. But

this point also it is unnecessary to decide in the present case.

28. In the result, then, 1 would answer the questions submitted to us as follows :Ã¯Â¿Â½

1. Yes, from a business connection. But it also arises directly u/s 4(1) and Section 6(iv) or (vi).

2. Yes.

3 and 4 No. because the Bombay Company is not in receipt of any such interest on behalf of the Hongkong Company as required by Section 40.

5. The relation between the two companies was that of borrower and lender, but having regard to Section 43, the Bombay Company though

deemed to be an agent of the Hongkong Company for the purposes of Sections 40 and 4"2 should not be assessed as they were not in receipt of

income. (See answer to questions 3 and 4.)

29. As regards costs, I would direct the costs of the Bombay Company to be paid by the Commissioner, such costs to be taxed by the Taxing

Master, Original Side, as on the Original Side scale.

Kemp, J.

30. The main question for our consideration in this reference is whether a Corporation called the Bombay Trust Corporation carrying on business

in Bombay is properly assessed under Sections 42(1) and 43 of the Indian Income Tax Act (XI of 1922) as the agent of another Corporation

called the Hongkong Trust Corporation carrying on business in Hongkong in respect of the income alleged to accrue to the latter in Bombay. The

facts giving rise to this reference are as follows. The Bombay Trust Corporation was registered in Bombay on September 8, 1920; the Hongkong

Trust Corporation was registered at Hongkong on July 6, 1921, The paid-up capital of the Hongkong Trust Corporation amounted to eight crores

of rupees and it had at its disposal about seven or eight crores more of cash deposits received from all sources. It was formed as a limited

company and by its memorandum of association it was empowered to carry on the business of bankers and financiers, advancing, depositing or

lending money and doing this business at Hongkong or in any part of the world. In fact its activities were confined to Bombay and to lending money

to the Bombay Trust Corporation. The Bombay Trust Corporation was a private limited company and by its memorandum and articles of

association its objects are stated, inter alia, to be to carry on business as capitalists and financiers, lending money and executing all kinds of

financial operations. There was undoubtedly an intimate connection between the Bombay Trust Corporation and the Hongkong Trust Corporation.

The Hongkong Trust Corporation, as I have said, practically confined all its activities to its money lending business with the Bombay Trust

Corporation in Bombay and lent the whole of the fifteen or sixteen crores constituting its paid-up capital and cash deposits to the Bombay Trust

Corporation from time to time at five and a quarter per cent, interest. The interest accruing due was remitted by the Bombay Trust Corporation

through its bankers Messrs. E. 1). Sassoon & Company, Bombay, to the Shanghai branch of the same bankers which kept an account of the

Hongkong Trust Corporation, On the profits and income accruing to the Hongkong Trust Corporation from this money-lending badness for the

years ending March 31, 1925, and March 31, 1026, the Commissioner has assessed the Bombay Trust Corporation under Sections 42(1) and 43

of the Indian Income Tax Act XI of 1922 as agents of the Hongkong Trust Corporation to Income Tax and super-tax for the financial years 1925-

1926 and 1926-1927.

31. The amount involved is large, the Income Tax for 1925-1926 amounting to Rs. 4,92,821 and super-tax Rs. 3,92,096, and for 1926-1927

Income Tax Rs. 5,38,510 and super-tax Rs. 3,55,882. The total, therefore, for the two years amounts to Rs. 18,79,321. At the request of the

assessee the Commissioner referred certain questions for our opinion u/s 66(2) of the Indian Income Tax Act XI of 1922. Those questions are

stated in paragraph 7 of the Commissioner''s reference. He was of opinion that the interest received by the Hougkong Trust Corporation were

profits or gains accruing through a business connection or property in British India u/s 42(1) of the Act and he was further of opinion that the

Bombay Trust Corporation could be treated as the agent of the Hongkong Trust Corporation under Sections 42(1) and 43 in respect of such

interest.

32. The first point for consideration is whether the income or profit accruing to the Hongkong Trust Corporation arose from a business carried on

by it in Bombay and it seems to me clear that it did. The correspondence shows that the procedure adopted in lending these moneys was for the

Hongkong Trust Corporation to make an offer from Hongkong to the Bombay Trust Corporation in Bombay to lend a sum of money. The

Bombay Trust Corporation accepted the offer in Bombay and the contract, therefore, was made in Bombay. The business between the two

companies formed a series of contracts from time to time and thus the whole of this money-lending business was done in Bombay and the interest

accrued here although it was remitted through Messrs. E.D. Sassoon & Company on behalf of the Bombay Trust Corporation to China. I think it

is clear this business was done in Bombay and that the income from it accrued to the Hongkong Corporation in Bombay.

33. Another question, however, arises in considering what meaning is to be given to the words ''business connection'' in Sections 42(1) and 43.

The Sassoon family were interested very largely in both the Bombay and the Hongkong Trust Corporations as well as in the firm of E.D. Sassoon

& Company whose Bombay office is in the same building as the Bombay Trust Corporation, through whom the moneys and the interest were

remitted from time to time.

34. There can be little doubt that although the Hongkong Trust Corporation and the Bombay Trust Corporation were separate legal entities there

was that intimate connection between them, as shown by their dealings, which shows that the Hongkong Trust Corporation was formed practically

for the purpose of lending all its available cash to the Bombay Trust Corporation and the intermediary between the two Corporations were the

bankers E.D. Sassoon & Company. The Hongkong Corporation lent all its paid-up capital and cash deposits apparently without security to the

Bombay Company. Such a connection between the Hongkong Trust Corporation and the Bombay Trust Corporation would, I think, generally be

regarded as a ""business connection"" and therefore the interest paid by the Bombay Trust Corporation were profits or gains accruing to the

Hongkong Trust Corporation in British India. In this view of the question if the decision in Whitney v. Inland Revenue Commissioners [1926] A.C.

37 is applicable to our Act the Hongkong Trust Corporation itself can be reached by a notice to make a return and be assessed on failure to do so

in respect of this business done by it in Bombay.

35. But the further question arises whether the Bombay Trust Corporation are the proper persons who can be assessed as the agents, under

Sections 42(1) and 43, of the Hongkong Trust Corporation. In Imperial Tobacco Company of India, Ld v. The Secretary of State for India I.L.R

(1922) Cal. 721 the majority of the Court (Woodroffe and Greaves JJ.) held that Sections 41 and 43 were to be read together and that therefore

the statutory agent created by Section 43 must be one who is in receipt of the income &c, on behalf of the nonresident. That case was decided in

January 1922 prior to the coming into force of the present Act in March 1922. The present Act has added the words in Section 43 ""or through

whom such person is in the receipt of any income, profits or gains"", and it is to be noted, as the learned Chief Justice has pointed out, that the

Legislature, had it wished to disagree with the decision in Imperial Tobacco Company"s case, had the opportunity in the present Act of clearly

indicating that a 43 was not intended to be read with Section 41 as extending the meaning of the word "agent" only. On the other hand, Act XI of

1922 was probably introduced prior to January 3 922 and it is of course quite possible that the decision in Imperial Tobacco Company"s case

was not then brought to the notice of the framers of the present Act.

36. Now, as to the case of non-residents we have as 40 to 43 of the Act. Section 40 says tax shall be levied and recovered from his agent who is

in receipt on his behalf of any income, profits or gains chargeable under the Act. Section 4(1) applies the Act to all income, profits and gains

accruing or arising in British India. Also by it the Act may lay down that other income, profits and gains shall be regarded as accruing or arising in

British India.

37. Here the profits or gains clearly accrued in British India and are, therefore, taxable. But assurance is made doubly sure by Section 42(1) which

states that profits or gains accruing or arising to the non-resident from a business connection in British India shall be deemed to be income accruing

or arising in British India and here I have held there is such a business connection.

38. Can it be successfully contended that in respect of income coming under both the descriptions of accruing in British India and deemed to

accrue in British India u/s 4 the agent liable to assessment for such income wad intended to be vested with a different authority? I think not. I think

that agent in Section 42(1) mast mean agent in receipt of income on behalf of the non-resident as in Section 40. The income in Section 40 includes

the income in Section 42(1), Otherwise we have a contradiction as to the agent to be assessed.

39. Then Section 43 creates a statutory agent. It does not substitute such agent for an agent in receipt of income on the non-resident''s behalf. It

says certain persons may be agents, They are:Ã¯Â¿Â½

(1) an employee,

(2) one having a business connection with the non-resident, and

(3) one through whom the non-resident receives the income, or, it may be, one whose possession of the income is the constructive possession of

the non-resident. Neither construction of (3) matters here because.the Bombay Trust Corporation are mere debtors and cannot, in my opinion, be

regarded as fulfilling eithar description. If the Legislature had intended that the statutory agent should be the source of the income it should have

said so in clear and unmistakable terms.

40. Nor is the business connection here existing between the two Corporations such that the Bombay Trust Corporation can be regarded as a

person in receipt of the income on the Hongkong Trust Corporation''s behalf.

41. Any other construction of Section 43 would enable the Commissioner to serve any employee, who might not be in receipt of the income on the

non-resident''s behalf, so as to constitute him an assessee under the Act, This would be inequitable and can hardly have been intended and at any

rate any such liability should be expressed in clear and unambiguous terms. Having regard to the loose drafting of Sections 40, 42(1) and 43, 1

decline to hold it has this effect.

42. Further, I agree with respect with what the Chief Justice has pointed out in his judgment which I have had the advantage of perusing. IE in this

case there is no power of deduction under the Act the tax is payable by the assesses direct.

43. I agree with respect with the Chief Justice as to the answers to the questions submitted for our opinion.