Privy Council Appeal No. 16 *of* 1938

The Commissioner of Income-tax, Madras - - *Appellant*

v.

Diwan Bahadur S. L. Mathias - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH NOVEMBER, 1938.

Present at the Hearing:

LORD ATKIN.
LORD MACMILLAN.
LORD PORTER.
SIR LANCELOT SANDERSON.
SIR GEORGE RANKIN.

[*Delivered by* SIR GEORGE RANKIN.]

This appeal is brought by the Commissioner of Income-tax, Madras, from a judgment of the High Court at Madras upon a reference made under the provisions of section 66 of the Indian Income-tax Act, 1922. The year of assessment in respect of which the dispute arises is 1934-35 and the year of account or "previous year" is that which ended on 30th April, 1933. The assessee respondent resides at Mangalore in British India and owns coffee estates in the Mysore State, which is no part of British India. The Income-tax Officer at Mangalore assessed him to tax on a "total income" of Rs.29,160, of which Rs.25,963 was computed as the assessee's profits of a "business" of growing, curing and selling coffee for profit. By appeal to the Assistant Commissioner the assessee disputed his liability in respect of any part of the sum of Rs.25,963 and on his appeal being dismissed required the Commissioner to make a reference to the High Court. An agreed question having been stated and referred (24th July, 1936), in terms to be presently mentioned, the High Court decided in favour of the assessee, holding that the whole income derived by the assessee by the sale of the produce of his coffee estates was exempt from taxation. From the joint judgment (dated 29th April, 1937), of Beasley C.J., Varadachariar and King JJ., this appeal has been brought pursuant to a certificate granted by the High Court on 13th October, 1937.

There is no dispute as regards the material facts, and the figure (Rs.25,963) determined by the Income-tax Officer as the amount of net profit is not in itself in dispute as a

question of amount. In arriving at this figure deduction has been made from the proceeds of sale for all expenses incurred whether in or outside British India.

The Commissioner's statement of the facts is as follows:—

> "The Petitioner owns two coffee estates in the Mysore State for which he pays land tax to that State. These estates are worked by the Petitioner. He employs the labour required for the purpose and maintains an office in the estate in order to supervise them. The labour is recruited mainly at Mangalore and the manure, spray materials, tools, crop-bags, etc., required for the estate are purchased by the Petitioner at Mangalore and are sent to the estate. The crops are harvested by the labour employed by the Petitioner and are then brought to Mangalore in their raw state. There is no ready market for raw coffee. The Petitioner gets the green coffee cured at Mangalore by persons owning curing factories, on payment of a commission to them. The cured coffee is insured against fire till sale and the Petitioner pays the insurance charges. It is then sold at Mangalore by the Petitioner's selling agents, Messrs. Pierce Leslie & Co., Ltd., and the sale-proceeds are realised and retained there. A separate staff is maintained at Karkal in the Mangalore District for the various operations conducted in Mangalore. The accounts are written up by the estate staff in Mysore in respect of the expenses incurred in Mysore and by the Karkal staff in respect of the expenses incurred in Mangalore and in respect of the receipts. All the operations connected with the cultivation of the coffee plants and the collection, transport and sale of produce are controlled by the Petitioner from Mangalore. The result of the accounts in Mysore is incorporated in the books maintained at Karkal and a consolidated profit and loss account is made there. The income from this source was assessed under the head 'business' in the past."

On these facts the assessee's liability depends upon section 4 of the Act (XI of 1922), its true construction and the manner in which it is to be applied to his case. As it stood at the time of this assessment (1934) and still stands, it reads as follows:—

> "SECTION 4.—(1) 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.
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> "(2) Income, profits and gains accruing or arising without British India to a person resident in British India shall, if they are received in or brought into British India, be deemed to have accrued or arisen in British India and to be income, profits and gains of the year in which they are so received or brought notwithstanding the fact that they did not so accrue or arise in that year:
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> "Provided that nothing contained in this sub-section shall apply to any income, profits or gains so accruing or arising prior to the 1st day of April, 1933, unless they are income, profits or gains of a business and are received in or brought into British India within three years of the end of the year in which they accrued or arose:
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> "Provided further that nothing in this sub-section shall apply to income from agriculture arising or accruing in a State in India from land for which any annual payment in money or in kind is made to the State.
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> "EXPLANATION.—Income, profits or gains accruing or arising without British India shall not be deemed to be received or brought into British India within the meaning of this sub-section by reason

only of the fact that they are taken into account in the balance sheet prepared in British India.

" (3) This Act shall not apply to the following classes of income:—

* * * *

" (viii) Agricultural income."

Upon this section the assessee contended (1) that his income from coffee was not assessable as profits of a business; (2) that it was within the second proviso to sub-section (2); (3) that if any income was assessable under sub-section (1) it was only the residue left out of the sale proceeds after deducting the market value of the green coffee and the curing and other charges. The question of law upon which the parties were at issue was ultimately stated to the High Court in an agreed form as follows:—

" Whether any part of the income derived by the petitioner from the produce of his coffee estates in Mysore is exempt from taxation under the second proviso to section 4 (2) of the Indian Income-tax Act as being income that has accrued or arisen outside British India? "

The High Court was of opinion that the income in question was " income from agriculture " and that it arose or accrued in Mysore. " Whatever may be said as to ' profits ' or ' gains ' the view that ' *income* from agriculture ' can be said to arise or accrue only when and where the produce is sold and converted into money seems to us, with all respect, difficult to reconcile with the reasoning in [1900] A.C. 588," (*Commissioners of Taxation* v. *Kirk*). The learned Judges speak of that decision as recognising " that as a matter both of language and of business receipt of produce *in kind* may well be spoken of as receipt or accrual of income at the place where the produce is received." To the contention that even so the money income had been " received in British India" within the meaning of sub-section (1) as in the *Pondicherry Railway Co.* case, (1931) L.R. 58 I.A. 239 the learned Judges replied that sub-section (1) comprises receipts falling under sub-section (2) as well, and that it was not necessary or reasonable to read the two sub-sections as mutually exclusive. Hence on the footing that the income was received within the meaning of sub-section (1) they considered that the second proviso to sub-section (2) applied to exempt it. Finally, they held that the exemption to which the assessee was entitled under this proviso was of the same scope as the exemption of " agricultural income " as defined in section 2 (1) of the Act. Finding that the process applied to the coffee beans after they are picked was only a process " ordinarily employed by the cultivator to render the produce fit to be taken to the market " (as described in the definition of " agricultural income " given by section 2, sub-section (1) (*b*) (ii) of the Act) they held that the assessee was entitled to exemption " in respect of the whole price realised by the sale of his coffee."

Having regard to the assessee's contention that he was not conducting any business in coffee and to certain observations made by the learned Judges of the High

Court, it is necessary to state expressly their Lordships' opinion that the assessee is carrying on a "business" within the definition of the word given by section 2, sub-section (4) and within the meaning of section 10 of the Act. The observations of the Commissioner in his letter of reference are justified: "Such profit as the petitioner in this case derives from his possession of land in Mysore is derived by means of a business: and the fact that agricultural operations form an element in the business does not render it any the less a business." On the other hand the mere circumstance that income is to be placed under the head "business" has no effect to negative its being "agricultural income" as defined by section 2 (1) or "income from agriculture" under the second proviso to section 4 (2). But the green coffee itself cannot be regarded as income, profits or gains within the meaning of the Act: it is grown for purposes of sale and in order that profit may be earned. The business operations cannot be arbitrarily cut into two portions but must be regarded as a whole. Thus if the coffee market may be assumed to have its ups and downs, the assessee if he delayed his sales in expectation of a rise but found that prices fell, would not expect to be charged to tax on the profits that he would have made had he sold without delay. On the other hand, upon the question whether the profits and gains accrued or arose in British India, it may be that the fact that the coffee was grown in Mysore is by no means to be disregarded notwithstanding that it was sold in British India, especially if it be true that it was sold without further process of a manufacturing character. For the moment it is enough to say that it may be so, without examining the matter and without prejudice to either view. The High Court, in holding that the assessee's business income arose in Mysore, placed much reliance upon *Kirk's* case (*supra*) and considerable argument was addressed to the Board upon the matter. But it appears to their Lordships that other considerations decide this appeal, and that it is unnecessary to determine whether the income in question accrued or arose within or without British India. Accordingly they express no opinion as to the light, if any, thrown upon the phrase "accruing or arising in (a country)" by the decision in *Kirk's* case upon the phrases "earned in (a country)" and "arising or accruing from (a trade, land, a source)"—a matter upon which the High Court in the present case differed in opinion from the High Court at Calcutta (*Mohanpur Tea Company's* case, I.L.R. [1937] 2 Cal. 201).

The contention of the Income-tax authorities has been throughout that the income assessed to tax was not within sub-section (2) of section 4 because it did not accrue or arise outside British India. But in the High Court it was pointed out that the income was received in British India as the proceeds of all sales were paid to the assessee in Mangalore and so much of the price as represented profit was there received for the first time. It was contended, therefore, that the assessee was liable under sub-section (1)

of section 4 and that sub-section (2) and its proviso did not affect the assessee's liability. The answer given by the High Court has been stated and is now to be examined. But as the section has from time to time been altered by the legislature in view of rulings of the Courts, it is legitimate and it will be convenient to consider its history: though its present wording will *prima facie* determine its meaning completely, being intended to state with exactness the test of liability.

The Indian Income-tax Act of 1918 contained no clause corresponding to the second sub-section of the present section 4, but section 3 (1) of 1918 was similar to the present section 4 (1) as hereinbefore set out. It was as follows:—

> "3.—(1) Save as hereinafter provided, this Act shall apply to all income from whatever source it is derived if it accrues or arises or is received in British India, or is under the provisions of this Act, deemed to accrue or arise or to be received in British India."

When the Act of 1922 was passed the section was revised and expanded—a new sub-section being introduced together with an explanation thereof. This new sub-section applied only to the profits or gains of a business and had no effect upon income under any of the other "heads of income" (*cf.* section 6). It read:—

> "4.—(1) 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.
>
> "(2) Profits and gains of a business accruing or arising without British India to a person resident in British India shall be deemed to be profits and gains of the year in which they are received or brought into British India notwithstanding the fact that they did not so accrue or arise in that year, provided that they are so received or brought in within three years of the end of the year in which they accrued or arose.
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> "Explanation.—Profits or gains accruing or arising without British India shall not be deemed to be received or brought into British India within the meaning of this sub-section by reason only of the fact that they are taken into account in the balance sheet prepared in British India."

In the following year, however, 1923, the second sub-section was amended to read as follows:—

> "4.—(2) Profits and gains of a business accruing or arising without British India to a person resident in British India shall, if they are received in or brought into British India, be deemed to have accrued or arisen in British India and to be profits and gains of the year in which they are so received or brought, notwithstanding the fact that they did not so accrue or arise in that year, provided that they are so received or brought in within three years of the end of the year in which they accrued or arose."

In 1933 the second sub-section was again revised and put into the form already set forth as governing the present case. In its new form it applies to all income, profits and gains and not merely to those of a business, and the provision limiting its effect to income received in or brought into British India within three years of accrual was omitted

with a conditional saving in this respect for past income (that is, income accrued before 1st April, 1933), which retained its previous immunity unless it was business income within the three years' limit. At the same time the second proviso was introduced upon which the assessee is now relying.

The occasion for and to some extent the explanation of the second sub-section in its original form is to be seen in decisions of the Courts upon the word "received" as it appeared in the first sub-section of section 3 of 1918. These decisions were to the effect that if income had been received by the assessee outside British India it could not be again received by him within the meaning of the first sub-section. [*Sundar Das* v. *Collector of Gujrat* [1922] I.L.R. 3, Lah. 349, *Board of Revenue* v. *Ripon Press* [1923] 46 M. 706 (cases under the Act of 1918), *Sir Ali Imam's* case, 1 I.T.C. 402 (under the Act of 1922 but not a case of "business" profits).] The view taken was that the same sum could not be received a second time as income. There was a further difficulty or discrepancy under the earlier forms of the section if the income of one year was brought into British India in a later year. The result was that under sub-section (1) income could only be taxed on the ground of having been received in British India if it was income of the year of account originally received in British India. It will be observed that the various amendments leave the principle of the decisions above-mentioned untouched so far as concerns non-residents. Their general effect is to widen the liability of residents in respect of what they receive in British India by extending it to sums not received for the first time. But non-residents do not become chargeable by reason of monies having been brought into the country if originally received abroad.

The question to be answered is whether the second proviso to sub-section (2), assuming it to apply and the assessee's income to have accrued to him in Mysore, is any answer to an assessment made on him under sub-section (1) by reason of the fact that the income was received by him originally and as income in British India in the year of account.

If the central words of sub-section (1) be considered first—income accruing or arising or received in British India—it is clear that all three expressions must be applicable to the great bulk of the incomes of inhabitants of British India. It may be taken that all three expressions would not have been used unless it was thought that they exhibited some variation in meaning and that a case might possibly arise which would come under one only of the three. If on a question as to the exact meaning of "accruing" it were to be suggested that this only means "received" it would be reasonable to object that this can hardly be correct even though the difficulty of distinguishing between "accruing" and "arising" may be great. In this sense, perhaps not a very important sense, the expressions are antithetical. But it is very plain that there is here no question of a

complete disjunction or of the presentation of three mutually exclusive qualifications. No one would go about to prove that income was not received in British India by establishing that it arose or accrued there. When in sub-section (2) income " received in or brought into " British India is put into the class of " income accruing or arising " this does not at first sight suggest that such income if within the word " received " is thereby excluded from it in sub-section (1). The circumstances and context do not assist to carry any such negative implication. For that, there would seem to be required some words to the effect that it " shall be charged to tax as such and not otherwise." Still, no doubt, a draughtsman even at his fourth attempt may not succeed in saying quite as much as he means. Other indications must be carefully considered. If the exact language of the second proviso be examined with any care, it must appear that if nothing in sub-section (2) is to apply to the income of the assessee he can hardly rely upon sub-section (2) to take his case out of sub-section (1). No doubt, had it been expressly stated, or if it be held or assumed, that in the case of a resident income received in British India is never to be charged as such but only as having " accrued or arisen " it might become necessary to read the second proviso as meaning only that sub-section (2) should not apply to charge it. Even so, however, the language of the proviso is a second difficulty in the assessee's contention, which involves both that in the main clause of the sub-section the legislature has said less than it meant and that in the proviso it must be taken to have meant less than it said—if not, indeed, something different in kind. A third consideration must be allowed effect as a matter of construction. The question is entirely concerned with the result for purposes of tax of income having been " received in or brought into " British India. Had the assessee not been a resident he would have had no answer whatever to the present claim. But it is said that he escapes because he is a resident and comes as such within sub-section (2). This is to invert the intention of the sub-section which is to make receipt impose liability on the resident in some cases where the non-resident would go free. There is nothing whatever in sub-section (2) as it now stands or as it stood in 1922 and 1923 to relieve the resident from any liability which the non-resident is under. Hence the correct meaning of the proviso may well be the meaning which is intended—viz., that the widening of liability shall not attach to the incomes therein mentioned.

It is right to consider whether section 4 can be interpreted more favourably to the assessee on the footing that his income is of a class which is assimilated to " agricultural income " in British India. But unless it can be assumed as plain (despite much argument in the present case) that income from cultivating land in an Indian State can never accrue or arise in British India, it is at least clear that in some cases the agriculturist is not exempt at all. Again the agriculturist in an Indian State whose income in the narrow sense of sub-section (1) is received

in British India is not the ordinary agriculturist of his State. Nor does the typical agriculturist of Mysore reside in British India. The legislature may or may not have thought it to be advisable and sufficient that such a person should be relieved of the extended liability attached by sub-section (2) to the fact of receipt in British India without relieving him of the same liability under sub-section (1) as non-residents undoubtedly incur.

It is said, however, that the second proviso gives the assessee exemption; hence no other provision of the Act can be construed to render him liable. But what is the exemption given? There can be no general presumption that exemption from the provisions of a sub-section is intended as complete exemption from the tax. The distinction is between exempting a class of income in some events and exempting it in all events. The case of *Income Tax Commissioner* v. *Maharajadhiraj of Darbhanga,* [1935] L.R. 62, I.A. 215, was a case of "agricultural income" to which the Act does not apply [section 4 (3) (viii)]. "The exemption is conferred and conferred indelibly, on a particular kind of income and does not depend on the character of the recipient" [per Lord Macmillan at page 223]. The proviso now in question is not rendered otiose or even unimportant by the assumption that its opening words are a correct expression of its intention.

Their Lordships have reached the conclusion that upon this question the meaning and intention of the legislature is yielded by a strict construction of section 4 according to its language, and that any departure therefrom which can be suggested in favour of the assessee appears upon a full consideration to be unjustified. The assessee must be held liable to tax under sub-section (1) of section 4.

The answer proper to be given to the question stated by the Commissioner is that no part of the income therein mentioned is exempt from taxation under the second proviso to section 4 (2) of the Indian Income-tax Act.

Their Lordships will humbly advise His Majesty that this appeal should be allowed and that the question referred to the High Court should be answered as above-mentioned.

As the contention upon which the appeal has succeeded was not formally raised in the letter of reference, though it was mooted in argument before the High Court and dealt with by the judgment, there will be no order as to the costs of this appeal, but the High Court's order as to costs will be set aside and each party will bear its own costs in the High Court.

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In the Privy Council.

THE COMMISSIONER OF INCOME-TAX
MADRAS

v.

DIWAN BAHADUR S. L. MATHIAS

DELIVERED BY SIR GEORGE RANKIN

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
Pocock Street, S.E.1.

1938