# The Bhopal Trading Co., Kanpur vs Commissioner Of Income-Tax, U. P. on 17 December, 1954

## Equivalent citations: [1955]28ITR478(ALL)

JUDGMENT

MOOTHAM, J. - These cases arise out of the assessment for several years of the same assessee, the Bhopal Trading Company, which was assessed to income-tax and excess profits tax as an unregistered firm.

In Bhopal State outside British India, there was a limited liability company, known as The Straw Products Ltd. The assessee firm was the selling agent of that company and had an office in Bhopal. It had not been assessed to income-tax prior to 1942 but on the 11th of September, 1942, a notice under section 22(2) of the Indian Income-tax Act was issued to the assessee in Bhopal State. On the 18th of September, 1942, the assessee firm sent a reply stating that as it had not office at Kanpur and carried on business and had its office outside the jurisdiction of the Income-tax Officer, the notice and the blank form for submitting a return were returned. On the 25th of September, 1942, the Income-tax Officer informed the assessee that the Commissioner of Income-tax, Central Provinces and United Provinces, had assigned the case of the assessee to him under section 5(5) of the Income-tax Act, 1922, and he therefore had jurisdiction whether the assessee firm had or had not an office at Kanpur; and he asked the assessee to appear at Kanpur in person or through an authorised agent on the 2nd of October, 1942, at 11 a.m. and produce evidence in proof of its contention. On the 15th of October, 1942, the assessee re-asseted that the Income-tax Officer had no jurisdiction and that the assessee was, therefore not prepared to submit to his jurisdiction as desired. On the 15th of February, 1943, the Income-tax Officer served a notice under section 22(4) of the Act on Sohanlal Singhania, one of the partners of the assessee firm. On the 24th of November, 1943, a similar notice under section 22(4) was sent to the assessees office at Bhopal. On the 15th of December, 1943, the Income-tax Officer made an assessment order under section 23(4) of the Act holding that Rs. 36,000 was the assessable income, the whole of which had accrued or arisen or must be deemed to have accrued or arisen in British India. He also held that the firm had only two partners, Sohan Lal Singhania and Purshottam Das Singhania, both of whom were residents of Kanpur, that the business was "carried on at or controlled from Kanpur in British India" and that the assessee was therefore "ordinarily resident in British India." The shares of the two partners were assumed to be half and half.

Shortly after the assessment order, the assessee applied for cancellation of the assessment under section 27 of the Act. This application was dismissed. An appeal against this order, and also against the assessment order, were filed before the Appellate Tribunal. Both the appeals failed.

An application was thereupon made to refer certain questions of law, which it was said arose in the case for decision by this Court. That application has given rise to Income Tax Miscellaneous Case No. 367 of 1946. The Tribunal held that a question of law did arise and referred to us the following

question for our decision :

> "Whether on the facts stated above any question arose under section 64 of the Indian Income-tax Act, despite section 64(5), which had to be determined by the Commissioner and, if so, whether the failure of the Income-tax Officer to refer it to the Commissioner vitiated the assessment made on the assessee under section 23(4) of the Act ?"

Sub-sections (1) and (2) of section 64 of the Income-tax Act, 1922, provide that where an assessee carried on a business, profession or vocation at more places than one the Income-tax Officer of the area in which the principal place of its business, profession or vocation was situate shall have jurisdiction to make the assessment, while in all other cases the assessment will be made by the Income-tax Officer of the area in which the assessee resided. Sub-section (3) provides that where a question arises under section 64 as to the place of assessment, it was to be determined by the Commissioner. The provision of sub-section (5) to which a reference has been made in the statement of the case is as follows :

> "(5) The provisions of sub-section (1) and sub-section (2) shall not apply and shall be deemed never at any time to have applied to any assessee - (a) on whom an assessment or re-assessment for the purposes of this Act has been, is being or is to be made in the course of any case in respect of which a Commissioner of Income-tax appointed without reference to area under section (2) of section 5 is exercising the functions of a Commissioner of Income-tax, or
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> (b) where by any direction given or any distribution or allocation of work made by the Commissioner of Income-tax under sub-section (5) of section 5, of in consequence of any transfer made by him under sub-section (7A) of section 5, a particular Income-tax Officer has been charged with the function of assessing that assessee, or
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> (c) who or whose income is included in a class of persons or a class of incomes specified in any notification issued under sub-section (6) of section 5, but the assessment of such person, whether the proceedings for such assessment began before or after the 1st day of April, 1939, shall be made by the Income-tax Officer for the time being charged with the function of making such assessment by the Central Board of Revenue or by the Commissioner of Income-tax to whom he is subordinate, as the case may be."

Learned counsel for the assessee has rightly pointed out that the question of the place of assessment arises only in a case where the question is whether the assessee can be charged to income-tax by the Income-tax Officer of one area or another. The assessees contention was that as the assessee was not resident or ordinarily resident within the taxable territory and as it had received no income, profit or gain within that territory, section 64 of the Income-tax Act has not application. Learned counsel for the department also agrees that section 64 only applies to the place of assessment and has no application if no Income-tax Officer within the taxable territory has jurisdiction. The only answer

that we can, therefore, give to the question is that on the facts and circumstances of this case the question referred to us for answer does not arise and needs no answer.

The assessee has made an application under section 66(2) of the Indian Income-tax Act that certain other questions of law also arose and those should have been referred to us for decision. The questions have been formulated in paragraph 14 of the affidavit and are as follows :-

> "(i) Whether there was any evidence on the record to warrant the finding that the firm consisted of only two partners Lala Purshottam Das Singhania and Lala Sohan Lal Singhania ?
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> (ii) Whether there is any evidence on record for the finding that the control and management of the firm vested in the hands of the partners residing in British India or that it was exercised from British India ?
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> (iii) Whether there was any evidence on the record for the finding that the firm had income assessable to tax in British India ?
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> (iv) Whether the Income-tax Officer was right in treating the firm as resident and ordinarily resident within the meaning of the Indian Income-tax Act ?
>
> (v) Whether the appointment by the Commissioner of Income-tax could legally invest the Income-tax Officer with jurisdiction to assessee the applicant in the circumstances of the case ?
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> (vi) Whether in the circumstances of the case the notices under section 22(4) for the assessment years 1943-44 and 1944-45 were valid and validly served and if not whether the assessment made without the assistance of the accounts was vitiated in law or was it maintainable as a best judgment assessment ?

We shall deal with this application later along with a similar application in the connected case.

After the assessment for the year 1942-43 the Income-tax Officer issued notices under section 22(2) and section 34 of the Act for the assessment year 1941-42 and thereafter issued notices for the assessment years 1943-44, 1944-45 and 1945-46. Miscellaneous Case No. 87 of 1951 refers to these assessment years as also to the excess profits tax assessments for the calendar years 1942, 1943 and 1944.

Though in the first paragraph of the statement of the case it is mentioned that a reference was being made under section 66(1) of the Income-tax Act and section 21 of the Excess Profits Tax Act read with section 66(1) of the Indian Income-tax Act, and in paragraph 3 it is accounting period were the calendar years 1942, 1943 and 1944, the questions formulated do not relate to the Excess Profits Tax Act at all. The points of law in the excess profits tax references that might have to be considered might be entirely different in the income-tax references. In this connection we may draw attention

to the third proviso to section 5 the Excess Profits Tax Act, which is as follows :

> "Provided further that this Act shall not apply to any business the whole of the profits of which accrue or arise in an Indian State; and where the profits of a part of a business accrue or arise in an Indian State, such part shall, for the purposes of this provision, be deemed to be a separate business the whole of the profits of which accrue or arise in an Indian State, and the other part of the business shall, for all the purposes of this Act, be deemed to be a separate business."

The Tribunal should, therefore, formulate the questions arising out of the excess profits tax references which they want us to answer.

In the Connected Case No. 87 of 1951 the two questions of law that have been formulated are as follows :-

> "(1) Whether the Income-tax Officer had the jurisdiction to assess the assessee and if he did not have the jurisdiction whether the assessments made have been in any way vitiated ?
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> (2) Whether the assessments for the years 1941-42 and 1945-46 are invalid because the notices issued by registered post on the 17th December, 1945, were not actually received by the assessee or partner of the firm ?"

In this case also an application has been filed under section 66(2) that the Tribunal should have referred certain further questions of law for our decision. We shall deal later with this application along with the similar application in Miscellaneous Case No. 367 of 1946.

Coming now to the two questions referred to us in Miscellaneous Case No. 87 of 1951, the first question is differently worded but, when read with reference to the facts set out in the statement of the case, if is substantially the same as the question referred to us in Reference No. 367 of 1946. From paragraph 6 of the statement of the case it appears that the Commissioner of Income-tax, acting under section 5(5) of the Indian Income-tax Act, had on the 21st July, 1942, authorised the 1st Additional Income-tax Officer, Special Income-tax-cum-Excess Profits Tax Circle, Kanpur, to perform the functions of an Income-tax Officer in respect of the Bengal Trading Co., Kanpur, and by another order dated the 28th of July, 1943, under same section he had authorised the Excess Profits Tax Officer, Kanpur, to perform those functions.

Section 5(5) of the Indian Income-tax Act gives the Commissioner of Income-tax and certain other officers authority to confer powers on an Income-tax Officer in respect of any specified case or class of cases, but the sub-section will only apply to a case where the Indian Income-tax Act is applicable and where the Commissioner has jurisdiction under the Act. If the Commissioner has no jurisdiction under the Act, he obviously cannot authorise the Income-tax Officer or the Excess Profits Tax Officer to exercise any powers thereunder. This position is not contested by learned counsel for the Commissioner.

Where, however, the Commissioner has jurisdiction and the Income-tax Act applies, the question whether the assessment should have been made by one Income Officer or another is not a question for this Court to consider. In this connection we may refer to a decision of the Federal Court in Wallace Brothers & Co. Ltd. v. Commissioner of Income-tax, Bombay, Sind and Baluchistan.

Our answer to the first question, therefore, is that if the Income-tax Act was applicable and the assessee was liable under the Act, the Income-tax Officer had jurisdiction to assess the assessee, and in that view the rest of the question does not arise.

Coming to the second question, from the statement of the case it appears that notices dated the 17th of December, 1945, were issued by registered post addressed to the office of the assessee at Bhopal, but the notices were refused and were returned to the Income-tax Officer at Kanpur. These notices were in respect of the assessment years 1941-42 and 1945-46. On behalf of the assessee it was claimed that the firm was dissolved towards the end of 1944 and the assessee had, therefore, no office at Bhopal on the date when the notices were sent. The Tribunal did not accept the plea that the firm was dissolved towards the end of 1944 and that there was no office at Bhopal. If the notices were sent to the correct address and they reached the destination, the mere fact that the assessee refused to take them would not entitle him to claim that the notices were not duly served.

Section 63(1) of the Indian Income-tax provides that "A notice or requisition under this Act may be serveed on the person therein named either by post or as if it were a summons issued by a court, under the Code of Civil Procedure, 1908."

Section 27 of the General Clauses Act, 1897, provides that "Where any Central Act or Regulation made after the commencement of this Act authorities or requires any document to be served by post, whether the expression serve or either of the expressions give or send or any other expression is used, then unless a different intention appears, the service shall be deemed to be effected by properly addressing pre-paying and posting by registered post, a latter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

From the facts given in the statement of the case it appears that the question the Tribunal wants us to decide is, if a notice is sent to the correct address and by post but the assessee refuses to take the notice, it can be held to have been duly served.

Order V, rule 10, of the Civil Procedure Code provides that "Service of the summons shall be made by delivering or tendering a copy thereof....."

In a case where the notice is sent by post for which provision is made in section 63(1) of the Act, if the assessee refuses to accept the notice, the notice has been tendered to him and the service should, therefore, be deemed to be sufficient.

Our answer to the second question, therefore, is that the mere fact that the notices were not actually received by the assessee or a partner of the firm would not invalidate the assessments for the years

1941-42 and 1945-46, if the notices were sent by registered post to the proper address.

Coming now to the two applications under section 66(2) of the Indian Income-tax Act, certain important questions of law have been raised by counsel. Mr. Jagdish Swarup relies on the provisions of section 4A(b) of the Income-tax Act and has urged that there is a presumption that a firm is resident in British India and the burden of proving that it is not is on the assessee firm. Section 4A(b) is in these terms :

> "For the purposes of this Act a Hindu undivided family, firm or other association of persons is resident in British India unless the control and management of its affairs is situated wholly without British India;....."

Mr. Pathak, learned counsel for the assessee, on the other hand has urged that there is no such presumption, and that there must be some material before the Income-tax Officer from which he could reasonably come to the conclusion that a firm is resident in British India, and that it is only if there is prima facie evidence to that effect that the burden would shift to the assessee to establish that it is not resident in British India.

In the cases before us, according to learned counsel, there was no material on which the Income-tax Officer could come to the conclusion that the control and management of the assessees affairs were situated within British India. Learned counsel for the Commissioner, on the other hand, had laid stress on the words "unless the control and management of its affairs is situated wholly without British India" and has argued that it is for the assessee to prove that the control and management of its affairs were wholly without British India. It is not, we think, necessary for us at this stage to express an opinion on the point. To our minds, the following questions of law do arise on the arguments addressed by learned counsel :

> (1) Whether the burden of proof was on the assessee to establish that it was not resident in British India ?

The Income-tax Officer had served a notice on the assessee and had fixed a date on which the assessee was to establish that he was not resident in British India. The assessee did not appear. In case the burden of proof was on the Income-tax Officer it would be necessary to consider (2) Whether there was any material on which the Appellate Tribunal could come to the conclusion that the assessee was resident in British India ?

Mr. Pathak has urged further that inasmuch as his client had filed an affidavit and a copy of the return submitted to the Income-tax Officer at Bhopal as well as the assessment order passed by that Officer, there was material to establish that the assessee firm consisted of four partners, that the office of the assessee firm as at Bhopal where the entire business was carried on, and that the control and management of its affairs were not situated within British India. It may be necessary for the Tribunal to consider whether a question of law arises to the effect that (3) Whether the Tribunal was not justified in law in rejecting the evidence produced by the assessee and not taking the same into consideration ?

Another question that has been suggested to us is (4) Whether there was no evidence to show that the income had either been received or had accrued in British India ?

We are not undertaking the responsibility of framing the questions ourselves as the statement of the case as also the appellate orders are, as is too frequently the case, wholly unsatisfactory. A large number of questions have been suggested in the applications under section 66(2) of the Indian Income-tax Act. It is for the Tribunal to formulate the questions of law that arise out of the appellate order some of which have been indicated above for reference to this Court under section 66(2) of the Indian Income-tax Act.

Since it is impossible to dispose of these two reference finally at this stage we are not making any order as to costs of the two references. We, however, certify the fee payable to counsel for the Commissioner at a sum of Rs. 350 in each case. The assessee will get the costs of the two applications which we assessee at Rs. 100 in each case.

Reference answered accordingly.