Commissioner Of Income-Tax, Andhra ... vs Toshoku Ltd., Guntur Etc on 29 August, 1980

Equivalent citations: 1981 AIR 148, 1981 SCR (1) 587

Author: E.S. Venkataramiah

Bench: E.S. Venkataramiah, P.N. Bhagwati

PETITIONER:
COMMISSIONER OF INCOME-TAX, ANDHRA PRADESH HYDERABAD

Vs.

RESPONDENT:
TOSHOKU LTD., GUNTUR ETC.

DATE OF JUDGMENT29/08/1980

BENCH:
VENKATARAMIAH, E.S. (J)
BENCH:
VENKATARAMIAH, E.S. (J)
BHAGWATI, P.N.

CITATION:
1981 AIR 148 1981 SCR (1) 587

ACT:
Commission payable to non-resident foreign agent by the statutory agent-Statutory agent making credit and debit entries in his books of account under the head "commission account" on receipt of the sale price from the foreign agent and thereafter on remitting the commission amount to the foreign agent-Whether the commission amounts sent were assessable to income tax-Sections 5(2), 9(1)(i), 160, 161 and 163 of the Income Tax Act, 1961 read with Board's Circular (XXVII-I) of 1953 No. 26 (II/53) dated July 17, 1953-Whether the amounts should be treated as income deemed to have accrued or arisen in India.

HEADNOTE:
Dismissing the Revenue appeal by special leave, the Court
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HELD: (1) The credit entries made in the books of a statutory agent do not by themselves amount to receipt by

assessees who are non-residents as long as the amounts so credited in their favour are not at their disposal or control. [592 F]

The non-resident assessees in this case neither received nor could be deemed to have received the sums in question when their accounts with the statutory agent were credited, since a credit balance without more only represents a debt and a mere book entry in the debtor's own books does not constitute payment which will secure discharge from the debt. They cannot, therefore, be charged to tax on the basis of receipt of income actual or constructive in the taxable territories during the relevant accounting period. [592 F-G]

P. V. Raghava Reddi & Anr. v. Commissioner of Income-tax [1962] Supp. 2 S.C.R. 596, distinguished.

(2) Under clause (a) of the Explanation to clause (i) of sub-section (1) of section 9 of the Income Tax Act. in the case of the business of which all the operations are not carried out in India, the income of the business deemed under that clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India. If all such operations are carried out in India, the entire income accruing therefrom shall be deemed to have accrued in India. If, however, all the operations are not carried out in the taxable territories, the profits and gains of business deemed to accrue in India through and from business connection in India shall be only such profits and gains as are reasonably attributable to that part of the operations carried out in the taxable territories. If no operations of business are carried out in the taxable territories, it follows that the income accruing or arising abroad through or from any business connection in India cannot be deemed to accrue or arise in India. [593 B-D]

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In the instant case the non-resident assessees did not carry on any business operations in the taxable territories. They acted as selling agents outside India. The receipt in India of the sale proceeds of tobacco remitted or caused to be remitted by the purchasers from abroad does not amount to an operation carried out by the assessees in India as contemplated by clause (a) of the Explanation to section 9(1)(i) of the Act. The commission amounts which were earned by the non-resident assessees for services rendered outside India cannot, therefore, be deemed to be incomes which have either accrued or arisen in India. [593 E-G]

Commissioner of Income-tax, Punjab v. R. D. Aggarwal & Co. & Anr. 56 I.T.R. 20 and M/s. Carborandum Co. v. C.I.T. Madras [1977] 3 S.C.R. 475, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 782-783 of 1973.

Appeals by Special Leave from the Judgment and Order dated 18-11-1972 of the Andhra Pradesh High Court in Cases Referred Nos. 50 and 52 of 1970.

P. A. Francis, K. C. Dua and Miss A. Subhashini for the Appellant.

L. A. Subba Rao for the Respondent.

The Judgment of the Court was delivered by VENKATARAMIAH, J.-These two appeals by Special Leave are filed against a common judgment dated November 18, 1971 delivered by the High Court of Andhra Pradesh in Case Referred Nos. 50 and 52 of 1970.

Sri Bommidala Kotiratnam (hereinafter referred to as 'the statutory agent') is a dealer in tobacco at Guntur in the State of Andhra Pradesh. During the previous year relevant to the assessment year 1962-63, the statutory agent purchased tobacco in India and exported it to Japan, where it was sold through M/s. Toshoku Ltd. (the assessee involved in Civil Appeal No. 782 of 1973 a Japanese Company and admittedly non-resident. Under the terms of the agreement between the statutory agent and the assessee referred to above, the latter was appointed the exclusive sales agent in Japan for selling tobacco exported by the former. The assessee was entitled to a commission of 3% of the invoice amount. The sale price received on the sale of tobacco in Japan was remitted wholly to the statutory agent who debited his commission account with the amount of commission payable to the Japanese company and credited the same in the account of the Japanese company in his books on December 31, 1961. The amount was remitted to the Japanese company on February 1, 1962 on which date an appropriate debit entry was made in the account of the Japanese company with the statutory agent.

The statutory agent had similarly sold some tobacco during the same accounting period through another non- resident business house by name 'M/s Societe Pour Le Commerce International Des Tobacs' (the assessee involved in Civil Appeal No. 783 of 1973) carrying on business in France. The terms of agreement were the same as in the case of the Japanese Company referred to above, the only difference being the geographical area in which each of them had to render service as a selling agent. In this case also the statutory agent made similar entries in his books regarding the commission payable to the assessee and ultimately made a debit entry in the account of the assessee in his books when the amount was transmitted to the assessee.

During the assessment year the question whether the commission amounts sent to the Japanese company and the French business house (hereinafter referred to collectively as 'the assessees') were assessable in terms of section 161 of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') arose for consideration before the Income-tax Officer. The statutory agent contended that the amounts in question were not taxable in view of the clarification of the legal position by the Board Circular (XXVII-I) of 53 No. 26 (II/53) dated July 17, 1953 which stated:

> "A foreign agent of an Indian exporter operates in his own country and no part of his income arises in India. Usually his commission is remitted directly to him and is therefore not received by or on his behalf in India. Such an agent is not liable to Indian Income- tax."

The Income-tax Officer, however, came to the conclusion that the sums in question were taxable in view of the decision of this Court in P. V. Raghava Reddi & Anr. v. Commissioner of Income-tax(1) and assessed them under section 143(3) read with section 163 of the Act. The appeals preferred by the statutory agent against the orders of assessment before the Appellate Assistant Commissioner of Income-tax and the Income-tax Appellate Tribunal were unsuccessful. Thereafter the following common question of law was referred to the High Court of Andhra Pradesh under section 256(1) of the Act:-

> "Whether on the facts and in the circumstances of the case the assessment on the appellant under section 161 of the Income-tax, Act, 1961 is justified?"

The High Court held that the assessments were not justified and answered the question against the Department. Hence these appeals under Article 136 of the Constitution.

The relevant provisions of the Act on which reliance is placed before us are sections 5(2), 9(1)(i), 160, 161 and

163. Section 5(2) of the Act which deals with the chargeability of the income of a person who is a non- resident under the Act provides that subject to the provisions of the Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived (a) which is received or is deemed to be received in India in such year by or on behalf of such person, or (b) accrues or arises or is deemed to accrue or arise in India during such year. Explanation 1 to section 5(2) of the Act declares that an income arising abroad can not be deemed to be received in India for the purpose of that section by reason only of the fact that it is included in a balance sheet prepared in India. Section 9(1)(i) of the Act provides that all income accruing or arising whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India shall be deemed to accrue or arise in India. The explanation to this clause provides that in the case of a business of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India and in the case of a non-resident no income shall be deemed to accrue or arise in India to him through or from operations which are confined to the purchase of goods in India for the purpose of export. An agent of a non-resident including a person who is treated as an agent under section 163 of the Act becomes, according to section 160(1) of the Act, the representative assessee in respect of the income of a non-resident specified in sub- section (1) of section 9 of the Act. Section 161 of the Act makes a representative assessee, who is an agent of a non- resident personally liable to assessment in respect of the income of the non-resident. Section 163 of the Act defines persons who may be regarded as agents of non-residents for the purposes of the Act. Sections 160, 161 and 163 of

the Act are merely enabling provisions which empower the authorities at their option to make assessment on and to recover tax due under the Act from the representative assessee. It is not disputed in these cases that if the incomes in question of the assessees are taxable, the statutory agent is liable to pay the tax. The real question which falls for determination is whether the said incomes are taxable. The facts found in these appeals are that the statutory agent exported his goods to Japan and France where they were sold through the assessees. The entire sale price was received in India by the statutory agent who made credit entries in his account books regarding the commission amounts payable to the assessees and remitted the commission amounts to them subsequently. One extra feature in the case of the Japanese company is that it had been appointed as an exclusive agent for Japan. It is not disputed that the assessees rendered service as selling agents to the statutory agent outside the taxable territories.

In order to establish its case, the Revenue has strongly relied on the decision of this Court in the case of P. V. Raghava Reddy (supra). A perusal of that decision shows that the said case is distinguishable on facts. In that case the assessee had exported in the years 1948-49 and 1949-50 certain quantity of mica to Japan. Mica was not exportable directly to Japanese buyers during those years as Japan was under military occupation but to a State organisation called Boeki-Cho (Board of Trade). To negotiate for order and to handle its other affairs in Japan in connection therewith the assessee engaged San-Ei Trading Co. Ltd., Tokyo as its agent. The Japanese Company was admittedly a 'non-resident' company. Under the agreements the assessee under-took to pay certain percentage of gross sale proceeds as commission to the Japanese Company. With regard to the mode of payment of commission, the agreements provided a term which read thus:

> "In view of the difficulties in this country it is requested that the first party credits all these amounts to the account of the second party with them without remitting the same until definate instructions are received by the first party."

The first party to the agreement was the assessee and the second party was the Japanese Company. During the two accounting years a total amount of Rs. 13,319-12-4 was paid to the Japanese Company either directly or through others to whom the assessee was instructed by the Japanese Company to pay the amount. The Court rejected the contention of the assessee that the Japanese Company was not in receipt of the amount in the taxable territories and the amount was not income within the meaning of section 4(1)(a) of the Indian income-tax Act, 1922 with the following observations:-

> "This leaves over the question which was earnestly argued, namely, whether the amounts in the two accounting years can be said to be received by the Japanese Company in the taxable territories. The argument is that the money was not actually received, but the assessee firm was a debtor in respect of that amount and unless the entry can be deemed to be a payment or receipt cl. (a) cannot apply. We need not consider the fiction, for it is not necessary to go into the fiction at all. The agreement, from which we have quoted the relevant term, provided that the Japanese Company desired that the assessee firm should open an account in the name of the Japanese Company in their books of account, credit the amounts in that account, and deal with

> those amounts according to the instructions of the Japanese Company. Till the money was so credited, there might be a relation of debtor and creditor; but after the amounts were credited, the money was held by the assessee firm as a depositee. The money then belonged to the Japanese Company and was held for and on behalf of the Company and was at its disposal. The character of the money changed from a debt to a deposit in such the same way as if it was credited in a Bank to the account of the Company. Thus, the amount must be held, on the terms of the agreement, to have been received by the Japanese Company, and this attracts the application of s. 4(1)(a). Indeed, the Japanese Company did dispose of a part of those amounts by instructing the assessee firm that they be applied in a particular way. In our opinion, the High Court was right in answering the question against the assessee."

The Court, as it is obvious from the portion extracted above, proceeded to hold that the amount in question was received by the Japanese Company in India and hence was taxable on that basis.

In the cases before us there were no terms corresponding to the term extracted above which was found in the agreements between the assessee and the Japanese Company in P. V. Raghava Reddi's case (supra). It cannot be said that the making of the book entries in the books of the statutory agent amounted to receipt by the assessees who were non-residents as the amounts so credited in their favour were not at their disposal or control. It is not possible to hold that the non-resident assessees in this case either received or can be deemed to have received the sums in question when their accounts with the statutory agent were credited, since a credit balance without more only represents a debt and a mere book entry in the debtor's own books does not constitute payment which will secure discharge from the debt. They cannot, therefore, be charged to tax on the basis of receipt of income actual or constructive in the taxable territories during the relevant accounting period.

The second aspect of the same question is whether the commission amounts credited in the books of the statutory agent can be treated as incomes accrued, arisen, or deemed to have accrued or arisen in India to the non-resident assessees during the relevant year. This takes us to section 9 of the Act. It is urged that the commission amounts should be treated as incomes deemed to have accrued or arisen in India as they, according to the Department, had either accrued or arisen through and from the business connection in India that existed between the non-resident assessees and the statutory agent. This contention overlooks the effect of clause (a) of the Explanation to clause (i) of sub-section (1) of section 9 of the Act which provides that in the case of a business of which all the operations are not carried out in India, the income of the business deemed under that clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India. If all such operations are carried out in India, the entire income accruing therefrom shall be deemed to have accrued in India. If, however, all the operations are not carried out in the taxable territories, the profits and gains of business deemed to accrue in India through and from business connection in India shall be only such profits and gains as are reasonably attributable to that part of the operations carried out in the taxable territories. If no operations of business are carried out in the taxable territories, it follows that the income accruing or arising abroad through or from any business connection in India cannot be deemed to accrue or arise in India. (See Commissioner of Income-tax, Punjab v. R. D. Aggarwal & Co. & Anr.(1) and M/s.

Carborandum Co. v. C.I.T., Madras(2) which are decided on the basis of section 42 of the Indian Income-tax Act, 1922, which corresponds to section 9(1)(i) of the Act.) In the instant case the non-resident assessees did not carry on any business operations in the taxable territories. They acted as selling agents outside India. The receipt in India of the sale proceeds of tobacco remitted or caused to be remitted by the purchasers from abroad does not amount to an operation carried out by the assessees in India as contemplated by clause (a) of the Explanation to section 9(1)(i) of the Act. The commission amounts which were earned by the non-resident assessees for services rendered outside India cannot, therefore, be deemed to be incomes which have either accrued or arisen in India. The High Court was, therefore, right in answering the question against the Department.

For the foregoing reasons, the appeals fail and are hereby dismissed with costs. (Hearing fee one set).

V.D.K. Appeals dismissed.