Privy Council Appeal No. 37 *of* 1929.

The Commissioner of Income Tax, Bombay Presidency - - *Appellant*

v.

The Bombay Trust Corporation, Limited, as Agent of the Hongkong Trust Corporation, Limited - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH NOVEMBER, 1929.

Present at the Hearing:
LORD BUCKMASTER.
VISCOUNT DUNEDIN.
LORD TOMLIN.
SIR GEORGE LOWNDES.
SIR BINOD MITTER.

[*Delivered by* VISCOUNT DUNEDIN.]

The respondents in this case are the Bombay Trust Corporation, Limited, who are a company having their office in Bombay. A company called the Hongkong Trust Corporation, incorporated in Hongkong (hereinafter called the Hongkong company), lent money, from time to time, on deposit to the respondents at the rate of $5\frac{1}{4}$ per cent. and the respondents duly paid interest at that rate on the money deposited. The Senior Income-tax Officer duly served a notice on the respondents in terms of section 43 of the Indian Income-tax Act, 1922, that he intended to treat them as agents of the Hongkong company, and after hearing the respondents as to liability, he assessed them to income tax and super tax as agents of the Hongkong company in respect of the amount of interest in the year of charge. The respondents appealed to the Commissioner under section 30 of the Act contending that they were not liable to be so assessed, and also raising questions as to amount. The Commissioner on the

hearing of the appeals held that they were properly assessed as agents for the Hongkong company, but altered the assessment as to the amount. No further question on the amount arises. The respondents in pursuance of section 66 (2) of the Act required the Income-tax Commissioner to refer to the High Court the questions of law arising out of the decision of the Commissioner.

The questions so referred were as follows :—

"(1) Whether the interest paid by the Bombay Trust Corporation, Limited to the Hongkong Trust Corporation, Limited, on loans taken by the Bombay Trust Corporation, Limited, from the Hongkong Trust Corporation, Limited, is profits or gains accruing or arising to the Hongkong Trust Corporation, Limited, directly or indirectly through or from any business connection or property in British India.

(2) Whether such interest is liable to income tax under the Indian Income Tax Act.

(3) Whether the Bombay Trust Corporation, Limited, can be treated as the agent of the Hongkong Trust Corporation, Limited, for the purpose of section 42 of the Income Tax Act in respect of the interest so paid by the Bombay Trust Corporation, Limited, to the Hongkong Trust Corporation, Limited.

(4) Whether the Bombay Trust Corporation, Limited, can be deemed to be assessee under section 42 of the Act in respect of any income tax which might be levied on the interest so paid by the Bombay Trust Corporation, Limited, to the Hongkong Trust Corporation, Limited.

(5) Whether the relation between the Bombay Trust Corporation, Limited, and the Hongkong Trust Corporation, Limited, was not purely that of a borrower and lender and whether the Bombay Trust Corporation, Limited, as borrower, could be deemed to be the agent of the lender the Hongkong Trust Corporation, Limited, under sections 42 and 43 of the Income Tax Act in respect of interest payable on such loan and in respect of any income tax that may be chargeable on such interest."

The Court answered the questions submitted to them as follows :—

"(1) Yes, from a business connection, but it also arises directly under section 4 (1) and section 6 (iv) and (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 is 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 42, should not be assessed as they were not in receipt of income."

Appeal has been granted to His Majesty in Council against the above answers. The sections of the Act referred to in the answers are as follows :—

"Section 40. In the case of any guardian, trustee or agent of any person being a minor, lunatic or idiot or residing out of British India (all of which persons are hereinafter in this section included in the term 'beneficiary') being in receipt on behalf of such beneficiary or any income, profits or gains chargeable under this Act, the tax shall be levied upon and recoverable from such guardian, trustee or agent, as the case may be, in like manner and to the same amount as it would be leviable upon

and recoverable from any such benficiary if of full age, sound mind, or resident in British India, and in direct receipt of such income, profits or gains, and all the provisions of this Act shall apply accordingly."

"Section 42.—(1) In the case of any person residing out of British India, all profits or gains accruing or arising to such person, whether directly or indirectly, through or from any business connection or property in British India, shall be deemed to be income accruing or arising within British India, and shall be chargeable to income tax in the name of the agent of any such person, and such agent shall be deemed to be, for all the purposes of this Act, the assessee in respect of such income tax:

Provided that any arrears of tax may be recovered also in accordance with the provisions of this Act from any assets of the non-resident person which are, or may at any time come, within British India."

"Section 43. 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 upon whom the Income Tax Officer has caused a notice to be served of his intention of treating him as the agent of the non-resident person shall, for all the purposes of this Act, be deemed to be such agent:

Provided that no person shall be deemed to be the agent of a non-resident person unless he has had an opportunity of being heard by the Income Tax Officer as to his liability."

The High Court were in their Lordships' opinion clearly right in holding that the interest in question was a profit or gain accruing or arising to a person residing out of British India --to wit the Hongkong company—from a business connection in British India, and therefore falling under the words of section 42. But the High Court, noting that the Act goes on to declare that such profits or gains shall be chargeable to income tax in the name of the agent who shall be deemed to be the assessee in respect of such income tax, held that the term "agent" was used in the same sense as "agent" is used in section 40, *i.e.*, a person who receives the said profits and gains, and as the respondents, the Bombay Corporation, did not receive the money but on the contrary paid it, they answered questions 3 and 4 in the negative. In the same way they considered that "agent" in section 43 was also over-ridden as regards its meaning by section 40 and only applied to agents in receipt of the profits and gains. Their Lordships are unable to accept this view, as they feel constrained by the explicit words of section 43, which being explicit must rule whatever may be the general considerations as to what the Legislature was minded or was likely to do. Taking the words as they stand: the respondents have a business connection with the Hongkong company and "through them" the company is in receipt of profits or gains. The necessary notice of the intention of the Tax Officer to treat them as agents provided for has been served on them. All this being so, what says the section? They are "for all the purposes of the Act to be deemed to be such agent." Now one of the purposes of the Act is section 42. They are therefore to be "deemed to be" the agent who is chargeable to income tax, are deemed to be the assessee—the assessee being in terms of section 2 (2) defined as the person by whom income

tax is payable. Now when a person is "deemed to be" something, the only meaning possible is that whereas he is not in reality that something the Act of Parliament requires him to be treated as if he were. It follows that although the High Court was perfectly right in holding that if section 42 stood alone "agent" in that section would mean an agent in actual receipt of the profits or gains which were to be assessed, they failed to appreciate that section 43 puts the person who comes within its term artificially into the position of the agent and of assessee under section 42.

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed and the judgment of the Commissioner restored. The respondents must pay the costs before this Board and in the Courts below.

In the Privy Council.

THE COMMISSIONER OF INCOME TAX, BOMBAY,

v.

THE BOMBAY TRUST CORPORATION, LIMITED

DELIVERED BY VISCOUNT DUNEDIN.

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