

In the Mattr of Vs. G. Every.

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Court : Kolkata

Decided On : Feb-18-1937

Reported in : [1937]5ITR216(Cal)

Appeal No. : Income Tax Reference No. 1 of 1937

Appellant : In the Mattr of

Respondent : G. Every.

Judgement :

COSTELLO, J. - The point when arises for our consideration in this m atter is a short one and is contained in the question submitted to us by the Commissioner of Income Tax, Assam, as appearing in paragraph (4) of his statement of the case. It is this :

'In the facts and circumstances as stated above, can commission earned by the assessee in British India for services rendered in British India as an employee there, but actually received by him in the United Kingdom, while on leave be held to have accrued or arisen in British India within the meaning of Section 4(1) of the Indian Incom e tax Act (Act XI of 1922) ?'. The facts and the circumstances referred to in the question are briefly these. The assessee Mr. V. G. Every is an employee of the Pathini Tea Co., Ltd. which is a joint stock company incorporated under the English Companies Act having its registered office at No. 14, Fenchurch Street in the City of London. Mr. Every is employed by the company under the

terms of an agreement in writing, a certified copy of which has been placed before us. This agreement which is dated February 17, 1933 provides for a term of service for a period of four years calculated from the January 1, 1933. The provisions of the agreement which are relevant for our present purpose are those in clause 7 which runs as follows :-

'In consideration of the due observance and performance by the said employee of the several terms and stipulations which by him ought to be observed and performed and in consideration of the premises the said Company shall pay the said Employee during the continuance of this agreement a monthly salary to commence from January 1, 1933 and to be paid monthly as follows :-

'Salary; Rs. 800 per mensem.

Pony allowance Rs. 75 per mensem.

Commission : 5 per cent. on the nett profits of the Pathini and

Champabarie Divisions as may be determined by the Secretaries of the Company.

Furlough : Six months of full pay will be granted during the currency or at the expiry of this agreement as may suit the convenience of the Company together with Rs. 1,500 towards the cost of passage.

The said Company shall provide the said Employee with suitable dwelling house accommodation and medical attendance while on the garden free of charge'.

The garden referred to is that situated at a place called Pathini and by clause 1 of the agreement the employee is directed to proceed to Pathini or such Tea Garden or Plantation and in such part of India as the said company may direct and 'shall serve the said company in the cultivation and manufacture of tea and in such other matters in connection with the business of a Tea Planter and Manufacturer as the said company may from time to time require.' The Commissioner of Income Tax sets out in paragraph (2) of his statement of the case that Mr. V. G. Every of the Pathini Tea Estate in Assam received for his service during the accounting period 1934-35 salary in India amounting to Rs. 4,000 plus the taxable value of rent free

quarters which is put at Rs. 400. During this year, that is to say, the tax year 1934-35, says the Commissioner, Mr. Every was on leave for 7 months in the United Kingdom and while on leave there he received a sum of Rs. 6,965 being the commission earned by him in India during the previous year 1933-34. I pause here to make this observation that it appears that as a matter of fact, the sum which Mr. Every received while he was on leave during the year 1934 must actually have been received in respect of the operations of the company in the year 1932, that is to say, from January 1, 1932 to 31st December of that year... because the account of the company appear to be made up as at 31st December of each year though they are not actually certified by the Accounts of the company until some such period as the month of May in the succeeding year. The Commissioner of Income Tax proceeded thus : 'Under terms of this service the assessee is entitled to a percentage of the annual profits earned by the Estate subject to the assessee being in service of the Estate during that year. The commission was earned during a period in which the assessee was in residence and in service in India.'

What we are concerned with in the sum of money which was paid to the assessee while he was in England in the year 1934 which he had earned and which was payable to him on the basis of the profits made by the company for the accounting period January 1 to December 31, 1932. This matter has come before us in a rather unusual way because, originally it was never intended by the assessee that any question should come before a Court at all. The local Income Tax Officer made an assessment against Mr. Every on the September 20, 1935, and that was for the year 1935-36 on the basis of income received by the assessee during the previous year 1934-35. The assessment was for a sum of Rs. 7,702 made up follows :-

Salary Rs. 4,400. Commission Rs. 2,902. Other sources Rs. 400. Total Rs. 7,702.

The Income-tax Officer had taken the view that as regards the commission earned by the assessee seven-twelfths was not liable to tax but only five-twelfths, because the assessee had been on leave in the United Kingdom for a period of seven months. After receiving the assessment Mr. Every wrote a letter dated September 28, 1935, to the Assistant Commissioner and requested him to go into

the correctness of the assessment while he had made. We are told that the assessee merely took this course because he did not understand how the figure Rs. 400 as being income 'from other sources' had been arrived at. In the answer to this letter the Assistance Commissioner by a letter dated October 15, 1935, requested the assessee to make his petition on a proper appeal form duly certified and properly stamped. Accordingly on October 29, 1935, the assessee did file an appeal in the form prescribed, verified and properly stamped. The Assistant Commissioner of Income-tax fixed a date for the hearing of this appeal and gave a decision on the December 16, 1935. By his order of that date the Assistant Commissioner set aside the assessment made by the Income-tax Officer and directed that a fresh assessment should be made after taking into account the entire amount of the commission, that is to say, Rs. 6,965 instead of merely 5/12ths of that sum. A revised assessment was duly made on a total income of Rs. 11,765 made up as follows :-

Salary...

Rs. 4,400

Commission...

Rs. 6,965

Other sources...

Rs. 400

Total

Rs. 11,765

The assessee then found himself in a worse position than if he had never raised any question at all on the original assessment and so on the June 8, 1936, he appealed against the revised assessment by means of a petition (properly stamped and duly certified) to the Assistant Commissioner. The Assistant Commissioner by an order dated July 7, 1936 confirmed the assessment, that is to say, the revised assessment. Thereupon, the assessee being dissatisfied with the

order which the Assistant Commissioner of Income Tax, Assam, to refer certain questions of law for the opinion of this Court, questions which according to the assessee had arisen out of the order which the Assistant Commissioner had made. The questions that the assessee desired to refer were these '(a) Can the Assistant Commissioner make any order under Section 31 except on an appeal properly stamped and duly verified and in prescribed form (b) Can income received in the United Kingdom by an assessee in the United Kingdom be held to accrue in British India ?'.

The views of the Commissioner of Income Tax, Assam, on these questions are set out in paragraph (3) of the statement where he says : 'The first question does not arise out of the appellate order in spite of which a reference has been claimed, because it is not correct to say that the Assistant Commissioner passed his order, dated July 7, 1936, under Sec. 31 on an appeal petition which was not properly stamped and not duly verified. The application dated August 11, 1936, for a reference to the High Court under Sec. 66(2) of the Income Tax Act is with regard to the above order which the Assistant Commissioner passed December 16, 1935, and the appeal petition on which he passed that order was properly stamped and duly verified. The order of the Assistant Commissioner on the assessee's petition, dated September 28, 1935 was passed on October 15, 1935 and it was not an order under Sec. 31 but only an advice to the assessee to file his objection in the proper appeal form which the appellant did on October 29, 1935. I do not, in the circumstances, refer this question to the Honble High Court', then he proceeds thus : 'As regards the second question, the contention of the assessee is that the amount of commission having been received in the United Kingdom should be exempt from tax. The assessee did not bring this commission or any part of it to British India so as to attract liability under Sec. 4(2) of the Act. The question as propounded by the assessee is too abstract and is stated as if it relates to all classes of income. Instead of referring this question in its abstract form, I beg to refer the following question therefrom.' He then sets out the question when I stated at the outset of this judgment as being the question we are now required to decide. The opinion of the Commissioner of Income Tax, Assam, himself was that 'Mr. Every earned the commission in British India by service there during the year 1933-34.' I have already pointed out that the whole of the commission with which

we are concerned appears to have been actually earned by Mr. Every in the calendar year 1932. The Commissioner of Income Tax expressed the opinion that 'the whole of this income did thus accrue or arise in British India within the meaning of Sec. 4(1) of the Indian Income-tax Act. The amount is wholly earned in British India by a person residing in British India while earning the same and is earned by exertion wholly connected with British India. The simple fact that when this amount was actually paid the person entitled to receive it happened to be in England and thus received the payment thereof there does not in any way affect the time and place of accrual. I would, therefore, respectfully submit that the answer to the question should be in the affirmative as the commission in question did accrue and arise in British India within the meaning of Sec. 4(1) of the India Income-tax Act, 1922.'

We have listened with care, and considerable interest to the very full and able argument put forward by Mr. Ormond on behalf of the assessee, but I think there is no doubt that our opinion should coincide with the expressed by the Commissioner of Income-tax, Assam. Mr. Ormond argued, it has also been so argued on many previous occasions in analogous cases, that where the subject-matter of tax is salary or something in the nature of salary, there is very little difference, if any, in meaning as between the words 'accrue', 'arise' and the expression 'received in British India', as used in Sec. 4(1) of the Income-tax Act of 1922. The sub-section in its entirety reads as follows : ' 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.' Mr. Ormond has asked us to take the view that in gains which has accrued or arisen in British India. Mr. Ormond based a good deal of this argument upon observations in the judgment in the case of *Rogers Pratt Shellac & Co. v. Secretary of State for India in Council* (I.L.R. 52 Cal. 1). There the facts were that the assessee, which was a company incorporated in the United States of America having its Head Office in New York and branches and agencies in various States had branch office in Calcutta for the purpose of purchasing shellac. The goods as purchased were, I think, sold in the open market in America, on account of another company in America which was to pay the purchasing company a commission in

America which was to pay the purchasing company a commission of 6 per cent. On the purchase price plus expenses. The assessee company had also a factory in the United Provinces where produce purchased locally was worked up into a form suitable for export. No sales were conducted in India by the company. It was, however, held that the party was liable to pay income-tax and super-tax owing to the provisions of Sec. 3 sub sec. (1) read with Section 33 sub-sec. (1) of the Indian Income-tax Act of 1918 and Sec. 4 sub section (1) read with Section 42 sub-sec. (1) of the Indian Income-tax Act 1922. The observations I referred to are to be found in the Judgment of Mr. JUSTICE MUKHERJEE at page 29 where he said : 'The policy of the Act is to make the amount taxable when it is paid or received either actually or constructively. Accrues, and is received are three distinct terms. So far as receiving of income is concerned, there can be no difficulty; it conveys a clear and definite meaning, and I can think of no expression which makes its meaning plainer than the word receiving itself. The words accrue and arise also are not defined in the Act. The ordinary dictionary meanings of those words have got to be taken as the meanings attaching to them. Accruing is synonymous with arising in the case sense of springing as a natural growth or result. The three expressions accrues, arise and is received having been used in the section, strictly speaking, accrues should not be taken as synonymous with arises but in the distinct sense of growing up by way of addition or increase or as an accession or advantage, while the word arises means comes into existence or notice or presents itself. The former connotes the idea of a growth or accumulation, the latter of the growth or accumulation with a tangible shape so as to be receivable. It is difficult to say that this distinction has been throughout maintained in the Act and perhaps the two words seem to denote the same idea or ideas very similar, and the difference only lies in this that one is more appropriate than the other when applied to particular cases. It is clear, however, as pointed by Fry, L.J., in *Colquhoun v. Brooks* (21 Q.B.D. 52) (this part of the decision not having been affected by the reversal of the decision by the House of Lords), that both the words are used in contradiction to the word Receive and indicate a right to receive. They represent a stage anterior to the point of time when the income becomes receivable and connote a character of the income which is more or less inchoate.' Mr. Ormond, on the strength of the view expressed by Mr. JUSTICE MUKHERJEE

in that passage, invited us to come to the conclusion, as I have stated, that where it is a question of salary or something in the nature of salary, no distinction or on effective distinction can be drawn between the position which exists when the right to receive arises, and the position which exists when the income is actually received or, to put the matter in another way Mr. Ormond wishes us to take the view that the words 'accruing or arising' have nothing to do with the place of origin of the income, i.e., the place at which the income is earned by the proposed assessee. Mr. Ormond suggested that the presence of the words 'from whatsoever source derived' in sec. 4, sub-section (1) indicates that that is the true view of the matter. That, however, is not the opinion of the Bombay High Court as expressed in the case of the Commissioner of Income-tax, Bombay v. Raja Bahadur Banilal Motilal (I.T.R. 54 Bom 460). There are two passages in the judgment of Mr. JUSTICE BLACKWELL to which I will first refer. At page 467 the learned Judge said : 'In Section 4(1) of the Indian Income-tax Act of 1922 the words accruing or arising are found in juxtaposition to the words or received. Accordingly I think it plain that the words accruing or arising denote something different from the word received', and at page 469 he said :

I think that the words accruing or arising are used with reference to the place from which the income is derived and the use of the word source in the expression from whatever source derived confirms me in this opinion. In the present case the interest is derived from a loan which was made in British India, that loan, as to the principle, being repayable in British India, and I entertain no doubt that the interest accruing due upon, or arising from, that loan accrues or arises in British India.' The facts of the case were that certain promissory notes of the Government of India bearing 4 1/2% interest and repayable in 1955-60 were originally issued by the Government of India to the Imperial Bank of India in British India. The principal and interest were originally payable in British India. These notes were assigned by the Imperial Bank to the assessee and 'enfaced' for payment (I dislike the word very much, but it is the word used there) 'for payment of interest at Hyderabad (Deccan)'. The Commissioner of Income-tax assessed the assessee on the interest on these notes received by him through the Residency Treasury at Hyderabad. The assessee contended that he was not liable to pay either income-tax or super-tax thereon as the notes were enfaced for payment outside British

India, that is to say, Hyderabad. The learned Chief Justice in his judgment had said : 'The use of the word or in the phrase accruing or arising means what it says,' and that accordingly the two expressions accruing or arising are different from the expression received and further that the expression accruing or arising indicate some origin or sources of growth for the income in question. His opinion was therefore the same as that of Mr. JUSTICE BLACKWELL and with that opinion I respectfully and emphatically agree. There is one other case to which I desire to refer, and that is the case of the Commissioner of Income-tax, Bombay v. Sarup Chand Hukumchand (I.L.R. 55 BOM. 231). In that case the assessee had acted as the secretaries, treasurer and agents of a Mill Company registered at Indore, that is to say, outside British India. Under the terms of their agreement with the Company the assessees were entitled to charge and receive as selling agents of the mill 'commission on the gross sale proceeds of all cloth produced by the mill.' The agreement further provided that the assessees were at liberty to retain, reimburse, any pay themselves out of the moneys of the company all sums due to the assessees for commission or otherwise. It appears that the company opened a shop at Bombay for the sale of cloth produced by the company and that the shop at Bombay was managed by the assessee. The sale proceeds, i.e., the proceeds of the sales made in that shop at Bombay, were sent to Indore and subsequently, the assessees were paid the commission to which they were entitled in respect of such sales at Indore. The question arose as to whether the commission earned by the assessees on the sale of cloth at the Bombay shop was liable to be assessed to income-tax in Bombay. The CHIEF JUSTICE and Mr. JUSTICE BARLEE took the view that having regard to the terms of the agreement, as the income was commission on sales made in Bombay, that income accrued or arose in British India and no was liable to be taxed in Bombay, even though as a matter of practice between the parties the commission was actually paid at Indore. The cases I have cited give some indication -considerable indication in my opinion - that it hold that the words 'accrue or arise or received' are more or less synonymous and their conjunction in the said section nothing but a pleasure. We must, I think, interpret the section by way of giving a different meaning to the words 'accruing or arising' from that ascribable to the word 'received.' It seems to me however that it makes very little difference for our present purpose whether

one takes the view that the word 'accrue' is or is not merely an alternative with the word 'arise'. The important thing to decide is whether those two words, whether taken separately or in conjunction, have a meaning different from the word 'received'. It is of some significance, for the purposes of deciding the point now before us, to observe the precise language of S. 7 of the Income-tax Act. Sub-section (1) of which says : 'The tax shall be payable by an assessee under the head salaries in respect of any salary or wages, any annuity, pension or gratuity, and any fee, commissions perquisites or profits received by him in lieu of, or in addition to, any salary or wages, when are paid by or on behalf of Government, a local authority, a company, or any other public body or association, or by or on behalf of any private employee. The sub-section, therefore, puts into the category of salaries sums which are payable by way commission and the monetary value of perquisites, or other privileges such as the right to occupy a rent-free place of residence. Clause 7 of the Agreement which I have already read is, of course, very loosely worded and is by no means clear in meaning, largely owing to the fact that those who entered into the agreement did not take the trouble to omit or alter that part of the printed form which was not strictly applicable to the circumstances of the particular case. It is obviously inaccurate to include as being payable monthly and it would, of course, be impracticable to pay like monthly salary, that part of the employees remuneration described as 'Commission : 5 per cent. on the net profits of the Pathini and Champabari Divisions as may be determined by the Secretaries of the Company'. We must, I think, take it that for practical purposes and for the purposes of this case what was really intended was that although the commission might be payable in lump sum after the accounts of the company had been made up and an appropriate part of the proceeds assigned to the two divisions named, the commission, though paid in a lump sum, was nevertheless to be treated as if it were the same thing as salary paid upon a monthly footing. We must, therefore, deal with the question before us by reading Cl. 7 of the Agreement in the light of Sec. 7 of the Act and so upon the footing that salary was being earned by Mr. Every for services rendered by him to the company in their garden or tea plantation at Pathini and that he was only entitled, as the Commissioner of Income-tax, Assam, has suggested, to receive the commission as well as salary properly so called upon the basis, that he did in fact, render these

services. Mr. Ormond endeavoured to find some support for his contention that the question should be answered in the negative by reference to the case of *The Commissioner of Income Tax v. Phra Phraison alarak* (I.L.R. 6 Rangoon 598), where it was held that in the case of an officer employed by the Siamese Government whose salary was payable in Bangkok, for services rendered by him to Government at Moulmein in Burma : 'The words accrue and arise (which words may be regarded as synonymous) when applied to income are to be governed by the source from which it is received or earned'. In my view, however, that case is of no real assistance to the assessee in the circumstances of the present case because it is obvious that the Siamese Forest Officer might have been employed by his Government either Burma or in Siam or in any other part of the world, and be still entitled to receive the salary he was receiving. As was pointed out in the course of the case, he was not remunerated on the basis of a commission computed on the amount of timber which found its way from Siam into Burma in regard to which it was his duty to keep record and check account. It is that aspect of the matter which, in my view differentiates the present case from the Rangoon Case. Mr. Every was by the terms of his agreement only required to work and could only work and earn his salary in British India and, indeed, within the limits of a specified area or areas in British India and nowhere else. It follows therefore that the right to receive the commission was wholly dependent upon the work done and services rendered by Mr. Every in the tea garden at Pathini. These were a sine qua non and a condition precedent to the right to receive not only the remuneration which was termed salary but that part of the remuneration which was described as commission and to be calculated on the basis of 5 per cent. of such part of the net profits of the company as were referable to the Company's operations at Pathini and Champabari.

It seems to me that when one gets down to the fundamental aspects of the matter we have to decide, it really resolves itself entirely into a question of fact, and one which in my view should be looked at and decided in the light of common sense and plain thinking and not too much importance should be attached to, or emphasis laid upon, the niceties of verbal definitions.

It seems to me, looking at the matter from the point of view of simple common sense and in the freedom from all logomachy it is obviously right and proper to hold that the income which Mr. Every received for his services as an employee in the tea company did accrue or arise in British India, and the place from which the income came in any consideration of the question whether or not there was an accruing or arising of the income in British India. I would, therefore, answer the question put Before this Court in the affirmative.

In the circumstances of this case I think there should be no order as to costs.

PANCKRIDGE, J. - There is very little that I desire to add to the judgment already delivered.

In my opinion the words 'accruing and arising' are very wide, and I am in full agreement with those decisions of the Bombay High Court which have laid it down that they mean something different from 'being received'.

This view receives support from the language of Sec. 4(2) which specifically recognises that income, profits and gains may arise or accrue at one place and be received at another.

I think that the question whether any particular income, profits or gains accrue or arise in British India is a question of fact, and it is not practicable to formulate any precise test.

I am inclined to agree that it is not always enough that the income should be earned in British India in the sense that the assessee was in British India for a part of the period or all the period during which the income was earned.

For example, it would not be right in my opinion to hold that a portion of the salary of an officer of the Mercantile Marine accrued or arose in British India, because for some portion of the period during which the salary was earned the officer was serving in Indian waters. In this case it has been pointed out that the assessee is under a four years whole time agreement to serve his employers on their Indian tea estates. He cannot be called upon to serve elsewhere nor can he earn salary or commission elsewhere.

The commission payable is paid out of the profits of the Indian tea estates and is a fixed percentage of such profits, and in theory varies with the success and industry of the assessee in relation to the tea estates. This sufficiently distinguishes the case before us from the case of *The Commissioner of Income Tax v. Phra Phraison Salarak* (I.L.R. 6 Rang. 598) where the person sought to be assessed could be called upon to serve anywhere.

Moreover in that case the amount of the remuneration bore no relation to the results of the employees work in British India and was presumably paid out of the general revenues of Siam.

It is not necessary to go so far as the decision in the matter of the Bishop of Lucknow (I.L.R. 54 All. 223) for in that case it could not be suggested that the fund out of which the income was paid was connected in any way with British India. The facts of this case are quite different from those in the case of *Diwan Bahadur Sir T. Vijayaraghavacharya v. Commissioner of Income-Tax, Punjab, N.W.F.P. and Delhi* (4 I.T.R. 317) where the Court distinguished between pay and pension, although I entertain some doubt whether the distinction in the circumstances was relevant.

I only wish to add in conclusion that the question propounded by the Commissioner is only concerned with accruing or arising within the meaning of S. 4(1). In so framing the question the Commissioner was carrying out the wishes of the assessee, who suggested the following question :

'Can income received in the United Kingdom by an assessee in the United Kingdom be held to accrue in British India ?'

The decision does not therefore touch the question whether, as the Income-Tax Officer thought, a proportionate part of the income was not liable to tax as being leave salary paid in the United Kingdom to an employee of a company while on leave in the United Kingdom within the meaning of exception No. 22 made by the Governor-General in Council under S. 60(1) of the Act.

Reference answered accordingly.

