

PETITIONER:
PERFORMING RIGHT SOCIETY LTD. & ANR.

Vs.

RESPONDENT:
COMMISSIONER OF INCOME-TAX & OTHERS

DATE OF JUDGMENT 10/08/1976

BENCH:
GUPTA, A.C.
BENCH:
GUPTA, A.C.
SINGH, JASWANT

CITATION:
1976 AIR 1973 1977 SCR (1) 171
1976 SCC (4) 37

ACT:
Income Tax Act, 1961--S. 5(2)--Non-resident company receiving income outside India--income if accrued in India.

HEADNOTE:

The appellant Society which is an association of composers, authors and publishers of copyright musical works was incorporated under the English Companies Act, 1908 and 1913 with its registered office in London. It collects royalties for the issue of licences, granting permission for performing right in the works of its members and distributes the royalties to its members. The Society entered into an agreement in England with the President of India by which it granted to the All India Radio (the licensee) authority to broadcast from its sound broadcasting stations in India the musical works of the Society. Under the agreement the licensee had to pay in England annual licence fee payable to the Society.

The appellant contended (i) that the agreement between the appellant and the licensee having been executed in England and the royalties being also payable in England, the income out of this agreement was not liable to be taxed in India and (ii) the Society being under an obligation to distribute the income to its members, royalties realised are not really income of the Society.

Rejecting the contentions,

HELD: (1)(a) Whether a certain income accrued or arose in India within the meaning of s. 5(2) is a question of fact "which should be looked at and decided in the light of commonsense and plain thinking." The Society is a non-resident company and though it received the income: out of the agreement executed, not in India but England, the income undoubtedly accrued or arose in India. [175H and F]

(b) The question whether the agreement is the source of the income is not relevant because s. 5(2) provides that all income "from whatever source derived" is to be included in the total income of the non-resident assessee if the income accrues or arises in India during the relevant year. The income in this case had in fact accrued in India and by virtue of s. 9 no question arises whether it should be "deemed" to accrue or arise in India. [175 G]

In the matter of V.G. Every: (19'37) 5 I.T.R. 216 approved.

(2) Article 48 of the Society's Articles of Association shows that the royalties payable by the licensee under the, agreement are realised by the Society as its income. Out of the receipts are deducted the expenses and also such other sums as in the discretion of the General Council should be set aside for the purposes mentioned in that article. This is a case where the assessee having received the income, applies it in a particular way; it is not a case of diversion of income by an overriding charge. [177 C]

Raja Bejoy Singh Dudhuria v. Commissioner of Income-tax, Bengal (1933) 1 I.T.R., 135, P.C. Mullick and another (Executors) v. Commissioner of Income-tax, Bengal (1938) 6 I.T.R. 206 and Commissioner of Income-tax, Bombay City v. Sitaldas Tirathdas [1961] 41 I.T.R. 367 (pp. 374-375) distinguished.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 488 of 1975.

(Appeal by Special Leave from the Judgment and Order dated 24-9-1973 of the Calcutta High Court in Appeal from Original Order & No. 335/73).

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Hardayal Hardy, for appellant No. 1.

K. Sen, S.K. Mehta, M. Qamaruddin and P.N. Puri, for respondent No. 2.

S.C. Manchanda, P.L. Juneja and S.P. Nayar, for respondents. The Judgment of the Court was delivered by

GUPTA, J. The first appellant, performing Right Society Limited, (hereinafter called the Society) is a company incorporated under the (English) Companies Acts, 1908 and 1913, having its registered office at Copyright House, 33 Margaret Street, Cavendish Square, London a company limited by guarantee and having no share capital. The Society is an association of composers, authors and publishers of copyright musical works established to grant permission for the performing right in such works. 'Performing right' means the right of performing in public, broadcasting and causing to be transmitted to subscribers to a diffusion service, in all parts of the world. The members of the Society are required to assign to the Society the performing right in their works, and the Society exercises and enforces on their behalf all rights and remedies in respect of any exploitation of such works. The Society collects royalties for the issue of licences granting such permission and distributes the royalties to the members of the society, namely, the composers, authors, music publishers and other persons having an interest in the copyright in proportion to the extent to which a member's work is publicly performed or broadcast after a pro-rata deduction of the expenses. Article 43 of, the Articles of Association of the Society provides that the business and operations of the Society shall be conducted and managed by a General Council, and Article 48 authorises the General Council to apply the receipts also for certain other purposes. Article 48 reads as follows:

"48. The General Council may, before making any distribution among the Members:

(a) Apply out of the receipts such sums as it thinks proper or has agreed to contribute as :-

(i) Gratuities, donations, pensions and emoluments to any Member or ex-Member of the Society or any person at any time in the employment of the Society, or engaged in any business acquired by the Society, and the 'wives, widows, families and

dependants of any such person;

(ii) Contributions to any benevolent, pension or similar fund which may be established for the benefit of Members, ex-Members or employees of the Society or their wives, widows, families or dependants.

(b) Set aside out of the receipts such sums as it thinks proper as subscriptions, donations, loans, gifts other payments for any of the purposes for which powers is given by paragraphs (iii) and (iv) of Clause 3(f) of the Memorandum of Association, provided

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that without the assent of the Society in General Meeting the aggregate of all such payment shall not in any one year exceed the sum of one thousand pounds and four thousand pounds 'under the provisions of those paragraphs respectively.

(c) Set aside out of the receipts such sums as it thinks proper as a reserve fund to meet contingencies, or for future distribution, or for repairing, improving and maintaining any of the property or premises of the Society and for such other purposes as the General Council shall in its absolute discretion think necessary or conducive to the interests of the Society, and may invest for the several sums so set aside in such investments as it may think fit, and from time to time deal with or vary such investments and dispose of all or any part thereof for the benefit of the Society, and may divide the reserve fund into such special funds as it thinks fit, and employ the reserve fund or any part thereof for the general purposes of the Society, and that without being bound to keep the same separate from the other assets."

On December 13, 1953 the Society entered into an agreement with the President of India owning and controlling broadcasting stations in India and organizing and conducting the same under the name of All India Radio (hereinafter referred to as the licensee) whereby the Society granted to the licensee the authority, (a) to broadcast from the licensee's sound broadcasting stations in India all musical works included in the repertoire of the Society, and (b) to utilize, solely, for the purpose of sound broadcasting as aforesaid, any originating performance of such musical works, irrespective of the source of such performance and the means whereby the such performance is conveyed to the point of broadcast transmission from the licensee's stations. The agreement was executed in England. It may be stated here that previous to this agreement the parties had entered into a similar agreement in the year 1940. The agreement of 1953 states that the licence granted thereby "shall be deemed to have come into force on April 1, 1949 and shall continue from year to year until determined by either party giving to the other three calendar months' notice in writing to expire on March 31 in any year". The agreement provides that the licensee shall send to the Society at its registered office in London, the lists of all musical works broadcast in each week during the term of the licence from each of the licensee's main stations (Delhi, Bombay, Calcutta and Madras)

and the external services, and requires the licensee to furnish a return after the first day of April every year during the period of licence, stating the aggregate number of hours occupied during the period ended on the previous 31st March, in broadcasting Western music from each of the licensee's main and external Service Stations. The agreement further provides that for the rights granted, the licensee will pay to the Society annually a sum calculated at the rate of 2 (Two pounds) per hour of broadcasting Western music from each of the licensee's

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main and external Service Stations and that such annual payments must be made to the Society in London.

The second appellant, M/s. Natsin India Private Limited is a private limited company incorporated under the (Indian) Companies Act having its office at 26, Chowringhee Road, Calcutta. The second appellant was appointed by the Society to be its lawful attorney in India by virtue of a power of attorney granted by the Society to the, second appellant in July, 1967. As agent in India for the Society, the second appellant realises on its behalf royalties from cinema houses and other sources where music over which the Society has copyright is played in this country, and has, inter alia, the power to commence and prosecute suits and other proceedings, engage lawyers, and sign plaints, petitions etc. Prior to July, 1967 the Society, a non-resident company, used to file its returns of income before the Income-tax Officer, Madras, through its former agent in India, M/s. Vernon and Company of Madras. The royalties or fees realised from the licensee were not included in its returns for the assessment years 1947-48 to 1950-51. Later, the Income-tax Officer, Madras, issued notices under section 34(1) of the Income-Tax Act, 1922 and assessed the said income after deducting the proportionate administrative expenses. The appeals taken by Vernon and Company against the supplementary assessment orders for the aforesaid years were dismissed by the Appellate Assistant Commissioner, Madras. The matter rested there and the Society had been paying tax on its income in India including the income from royalties received from the licensee without objection until the assessment year 1967-68 for which the accounting year ended December 31, 1966. In the said assessment year also the Income-tax Officer, Companies Circle L(II), Madras by his order dated October 23, 1963 assessed the total income of the Society treating the income arising out of the agreement with the licensee as chargeable as was being done all these years. Against this order of assessment, the Society through the second appellant made a revisional application under section 264 of the Income-Tax Act, 1961 (hereinafter referred to as the Act) to the Commissioner of Income-tax, West Bengal, where the Society's income-tax file had been transferred in the meantime. The Additional Commissioner of Income-tax who dealt with the application dismissed the same by his order dated July 18, 1970. The Society then moved a

writ petition before the Calcutta High Court challenging the order of the Additional Commissioner of Income-tax. A rule nisi was issued on the petition by a learned Judge of the High Court but ultimately the rule was discharged and the petition was dismissed. On appeal by the Society, a Division Bench of the High Court affirmed the view taken by the learned single Judge and dismissed the appeal on September 24, 1973. In this appeal by special leave the appellants question the correctness of that decision and challenge the order of assessment on two grounds:

(1) the agreement between the Society and the Licensee having been executed in England and the royalties being also payable in England, the income out of this agreement is not liable to be taxed in India;

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(2) the Society being under an obligation to distribute the income to its members, the royalties realised are not really the income of the Society. The first point seems to be covered by the provisions of section 5(2) (b) of the Act. Section 5(2) reads as follows:

"5. Scope of total income:

(1) $x \quad x \quad x$

(2) Subject to the provisions of this Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which-

(a) 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 to him in India during such year.

Explanation-1.--Income accruing or arising outside India shall not be deemed to be received in India within the meaning of this section by reason only of the fact that it is taken into account in a balance sheet prepared in India.

Explanation 2.--For the removal of doubts, it is hereby declared that income which has been included in the total income of a person on the basis that it has accrued or arisen or is deemed to have accrued or arisen to him shall not again be so included on the basis that it is received or deemed to be received by him in India."

The Society is a non-resident company, and though it receives the income out of the agreement executed not in India but in England, the income undoubtedly accrues or arises in India. On behalf of the appellants it was contended that the source of income was really the agreement which was entered into in England. We do not think that the question as to the source of the income is relevant because subsection (2) of section 5 provides that all income "from whatever source derived" is to be included in the total income of the non-resident assessee if the income accrues or arises in India during the relevant year. Reference was also made to section 9 of the Act which enumerates the incomes that shall be "deemed to accrue or arise in India" though actually accruing elsewhere, to establish that the income in question could not be deemed to accrue or arise in India. But the income

in this case has in fact accrued in India and no question arises whether it should be "deemed" to accrue or arise in India. 'Whether a certain income accrued or arose in India within the meaning of section 5(2) is a question of fact "which should be looked at and decided in the light of commonsense and plain thinking" as the Calcutta High Court considering a similar question under section 4(1)

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of the Income-Tax Act, 1922 observed.(1) In the case before us the High Court and the income-tax authorities considered it a hard matter of fact that the income derived from broadcast of copyright music from the stations of All India Radio arose in India. In our opinion this was the correct view to take and we find no reason to differ from it.

The next question is whether the income from the royalties was the Society's own income. It was Contended on the authority of Raja Bejoy Singh Dudhuria v. Commissioner of Income-Tax, Bengal, (") that the obligation to disburse the sum among its members diverted the income from the Society to the members, and it could not be called the income of the Society. In Bejoy Singh Dudhuria's case there was a decree of the court charging the appellant's whole resources with a specific payment to his step-mother, the Privy Council held that the decree had to that extent diverted his income from him and directed it to his step mother, and that to that extent what he received for her was not his income. But where payments are made by the assessee after he has received the income as his, the position is different. This was pointed out by the Judicial Committee in a later case, P.C. Mullick and another (Executors)v. Commissioner of Income-tax, Bengal,(1) where the executors in accordance with the directions in the will had paid Rs. 5,537/- to the person who performed the testator's addya Sradh, and another sum of Rs. 1,25,000/- for probate duty out of the income of the estate. It was held that this was not a case in which a portion of the income was by an overriding title diverted from person who would otherwise have received it as in Bejoy Singh Dudhuria's case but it was "simply a case in which the executors having received the whole income of the estate apply a portion in a particular way pursuant to the directions of their testator, in whose shoes they stand". The true test for the application of the rule of diversion of income by an overriding title has been explained by this Court in Commissioner Income-tax, Bombay City v. Sitaldas Tirathdas(4)

"In our opinion, the true test is whether the amount sought to be deducted, in truth, never reached the assessee as his income. Obligations, no doubt, there are in every case, but it is the nature of the obligation which is the decisive fact. There is a difference between an amount which a person is obliged to apply out of his income and an amount which by the nature of the obligation cannot be said to be a part of the income of the assessee. Where by the obligation income is diverted before it reaches the assessee, it is deductible; but where the income is required to be applied to discharge an obligation after such

income reaches the assessee, the same consequence, in law, does not follow. It is the first kind of payment which can truly be excused and not the second. The second payment is merely an obligation to pay another

(1) In the matter of V. G. Every. (1937) 5 I.T.R. 216 (Coskello J.)

(2) [1933] 1 I.T.R. 135

(3) (1938) 6 I.T.R. 206.

(4) (1961) 41 I.T.R. 367 (pp. 374-375).

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a portion of one's own income, which has been received and is since applied. The first is a case in which the income never reaches the assessee, who even if he were to collect it, does so, not as part of his income, but for and on behalf of the person to whom it is payable."

On the facts of the present case it is clear that the royalties payable by the licensee under the agreement are realised by the Society as its income; Article 48 of the Society's Articles of Association puts the matter beyond doubt. Out of the receipts are deducted the expenses and also such other sums as in the discretion of the General Council should be set aside for the purposes mentioned in Article 48. This is a case where the assessee having received the income applies it in a particular way; it is not a case of diversion of income by an overriding charge.

The appeal is accordingly dismissed. There will be no order as to costs.

P.B.R.
dismissed.
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Appeal