[1948] 16 ITR 240 (PC)

PRIVY COUNCIL

Wallace Brothers & Co., Ltd.

v.

Commissioner of Income-tax

LORD UTHWATT, LORD DU PARCQ, LORD NORMAND, LORD OAKSEY, SIR MADHAVAN NAIR

PRIVY COUNCIL APPEAL NO. 65 OF 1945

FEBRUARY 17, 1948

David Maxwell Fyfe, K.C. and **J. Nissen** *for the Appellant.*

J. Millard Tucker, K.C. and **B. Mackenna** *for the Respondent.*

JUDGMENT

Lord Uthwatt — This is an appeal by leave of the Federal Court of India from a judgment of that Court dismissing an appeal by the appellant, Wallace Brothers and Co., Ltd., from a judgment of the High Court of Bombay answering in favour of the respondent, the Commissioner of Income-tax, Bombay District, certain questions of law referred to the High Court by the Income-tax Appellate Tribunal.

Two questions are in issue: first the validity of certain provisions of the Indian Income-tax Act, 1922-1939, by virtue of which there was made on the appellant company an assessment to income-tax on income which included income arising without British India, and second, the jurisdiction of a particular Income-tax Officer to make that assessment.

The directly relevant provisions of the Income-tax Act, 1922-1939, are contained in Sections 3, 4, 4A and 64. These, so far as it is necessary to state them, are as follows :—

> "3. Where any Act of the Central Legislature enacts that income-tax shall be charged for any year at any rate or rates tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of, this Act in respect of the total income of the previous year of every individual, Hindu undivided family, company and local authority, and of every firm and other association of persons or the partners of the firm or the members of the association individually.
>
> 4. (1) Subject to the provisions of this Act, the total income of any previous year of any person includes all income, profits and gains from whatever source derived which—
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> (*a*)are received or are deemed to be received in British India in such year by or on behalf of such person, or
>
> (*b*)if such person is resident in British India during such year,—
>
> (*i*)accrue or arise or are deemed to accrue or arise to him in British India during such year, or
>
> (*ii*)accrue or arise to him without British India during such year, or.....
>
> 4A. For the purposes of this Act—
>
> (*c*)a company is resident in British India in any year (*a*) if the control and management of its affairs is situated wholly in British India in that year, or (*b*) if its income arising in

British India in that year exceeds its income arising without British India in that year.....

64.(1) Where an assessee carries on a business, profession or vocation at any place, he shall be assessed by the Income-tax Officer of the area in which that place is situate or, where the business, profession or vocation is carried on in more places than one, by the Income-tax Officer of the area in which the principal place of his business, profession or vocation is situate."

The material facts are that the appellant company was incorporated in the United Kingdom and that the control and management of its affairs are situate exclusively in that country. It is a member of the firm of Wallace and Co., which carries on business in Bombay. The Income-tax Appellate Tribunal found as a fact that the appellant company was a "sleeping partner" in that firm. Their Lordships understand this finding to mean that the appellant company took no part in the management of the firm's affairs. In the year 1938-1939 —"the previous year" for the purposes of this case—the income of the appellant company arising in British India was Rs. 17,85,831 and its income arising without British India was Rs. 7,48,427. On the 12th February, 1941, the appellant company was assessed to tax for the assessment year 1939-1940 on the whole of its income. That assessment was made by the Additional Income-tax Officer within whose District the firm's place of business was situate.

Upon these facts, which are to be found in the case stated by them, the Tribunal referred the following questions of law to the High Court :—

(*i*)Whether in the circumstances found by the Tribunal in its order under Section 33, the assessee company was taxable to income-tax and super-tax for assessment year 1939-1940 in respect of the income (Rs. 7,48,427 less Rs. 4,500) which accrued or arose to it without British India in the previous year?

(*ii*)Are the provisions of Sections 4A (*c*) and 4(1)(*b*)(*ii*) of the Income-tax Act *ultra vires* the Indian Legislature?

(*iii*)Is sub-clause (*b*) of clause (*c*) of Section 4A of the Amended Act applicable to the assessment of the assessee company for the year 1939-1940?

(*iv*)Whether on the facts found by the Tribunal the Additional Income-tax Officer, Companies Circle, Bombay, had jurisdiction under Section 64 (1) or Section 64 (2) to make the assessment?

The High Court and the Federal Court answered all four questions in favour of the respondent. In the appeal before their Lordships the appellant company did not challenge the answer to the third question.

Their Lordships will deal first with the subject-matter raised by the first two questions.

The sub-sections referred to in the second question contain only definitions of "total income" and "residence of a company." By themselves these definitions do nothing. Taken in isolation they raise no question of *vires.* But the use of the defined terms in the charging section of the Act (Section 3) may result in *ultra vires* legislation. The question at issue here is but one question only, namely, the effectiveness in law of the charging section in its application to companies which satisfy the test set forth in the definition of residence as respects their total income computed as including income arising without British India.

The general nature of the charging section is clear. First, the charge for tax at the rate fixed for the year of assessment is a charge in respect of the income of the "previous year," not a charge in respect of the income of the year of assessment as measured by the income of the previous year. That has been decided and the decision was not questioned in this appeal.

Second, the rate of tax for the year of assessment may be fixed after the close of the previous year and the assessment will necessarily be made after the close of that year. But the liability to tax arises by virtue of the charging section alone, and it arises not later than the close of the previous year, though quantification of the amount payable is postponed. The fact of residence or non-residence of a company as gathered from the application of the statutory test has become established, though not formally ascertained, at the close of the previous year. The legislation, therefore, purports to tax a company which, when the liability arose, satisfied one or other of the conditions set forth in the definition of residence.

The precise question at issue can now be stated. The particular circumstances affecting the appellant company—namely, that it was a member of a partnership carrying on business in British India and the size of the excess of its British Indian income over its other income are of course irrelevant in considering the validity of the legislation. Further, it is not disputed that it is competent to the Central Indian Legislature to subject to income-tax all income arising in British India: the relevant definition of residence does not apply to individuals; and the legislation does not affect to impose a lien on income arising without British India but to tax companies in respect of income which includes such income. The second limb of the definition of residence is alone in issue. It is to be assumed that there is no connexion between the companies and British India except the derivation from British India of the major part of their income during the previous year. Are such companies in respect of their total income for that year persons subject to the power of the Central Indian Legislature to legislate as respects taxes on income?

The contentions of the appellant company were that legislation in regard to income-tax having an extra-territorial operation was *ultra vires* the Central Indian Legislature and that the impugned legislation had that operation. Both contentions were disputed by the respondent.

Their Lordships do not approach the matter on the formal lines embodied in these contentions. There is no rule of law that the territorial limits of a subordinate legislature define the possible scope of its legislative enactments or mark the field open to its vision. The ambit of the powers possessed by a subordinate legislature depends upon the proper construction of the statute conferring those powers. No doubt the enabling statute has to be read against the background that only a defined territory has been committed to the charge of the legislature. Concern by a subordinate legislature with affairs or persons outside its own territory may, therefore, suggest a query whether the legislature is in truth minding its own business. It does not compel the conclusion that it is not. The enabling statute has to be fairly construed.

The relevant power [Section 99(1) and Section 100 of the Government of India Act, 1935] is a power to make laws for the whole or part of British India or any Federated State with respect to "taxes on income other than agricultural income." The power to tax agricultural income is given to the Provincial Legislatures and the exception throws no light on the construction of the phrase "taxes on income." None of the other provisions of the Act affords any guidance as to the income or persons who may be subjected to tax. Only sub-section (2) of Section 99 need be particularly referred to. That sub-section provides that "without prejudice to the generality of the powers conferred by the preceding sub-section, no Federal law shall, on the ground that it would have an extra-territorial operation, be deemed to be invalid in so far as it applies to," certain persons and

things. In their Lordships' view this subsection does no more than assume that there may be some laws having an extra-territorial operation validly made pursuant to subsection (1). It is no help one way or another in determining the authorised area of taxes on income.

Where Parliament has conferred a power to legislate on a particular topic it is permissible and important in determining the scope and meaning of the power to have regard to what is ordinarily treated as embraced within that topic in the legislative practice of the United Kingdom [see *Croft* v. *Dunphy* [1933] AC 156]. The point of the reference is emphatically not to seek a pattern to which a due exercise of the power must conform. The object is to ascertain the general conception involved in the words used in the enabling Act.

Income-tax legislation in the United Kingdom has—putting the matter broadly—proceeded on the lines that there is subjected to income-tax all income arising within the United Kingdom and (independently of remittance to the United Kingdom) some, but not all, income arising abroad belonging to a person resident in the United Kingdom.

The resulting general conception as to the scope of income-tax is that, given a sufficient territorial connection between the person sought to be charged and the country seeking to tax him, income-tax may properly extend to that person in respect of his foreign income.

In their Lordships' view that general conception finds a place in the phrase "taxes on income" as used in the Government of India Act, 1935. That conclusion marches with the construction which their Lordships would, without the aid of a consideration of the British legislation, have placed on the Government of India Act, 1935.

The provisions of the British Income Tax Acts do not in their Lordships' view give any further definition of the scope of the power to impose taxes on income. The distinction drawn in British legislation between those foreign incomes which are, and those foreign incomes which are not, taxable in the hands of a "resident" does, not mark any matter of principal which can be considered as imported into the phrase "taxes on income." In their Lordships' opinion— they confine their attention to companies—the necessity that the territorial connection should be residence as understood for the purpose of the British Income Tax Acts, is not embedded in the terms of the power. It is artificial in any event to attribute residence to a company. No less artificial is the selection as a matter of judicial construction of the British Income Tax Acts of the place at which central control is exercised as the residence of a company. The principle—sufficient territorial connection—not the rule giving effect to that principle—residence—is implicit in the power conferred by the Government of India Act, 1935.

The result is that the validity of the legislation in question depends on the sufficiency for the purpose for which it is used of the territorial connections set forth in the impugned portion of the statutory test. Their Lordships propose to confine themselves to that short point and do not propose to lay down any general formula defining what territorial connection is necessary. In their view the derivation from British India of the major part of its income for a year gives to a company as respects that year a territorial connection sufficient to justify the company being treated as at home in British India for all purposes relating to taxation on its income for that year from whatever source that income may be derived. If it is so at home in British India it is a person properly subject to the jurisdiction of the Central Indian Legislature.

Unlike an individual a company has an economic existence only. No activities other than the making and spending of money are open to it. When a company in any particular year derives the major portion of its income, from a country, it is a legitimate conclusion that the company has

rooted itself there for that year. The connection that results is at least as solid as the connection given by the place of central control; and in a search for a home for income-tax purposes as respects that year that connection might well be thought more pertinent than the connection, readily changeable and often changed given by the place of central control. In such a search the place where commercial activities yield the result is at least as relevant as the place where they are conceived. A company which in substance lives on a country may rationally be treated as living in it.

It is unnecessary to consider whether the statutory test is a satisfactory definition of residence. That is an abstract question. It is sufficient to come to the conclusion that a company satisfying the statutory test is a person within the territory of British India so far as concerns taxes on its income accruing during the period when the test is satisfied.

The remaining question relates to procedure. The submission of the appellant is that, assuming the challenged provisions not to be *ultra vires,* the assessment was not made by the proper officer. The relevant provision is Section 64, and the facts have already been stated. The contention of the appellant company was that by reason that it took no active part in the partnership business it did not carry on business at the partnership place of business. There is no substance in the contention. There is no particular provision in the partnership articles which needs consideration. The essence of partnership is that each of the partners is the agent of the others for the purpose of carrying on the partnership business. Failure by any one partner to take part in the management of the business does not therefore have the result that he is not carrying on business as partner.

Their Lordships will humbly advise His Majesty that this appeal be dismissed. The appellant company will pay the costs of the appeal.