

## REFERENCE UNDER THE INCOME-TAX ACT.

*Before Costello and Panckridge J.J.*

*In the matter of V. G. EVERY.\**

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Jan. 29;

Feb. 8, 17, 18.

*Income-tax—Employee—Commission earned in British India, but received outside—Leave salary, if liable to tax in British India—Indian Income-tax Act (XI of 1922), ss. 4(1), 6, 7(1), 10, 31. 60(1).*

Commission earned by an 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, can be held to have accrued or arisen in British India within the meaning of s. 4(1) of the Indian Income-tax Act.

*Per PANCKRIDGE J.* This decision does not touch the question, whether, as the income-tax officer thought, a proportionate part of this 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 Indian Income-tax Act.

*Commissioner of Income-Tax, Bombay v. Bansilal Motilal* (1) and *Commissioner of Income-tax, Bombay v. Sarupchand Hukamchand* (2) referred to.

*Re Rogers Pyatt Shellac & Co. v. Secretary of State for India* (3); *Commissioner of Income-tax v. Phra Phraison Salarak* (4) and *T. Vijayaraghavacharya v. Commissioner of Income-tax, Punjab, N. W. F. P. and Delhi* (5) explained and distinguished.

**INCOME-TAX REFERENCE** at the instance of the assessee.

The assessee, V. G. Every, manager of the Pathini Tea Estate in Assam—owned by a company incorporated in the United Kingdom—received in British India for his services there, during the accounting period 1934-35, Rs. 4,000 as salary *plus* Rs. 400 being the taxable value of rent-free quarters. During this year Mr. Every was on leave for seven months in the United Kingdom, and while on leave there he received a sum of Rs. 6,965 as the commission earned by him in British India during the previous

\*Income-tax Reference, No. 15 of 1937, under section 66(2) of the Indian Income-tax Act.

(1) (1930) I. L. R. 54 Bom. 460.

(3) (1924) I. L. R. 52 Cal. 1.

(2) (1930) I. L. R. 55 Bom. 231.

(4) (1928) I. L. R. 6 Ran. 598.

(5) (1936) 4 Ind. Tax Rep. 317.

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year, *i.e.*, 1933-34. Under the terms of his service the assessee was entitled to a percentage of the annual profits earned by the Pathini Tea Estate subject to the assessee being in the 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 British India. The Income-tax Officer held that seven-twelfths of his commission received in the United Kingdom was not liable to tax, because the assessee was on leave in the United Kingdom for seven months. The assessee then wrote a letter to the Assistant Commissioner of Income-tax, Assam, requesting him to enquire into the correctness of the assessment regarding the item of Rs. 400 only and, as desired by the latter, also filed an appeal in the prescribed form duly verified and stamped. Thereupon the Assistant Commissioner of Income-tax, Assam, set aside the assessment and ordered the Income-tax Officer to make a fresh assessment by taking into account the entire amount of the commission. The assessee's appeal against this revised assessment having been dismissed, he asked the Commissioner of Income-tax, Assam, to refer the following two questions of law, which the assessee alleged arose out of the Assistant Commissioner's order to the High Court :—

(a) Can the Assistant Commissioner make an order under s. 31 except on an appeal properly stamped, duly verified and in the 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 Commissioner of Income-tax, Assam, being of opinion that these questions were too abstract, having been stated as if relating to all classes of income, redrafted the questions in the form stated in the opening of the judgment. At the hearing of this Reference the High Court granted an adjournment to enable the assessee's counsel to produce the original agreement, which had not been placed on the record or made an exhibit.

*Ormond* for the assessee. In the circumstances of this case commission, which was received by Mr. Every in London in the year 1934, was not income, profits or gains, which had accrued or arisen in British India. Where the subject-matter of the tax is salary or something in the nature of salary, there is very little difference, if any, in meaning between the words "accrue," "arise" and "received in British India" as used in s. 4(1) of the Income-tax Act. 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. The presence of the words "from whatever source derived" in s. 4(1) indicates that is the true view of the matter. Commission received during leave outside British India is on the same footing as leave salary and as such is not liable to tax in British India. *Vide* rule No. 22 of the Statutory Rules framed by the Governor-General-in-Council under s. 60(1) of the Indian Income-tax Act. I rely on *Re Rogers Pyatt Shellac & Co. v. Secretary of State for India* (1); *Jiwan Das v. Income-Tax Commissioner, Lahore* (2); *Commissioner of Income-tax v. Phra Phraison Salarak* (3); *T. Vijayaraghavacharya v. Commissioner of Income-tax, Punjab, N. W. F. P. and Delhi* (4) and *Board of Revenue, Madras v. Ramanadhan Chetty* (5).

In the matter of *the Bishop of Lucknow* (6) is clearly distinguishable and has been disapproved by a Lahore Full Bench.

*Sir A. K. Roy*, Advocate-General, and *Radha Binode Pal* for the Commissioner of Income-tax, Assam. The words "accrue," "arise" and "received" are not synonymous. The question, whether any particular income, profits or gains accrue or arise in British India is a question of fact. The source

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(1) (1924) I. L. R. 52 Cal. I, 11, 23, 29. (4) (1936) 4 Ind. Tax. Rep. 317, 322.

(2) (1929) I. L. R. 10 Lah. 657.

(5) (1919) I. L. R. 43 Mad. 75.

(3) (1928) I. L. R. 6 Ran. 598.

(6) (1931) I. L. R. 54 All. 223.

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or place of origin of the income has to be considered. This commission accrued, arose and was earned by the assessee during a period, in which he was in residence in British India and is, therefore, liable to tax here. I rely on *Commissioner of Income-Tax, Bombay v. Bansilal Motilal* (1); *Commissioner of Income-tax, Bombay v. Sarupchand Hukamchand* (2) and *In the matter of the Bishop of Lucknow* (3).

*Ormond*, for the assessee, in reply.

COSTELLO J. The point which arises for our consideration in this matter is a short one and is contained in the question submitted to us by the Commissioner of Income-tax, Assam, as appearing in para. (4) of his statement of the case. It is this:—

“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 s. 4(1) of the Indian Income-tax Act (XI of 1922)?”

The facts and the circumstances to which the question relates are briefly these. The assessee, Mr. V. G. Every, is an employee of the Pathini Tea Company, Limited, which is a joint stock Company incorporated under the English Companies Act and having its registered office at No. 14, Fenchurch Street, in the city of London. Mr. Every is employed by that 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 January 1, 1933. The provisions of the agreement, which are relevant for our present purpose, are those contained in cl. 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

(1) (1930) I. L. R. 54 Bom. 460, 469. (2) (1930) I. L. R. 55 Bom. 231, 235.  
(3) (1931) I. L. R. 54 All. 223.

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 Champa-barie Divisions as may be determined by the secretaries of the company.

Furlough : Six months' furlough on 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 a 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 cl. 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 para. (2) of his statement of the case that Mr. V. G. Every of the Pathini Tea Estate in Assam received for his services 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 seven 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 December 31, of that year, because the accounts

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of the company appear to be made up as at December 31, of each year, though they are not actually certified by the accountants 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 his service the assessee is entitled to a percentage of the annual profits earned by the estate subject to the assessee's 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 is 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 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 as follows :—

			Rs.
Salary	..	..	4,400
Commission	..	..	2,902
Other sources	..	..	400
			<hr/>
Total	..	..	7,702
			<hr/>

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 which he had made. We

are told that the assessee merely took this course because he did not understand how the figure Rs. 400 "from other sources" had been arrived at. In answer to this letter the Assistant 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 the October 29, 1935, the assessee filed 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 eventually gave a decision on 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 five-twelfths of that sum. A revised assessment was duly made on a total income of Rs. 11,765 made up as follows :—

		Rs.
Salary .. ..	..	4,400
Commission .. ..	..	6,965
Other sources .. ..	..	400
Total .. ..		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 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 had made, asked the Commissioner of Income-tax, Assam, to refer certain questions of law for the opinion of this Court—questions, which according to the assessee had

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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 s.31 except on an appeal properly stamped and duly verified and in the 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 on these questions are set out in para. (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 s. 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 s. 66(2) of the Income-tax Act is with regard to the above order which the Assistant Commissioner passed on 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 s. 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 Hon'ble 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 s. 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 (appearing at the outset of this judgment) we are now required to decide. The opinion of the Commissioner of Income-tax 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 s. 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 s. 4(I) of the Indian Income-tax Act, 1922.

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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 that expressed by the Commissioner. 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 (if any) difference in meaning as between the words “accrue,” “arise” and the expression “received “in British India” as used in s. 4(I) of the Income-tax Act. 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 s. 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 the circumstances of this case commission which was received by Mr. Every in London in the year 1934 was not income, profits or gains which had accrued or arisen in British India. Mr. Ormond based a good deal of this argument upon observations in the judgment in the case of *Re Rogers Pyatt Shellac & Co. v. Secretary of State for India* (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 a branch office in Calcutta for the purpose of purchasing shellac. The goods so purchased were, I think, sold in the open market in America, on account of another company in America which had to pay the purchasing

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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 s. 3, sub-s. (1), read with s. 33, sub-s. (1) of the Indian Income-tax Act of 1918 and s. 4, sub-s. (1), read with s. 42, sub-s. (1) of the Indian Income-tax Act of 1922. The observations I referred to, are to be found in the judgment of Mukerji J. at p. 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", "arises" and "is received" are three different 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 these words have got to be taken as the meanings attaching to them. "Accruing" is synonymous with "arising" in the sense of springing as a natural growth or result. The three expressions "accrues", "arises" 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 or 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 and 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* (1) . . . 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.

These observations were not affected by the subsequent decision of the House of Lords in the same case (2)

It was on the basis of the view expressed by Mukerji J. in the passage above quoted that Mr. Ormond invited us to come to the conclusion that where it is a question of salary or something in the nature of salary, no distinction or no effective distinction can be drawn between the position which

(1) (1888) 21 Q. B. D. 52, 59.

(2) (1889) 14 App. Cas. 493.

exists when the right to receive arises, and the position which exists when the income is actually received. To put the matter in another way, Mr. Ormond wished 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 whatever source derived" in s. 4, sub-s. (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 *Commissioner of Income-Tax, Bombay v. Bansilal Motilal* (1). There are two passages in the judgment of Blackwell J. to which I will first refer. At p. 467 the learned Judge said :—

In s. 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 p. 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 principal, 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 *per cent.* 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 "enfaced" 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

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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 for payment outside British India and as the interest was paid to him outside British India, that is to say, Hyderabad. Martin C. J. in his judgment had said :—

The use of the word “ or ” means what it says, and that accordingly the two expressions “ accruing or arising ” are different from the expression “ received ,”

and further

That these expressions “ accruing or arising ” indicate some origin or source of growth for the income in question.

His opinion was, therefore, the same as that of Blackwell J. and with that opinion I emphatically agree. There is one other case to which I desire to refer, and that is the case of *Commissioner of Income-tax, Bombay v. Sarupchand Hukamchand* (1). In that case the assessees had acted as the secretaries, treasurers 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 and 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 assessees. 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

(1) (1930) I. L. R. 55 Bom. 231; 235.

of cloth at the Bombay shop was liable to be assessed to income-tax in Bombay. The Chief Justice and Barlee J. 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 so 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 would not be correct to hold that the words “accrue or arise or received” are more or less synonymous and their conjunction in the said section nothing but a pleonasm. 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 purposes 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-s. (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 fees, commission, perquisites or profits received by him in lieu of, or in addition to any salary or wages, which 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 employer.

The sub-section, therefore, puts into the category of salaries sums which are payable by way of 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

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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 would obviously be impracticable to pay as monthly salary that part of the employee's remuneration described as "Commission: "5 per cent. on the nett 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 all practical purposes what was really intended was that, although the commission might be payable in a lump sum after the accounts of the company had been made up and an appropriate part of the proceeds assigned to the two divisions, 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 basis. We must, therefore, deal with the question before us by reading cl. 7 of the agreement in the light of s. 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 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 *Commissioner of Income-tax v. Phra Phraison Salarak* (1) 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 that 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 the "income accrues and arises, not by the place where it "is received or earned."

(1) (1928) I. L. R. 6 Ran. 598.

In my view, however, that case is of no real assistance to the assessee in the present case, because it is obvious that the Siamese Forest Officer might have been employed by his Government either in Burma or in Siam or in any other part of the world, and he still have been 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 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 records and check accounts. It is that aspect of the matter which, in my view, differentiates the present case from the Rangoon case (1). 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 dependant 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 also that part of the remuneration which was described as "commission" to be calculated on the basis of 5 *per cent.* of such part of the nett 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 in which not too much importance should be attached to the niceties of verbal definitions.

It seems to me, looking at the matter from the point of view of simple common sense and with 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

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company did accrue or arise in British India, and that in the circumstances of the case it is impossible to ignore the place from which the income came, in any consideration of the question whether or not there was an accruing or the arising of the income in British India. I would, therefore, answer the question in the affirmative.

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

PANCRIDGE 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 s. 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 wholetime



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.

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The commission payable is paid out of the profits of the Indian tea estates and is a fixed percentage of such profits; in theory it 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 *Commissioner of Income-tax v. Phra Phraison Salarak* (1), 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 employee's 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 *In the matter of the Bishop of Lucknow* (2), 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 *T. Vijayaraghavacharya v. Commissioner of Income-tax, Punjab, N. W. F. P. and Delhi* (3) 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(I). In so framing the question the Commissioner was carrying out the wishes of the assessee, who had 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?'"

(1)(1928) I. L. R. 6 Ran. 598.

(2) (1931) I. L. R. 54 All. 223.

(3) (1936) 4 Ind. Tax Rep. 317.

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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 in the affirmative.*

Attorney for assessee : *M. N. Sen.*

Attorney for Commis-  
sioner of Income-tax, Assam : *Government Solicitor,*  
*Bengal.*

G. S.