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property over Rs. 100, in value, and if they are not so registered they cannot by reason of section 49 be admitted as evidence of the transaction they purport to effect; but they may be used for the collateral purpose of proving division of status among the parties to the documents. When so used they do not "affect" immoveable property nor is the division of status a "transaction affecting immoveable property" in the sense intended by the Act to be given to the word "affect." Documents that do not fall under the above description are not required to be registered at all and are admissible in evidence without registration. All costs hitherto incurred to be costs in the cause.

N.R

APPELLATE CIVIL.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice and Mr. Justice Wallace.

1922, October 30.

THE SECRETARY, BOARD OF REVENUE (INCOME-TAX), MADRAS, REFERRING OFFICER

v.

THE MADRAS EXPORT COMPANY (ASSESSEE).*

Ss. (1) 3 (1) (5) *and* 33 *of Indian Income-tax Act* (*VII of* 1918)—*Firm in France buying goods in India through agent but selling them for profit in France—Profit not taxable under the Act.*

As the agent of a firm situated in Paris, *A* bought raw skins in Madras and exported them to Paris where the firm sold them for profit.

Held, that as the profits accrued solely in France they were not taxable in British India.

* Referred Case No. 4 of 1922.

Held, further that section 33 (1) of the Indian Income-tax Act did not create a new category of income which could be charged under the Act in addition to incomes mentioned under section 5 as chargeable under the Act but that section 33 (1) merely provided a machinery by which non-resident foreigners (amongst others), trading in British India or having business connexion in British India could be taxed on income derived by them in British India.

Greenwood v. *Smidth* [1922] 1 A.C., 417, followed.

CASE stated under section 51 of Act 7 of 1918 by the Secretary, Board of Revenue (Income-tax), Madras.

The facts and the question referred for decision are given in the first paragraph of the judgment of WALLACE, J.

R. N. Ayyangar with *O. T. Govindan Nambiyar* for assessee.—The foreign company derives no profits in India. The sales are made solely outside India and all the profits accrue only outside India. Hence the foreign company is not taxable in India. All taxable income is mentioned in section 5 of the Act and section 33 (1) does not add to it. Section 33 (1) merely mentions the machinery by which certain persons like non-resident foreigners can be taxed upon incomes derived by them in India either directly from their trade in India or by their business connexions in India. The test is whether the profits sought to be charged arise in India. He referred to section 31 (2) of the Finance Act of 1915 and *Smidth & Co.* v. *Greenwood*(1), *Smidth & Co.* v. *Greenwood*(2), *Greenwood* v. *Smidth & Co.*(3), *Sulley* v. *The Attorney-General*(4), *Board of Revenue, Madras* v. *Ramanadhan Chetty*(5), *Grainger & Son* v. *Gough*(6).

C. Madhavan Nayar for Government.—The profits are taxable income though earned outside India provided they are derived through some business connexion

(1) [1920] 3 K.B., 275.
(2) [1921] 3 K.B., 583.
(3) [1922] 1 A.C., 417.
(4) (1860) 5 H. & N., 711.
(5) (1920) I.L.R., 43 Mad., 75.
(6) [1896] A.C., 325, 334.

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in British India. "Business connexion" is wider than trade or business. Section 33 (1) is in a chapter headed liability to tax and it is a new section designed to cover such cases and it mentions a class of chargeable income in addition to those mentioned in section 5. See the words "other sources of incomes" in section 5. Section 33(1 does not merely provide a machinery by which to tax non resident traders. He referred to section 3 for the definition of "income" under which incomes like these are deemed to accrue in India. The English Act is not in *pari materia* with the Indian Act and the English cases are not good guides for construing the Indian Act.

JUDGMENT.

SCHWABE, C.J.

SCHWABE, C.J.—The question for determination in this case is whether the profits made by a resident in France with a branch or agent here—which profits are received and retained in France—are liable to income-tax.

The relevant facts are that a French firm has a branch in Madras whose sole duty is to buy leather goods here and ship them to France. The French firm are a firm of commission agents and they make the profits in question by being paid at a defined rate commission on the value of the goods shipped. I had some doubt whether the fact that the French firm made this profit by commission distinguished the case from that in which a similar firm bought here through agents and made a profit by re-sale in France, but have come to the conclusion that it is an irrelevant consideration how it makes its profits, if it is in fact made and received in France and not here. By section 3 (1) the Act is to apply to all income from whatever source it is derived if it accrues or arises or is received in British India, or is under the provisions of the Act deemed to accrue or

arise or to be received in British India. By section 5, which is the charging section, certain classes of income are chargeable to income-tax and they include "(IV) income derived from business." Chapter 4 of the Act, headed "liability in special cases," contains a group of sections providing for taxation of certain persons although not the actual persons entitled to the income in question such as guardians, trustees, agents and partners in a firm which has discontinued business. Section 33 (1), one of those grouped sections, is in the following words :—

"In the case of any person residing out of British India all profits or gains arising to such person, whether directly or indirectly through or from any business connexion in British India, shall be deemed to accrue in British India and shall be chargeable to income-tax in the name of the agent of any such person, and such agents are to be deemed for the purposes of this Act to be assessees in respect of such income-tax."

It is argued on behalf of the Government that this section brings into tax income wherever earned or whether received in British India or not by a foreign resident if any part of the business which ultimately results in profits is conducted in British India. If this contention is right it would result in all foreign purchasers of goods in India for the purpose of manufacture or re-sale elsewhere being liable for Indian income-tax on any ultimate profits made in the countries to which the goods are exported. This would be a startling innovation and quite contrary to the established principle of taxation in England, and as far as I know, elsewhere and one which might lead to protest on the ground that it was contrary to the comity of nations, and would also in all probability result in residents in foreign countries as far as possible avoiding purchasing in this country its products, though these are considerations with which the Courts are not concerned if the statute clearly imposes

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such taxation, though they are material considerations in selecting between alternative interpretations if there is found to be an ambiguity. It may be that the words of section 33 (1) taking its language literally, would be sufficient to impose this taxation though, it is to be observed, the words "through or from any business connexion in British India" are very vague and the meaning thereof is not defined. The words are in my view most unsuitable if intended to have a wider meaning than the well-known meaning of the words in the charging section 5 (iv) "income derived from business" and bring into tax in respect of foreign residents something which is not covered by those words. I think the right view is that section 33 (1) is not a charging section at all, but a machinery section and is not intended to impose any taxation upon any income which would not otherwise be liable to tax, but to point to the method of collecting the income-tax where a person whose income is to be taxed is not himself available. In this view, we are supported by authority for much the same point arose in England. Section 31 (2) of the Finance Act II of 1915 is in the following terms :—

A non-resident person shall be chargeable in respect of any profit or gains arising whether directly or indirectly through or from any branch, factorship, agency, receivership, or management, and shall be so chargeable under section 41 of the Income-tax Act of 1842 in the name of the branch, factor, agent, receiver or manager.

In *Greenwood* v. *Smidth & Co.*(1), the House of Lords affirming the decision of ROWLATT, J., in *Smidth & Co.* v. *Greenwood*(2), and of the Court of Appeal in *Smidth & Co.* v. *Greenwood*(3), decided that this section, though in terms wide enough to bring into tax non-residents in respect of

(1) [1922] 1 A.C., 417. (2) [1920] 3 K.B., 275.
(3) [1921] 3 K.B., 583.

profits earned abroad through direct or indirect dealing through an agency in England, did not bring into tax profits unless they were earned or received in Great Britain and held that that section was a machinery section and not a charging section. Lord Buckmaster at page 423 stated the principle in the following words :—

"It is important to remember the rule which the Courts ought to obey that when it is desired to impose a new burden by way of taxation it is essential that the intention should be stated in plain terms. The Courts cannot assent to the view that if a section in a taxing statute is of doubtful and ambiguous meaning it is possible out of that ambiguity to extract a new and added obligation not formerly cast upon the tax-payer."

In my judgment this rule applies to this case.

Nor is the matter without authority here, for in *Board of Revenue, Madras* v. *Ramanadhan Chetty*(1), this Court, although it was not necessary for the decision of that case, expressed its view that section 33 (1) was merely a machinery section and not a charging section, and I agree with the reasoning on that point, and particularly with that of OLDFIELD and SESHAGIRI AYYAR, JJ.

For these reasons the judgment of this Court must be in favour of the assessee with costs to be taxed.

WALLACE, J.—This is a case referred to this Court under section 51 of the Income-tax Act VII of 1918 by the Board of Revenue. The stated case rests on the following facts. A firm with headquarters in Paris purchases skins in British India to the orders of constituents in various parts of Europe and America, and makes its profit by commission on the sales. The skins are bought in British India for the firm by an agency called the Madras Export Company resident in Madras.

(1) (1920) I.L., 43 Mad., 75.

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This company buys skins at the lowest prices it can get, subject to a maximum fixed by the Paris firm, and ships them in the raw state, as purchased, under the directions of the Paris firm. It is admitted that the Madras Export Company makes none of the profit on the sales of these skins, and that no part of the profits of the firm in Paris are remitted as such to Madras. It is presumed that the Paris firm puts the Madras Export Company in funds for the purchases out here. The question is whether the Madras Export Company is assessable by force of section 33 (1) of the Income-tax Act VII of 1918 as the agent of the Paris firm on the profits made in Paris by the Paris firm through or from its business connexion with the Madras Export Company in British India.

The section of the Act called in aid by the Board, section 33 (1), runs as follows :—

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

The phrase "shall be deemed to be income accruing or arising within British India" relates back to section 3 (1) where under the heading "Taxable income," it is enacted that

"This Act shall apply to all income from whatever source it is derived if it accrues or arises or is received, in British India, or is, under the provisions of this Act, deemed to accrue or arise or to be received in British India."

Hence sections 3 (1) and 33 (1) read together import that the Act shall apply to all income accruing or arising to a non-resident in British India, whether directly or indirectly, through or from any business connexion in

British India. The Government Pleader, on behalf of the Board of Revenue, contends that this renders liable to income-tax all business profits made by a non-resident received not only within but outside of British India in so far as these accrue or arise through or from any business connexion in British India. If the phrase "business connexion" is to be read as the Government Pleader contends as something much wider than the term "trade or business" itself, then the far-reaching effects of such a claim are obvious, and will extend far beyond what had been hitherto recognized in British India as the territorial limit of taxation of income derived from trade. Hitherto such taxation has been limited to incomes accruing or arising in or received in British India from trade carried on in British India whether the recipient resides in British India or not, and to income received in British India though derived from a foreign source when the recipient resides in British India. The general scope of sections 3 and 5 of the Act of 1918 does not seem to me to alter the previous general principle that the profits taxed should accrue in British India. If it was intended to abandon this well-recognized restriction and to reach profits accruing outside British India, more apt and express terms should have been employed in those sections.

The term "business connexion" has not been defined in the Act. That perhaps is not surprising in an Act which does not even define the source of gain which it sets out to tax; but when it is contended that "business connexion" was designed to mean something different from and wider than the business itself, which *ex-hypothesi* takes place outside British India, and thus to cast wider the net of the income-tax gatherer, it behoves us to be cautious and not to accept the contention, unless we find it justified by the legal maxim enunciated by

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Lord STERNDALE, M.R., in *Smidth & Co.* v. *Greenwood*(1), that the well-known canon of construction of taxing Acts is that no one is to be taxed except by express words. Does the Act then expressly charge income accruing outside British India, but derived through or from a business connexion in British India?

The charging section of the Act is section 5. Sub-section (iv) makes chargeable "income derived from business" and "income" for the purposes of this case has the meaning read into section 3 (1) which I have set out above: that is, it would cover income accruing or arising outside British India through or from any business connexion in British India. Thus such income itself is only chargeable when it is "Income derived from business" by force of section 5. The phrase in section 5 is not "income derived from or through any business connexion." At one stage of his argument the Government Pleader contended that such a phrase might be implied under sub-section (vi) of section 5, "income derived from other sources" but such a contention I cannot accept, as it violently contravenes the principle enunciated above that taxation must be imposed by express words. The real question for decision is, is the phrase "through or from any business connexion" in section 33 (1) governed and controlled by the phrase "derived from business" in section 5 (iv) or not? That it is, seems to me to be obvious from the fact that section 33 (1) is not designed or situated in the Act as a charging section in addition to section 5. It is not found under the chapter "Taxable income" alongside the charging section, but under the chapter headed "Liability in special cases," a chapter which is designed to provide

(1) [1921] 3 K.B., 583 at 583.

for the collection of the tax from persons other than the direct beneficiaries of the income received, that is guardians, trustees, agents, receivers and so on. That is, it is a part of the "machinery" sections setting out the method by which the tax, if otherwise chargeable, is to be collected in certain cases when the direct beneficiary cannot be got at, and it is not a charging section designed to declare some other gains taxable beyond what has been declared by section 5 to be taxable. I am fortified in this conclusion by the remarks of OLDFIELD, J., no doubt *obiter dicta*, in *Board of Revenue, Madras* v. *Ramanadhan Chetty*(1), that section 33 is intended to provide for the liability to tax of a person through whose hands in one capacity or other the profits in question will pass in British India, and whom therefore the Crown can reach in order to collect it, and also by the rules framed under section 33 by the Governor in Council, printed at page 76 of the Income-tax Manual of 1920, where it is laid down that profits in a case like this may be calculated on the percentage of the turnover of the business carried on in British India. The object of section 33 (1) then is merely to provide for an agent being the assessee in place of his non-resident principal, so far as that principal is liable under section 5, as hitherto interpreted, to the tax, i.e., in respect of income derived by the principal from business in British India. The condition precedent to assessability is business in British India and not merely a business connexion in British India, and it is not laid down in that Act that the two phrases are identical in meaning. The test, I take it is:—Is the non-resident firm by its agency out here in British India, making profits in British India which pass to it through

(1) (1920) I.L.R., 43 Mad., 75.

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the hands of its agent? If it is, then section 33 (1) applies. If not, not. I am therefore unable to hold, in the absence of more clear and express words, that section 33 (1) was intended in any way to enlarge the scope of section (5) or to bring into the net any income accruing outside British India but not derived from business within British India merely because that income was received through or from a business connexion in British India.

Section 33 (1) then is governed and controlled by section 5 and really applies and was intended to apply to cases where a non-resident firm takes income or profits from business carried on by it in British India, which are transmittable and are transmitted to it through its resident agent. The agent will be taxed and will be the assessee for the purposes of the Act for the profits in British India of that business, and, in order to guard against the section being taken to mean that it is merely the agent's own profits which are chargeable, language is used implying that it is the profits of his firm accruing in or arising through its business connexion in British India which are taxable through the agent.

In the present case the non-resident firm in India is merely buying raw material for shipment and sale abroad, and the profits realized from the sale are realized in Paris. There is clear authority in the leading case of *Sulley* v. *The Attorney-General*(1), which is an exactly parallel case, for holding that the firm does not thereby carry on trade or business in British India. It was there held that the place of trade is the place where the profits come home to the firm, and a non-resident firm is not assessable on profits made abroad merely because it has a resident agent for purchasing and

(1) (1860) 5 H. & N., 711.

shipping raw material, and that it is no part of the Income-tax Law so far as laid down that the firm shall be taxable in every country in which it has established buying agents. To a similar effect is the decision in *Smidth & Co.* v. *Greenwood*(1) where it is laid down that a trade is exercised in the place where the business transactions are closed, that is, in the case of a selling business, the place where the sales are effected and the profit thereby realized. The latter decision interprets section 31 (1) and (2) of the British Finance Act II of 1915, which closely resembles section 33 (1) of the British India Income-tax Act of 1918, and it is noteworthy that, though in the case of *Sulley* v. *The Attorney-General*(2), the Nottingham partner in the case was obviously a "Branch" of the New York firm, the Court in *Smidth & Co.* v. *Greenwood*(1) held that the decision in Sulley's case had not been radically affected by the new legislation, and held in effect that the extension of the Income-tax Act of 1842, which made a non-resident firm chargeable in the name of its branch did not mean that the existence of a branch sufficed to imply that the non-resident firm carried on trade in the United Kingdom or sufficed to make the profits of the non-resident firm received outside the United Kingdom taxable.

In the present case, no profits of a non-resident firm exist in this country or pass from it through the hands of the Madras Export Company. That company transmits to the Paris firm raw material, and not profits derived thereon ; it realizes for the Paris firm no income made in British India which is taxable before it leaves British India. To my mind then there is no income chargeable with income-tax under section 5 of the Act,

(1) [1921] 3 K.B., 583. (2) (1860) 5 H. & N., 711.

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and section 33 (1) read with section 3 does not bring within the scope of section 5 income accruing or arising wholly outside British India to the firm of which the Madras Export Company is the local agent.

Therefore, the answer to the reference is that the Madras Export Company is not liable to be taxed on the profits of the business carried on in Paris by its Paris principal which are realized by the latter's business connexion with British India.

King and Partridge—Attorneys for Assessee.

N.R.