

1937

*Present: Moseley J. and Fernando A.J.*CHIVERS & SONS, LTD. v. COMMISSIONER OF
INCOME TAX.82—(Intq.) *Special.*

Income tax—Sale of goods by non-resident person—Agent instrumental in selling goods—Liability of non-resident person to pay tax—Income Tax Ordinance, No. 2 of 1932, ss. 5 (1) (b) and 34.

A firm in Ceylon stocks and sells, among other goods, the goods manufactured by the appellants in England and shipped to Ceylon.

The local firm also displays samples of appellants' goods, canvasses for orders, and through their indenting department arranges for the supply on order from local dealers of goods shipped by the appellants.

The firm receives a commission from the appellant for all orders received and executed by them on indents placed through them.

The firm is bound to pay to the appellant the value of goods ordered on indents placed through them if the local dealers fail to pay their value.

Where dealers place orders directly with the appellants, the firm receives no commission.

There was no formal agency agreement between the appellants and the firm, and the appellants have no sole agent in Ceylon.

Held, that the firm in Ceylon was instrumental in selling the goods of the appellants within the meaning of section 34 of the Income Tax Ordinance, and that the profits derived by the appellants from such sale were liable to Income Tax under section 5 (1) (b) of the Ordinance.

THIS was a case stated for the opinion of the Supreme Court under section 74 of the Income Tax Ordinance, No. 2 of 1932, by the Board of Review constituted under that Ordinance.

The questions were whether upon the facts stated in the head note (1) the local firm was acting on behalf of a non-resident person within the meaning of section 34 of the Ordinance; (2) whether the firm was

instrumental in selling or disposing of the goods of the appellants; (3) whether the profits arising to the appellants from the sale of their goods on indents placed through the firm should be deemed to be derived by the appellants from business transacted in Ceylon within the meaning of section 34 and therefore liable to Income Tax under section 5 (1) (b) of the Ordinance.

H. V. Perera, K.C. (with him *N. Nadarajah*), for the assessee, appellant.—The Commissioner has held that there is no liability arising under section 5 (1). Upon that finding there can be no liability at all. Section 34 (1) is only explanatory. The point for decision is whether the profits in question arise in or are derived from Ceylon. *F. X. Pereira & Sons* stock *Chivers'* goods on their own account. It is clear from the form of the indent A that *F. X. Pereira & Sons* act on behalf of the person indenting the goods. They cannot therefore be regarded as acting on behalf of *Chivers*. Their position is that of "stockists", like that of any other dealer, who stocks the goods of *Chivers*. The Commissioner admits that "buying agencies" are not liable. There is no difference between *F. X. Pereira & Sons* in this connection and a buying agency. It cannot be said that *F. X. Pereira & Sons* are instrumental in selling the goods of *Chivers*. The indent is accepted in England. *Chivers* may or may not accept the indent. *F. X. Pereira & Sons, Ltd.*, guarantee payment by the person indenting. They are paid a commission for this service. *F. X. Pereira & Sons, Ltd.*, would be "instrumental" within the meaning of section 34, if only the last step remains to be taken, in the matter of accepting the indent. That is not the case here. And *F. X. Pereira & Sons* do nothing between the point of time at which the offer is made by the indenter and the point of time at which it is accepted by *Chivers*. They act as a Post Office. *F. X. Pereira & Sons* are no more instrumental in selling *Chivers'* goods than the proprietor of a newspaper would be who advertises *Chivers'* goods. Counsel cited *Anglo-Persian Oil Co., Ltd. v. Commissioner of Income Tax*¹, *Lowell and Christmas, Ltd. v. Commissioner of Taxes*², and *Greenwood v. Smidth (F. L.) & Co.*³.

J. E. M. Obeyesekere, C.C., for the Commissioner of Income Tax.—The liability to pay income tax is provided by section 5 (1) of Ordinance No. 2 of 1932. In the case of a person not resident in Ceylon it must be shown that the income sought to be taxed arises in or is derived from Ceylon. The expression "profits and income arising in or derived from Ceylon" is defined in section 5 (2) to include, *inter alia*, all profits derived from business transacted in Ceylon, whether directly or through an agent. Chapter VIII. of the Ordinance contains provisions relating to special cases, and in division F, special provision is made as regards the liability of non-resident persons. Section 34 (1) occurs in this chapter. If, therefore, it is shown that a person in Ceylon, acting on behalf of a non-resident person, is instrumental in selling or disposing of any property, the profits arising from such sale or disposal is to be deemed to be derived by the non-resident person from business transacted by

¹ (1935) 38 N. L. R. 348.

² (1922) 1 A. C. 417.

³ (1908) A. C. 46.

him in Ceylon. Section 34 (1) must be read with section 5 (2) and in turn with section 5 (1). If, therefore, it is shown—

- (a) that the appellants were acting on behalf of Chivers & Sons, Ltd., who are a non-resident person ; and
- (b) that they have been instrumental in selling goods belonging to Chivers & Sons, Ltd. ;

there is a liability to pay tax on the part of Chivers & Sons, Ltd. Question (a) is one of fact and the only question for determination by the Supreme Court is whether there was sufficient evidence before the Board of Review upon which they could find that the appellants were in fact acting on behalf of Chivers & Sons, Ltd. The expression “acting on behalf of a non-resident person” occurring in section 34 (1) connotes something wider than the relationship of agency which, for the purposes of this Ordinance, is defined in section 2. It is submitted that what is necessary is to prove that the appellants were acting generally on behalf of Chivers & Sons, Ltd. It is unnecessary to show that they were agents in the strict sense of the term or that they had authority on behalf of Chivers & Sons, Ltd., to make binding contracts. There is no doubt, as regards question (b), that the appellants were instrumental in selling the goods of Chivers & Sons, Ltd. They displayed their goods, canvassed for orders and forwarded indents direct to Chivers & Sons, Ltd. For so doing they were paid a commission. There is no reason to suppose that this commission was paid only on account of the liability they accepted to make good any default on the part of the indenting parties. Counsel referred to the case of the *Anglo-Persian Oil Co., Ltd. v. Commissioner of Income Tax (supra)*. He relied upon the interpretation of section 34 given in that case by Akbar J. He distinguished the cases *Lowell and Christmas, Ltd. v. Commissioner of Taxes (supra)*, and *Greenwood v. Smidth (F. L.) & Co. (supra)* cited by Counsel for the appellant on the ground that they were concerned in those cases in interpreting the provision of the English Act as to whether the profits were derived from a trade exercised in England. There is no provision in the English Act corresponding to section 34 (1) of our own Ordinance. Counsel submitted that the questions stated by the Board of Review must be answered in the affirmative.

H. V. Perera, K.C., in reply.

Cur. adv. vult.

November 1, 1937. FERNANDO A.J.—

This is a case stated under section 74 of Ordinance No. 2 of 1932 by the Board of Review constituted under that Ordinance for the opinion of this Court on the questions of law involved in the assessment made on Messrs. Chivers & Sons, Limited, who are referred to as the appellants. The facts of the case as stated are :—

That Messrs. F. X. Pereira & Sons who are residents in Ceylon stock and sell, among other goods, the goods of the appellants.

That they display samples of the appellants' goods.

That they have an indenting department which arranges for the supply on orders from local dealers of goods shipped by the appellants and others.

That F. X. Pereira & Sons from time to time canvass for orders for the appellants' goods.

That F. X. Pereira & Sons supply goods when so ordered from their stocks, or if that is not possible, the dealer forwards to them a form of indent addressed to the appellants.

That F. X. Pereira & Sons received a commission from the appellants for all orders received and executed by them on indents placed through F. X. Pereira & Sons.

That sometimes dealers do place orders directly with the appellants, and that on such orders, F. X. Pereira & Sons get no commission.

That F. X. Pereira & Sons have to pay to the appellants the value of the goods ordered on indents placed through them if the local dealers fail to pay for the goods.

That there is no formal agency agreement between the appellants and F. X. Pereira & Sons, and that the appellants do not have any sole agent in Ceylon.

The taxable profits derived by the appellants from orders placed with them through F. X. Pereira & Sons were assessed at Rs. 174, and the tax payable upon such profits was assessed at Rs. 20.88.

The questions for the opinion of this Court are stated to be as follows :—

- (1) Whether upon the facts F. X. Pereira & Sons were acting on behalf of a non-resident person within the meaning of section 34 of the Ordinance.
- (2) Whether they were instrumental in selling or disposing of the appellants' goods.
- (3) Whether the profits arising to the appellants from the sale of their goods on indents placed through F. X. Pereira & Sons should be deemed to be derived by the appellants from business transacted in Ceylon within the meaning of section 34, and therefore liable to Income Tax under section 5 (1) (b) of the Ordinance.

Section 5 of the Ordinance provides that Income Tax shall be charged in respect of the profits and income arising in, or derived from Ceylon in the case of a person who is not resident in Ceylon, and sub-section (2) provides that for the purposes of this Ordinance "profits and income arising in or derived from Ceylon" includes all profits and income derived from business transacted in Ceylon whether directly or through an agent. The word "agent" for the purpose of this section is defined by section 2 as including any person in Ceylon through whom the non-resident person is in receipt of any profits or income arising in or derived from Ceylon. Section 34 occurs in chapter VIII. which contains provisions relating to special cases, and the special case dealt with by chapter VIII.—F is the liability of non-resident persons. With regard to such non-resident persons, section 34 (1) provides that where a person in Ceylon acting on behalf of a non-resident person sells or disposes of any property, the profits arising from such sale shall be deemed to be derived by the non-resident person from business transacted by him in Ceylon, and the person in Ceylon who acts on his behalf shall be deemed to be his agent for all the purposes of this Ordinance. It also provides that where a person in Ceylon acting on behalf of a non-resident person is instrumental in selling or

disposing of any property, the profits arising from the sale are similarly deemed to be derived from business transacted in Ceylon. This section was considered by this Court in *Anglo-Persian Oil Co., Ltd. v. Commissioner of Income Tax*¹, and it was held that section 34 is supplementary to section 5 and was inserted in the Ordinance to include contracts which have been entered into as a result of the efforts of agents in Ceylon of a foreign principal, even when such contracts have been finally concluded outside Ceylon. Akbar J. followed the English case of *Maclaire & Company v. Eccott*², in which it was laid down that in the case of a merchant's business, the trade is exercised or carried on at the place where the contracts are made. Referring to that part of section 34, which deals with sale or disposal, and that was the only part of the section that was considered in that case, Akbar J. held that a sale or disposal referred to in the section was a definite legal act, and did not include a mere delivery of goods in pursuance of a contract made outside Ceylon. He then proceeded to consider the effect of the words, "instrumental in selling or disposing" and observed that these words were intended to catch up acts of canvassing which result in contracts outside Ceylon if the Crown can prove that the agent was instrumental in getting the sale or disposal fixed. Koch J. in the same case dealing with the words "instrumental in selling" held that these words meant aiding or assisting in bringing about the contract of sale which but for such aid and tancassise may never come off. "The non-resident person" he observed, "will also be liable, *although the sale was actually effected by him if in point of fact his agent in Ceylon acting on his own behalf was instrumental in selling the property*". There was no evidence led in that case to prove that the agent in Ceylon had anything to do with the contract of sale which was entered into in England, and it was not contended in that case that the agent in Ceylon had been instrumental in bringing about the contract of sale. In this case, however, it has been found as a fact that F. X. Pereira & Sons stocked goods, which belonged to Chivers & Sons, Limited, displayed their goods, kept samples of them, canvassed orders for those goods and received a commission on any order which was accepted. Obviously these acts were all done on behalf of Chivers & Sons, Limited, and the correspondence produced before the Commissioner shows clearly that they were done at the request of Chivers & Sons, Limited.

When the purchaser had after seeing the samples, and having ascertained the price decided to order the goods, he entered into an indent which appears to have been a printed form supplied to him for that purpose. That indent was forwarded by F. X. Pereira & Sons to Chivers & Sons, Limited, and the latter on receiving the indent accepted it and sent the goods. It seems to me that F. X. Pereira & Sons had done, everything it was possible for them to do to bring about a contract, although they had no authority from Chivers & Sons, Limited, to enter into a contract themselves on their behalf. While it is correct to say that the sale of the goods by Chivers & Sons, Limited, did not take place in Ceylon inasmuch as they accepted the offer in England, there is little

¹ 38 N. L. R. 348.

² 12 Times Law Reports 416.

doubt to my mind that F. X. Pereira & Sons had done everything that was necessary to bring about a contract. They were, therefore, instrumental in selling within the meaning of section 34, and it seems obvious that in acting with that object, they were acting on behalf of the assessee.

Mr. Perera for the appellants contended that the Indentors constituted F. X. Pereira & Sons their agent, and he referred to the condition in that form by which the purchaser authorised and requested F. X. Pereira & Sons to order and import the goods on their account. For this reason he argued, that when that indent was signed, F. X. Pereira & Sons became the agent of the purchaser, and that they therefore ceased to be the agent of Chivers & Sons, Limited, or to act on their behalf. If however, it is admitted that they were acting on behalf of Chivers & Sons up to the time of that indent, it is difficult to see how the act of the purchaser in signing the indent deprived F. X. Pereira & Sons of their authority to act on behalf of Chivers & Sons, Limited. It is not necessary in this case to consider whether the indent did constitute F. X. Pereira & Sons the agents of the Indentor and whether they ceased, therefore, to be the agents of Chivers & Sons because the only question before us is, whether by canvassing for the orders, F. X. Pereira & Sons had been instrumental in bringing about the sale by the assessee, and on that question I see no difficulty.

Mr. Perera also argued that the person who is instrumental in selling goods must do something between the offer by the purchaser and the acceptance by the seller. It is difficult to my mind to conceive of any act which a third party could or should do between offer and acceptance. If A has induced B to make an offer to C on terms which A knows will be acceptable to C, the only act which is necessary to complete the contract is the acceptance by C of those terms. If A is aware that C will accept those terms all he has to do is to see that the offer is communicated to C. In my opinion this contention of Mr. Perera must fail.

The English authorities cited to us are really not relevant inasmuch as they deal with the question as to where a sale in fact takes place, which question was considered by this Court in *Anglo-Persian Oil Co., Ltd. v. Commissioner of Income Tax (supra)*.

Section 34 must I think in this Ordinance be read along with section 5, and the effect of section 34 is to include under profits arising in or derived from Ceylon, all profits from the sale of goods where such sale has been brought about through the instrumentality of a person in Ceylon acting on behalf of the seller who is outside Ceylon, and in spite of the fact that legally the transaction of the business or the sale takes place outside Ceylon. Section 34 provides that those profits shall be deemed to be derived from a business transacted in Ceylon.

The appeal, therefore, must be dismissed, and the appellant will pay to the respondent his costs of this appeal as taxed by the Registrar.

MOSELEY J.—I agree.

Appeal dismissed.