INCOME-TAX REFERENCE.

Before Rankin C. J., C. C. Ghose and Buckland JJ.

1929

Aug. 12.

GOOPTU ESTATES, LIMITED,
*In the matter of.**

Income-tax — Lease — Breach — Forfeiture — Penalty — Selâmi — *Premium — Income—Notional income—Depreciation—House property—Business— Indian Income-tax Act (XI of 1922), s. 4, sub-s. (3), cl. (vii); s. 9; s. 10, sub-s. (2), cl. (vi); ss. 11, 12, 33; s. 66, sub-s. (2).*

Where a *lakh* of rupees was paid to the lessors by the assigns of the lessee, in consideration of the lessor's waiving the forfeiture, which the lessees had incurred in terms of the lease for a breach thereof, this sum having been demanded and paid in respect of a re-settlement of this property with the lessee's assigns for the remaining 48 years out of the 49 years, which exhausted the lessor's leasehold interest,

held that the sum in question was to be regarded as a *selâmi* or premium in the ordinary sense, and was not liable to assessment under the Indian Income-tax Act.

Held, further, that, if the assessee could not be regarded as carrying on a business in house property, he could not be made liable upon principles which were applicable only to persons carrying on business.

Though it cannot be said that *selâmi* can never be income under section 12, it would be highly unreasonable to treat any part of this *selâmi* as income. The very logic, by which the Act has by section 12 excluded from the account any allowance for depreciation, provided for by section 10, sub-section (2) of this wasting asset, excludes this item of *selâmi* also. Neither has place in a revenue account strictly limited to its immediate purpose.

INCOME-TAX REFERENCE at the instance of the Gooptu Estates, Limited, assessees.

The facts of the case, out of which this Reference arose, appear fully in the following Letter of Reference, from Mr. F. W. Strong, Commissioner of Income-tax, Bengal, dated Calcutta, the 7th February, 1929 :—

Under the provisions of section 66(2) of the Income-tax Act, I have the honour to refer to the Hon'ble High Court certain questions of law, arising out of the order of the Assistant Commissioner of Income-tax, Headquarters, on appeal filed by the Gooptu Estates, Limited, against the assessment made on them by the Income-tax Officer, Companies District I, for the year 1927-28.

2. The facts of the case are as follows :—The Gooptu Estates, Limited, a limited company, have taken lease of certain house properties belonging to Babu Ramchandra Gooptu, deceased, and receive rents from the sub-tenants. The premises at No. 100, Clive Street, are one of these properties. They were leased to the Tata Industrial Bank, Limited, for fifty years from the 1st August, 1920. It was agreed upon between the company

*Reference under section 66(2) of the Income-tax Act mad by F. W. Strong, Commissioner of Income-tax, Bengal, dated Feb. 7, 1929.

and the bank that, if the conditions of the lease were breached, the lease would at once expire. In the year 1923, the Tata Bank went into voluntary liquidation to effect an amalgamation with the Central Bank of India, Limited. This was considered by the company as a breach of the conditions of the lease. Finally, they compromised their claim, by accepting a *lakh* of rupees, and made over the premises to the Central Bank of India, Limited, at an increased rent for the unexpired portion of the lease. This *lakh* of rupees was received on the 21st December, 1923, *i. e.*, in the year 1923-24, and was admittedly shown under the head suspense account in the balance sheet for 1923, the accounting year of the company being the calendar year, but it did not pass through the profit and loss account. The same thing happened in 1924 and 1925, the heading only being changed from "Suspense" to "Lease account." As the amount was treated, as in suspense in the accounts, it was not included in the assessment of the company for any of the years 1924-25, 1925-26 or 1926-27. In the balance sheet of the year ending 31st December, 1926, the amount was shown under the head "Reserve account" without, however, passing it through the profit and loss account, as should have been done. In checking the accounts of 1926, this item came to the notice of the Income-tax Officer and the amount was added back to the profits. Thus the amount was for the first time assessed under the head "Other sources" to income-tax and super-tax for the year 1927-28.

3. Against the assessment, the company appealed to the Assistant Commissioner of Income-tax, claiming that the said *lakh* of rupees was not income assessable to tax. It was either a casual gain or a capital receipt and so exempt from tax. Further, were it assessable, it could not be taxed in 1927-28. The Assistant Commissioner of Income-tax decided that it was *selâmi* and as such liable to tax in the year 1927-28, for until the amount was shown under the head "Reserve account" the Income-tax Officer was not in a position to consider whether the amount was assessable or not.

4. Finally the company have filed a petition under sections 33 and 66 (2) asking for review of the Assistant Commissioner's order on appeal, or for reference to the High Court of the following questions of law :—

(*Set out in the judgment.*)

* * * * * * *

I have declined to interfere in review and so refer the case to the Hon'ble High Court. My opinion on the questions is as below :—

Question 1.—The sum in question is not covered by section 4 (*3*) (*vii*) of the Act, as it is a receipt arising directly out of the assessees' occupation, which is that of subletting leasehold properties. The decision of the Calcutta High Court in the case of *In re Turner Morrison & Co., Ltd.* (1) applies.

Question 2.—The payment was in the nature of a *selâmi* or premium paid in consideration of the Central Bank being allowed to replace the original lessee, the Tata Bank, Limited. Such *selâmi* or premium is an addition to the company's profit for the year in question. The ruling quoted by the assessee does not seem to have any bearing on the question.

Question 3.—It is a question of fact and depends on the circumstances of the case, whether the sum in question was assessable in the year 1927-28 or not. Owing to the manner in which it was shown in the accounts, the sum was treated as in suspense in the assessments for 1924-25, 1925-26 and 1926-27. When it was for the first time shown in the balance sheet as in reserve in 1926, it was considered to have become part of the company's profits, and was rightly assessed in the assessment for 1927-28. This hardly involves a question of law.

(1) (1928) I. L. R. 56 Calc. 211.

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Mr. A. K. Roy and *Mr. S. Mitra*, for assessee.

The Advocate-General (*Mr. N. N. Sircar*) and *Dr. Radhabinode Pal*, for the Commissioner of Income-tax.

Cur. adv. vult.

RANKIN C. J. The assessees are a limited company (Gooptu Estates, Limited), who in 1922 took a lease for fifty years from the representatives of one Ramchandra Gooptu of certain properties, which included the premises known as 100, Clive Street, Calcutta. This lease was subject to a building lease previously granted in June, 1920, by the executors of the will of the said Ramchandra Gooptu, whereby the premises 100, Clive Street, were demised for 50 years to the Tata Industrial Bank, Limited, on a monthly rental of Rs. 5,000. The Tata Industrial Bank, Limited, had paid a premium or *selâmi* of 1 *lakh* of rupees, and by the terms of the lease had undertaken to demolish the building then standing on the demised premises and to erect thereon a new office building in accordance with conditions to be approved by the lessors. In August, 1923, the Tata Industrial Bank, Limited, having expended a large amount of money upon the erection of the new building, went into voluntary liquidation, for the purpose of a scheme of amalgamation with the Central Bank, Limited. Thereupon, the assessees, Gooptu Estates, Limited, taking advantage of a forfeiture clause in the lease of 1920, which gave power to the lessors to re-enter, if the Tata Industrial Bank, Limited, should go into liquidation, claimed to determine the lease and demanded immediate possession. The Central Bank of India, Limited, faced with this claim, compromised with the assessees, who waived the forfeiture and agreed to a transfer of the lease to the Central Bank, Limited, in consideration of a lump sum payment of Rs. 1,00,000 and a further monthly payment of Rs. 750 during the residue of the lease. The sum of 1 *lakh* was paid by the Central Bank, Limited, to the assessees on the 21st December, 1923. The Income-tax

authorities, for the year of assessment 1927-1928, have claimed to treat this sum as part of the assessable income of the assessees and the Commissioner of Income-tax, Bengal, has at their request referred to this Court the following questions of law :—

(1) Whether the sum of Rs. 1,00,000, having been received in consideration of the waiver of their rights, in connection with a breach by the lessee of a vital condition of the lease, is in the circumstances a casual gain or a non-recurring income within the meaning of section 4, sub-section 3, clause 7, of the Income-tax Act.

(2) Whether the said sum of Rs. 1,00,000 was a *selâmi*, and whether, even assuming that it was a *selâmi*, it is an assessable income within the meaning of the Income-tax Act or is a capital and casual non-recurring receipt as held in the case of *Shiva Prasad Sing* v. *The Crown* (1).

(3) Whether the income derived, accrued and received in the year 1923 can, in the circumstances, *viz.*, the transfer of the amount from one account to another to suit the convenience of accountancy, be treated as assessable income in the year 1927-28.

I propose to consider the second question first. The assessment order, dated the 30th November, 1927, has been included in the paper book and from this, as well as from the case stated, it appears that the assessment was made under section 12 of the Act under the head "other sources." The assessment order shows that the assessment, being under section 12, and not under section 10 under the head "business," the Income-tax authorities have refused to permit the assessee to take credit for any sum on account of depreciation of the buildings, *etc.*, which are part of their capital assets.

In a case of this character, much may depend upon the particular head of charge, under which the assessees are being brought; and the question before us is not to be decided under sections 9, 10 or 11 of the Act. Where the assessee is the owner of property consisting of any buildings or land appurtenant thereto, the statute charges him upon the basis of a notional income, the amount of which is computed by finding the *bonâ fide* annual value and making the deductions therefrom which are allowed by section 9. As the assessees, in this case, have only a limited interest, namely, the interest of a lessee for fifty years, the Income-tax authorities

(1) (1924) I. L. R. 4 Patna 73.

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may well be right in regarding section 9 as inapplicable to the case. Again, if, in the view taken by the Commissioner, the circumstances are not such that the assessee can be regarded as carrying on a business in house property—a view which has not been questioned before us and which must clearly be accepted—it is obvious that the assessees cannot be made liable upon principles which are applicable only to persons carrying on business.

If we were dealing with this case under section 10 of the Act, and upon a finding that the letting out of property upon lease for *selâmi* and for rent, the forfeiting of leases where possible and the exaction of fresh *selâmi* and increased rent were all acts done in the carrying on or carrying out of a business in house property, it might well be correct to hold that the sum now in question was earned as part of the profits of the business, and was assessable accordingly to tax. [*Commissioner of Taxes* v. *Melbourne Trust, Limited* (1), *In re Spanish Prospecting Company, Limited* (2), *Assets Company, Limited* v. *Forbes* (3).] On the other hand, on that view, the assessee would be entitled to the allowance in respect of depreciation on buildings, machinery, plant or furniture prescribed by clause (*vi*) of sub-section 2 of section 10.

From this standpoint, "profits," as Lord Moulton observed in *In re Spanish Prospecting Company, Limited* (2), implies a comparison between the state of a business at two specific dates usually separated by an interval of a year, and if the company was to be regarded as dealing in house property by letting it out for premium and rent in the course and for the purposes of its business, the money value of the extent to which at the end of a year it had bettered its position by such means would be assessable as profit. If its position has bettered by other means, from causes not directly connected with the business of the company, the enhanced value, though realised, is not part of the profits of the business [*Californian Copper*

(1) [1914] A. C. 1001. (2) [1911] 1 Ch. 92.

(3) (1897) 3 Tax Cas. 542.

Syndicate (Limited and Reduced) v. *Harris* (1), *Tebrau (Johore) Rubber Syndicate, Limited (in Liquidation)* v. *Farmer* (2)]. Everything depends upon what the business is.

If, however, the assessee is not carrying on a business, the matter must be examined from another angle. The absence of any provision in section 12 of the Act for an allowance of depreciation upon fixed capital is an indication of the difference. It points to the fact that, under this head, the income can *primâ facie* be ascertained without a valuation of all assets at two different dates and by means of a computation of receipts and expenditure into which the rise or fall of capital values does not enter. If the expenditure required to obtain the income from the capital asset is negligible, the case is the simple case of a man in receipt of a clear revenue therefrom. If some considerable expenditure is necessary before the annual return can be obtained, then the history of the year will be stated in the form of a "trading" or "revenue" account or account of the receipts and expenditure during the year. It is essential, when accounting on this basis, to exclude from either side of the account matters which in substance represent only a rise or fall in the value of the asset from which revenue is derived, as distinct from the net revenue itself or which represent only a change in the form of the investment, whether the change be a change into money or into some other form of property.

Now, cases of *selâmi* or premium upon a lease may present considerable difficulty in maintaining the distinction between capital and revenue accounts. In *Shiva Prasad's case* (3), Dawson Miller C. J. discussed the question in the case of a holder of an impartible Raj, who possessed *zemindâri* properties. The case before us is the case of a company and apparently of a company which possesses a good many leasehold properties. But, under section 12 of the

(1) (1904) 5 Tax Cas. 159. (2) (1910) 5 Tax Cas. 658.
(3) (1924) I. L. R. 4 Patna 73.

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Act, and upon the facts stated in the case, I do not see how a different result can be arrived at from that, which would have been correct, had the lease of 100, Clive Street, been the sole capital asset of an individual. Section 12 covers many different types of income but, even if it be assumed that such matters would affect the question, the case stated contains no findings as to the character or constitution of the company, the purpose for which it was formed, the extent of its operations or the particular character of the transaction by which the representatives of Ramchandra Gooptu, deceased, with the assent of the beneficiaries under his will have demised his properties to Gooptu Estates, Limited. We know indeed that the assessee company is not said to be carrying on a business and it may be, for aught we know, that it has been formed merely to provide convenient machinery for management or as a scheme, by which the testator's estate can be administered, and in the end distributed to the best advantage.

Looking at the assessees, therefore, simply as owning leasehold property from which they derive a revenue, we find as regards 100, Clive Street, that they are charged and chargeable under section 12 with the whole of the net rent notwithstanding that it is derived from a wasting asset. They have a lease for fifty years from 1922 and the property is sublet for fifty years from 1921. In 1923, when the Tata Industrial Bank incurred a forfeiture of their lease, the assessees, instead of being interested merely as reversioners entitled to the rent reserved during the currency of the lease, became at one stroke entitled to immediate possession of the property, as it then stood. Their investment or capital asset had advanced suddenly in value and they were free to deal with it as they liked, subject only to the covenants in their own lease. Had they sold it no part of the purchase price could have been regarded as revenue. Had they sold a half share in it, the same would still hold. What then did they do? By a bargain with the Central Bank, they contrived to

the extent of a *lakh* of rupees to realise the *enhanced* value at once and the rest of the enhancement in value of their asset they converted into a right to an additional monthly sum of Rs. 750. The finding by the Commissioner is that the *lakh* of rupees was "in the nature of a *selâmi* or premium" and he adds "paid in consideration of the Central Bank being "allowed to replace the original lessee." These last words are not very lucid, because the sum was not exacted as a term of mere assent to an assignment, but by reason of the claim that the lessee had incurred a forfeiture and in consideration that the forfeiture was waived. The sum in question is certainly to be regarded as a *selâmi* or premium and that in the ordinary sense. It was demanded and paid in respect of a re-settlement of this property, not for a year or even for a few years only, but for the remaining 48 years out of the 49 years which exhausted the assessees' leasehold interest. I do not say that *selâmi* can never be income under section 12, but it would in my opinion be highly unreasonable to treat any part of this *selâmi* as income. The very logic, by which the Act has excluded from the account any allowance for depreciation of this wasting asset, excludes this item also. Neither has place in a revenue account, if the account be strictly limited to its immediate purpose.

In my opinion, the second question referred to us should be answered in favour of the assessees. In this view, the other questions do not arise and need not be discussed.

The assessees must have their costs of the Reference.

C. C. GHOSE J. I agree.

BUCKLAND J. I agree.

Second question answered in assessees' favour.

Attorneys for the assessees: *Dutt & Sen.*

Advocate for the Commissioner of Income-tax: *Dr. Radhabinode Pal.*

G.S.