

INCOME-TAX REFERENCE.

Before Derbyshire C. J. and Costello J.

In the matter of AMULYA DHAN ADYA*.

1936
—
Mar. 3.

Income-tax—Hindu undivided family—Mortgage—Busti lands—Deduction from income-tax—Gross realisation—Indian Income-tax Act (XI of 1922), ss. 9(1) (iv), 12, 66(2).

An undivided Hindu family is a single unit for the purpose of income-tax matters.

Section 9 (1) (iv) of the Income-tax Act applies only when the property *i.e.*, the property, which constitutes the taxable property of the undivided Hindu family, is subject to a mortgage.

When the assessee as a Hindu undivided family is being assessed under the provisions of s. 9 of the Income-tax Act, the word "mortgage" in s. 9(1)(iv) refers to a mortgage by the Hindu undivided family as such and does not include a mortgage by any individual member or members of his or their shares only of such property.

As soon as a property is mortgaged, the realisations from that property do not cease to belong to its owner, the mortgagor, nor does a portion of the rents and profits legally belong to the mortgagee on account of interest, the balance, if any, alone belonging to the mortgagor.

In an assessment under s. 12 of *busti* lands the income is not to be computed after deducting the interest on the mortgages on such properties from the gross realisations in cases where the mortgages have not been made for purposes of the said properties but for raising a loan for some other purposes of the assessee.

REFERENCE at the instance of the assessee.

The facts of the case and the arguments in the Reference appear sufficiently in the judgment.

Gunada Charan Sen, Anilendra Nath Ray Chaudhuri and Gour Mohan Datta for the assessee.

A. K. Roy, Advocate-General, and Ramesh Chandra Pal for the Income-tax Department.

COSTELLO J. The two questions on which we are asked to express our opinion have arisen in connection with an assessment made in the year 1933-34 on the income of the assessee derived from business in

*Income-tax Reference, No. 8 of 1935, under section 66 (2) of the Indian Income-tax Act.

1936

In the matter
of *Amulya Dhan*
Adya.

Costello J.

paddy and rice and in money lending: on income derived from properties assessed under s. 9 of the Indian Income-tax Act, XI of 1922, and from ground rents and dividends. There is also an item in the assessment, which is described as *busti* lands. That was assessed under s. 12 of the Indian Income-tax Act of 1922. The assessee is a Hindu undivided family governed by the *Dâyabhāga* School of Hindu law. At some date long anterior to the date of the assessment that family had taken a loan from Raja Janaki Nath Ray on the security of part of the house property, *busti* land, and their share in an agricultural estate, certain holdings in stocks and shares and the stock-in-trade of the paddy and rice business. On a subsequent date the family had borrowed money from the Bhawanipur Banking Corporation, Ltd., on the same security at a rate of interest of 9 *per cent.* Some time after that certain members of the Hindu undivided family which constitutes the assessee—these members having a twelve annas interest in the family property—executed a third mortgage in favour of the Khulna Loan Company giving as security their share in five separate house properties at that time not subject to any mortgage. As the learned Commissioner of Income-tax points out, it should be noted that only a twelve annas interest in these properties was mortgaged and the other sharer—the four annas sharer—did not come in at all, as he raised his share of the amount necessary to meet their creditors from his own individual property or that of his wife's family.

In the year of accounting the amount paid or payable on account of the first two of the mortgages I have mentioned, by way of interest was the sum of Rs. 42,917 and the amount of interest paid or payable in respect of the third mortgage was Rs. 7,236. In the assessment the amount of interest of Rs. 7,236 in respect of the third mortgage has been disallowed altogether, that is to say, the Income-tax Officer has declined to allow it to be treated as a deduction. The sum of Rs. 42,917, being the amount of interest on

the first two mortgages, has been allocated to the respective properties mortgaged, Rs. 7,716 being allocated to the *busti* lands and this amount has not been allowed as a deduction, because the income derived from the *busti* lands has been assessed under the head "other sources", that is to say, under the provisions of s. 12 of the Indian Income-tax Act. The Income-tax Officer took the view that that section does not admit of any such allowance.

Certain questions were formulated by the assessee for reference to this Court. They were in extremely general terms and, as the learned Commissioner of Income-tax himself has said, they do not appear to be happily worded and accordingly he declined to refer them to this Court in their original form. He substituted in their place two other questions, which are the questions we have to answer. They are these—

(i) When the assessee is a Hindu undivided family and is being assessed in respect of income under the head "Property" under s. 9 of the Income-tax Act, whether the word "mortgage" in s. 9 (1) (iv) refers to a mortgage by the Hindu undivided family as such or whether it includes also a mortgage of his share only of such property by any individual member thereof for his own purposes?

(ii) "Whether in an assessment under s. 12 for *busti* lands the income is to be computed after deducting from gross realisations, any interest on mortgage of such properties, such mortgage having been made not for any purposes of the said properties but for raising a loan for some other purposes of the assessee?"

In order to give answers to these two questions it is desirable to refer at the outset to two of the definitions, which are contained in s. 2 of the Indian Income-tax Act of 1922. Sub-section (2) of s. 2 reads thus:—

"Assessee" means a person by whom income-tax is payable

and sub-s. (9) reads thus:—

"Person" includes a Hindu undivided family.

In the previous Income-tax Act (of the year 1918) those two sub-sections were all contained in sub-s. (2) of s. 2 of that Act which read thus—

"Assessee" means a person by whom income-tax is payable and includes a firm and a Hindu undivided family.

1936

In the matter
of *Amulya Dhan*
Adya.

Costello J.

1936

In the matter
of *Amulya Dhan*
Adya.

Costello J.

Although in the present Act "assessee" in one place is defined as a person by whom income-tax is payable and in another place "person" is stated to include a Hindu undivided family, the effect is the same as that of the definition in the Act of 1918. Putting the two things together for our present purpose it comes to this that the assessee with whom we are concerned is a Hindu undivided family. So much has been admitted by Mr. Sen appearing on behalf of the assessee.

Mr. Sen has argued as regards the first of the two questions we have to answer that by reason of the provisions in s. 9(1)(iv) the position in the present case is that the property is subject to a mortgage—the property, which is the basis of the assessment under s. 9(1)—and that, therefore, the assessee is entitled to claim as a deduction the amount of interest which is payable in respect of the mortgage on a part of the property, even though that mortgage was effected not by the undivided joint Hindu family as such but only by some of the co-sharers who constitute that undivided family. That contention seems to me to ignore the fact that the assessee is the undivided Hindu family—not the persons who compose that family, but the family taken as a unit; in other words the undivided Hindu family is a single unit for the purpose of income-tax matters. In that view of the position, to say that, merely because a certain part of the property had been mortgaged or because persons, having a twelve annas share in the family property, executed a mortgage or mortgages: therefore interest payable in respect of those mortgages is a deductible allowance, is to read into s. 9(1)(iv) words which are not there and to make the section read something like this: "where property or any part of the property was subject to a mortgage," etc. I am clearly of opinion that s. 9(1)(iv) of the Act applies only when the property, *i.e.*, the property which constitutes the taxable property of the undivided Hindu family, is subject to a mortgage. That is not the position here.

The result is that as regards the first question we are bound to say that, when the assessee as a Hindu undivided family is being assessed in respect of his income under the provisions of s. 9 of the Income-tax Act, the word "mortgage" in s. 9(1)(iv) refers to a mortgage by the Hindu undivided family as such and does not include a mortgage by any individual member or members of his or their shares of such property.

1936
 In the matter
 of *Amulya Dhan*
Adya.
 Costello J.

A regards the second question Mr. Sen has conceded that the mortgages that were made in respect of the *busti* lands were not such as would fall within the purview of s. 12(2) of the Income-tax Act. That sub-section says "such income, profits and gains" that is to say income, profits and gains referred to in sub-s. (1)—

shall be computed after making allowance for any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of making or earning such income, profits or gains, provided that no allowance shall be made on account of any personal expenses of the assessee.

It is obvious that the interest payable in respect of the mortgages on the *busti* lands cannot by any stretch of language be accurately described as expenditure incurred solely for the purpose of earning the income which is derived by the joint Hindu family from the *busti* lands.

The learned Commissioner has pointed out in the statement of the case that the contention of the assessee was—

That as soon as a property is mortgaged the realisations from that property no longer wholly belong to its owner, the mortgagor. According to his contention a portion of the rents and profits legally belongs to the mortgagee on account of interest and the balance, if any, alone belongs to the mortgagor.

The learned Commissioner has expressed the view that as a general proposition of law this contention is wholly untenable. With that expression of opinion I entirely agree. It is manifest that rents and profits or proportionate rents and profits derivable from

1936

In the matter
of *Amulya Dhan*
Adya.

Costello J.

the *busti* lands were in no sense ear-marked or allocated for the purpose of paying interest due in respect of the mortgages on those *busti* lands. It was open to the mortgagor to discharge his liability for interest by using either a part of the rents and profits derived from the mortgaged *busti* lands or money from other sources, if he was so minded. There is nothing whatever to show that the interest payable in respect of the mortgagees on the *busti* lands was paid out of the rents and profits received by the mortgagor from those particular lands.

It follows, therefore, that the answer to the second question must be this:—that in an assessment under s. 12 of *busti* lands the income is not to be computed after deducting the interest on the mortgages on such properties from the gross realisations in cases where mortgages have not been made for purposes of the said properties but for raising a loan for some other purposes of the assessee.

The Income-tax Department will get such costs of the Reference as are allowed by the rules.

DERBYSHIRE C. J. I agree.

Advocates for assessee: *Anilendra Nath Ray Chaudhuri* and *Gour Mohan Datta.*

Advocate for Income-tax Department: *Ramesh Chandra Pal.*

G. S.