"recovered." We are therefore satisfied that the words "tax was recovered" mean "tax was received by the Government."

It has been pointed out to us that this interpretation may cause hardship in individual cases where there has been delay on the part of the income-tax authorities in England in making the refund there, such delay not being due to the default of the assessee. We would point out that this hardship can only be obviated by an amendment of section 50 and we are of opinion that this should be done by giving the Income-tax Commissioner power to extend the time in suitable cases.

The petitioner will pay the costs of this application, i.e., Counsel's fee Rs. 250.

Moresby & Co., Attorneys for assessee.

N.R.

SPECIAL BENCH.

Before Sir William Phillips, Kt., *Officiating Chief Justice*, *Mr. Justice Ramesam and Mr. Justice Beasley.*

THE COMMISSIONER OF INCOME-TAX, MADRAS, REFERRING OFFICER,

1927, September 5.

v.

YAGAPPA NADAR, ASSESSEE.*

Indian Income-tax Act (XI of 1922), sec. 2 (1) (b)—Agricultural income—When income derived from toddy is such income.

Income derived from toddy is agricultural income when it is received by the actual cultivator, whether owner or lessee of the land on which the trees grow. If the income is obtained by a person who has not produced the trees from which the toddy is tapped, or has not done any agricultural operation whereby

* Referred Case No. 16 of 1926.

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those trees have been raised, it is not agricultural income within the meaning of the Act.

CASE stated under section 66 (1), Act XI of 1922, by the Commissioner of Income-tax, Madras, referring the following question :—

"Whether toddy extracted from coconut trees situate on lands assessed to Government revenue is or is not agricultural income within the meaning of section 2 (1) and whether the Income-tax Act applies to profits derived from the sale of such toddy?"

The necessary facts are given in the judgment.

K. S. Jayarama Ayyar (with *S. Nagaraja Ayyar*) for assessee.—The income made by drawing and selling toddy even by a contractor who is not the owner or lessee of the land on which the trees stand is "agricultural income" and not "business" income within the meaning of the Income-tax Act. See Maclean's Manual, Vol. III, page 906, as to the process of producing and extracting toddy. Rubber is treated as agricultural product. See Law of Income-tax, page 90, by V. S. Sundaram. Likewise sugarcane and tea after cutting. "Agriculture" is defined in *Panadai Pathan* v. *Ramasami Chetti*(1). If when the owner himself raises toddy it is agricultural product, it is equally so in the hands of a lessee of trees.

[PHILLIPS, OFFG. C.J.—The former is a cultivator within section 2 of the Act and the latter is not. How can a process which eventually destroys the trees be classed as agricultural income?]

Both are agriculturists. See V. S. Sundaram's Law of Income-tax, page 82. All the facts of this case are not fully given by the Commissioner. I am not only the owner of some land on which some of the trees stand but I am also the lessee of some trees of another and I water both classes of trees for producing juice. There cannot be double taxation for the same income—*Chief Commissioner of Income-tax* v. *Zamindar of Singampatti*(2). In this case there is a tax on the land; there is also a tax on the trees, and I am now sought to be taxed with income-tax in respect of the income derived by selling the juice of the trees. Tree tax is said to be revenue in the Abkari Act. Mere exposure to air in order to make the juice ferment

(1) (1922) I.L.R., 45 Mad., 710. (2) (1922) I.L.R., 45 Mad., 518.

is not any industrial operation. If there is no lease of the land in my favour there is at least a lease of the trees which are movables. I am not a mere licensee to be taxed.

M. Patanjali Sastri for Referring Officer.—The onus is on the assessee. His income is not an agricultural income. He does nothing by way of agriculture to get the juice. It is the landlord that does it. In his hands it may be agricultural income. The assessee is not even the lessee of the land; he is only a licensee and his income from juice is taxable; *W. Donald* v. *A. Thomson*(1). For the difference between a lease and a licence, see *Secretary of State for India* v. *Karuna Kanta Chowdhry*(2); if at all the assessee waters the trees it must be due to some arrangement by him with the owner; *Hornsby* v. *Maynard*(3).

JUDGMENT.

The question referred by the Income-tax Commissioner is

"Whether toddy extracted from coconut trees situate on lands assessed to Government revenue is or is not agricultural income within the meaning of section 2 (1) and whether the Income-tax Act applies to profits derived from the sale of such toddy?"

It is contended for the petitioner that he as lessee of the trees is entitled to treat the income derived from the toddy which is produced from these trees as agricultural income. The juice which by contact with air in time becomes toddy is a product of these coconut trees and it is contended that as such it is an agricultural product. That undoubtedly is so, and the income derived therefrom by the person who has produced that product by agricultural operations would be agricultural income, but it does not at all follow that if he sells the juice to another person and that person makes an income by again selling that product that the latter income is agricultural income. Ordinarily, it would certainly not

(1) (1922) 8 Tax. Cas., 272. (2) (1908) I.L.R., 35 Calc., 82 (F.B.) at 98.
(3) [1925] 1 K.B., 514 at 523.

COMMISSIONER OF INCOME-TAX, MADRAS, v. YAGAPPA NADAR.

be agricultural income unless it could be shown that the second seller had obtained his income by agriculture, that is to say, he must show that he has either as owner or as lessee done some agricultural operation by reason of which he becomes possessed of the toddy and therefore is entitled to treat the proceeds as income from agriculture. It is contended here that the petitioner is the lessee of the trees, but admittedly not of the land on which they stand. It is very doubtful whether it is possible to have a lease of the trees without the land on which they stand. Under the Transfer of Property Act leases are only in respect of immovable property and no instance of a lease of movable property has been suggested to us. No interest in the land has been transferred here and it would appear that what the petitioner has obtained is a mere licence to tap the trees and draw the juice. If that is so, the mere fact that he has to water the trees (and this is not proved to be the case) shows only that the watering is one of the conditions of his licence and not an act whereby the agricultural produce had been raised, for that was raised before he obtained his licence. As the facts of the case have not been put before us by the Commissioner, we must give a general answer as follows :—

"Income derived from toddy is agricultural income when it is received by the actual cultivator, whether owner or lessee of the land on which the trees grow. If the income is obtained by a person who has not produced the trees from which the toddy is tapped, or has not done any agricultural operation whereby those trees have been rasied, it is not agricultural income within the meaning of the Act."

Counsel's fee Rs. 250 will be paid according to the result of the disposal of the petition.

N.R