British India over the overseas branches, the commissioner would have stated it as supporting his case and set it out.

The Commissioner will pay the assessee's costs of this reference. Fees Rs. 250.

My learned brothers have seen this judgment and concur in it.

K.R.

SPECIAL BENCH.

Before Sir Murray Coutts-Trotter, Kt., *Chief Justice*, *Mr. Justice Beasley and Mr. Justice Srinivasa Ayyangar.*

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

v.

S.K.R.S.L. FIRM, SIVAGANGA CIRCLE, OKKUR, ASSESSEE.*

1927, March 28.

Income-tax Act (XI of 1922), ss. 4 (2) and 66—Reference by Commissioner—Profits earned or accrued outside British India—Remitted into British India—Profits accrued both beyond and within three years of remittance—Presumption, whether remittance related to earlier or later profits—Burden of proof on assessee.

When a man has profits earned more than three years before the year of assessment and also profits earned within that period, to his credit, in a trade carried on by him outside British India, there is no presumption that a remittance made to him in British India, of a sum which might fall in either set of profits, is made from the earlier profits and not from the later.

The effect of section 4 (2) of the Income-tax Act (XI of 1922) is to cast upon the assessee the burden of proving that the profits accrued or arose outside British India more than three years before they were received or brought into British India.

* Referred Case No. 10 of 1926.

COMMISSIONER OF INCOME-TAX, MADRAS, v. S.K.R.S.L. FIRM.

CASE stated by the Commissioner of Income-tax, Madras, on reference to the High Court made under section 66 of the Income-tax Act (XI of 1922), in pursuance of the order of the High Court directing a case to be stated.

The material facts appear from the order of reference. The material portions of the said order were as follows :—

"The assessee has a business in Ceylon, the profits of which were standing to his credit there, about Rs. 89,552, earned subsequent to March 1920 together with about Rs. 77,524 earned prior to that date. During the year of account, viz., on 31st August 1923, there was a remittance of profits to the extent of Rs. 50,000 from Ceylon to Rangoon. That remittance is taxable under section 4 (2), if the profits remitted were earned subsequent to March 1920. It is not taxable if the remittance came from profits earned prior to April 1920. There is nothing in the facts of the case to show definitely which profits yielded the remittance."

"The assessee holds, I understand, on the authority of Clayton's case, that there is a presumption that the remittance came from the earlier profits. I am of opinion that Clayton's case is inapplicable, and that there is a presumption that the remittance came from the later profits. To my mind this case is governed by the case of *Scottish Provident Institution* v. *Allan*(1), where it was held that there is a presumption that a remittance is from income rather than from capital. Now profits of one year, if they are not spent, become capital of the next year. All the profits of the years prior to the year of assessment have become capital and would not be assessable but for the special provisions of section 4 (2), which enables us to tax what would otherwise be capital. The distinction to be drawn in this case is therefore between capital and income, and not one between older and newer profits. Applying the Scottish Provident Institution decision to the special circumstances of India in which four years' profits are to be deemed to be income, I am of opinion that there is a legal presumption that the remittance came from the later profits rather than from the earlier."

(1) [1903] A.C., 129 ; S.C., 4 Tax Cas., 591.

K. S. Krishnaswami Ayyangar with *K. S. Rajagopalachari* for assessee.—Profits made outside British India, and remitted to British India, are taxable, if they accrued within three years of their remittance to British India, and they are exempt from assessment, if made beyond three years of their remittance. In this case profits, to the extent of about Rs. 71,000, were made more than three years prior to remittance into British India, and profits amounting to about Rs. 80,000 were made within three years but were not entered in the accounts. Remittance of Rs. 50,000 was made. The question is out of which profits was the remittance made. The Commissioner held that profits not remitted for some years became capital, and current profits remained as profits. There is no authority for the proposition that if profits are not remitted for some years, they automatically become capital. This is not a case of conflict between capital and profits, but one between two sets of profits only. When there is no evidence as to out of which item of the profits the remittance was made, there is a presumption that it came out of the earlier item, because law presumes that a man does a thing in his interest, and not against his interest. If there is no evidence whatever, the finding of fact of the Commissioner is not sustainable. If there is no legal evidence at all for the finding, it is a matter of law and the High Court can interfere.

M. Patanjali Sastri for the Referring officer.—The Commissioner has found on evidence referred to in his review order, and not merely on presumption.

JUDGMENT.

The question referred to us is in the following terms:—

"When a man has profits earned more than three years before the year of assessment and also profits earned within that period to his credit in a trade carried on by him outside British India, is there any presumption that a remittance made to him in British India for a sum which might fall in either set of profits is made from the earlier profits and not from the later?"

Under section 4 (2) of the Act profits and gains of a business accruing or arising without British India to

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a person resident in British India shall, if they are received in or brought into British India, be deemed to have accrued or arisen in British India and to be profits and gains of the year in which they are so received or brought, notwithstanding the fact that they did not so accrue or arise in that year, provided that they are so received or brought in within three years of the end of the year in which they accrued or arose. That appears to us to be a clear intimation that sums remitted to British India are to be deemed to have accrued or arisen in the year of remission unless they accrued or arose more than three years before. We entertain no doubt that the effect of that must be to cast upon the assessee the burden of proving that the profits accrued or arose more than three years back, a matter after all peculiarly within his knowledge and not within the knowledge of the income-tax authorities. That is an answer to the reference and it is clear that the Commissioner acted on that principle, and whether he came to a right conclusion of fact in the light of it is not for us. It is no doubt true that, in appending reasons for his own opinion on the point he was referring as he is directed under the Act to do, he enounced some very dubious propositions of law. That does not alter the position that in paragraph 5 of his review order he dealt with the question of fact unvitiated by any such misdirection of himself and dealt with it adversely to the assessee. The answer to the reference is in the negative.

The assessee must pay Rs. 250 for the costs of the Commissioner.

K.R.