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appeal, all further proceedings under the decrees of the 5th October 1920, the 28th October 1926, and the 7th March 1928, must be stayed. The respondent must pay the costs of the appellants of their petition for the admission of evidence and of the hearing of this appeal before their Lordships, down to and including this judgment.

Their Lordships have humbly advised His Majesty accordingly.

Solicitors for appellants : *Hy. S. L. Polak & Co.*

Solicitors for respondent : *Douglas Grant & Dold.*

A.M.T.

INCOME-TAX REFERENCE.

Before Sir Owen Beasley, Kt., Chief Justice, Mr. Justice Cornish and Mr. Justice Bardswell.

1933. May 11.

A. S. PL. VR. RAMASAMI CHETTYAR, PETITIONER,

v.

THE COMMISSIONER OF INCOME-TAX, MADRAS, RESPONDENT.*

Indian Income-tax Act (XI of 1922), sec. 4 (2)—Foreign money-lending business—Properties taken over in discharge of debts in course of—Rents derived from, and treated as assets of that business—Assessability of, as part of profits of that business when remitted to British India, under sec. 4 (2).

Held (CORNISH J. dissenting) that rents derived from properties taken over in discharge of debts in the course of foreign money-lending business and treated as assets of that business could be assessed as part of the profits of that business when remitted to British India under section 4 (2) of the Indian Income-tax Act, XI of 1922.

* Original Petition No. 108 of 1932.

Salisbury House Estate, Limited v. *Fry*, (1929) 15 T.C. 267, is not an authority for the position that in law under no circumstances can a company or firm deriving profits from land be described as traders and those profits the profits of a trade. What has to be seen is whether the transaction which resulted in those profits can fairly be described as a part of the assessee's ordinary business.

Section 9 of the Indian Income-tax Act is inapplicable to income from property in a foreign country.

Per CORNISH J.—In order to bring income within the reach of section 4 (2) it must be shown that it is a profit of a business which means that the source of the profit is a business carried on by the assessee, be the assessee a business-man or a business concern. Rents derived from property do not become profits of a business simply by virtue of the ownership of the property being in a business concern, and it makes no difference that the property was acquired by the profits of the business or in the course of the business. The rent may be a profit of the business-man ; but it is not a profit of the business unless it is derived from the business. Rents received by the assessee from his house property cannot become assessable as income from the trade or business of the assessee by reason of the assessee treating those rents as part of its profits.

PETITION under section 66 (3) of the Indian Income-tax Act, XI of 1922.

R. Kesava Ayyangar for petitioner.

M. Patanjali Sastri for Commissioner of Income-tax.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J. BEASLEY C.J.—The following question has been referred to us by the Commissioner of Income-tax, Madras, in pursuance of this High Court's order in Original Petition No. 108 of 1932, dated the 30th August 1932, namely,

"Whether the rentals derived from properties taken over in discharge of debts in the course of foreign money-lending

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business and treated as assets of that business can be assessed as part of the profits of that business when remitted to British India under section 4 (2) of the Indian Income-tax Act."

The petitioner is a Nattukkottai Chetti and is the proprietor of a money-lending business in Burma and also a partner with a seven-eighths share in a banking business at Kuala Lumpur in the Federated Malay States, namely, the "A.S.PL. VR." firm. In the year of account a large sum of money was shown in the books of the firms at Burma and Kuala Lumpur to have been remitted from Kuala Lumpur to Burma during that year. The question arose during the assessment whether that sum included any part or the whole of the petitioner's share of profits of the Kuala Lumpur business during the three years prior to the year of account which would be liable to tax under section 4 (2) of the Act. In considering this question, the Income-tax Officer had to deal with the rental income derived from fifteen house properties in Kuala Lumpur, all the houses except one admittedly having been taken over in discharge of the debts due from the customers of the business. The one house also was acquired with a view to secure overdrafts from banks for the purposes of the money-lending business. All these houses are shown as assets of the money-lending business ; and the rentals from the houses and the expenditure relating to them are accounted for in the books and the net result is taken periodically to the profit and loss account of the business. All the houses except one have now been sold and the profits derived by the sale of the house properties have been assessed already as business profits. The Income-tax Officer held that the rents received amounting to $9,219 should

be treated as part of the petitioner's income from business. He, therefore, included that amount in the profit available for remittance under section 4 (2) of the Act. In the opinion of the Commissioner of Income-tax that assessment was correct; and, in dealing with the question referred by him, he observes that, under section 9 (1) of the Act, tax is payable by an assessee under the head "property" in respect of the *bona fide* annual value of buildings, etc., of which he is the owner, that there is nothing in the section to indicate that the buildings, etc., must be situate in British India but that this section is governed by section 4 (1), which requires that income, to be assessable, must accrue or arise or be received in British India. He draws the conclusion that, as what is assessed is the annual value of the buildings and not the rent, even if the owner of buildings situate elsewhere receives the rent in British India, that does not constitute under section 4 (1) a receipt of income taxable under the head "property". As regards the annual value of buildings, he contends that section 9 of the Act is of no application to buildings situate elsewhere than in British India. His contention, therefore, is that, where these rents are received abroad from foreign property, they cannot be reached by section 9 of the Act and can only be reached by section 4 (2) and then only if the facts warrant that income to be properly described as profits and gains of a foreign business. The petitioner, on the other hand, contends that income of this nature is not and cannot be business income. He points out that income-tax is paid by an assessee under various heads for which

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sections are provided, that, had this income accrued in British India, the tax would have been payable by the assessee under section 9 of the Act and not section 10 which deals with the profits or gains of a business and that the two sections are quite distinct, the one relating to property and the other relating to the profits or gains of a business, and this of course is quite true. In support of this argument it is contended that the House of Lords have decided that income derived from the letting of premises is assessable as income derived from property in land and not as business profits. That is in the case of *Salisbury House Estate, Limited* v. *Fry*(1). In that case, the appellant company was the owner of a large block of buildings and let out the rooms as unfurnished offices to tenants. The company had no other business except the letting out and management of the one property. Their Lordships held that the company was properly assessable under Schedule A and not under Schedule D. It is argued by the petitioner here that this is a decision directly in point because the opinion expressed by their Lordships in this case was that the assessee in such a case cannot be said in respect of the income from land to be earning profits from trade. Putting out of consideration any question of distinct classification of income such as the determination of which schedule the income falls within for the purpose of its being taxed, if the judgment of their Lordships means that income derived by a trading company from land can never be profit earned

(1) (1929) 15 T.C. 267.

from trade or business, although that may be the only business carried on by an assessee, then this case is strongly in point. But it has to be remembered that what their Lordships were considering was whether that particular income stood to be assessed under Schedule A or Schedule D and not whether it was liable to be assessed at all and whether the income-tax authorities as they claimed had any option to include that income in Schedule D notwithstanding the fact that it might also have been included in Schedule A. This claim of the income-tax authorities their Lordships negatived. They held that the income-tax authorities had no such option and that, where the assessees were capable of being assessed under Schedule A, they could not, in respect of the same income, be assessed under Schedule D, in other words, where there are various classes of income and the taxing statute says that income of a particular class is to be charged under a particular section or schedule, then it is to be charged under that section or schedule only. Exactly similar is the case under the Indian Income-tax Act. But it must be remembered that in the House of Lords case what was being dealt with was income derived from property within the United Kingdom and not property elsewhere. If the contention put forward by the petitioner here is correct, it means that this class of income, having once been labelled "property", wherever that income is derived, whether in British India or in any other part of the world, it is still "property" and has to be dealt with under section 9 of the Act as such. In my view, that argument is unsound; and it is important to see

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whether under the English Act such income, once having been assessable under Schedule A, must still be so when it is derived from property in a foreign country. It is clear that such income is no longer assessed under Schedule A but under Case V of Schedule D, namely, tax in respect of income arising from stocks, shares and rents out of the United Kingdom. This certainly shows that it is only when the property in respect of which the assessment is made is in the United Kingdom that Schedule A is of application and that, when the income accrues from foreign property, it is dealt with in Schedule D in the same way as are all profits and gains from whatever source accruing in the foreign country to a resident in England and in which schedule all profits of any trade, profession, employment and vocation in England also are assessable; nor is the assessment based on the annual value as it is in Schedule A but on actual profit. It seems to me, therefore, that, by the analogy of the English Act, section 9 of the Indian Act cannot be applied to income from property in a foreign country and that it is only when income is derived from property in British India that section 9 is of any application at all. How then is this income to be taxed when it is brought into British India? The petitioner's contention is that, if section 9 does not apply, the income is not taxable at all. With that contention I am unable to agree. If there is evidence upon which the income-tax authorities can find that these are the profits and gains of a business, then it seems to me that they are taxable under section 4 (2) of the Act; and the fact that they would, if the property had been in

British India, be classified under section 9 instead of section 10 of the Act cannot alter that description if they are capable of bearing it. It then becomes a question of fact, namely, whether these rentals can be said to be the profits and gains of the petitioner's banking business. I do not understand their Lordships in *the Salisbury House Case*(1) to say that in law under no circumstances can a company or firm deriving profits from land be described as traders and those profits the profits of a trade. They are merely deciding a question of income-tax. At page 328 of the report of *Salisbury House Estate, Limited* v. *Fry*(1), Lord MACMILLAN says, speaking of the company's activities,

> " Land-owning, however profitable, is not a trade within the meaning of the Income-tax Code. Property in land as a source of income is dealt with, and can only be dealt with, under Schedule A, and the rules of that schedule prescribe how the income from landed property is to be ascertained and measured. "

In my view, when section 9 is put out of consideration as touching this matter, all that has to be seen is whether this banking firm as a part of its business activities derived this profit. This is a question of fact. If the Commissioner of Income-tax holds that this income is a profit of the business because it has accrued to that business irrespective of whether it did so in the ordinary way of the business, then I think that he has not applied the proper test. What has to be seen is whether the transaction which resulted in this profit can fairly be described as a part of the assessee's ordinary business.

(1) (1929) 15 T.C. 267.

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I think it can. This is a banking business and it is the business of bankers to lend money and in the course of that business the loans are repaid usually of course in cash but certainly, not uncommonly, by the sale of jewels and other valuable articles pledged with the bankers. When loans are repaid, the money is ordinarily invested in the business. This is particularly so where the assessee carries on a banking business abroad and has normally no intention of becoming a land-owner in that foreign country. The interest on the investment is a business profit clearly. Does what took place in this case differ materially from the banker's ordinary transaction? Instead of taking cash payments from the debtors the assessee took their equivalent, the houses, in discharge of their debts. That was as much a part of the assessee's banking business as if he had received the repayment in cash. During the interval between the receipt of the houses and their sale, rents were received from the tenants of the houses so handed over in discharge of the debts. It is not as though the assessee had invested some of his profits in immovable property. That is not the case here at all. That rents were received by him instead of interest on the returned loans was merely due to the accident that instead of being repaid in cash the assessee was repaid in kind. In my view, therefore, the rents received by the assessee were not only received by him in the course of his business but were received by him as a banker and the transaction was a banking transaction.

I would, therefore, answer the question referred to us in the affirmative and direct the

petitioner to pay Rs. 250 costs of the Commissioner of Income-tax.

CORNISH J.—The sole question for decision on this reference is whether income derived as rent from property situated outside British India, but received by the assessee-owner within British India, can be charged to income-tax under section 4 (2) as "profits and gains of a business accruing or arising without British India".

It is admitted by Mr. Patanjali Sastri on behalf of the Income-tax Commissioner that if the property in question had been situate in British India the assessee would have been chargeable to tax under section 9. It does not of course follow that because this income is not taxable under section 9, on account of the property being situate outside British India, it could not be chargeable to tax under section 4 (2) if the income received by the assessee from the property is a profit of a business. It is only on that footing that this income can be made taxable. But in order to bring the income within the reach of section 4 (2) it must be shown that it is a profit of a business, which means that the source of the profit is a business carried on by the assessee, be the assessee a business-man or a business concern. Rents derived from property do not become profits of a business simply by virtue of the ownership of the property being in a business concern, and it makes no difference, in my opinion, that the property was acquired by the profits of the business or in the course of the business. The rent may be a profit of the business-man; but it is not a profit of the business unless it is derived from the business. In the present case, the assessee acquired

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the property in the course of his money-lending business. Certain customers to whom he had lent money were unable to pay their debts and the assessee took over the security, the property, in satisfaction of his claims. By that operation the money-lender became a land-owner and let the property for rent to tenants. He dealt with the property as a landlord. The payment of rent by his tenants was entirely independent of any money-lending business carried on by him. The rent was paid to him and received by him because he was the landlord and not on account of any transaction in his money-lending business. Applying the language of Lord WARRINGTON in *Salisbury House Estate, Limited* v. *Fry*(1):

> "There is nothing in the facts stated in the case which would properly lead to the conclusion that in dealing with the property the Company (the words 'the money-lender' may here be substituted for 'the company') is acting otherwise than as an ordinary landlord would act in turning to profitable account the land of which he is the owner."

The Income-tax Commissioner relies on the facts that the assessee was carrying on a business of money-lending; that the house properties were assets of his business and were treated by the assessee as such; and the Commissioner's conclusion is that any income from the property must be a receipt of the business—therefore, a profit of the business. I have already endeavoured to show that, according to my judgment, the acquisition of property by a business concern in the course of its business does not *ipso facto* render the rent received from that property profits of the business. In *Salisbury House Estate, Limited* v. *Fry*(1)

(1) (1929) 15 T.C. 267, 315.

(supra) Lord ATKIN stated (page 318) that it made no difference that rents received from property owned by a trading company formed part of the annual profits of the Company ; the income would be assessable under Schedule A and not as income from trading under Schedule D. I take that to mean that the rents received by the Company from its house property could not become assessable as income from the trade or business of the Company by reason of the Company treating those rents as part of its profits. That seems to me decisive against the argument of the Income-tax Commissioner, to which I have just referred, that income from property owned by a business concern is a profit of the business.

I would, therefore, answer the reference by saying that the income received by the assessee from the property in question cannot be assessed under section 4 (2) as profits of business.

BARDSWELL J.—I have had the advantage of reading in advance the judgments just delivered by my Lord the CHIEF JUSTICE and my learned brother, CORNISH J. I think it clear, for the reasons fully set out in my Lord's judgment, that the rentals from the house properties in question cannot be treated as income under section 9. They can, therefore, be taxed only if they can be regarded as profits and gains of a business so as to come within the scope of section 4 (2). In my opinion they can be so treated.

BARDSWELL J.

The remarks of Lord ATKIN in *Salisbury House Estate, Limited* v. *Fry*(1), which have been quoted

(1) (1929) 15 T.C. 267, 315, 318.

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by CORNISH J., have to be read with what that learned Lord has said later at page 321:

"I find it difficult to say that companies which acquire and let houses for the purposes of their trade . . . do not let the premises as part of their operation of trade."

I take that case as deciding no more than that rentals from house property can only be included in Schedule A to which, in this country, section 9 corresponds, if that schedule is applicable and not that such rentals can in no circumstances be treated as profits and gains of a business. In the present instance it is found that section 9, which corresponds to Schedule A, is not applicable, while except in the case of one house the properties acquired have not been acquired merely for the purposes of the money-lending business, but actually been received as a payment in kind in discharge of debts, due to the money-lending firm. I agree with my Lord that the rentals received from these properties after the properties had been received and before they had been sold were as much interest on the repaid loans as if the loans had been repaid in cash. The rental of the remaining house has also, in my opinion, clearly to be regarded as a profit of the business, seeing the purpose for which it had been acquired. I agree that the question referred to us should be answered in the affirmative and that the petitioner should pay the costs of the Commissioner of Income-tax.

A.S.V.