INCOME-TAX REFERENCE.

Before Sir Owen Beasley, Kt., *Chief Justice, Mr. Justice Ramesam and Mr. Justice Sundaram Chetti.*

S. R. M. S. SUBRAMANIA CHETTIAR (ASSESSEE), PETITIONER,

1934, May 2.

v.

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

Indian Income-tax Act (XI of 1922), *sec.* 4 (3) (*vii*)—*Business profit though casual and non-recurring in nature—Test of—Assessability to income-tax of—Money-lender—Assignment of mortgagee rights taken by—Profit made by money-lender out of transaction of—Business profit if—Transaction, though an isolated one and speculative in character, not essentially different in nature from money-lender's other transactions.*

In order to claim the privilege of the exemption under section 4 (3) (vii) of the Indian Income-tax Act of 1922 it must be shown that the receipts are not those arising from business or the exercise of a profession and that the receipts are of a casual and non-recurring nature. If in a particular case the receipts can be reasonably deemed to arise from a business or the exercise of a profession, they would be chargeable to income-tax, though casual and non-recurring in nature.

The assessee, who was a professional money-lender carrying on money-lending business at various places, was also a partner in a money-lending firm in Burma. In 1918 the assessee got an assignment in his favour of the right, title and interest of the mortgagee under a mortgage executed in the English form from a person who had become the owner of the mortgage right by reason of his purchase of the same in Court auction in execution of a money decree obtained against the mortgagee. At the time of the assignment a claim under an equitable sub-mortgage of his mortgage rights effected by the original mortgagee was the subject of litigation in the Privy Council.

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* Original Petition No. 99 of 1932.

SUBRAMANIA CHETTIAR *v.* COMMISSIONER OF INCOME-TAX, MADRAS.

Subsequent to the assignment in favour of the assessee the Privy Council decided that the sub-mortgage was invalid and was unenforceable on the mortgaged property. The assessee subsequently filed a suit to enforce the mortgage and obtained a decree for the amount sued for with a direction that, in default of payment by the mortgagor of the amount within the prescribed time, he should be debarred from his right to redeem the mortgage. Subsequent to the decree the assessee entered into a compromise with the mortgagor, whereby certain house properties the subject of the mortgage were delivered to the assessee in satisfaction of his claim under the mortgage. He retained those properties for a few years receiving the rents and profits thereof and then sold them. By the sale he realized a sum of Rs. 63,624 in excess of the outlay made by him, namely, the amount he paid for getting the assignment and the sum expended by him in the subsequent litigation relating to it. It was found that the initial outlay for the purpose of getting the assignment was out of the money which the assessee had lent to or deposited in a firm at Rangoon, that the transaction in question was not essentially different in nature from the assessee's other transactions, and that it was entered upon as a matter of business.

Held that the said sum of Rs. 63,624 was profit derived by the assessee in respect of a transaction connected with his money-lending business and was assessable to income-tax.

Commissioner of Income-tax v. *Sir Purshottamdas Thakordas*, (1925) 2 I.T.C. 8 ; 27 Bom. L.R. 478, relied upon.

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

S. T. Srinivasagopalachariar (with him, *P. R. Srinivasan*) for assessee.—What is income within the meaning of the Indian Income-tax Act, is dealt with in *Commissioner of Income-tax, Bengal* v. *Shaw, Wallace and Company*(1). Carrying on of business is a condition precedent to there being income within the meaning of the Act.

[The assessee is a money-lender. Instead of lending money himself on the security of immovable property he takes an assignment of a mortgage. Why should it not be said that

(1) (1932) I.L.R. 59 Calc. 1343, 1349 (P.C.).

this was incidental to his money-lending business?—SUNDARAM CHETTI J.]

Neither the mortgagor nor the mortgagee-assignor was a debtor of the assessee nor was the assessee in the habit of engaging in such kind of business. It was a purely speculative transaction and an isolated one. Further, when as a result of the compromise the assessee acquired the immovable property, he had no idea of selling it and making a profit. He remained owner of the property for about three years, paid income-tax on the property during that period and then sold the property. He could not in any sense be said to have carried on a trade during that period. As to the test of a venture in the nature of a trade, see *per* ROWLATT J. in *Leeming* v. *Jones*(1) and *per* LAWRENCE L.J. on appeal, and *per* LORD BUCKMASTER in *Jones* v. *Leeming*(2). As to the meaning of an isolated transaction, see per VISCOUNT DUNEDIN in the last case. [*Balgownie Land Trust, Ltd.* v. *The Commissioners of Inland Revenue*(3), *Commissioners of Inland Revenue* v. *Livingston*(4), *Martin* v. *Lowry*(5), *Graham* v. *Green*(6) and *Assets Company, Limited* v. *Forbes*(7) referred to.]

M. Patanjali Sastri for Commissioner of Income-tax.—The present case is of the type of cases represented by *Board of Revenue* v. *Arunachalam Chettiar*(8).

[The argument of the Government Pleader at page 198 in that case seems to show that exchange speculation was a part of the assessee's business.—RAMESAM J.]

The assessee cannot have the benefit of the exemption unless both conditions are fulfilled, viz., (1) that the transaction is an isolated one and (2) that it is not so connected with his ordinary business that it may be said to be a part of such business. A transaction may be connected with a trader's ordinary business but may still be an isolated one because such transactions must from the very nature of things be rare. In such a case the assessee cannot claim the benefit of the exemption. Neither the fact that the transaction is not in the ordinary course of the assessee's business nor the

(1) [1930] I.K.B. 279.
(2) [1930] A.C. 415; 15 T.C. 333, 357.
(3) (1929) 14 T.C. 684, 691.
(4) (1926) 11 T.C. 538, 542.
(5) (1926) 11 T.C. 297, 309, 314.
(6) [1925] 2 K.B. 37; 9 T.C. 309.
(7) (1897) 3 T.C. 542, 549.
(8) (1923) I.L.R. 47 Mad. 197.

SUBRAMANIA CHETTIAR v. COMMISSIONER OF INCOME-TAX, MADRAS.

fact that it is an isolated one singly is conclusive in favour of the assessee's right to exemption. [*In the matter of Chunni Lal, Kalyan Das*(1) and *Commissioner of Income-tax* v. *Sir Purshottamdas Thakordas*(2) referred to.] In the present case the assessee is a money-lender by profession and it is usual for such people to handle mortgage transactions such as the one in question. The assessee refused to produce the headquarters accounts which would have shown how this transaction had been dealt with by him. The Income-tax authorities were therefore justified in presuming that this transaction was allied to the assessee's business. Even otherwise on the facts and circumstances of the case the particular transaction in question must be held to be allied to the assessee's ordinary course of business. If that is so, the consideration of questions such as whether the transaction was an isolated one or whether there was a carrying on of business is irrelevant. *Commissioner of Income-tax, Bengal* v. *Shaw, Wallace and Company*(3) has therefore no bearing. [*Beynon and Co., Limited* v. *Ogg*(4) referred to.]

S. T. Srinivasagopalachariar in reply.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by

SUNDARAM CHETTI J.

SUNDARAM CHETTI J.—This is a reference by the Commissioner of Income-tax, Madras, under section 66 (3) of the Indian Income-tax Act XI of 1922 for the decision by the High Court of the following question, viz., "whether the sum of Rs. 63,624 is assessable to income-tax." The assessee is S. R. M. S. Subramania Chettiar who is a Nattukottai Chetti residing at Nemathanpatti in the Ramnad District. He is a professional money-lender carrying on money-lending business at his headquarters (Nemathanpatti) and also at Muar in the Federated Malay States. He is also a partner in a money-lending firm known as S. R. M. S.

(1) (1924) I.L.R. 47 All. 368.

(2) (1925) 2 I.T.C. 8, 11; 27 Bom. L.R. 478.

(3) (1932) I.L.R. 59 Calc. 1343 (P.C.).

(4) (1918) 7 T.C. 125, 131.

SUBRAMANIA CHETTIAR v. COMMISSIONER OF INCOME-TAX, MADRAS.
——
SUNDARAM CHETTI J.

Firm, Meiktila in Burma. He was assessed to income-tax in the year 1930–31 on the basis of the income derived by him in the previous Tamil year "Sukla." One of the items of income derived is a sum of Rs. 63,624 which is stated to be the profit derived by the assessee from the sale during the year of account of certain house properties in Rangoon. The question for determination is whether this profit is chargeable to income-tax or not.

A brief statement of the facts relating to the acquisition and sale of these properties is necessary. One M. L. R. M. A. Firm, Rangoon, had a mortgage executed in their favour in 1910 by one S. A. Seedat for a sum of Rs. 80,000. The aforesaid firm appears to have effected an equitable sub-mortgage of their rights in the original mortgage deed to one Malladi Sathialingam. The claim under the sub-mortgage was the subject of litigation in the Privy Council in 1918, when the present assessee got an assignment in his favour of the right, title and interest of the original mortgagees (M. L. R. M. A. Firm) for a sum of Rs. 4,000 from one Singaram Chetti, who had by that time become the owner of the mortgage right by reason of his purchase in Court auction in execution of a money decree obtained against M. L. R. M. A. Firm. Subsequent to this assignment in favour of the assessee, the appeal in the Privy Council, in which the present assessee got himself impleaded, was decided against Sathialingam and the result was that the equitable sub-mortgage held by Sathialingam became unenforceable on the mortgaged properties, as it was found to be invalid. The encumbrance on

the original mortgage right having become nil, the assessee was in a position to file a suit in the Chief Court of Rangoon in 1923 on the mortgage deed of 1910 as the assignee of the mortgagees' rights thereunder for the recovery of a sum of Rs. 1,68,300 as the aggregate of the principal and interest due. In that suit, the transaction was found to be an English mortgage and a decree was given in favour of the assessee for the amount sued for with a direction that Seedat should pay the amount within six months from the date of the decree (19th May 1925), and that, in default of payment within the prescribed time, he should be debarred from his right to redeem the mortgage. In March 1926 the assessee entered into a compromise with the original mortgagor, whereby certain house properties in Rangoon (the subject of the mortgage) were delivered to the assessee in satisfaction of his claim under the mortgage. He retained these properties for a few years receiving the rents and profits thereof, and keeping accounts for the receipts and expenditnre relating to them till October 1929, when he sold the same for a sum of Rs. 70,000. It was found by the Income-tax Officer that the assessee had incurred a net expenditure of Rs. 6,376 for the purchase of the mortgage right and in the subsequent litigation relating to it. The difference between the sale proceeds of the properties and the outlay made by the assessee, viz., Rs. 63,624, was treated as profit derived by him in this transaction and assessed to income-tax. The legality of this assessment is questioned by the assessee.

It is contended on his behalf that the receipt of the sum in question in the year of account did

SUBRAMANIA CHETTIAR v. COMMISSIONER OF INCOME-TAX, MADRAS.

SUNDARAM CHETTI J.

not arise in the course of any business conducted by him, but it was an isolated venture, speculative and also casual or non-recurring in its nature. The question is whether this income is exempt from income-tax under section 4 (3) (vii) of the Income-tax Act of 1922. By virtue of that clause, any receipts not being receipts arising from business or the exercise of a profession, vocation or occupation, which are of a casual and non-recurring nature, are exempt from income-tax. In order to claim the privilege of this exemption it must be shown that the receipts are not those arising from business or the exercise of a profession and that the receipts are of a casual and non-recurring nature. If in a particular case the receipts can be reasonably deemed to arise from a business or the exercise of a profession, they would be chargeable to income-tax, though casual and non-recurring in nature. Section 2, clause 4, of the Income-tax Act runs thus :—

"'Business' includes any trade, commerce, or manufacture or any adventure or concern in the nature of trade, commerce or manufacture."

It is unnecessary to consider for the purposes of this case whether the definition given is exhaustive or not. There is no doubt that the assessee is a professional money-lender and was carrying on money-lending business in 1918, when he got an assignment of the mortgage in question for a consideration of Rs. 4,000 as stated above. The Commissioner has rightly observed that the assessee's business is to handle money-lending transactions of various kinds including mortgages. As a money-lender, his ordinary business is to lay out moneys with a view to make a profit by advancing various loans secured and unsecured.

SUBRAMANIA CHETTIAR v. COMMISSIONER OF INCOME-TAX, MADRAS.

SUNDARAM CHETTI J.

Whatever he so lends out would be the principal sum invested, and the various sums of interest stipulated for would be the contemplated profit. There can be no doubt that, if the assessee had himself lent a sum of rupees under a mortgage bond, whatever profit he happens to derive in that transaction is a profit derived in his money-lending business. The effect of such a transaction is the creation of the relationship of creditor and debtor. By getting an assignment of a mortgage bond already obtained by another, the same result is achieved, as the assignee would be standing in the shoes of the assignor and could exercise the rights of the mortgagee, treating the mortgagor as his debtor. In the present case, the assessee virtually became the assignee of the mortgagees' rights under the mortgage bond in question, by a rather circuitous process, which however does not make his position anything different from that of an assignee of the mortgagees' rights. In fact, it was in the capacity of such an assignee of the mortgagees' rights that the assessee sued upon the original mortgage bond for a pretty large amount and got such a decree as could have been passed in favour of the original mortgagees themselves. The mortgage debt due to him was determined by the decree, and, instead of realizing the amount directly, he took possession of the mortgaged properties in satisfaction of his claim under the mortgage bond, and, after a few years, converted the same into cash by effecting a sale thereof for Rs. 70,000. That he thereby made a profit of a very large sum more or less in the nature of a windfall is a fact. Can it be said that the profit so derived by him is in respect of a transaction which is

beyond the scope of the ordinary course of money-lending business carried on by him? If he becomes a mortgagee by advancing a loan on the security of immovable property any profit derived by means of such a transaction is unquestionably chargeable to income-tax as a business profit. Though, at the inception, the mortgage loan was not actually advanced by the assessee, the subsequent advance of Rs. 4,000 for getting an assignment of the mortgagees' rights is certainly a venture coming within the generally recognized ambit of the money-lending business and cannot be deemed to be so disconnected with the profession of a money-lender as to take it out of the category of business carried on by the assessee. All that can be said is that the profit realized was extraordinary, in the sense that it was beyond the usual expectations of a money-lender in respect of a normal money-lending transaction. The fact that a particular transaction in a money-lending business is speculative does not take it out of its category. Suppose an unscrupulous money-lender takes hold of an expectant heir or an inexperienced youth in an opulent family eager for handling money, and takes a promissory note or mortgage bond for twice the amount actually lent, and also stipulates for a high rate of interest. If he succeeds in realizing the full amount due under such a promissory note or bond in the year of account, would not the profit made thereby, which includes not only the stipulated interest but also an extraordinary profit which stood the risk of being disallowed in a Court of law if contested by the debtor, and therefore speculative in nature, become chargeable to income-tax? Though the

SUBRAMANIA CHETTIAR v. COMMISSIONER OF INCOME-TAX, MADRAS.

SUNDARAM CHETTI J.

transaction in question in this case may be said to be a special variety of money-lending business, it still partakes of the essential characteristics of a money-lending transaction.

In one portion of his reference, the Income-tax Commissioner states that it is perhaps not possible to link this up with his other transactions and to say that it formed a part of his ordinary business or was undertaken in the course of that business. He states that though it is an isolated transaction it was nothing else than an adventure in the nature of trade and the profit so derived was a business profit. This observation led to a good deal of argument, but, in the view we have taken as set forth, it is unnecessary to discuss the cases dealing with what is called an adventure in the nature of trade. If it is simply deemed to be an adventure in the nature of trade, then we have to see, as observed by the Lord PRESIDENT in the case of *Balgownie Land Trust, Ltd.* v. *The Commissioners of Inland Revenue*(1), whether it is a single plunge and if so whether it is shown to the satisfaction of the Court that the plunge is made in the waters of trade. It is only in such a case we have to see whether such speculative ventures have been systematically carried on and this venture is one of a series of such transactions so as to indicate a continuity in the occurrences of that kind.

In another part of the reference, the Commissioner has distinctly stated that, though it is an insolated transaction speculative in character, it was not essentially different in nature from the assessee's other transactions, and it cannot be said

(1) (1929) 14 T.C. 684.

SUBRAMANIA CHETTIAR
v.
COMMISSIONER OF INCOME-TAX, MADRAS.

SUNDARAM CHETTI J.

that it was not entered upon as a matter of business. We think that this observation is correct and is the proper legal inference from the proved facts. It appears that even the initial outlay of Rs. 4,000 for the purpose of getting the assignment was out of the money which the assessee had lent to or deposited in a firm at Rangoon known as S.M.A.R., Rangoon. As observed by the Income-tax Officer this item of investment must appear in the assessee's headquarters accounts, which he however refrained from producing.

The facts of the present case bear a close resemblance to the facts of the case dealt with by the Bombay High Court in the case of *Commissioner of Income-tax, Bombay* v. *Sir Purshottamdas Thakordas*(1). In that case, the assessee was found to be a cotton merchant. At the time of a serious crisis in the cotton market, the assessee came to be appointed under a power of attorney as an agent for the sale and disposal of all the cotton bales on behalf of the firm of Umar Sobhani. It was a venture of considerable magnitude, whereby the assessee earned a very large sum by way of commission. Though it was found to be an adventure of a casual and non-recurring nature, it was still found to be a profit connected with the business carried on by the assessee as a cotton merchant. Any receipts arising from the buying and selling of cotton would no doubt be considered as profit arising from the trade or business of a cotton merchant. As regards the special kind of profit earned by way of commission, MACLEOD C.J. states thus at page 11:

"The argument that receipts from an extraordinary transaction connected with business, such as the one in this

(1) (1925) 2 I.T.C. 8; 27 Bom. L.R. 478.

case, which would not be likely to occur again for many years, can be placed in the same category as receipts entirely disconnected with business or the profession or vocation or occupation of the assessee which might be considered of a casual and non-recurring nature, cannot be accepted."

This observation is very pertinent to the facts of the present case. [*Vide* also the decision of a Bench of this High Court in *Board of Revenue* v. *Arunachalam Chettiar*(1).]

We therefore find that the sum of Rs. 63,624 is profit derived by the assessee in the year of account in respect of a transaction connected with his money-lending business, and answer the question in the affirmative. The assessee will pay the costs of the reference to the Income-tax Commissioner Rs. 250.

A.S.V.

APPELLATE CIVIL.

Before Sir Owen Beasley, Kt., *Chief Justice, and Mr. Justice King.*

1934, July 30.

G. SUNDARAM CHETTIAR (PETITIONER), APPELLANT,

v.

P. A. VALLI AMMAL, (RESPONDENT), RESPONDENT.*

Original Side Rules, Madras (1927), *O. VII—Leave to defend—Principles governing the grant of—" Triable issue "—Grant of conditional leave—Non-fulfilment of condition—Decree in consequence of—Appeal from order of conditional leave and no appeal from decree—Appellate Court setting aside the conditional order—Effect of—Application for stay in the appellate Court—Competency of—Civil Procedure Code* (*Act V of* 1908), *O. XXXVII, r.* 3 *and O. XLI, r.* 5.

A suit on a promissory note was filed under the summary procedure prescribed under Order VII of the Original Side

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(1) (1923) I.L.R. 47 Mad. 197.

* Original Side Appeal No. 36 of 1934 and C.M.P. No. 3065 of 1934.