COMMISSIONER OF INCOME-TAX, MADRAS v. MUTHU-KARUPPAN CHETTIAR.

LEACH C.J.

from the section itself, the assessee is entitled to have it read in this way.

The parties having agreed that section 26 (2) does apply to the present case, and as we hold that it does cover the process of computation, the assessee must be regarded as the lender of the Rs. 1,00,000 to the S.P.K.A. firm and deemed to have received repayment of the loan. The amount which he received covered both principal and interest and as the payment was made to him in British India, the interest is taxable but not the principal.

The reference will be answered in the sense indicated and as the assessee has succeeded in the main part of the claim, he will be entitled to his costs, which we fix at Rs. 250, and to the return of the deposit.

A.S.V.

INCOME-TAX REFERENCE.

Before Sir Lionel Leach, Chief Justice, Mr. Justice Madhavan Nair and Mr. Justice Varadachariar.

1938, October 26.

S. N. NARAYANAN CHETTIAR, PETITIONER,

v.

COMMISSIONER OF INCOME-TAX, MADRAS, RESPONDENT.*

Indian Income-tax Act (XI of 1922), sec. 4 (2)—Foreign businesses carried on by assessee—Profits, if have resulted from—Mode of finding out—Losses in some of businesses—Deduction of, from profits earned in others—Necessity.

Where an assessee carries on two money-lending businesses outside British India, both being his sole businesses having current transactions and controlled by him, and where one of

* Original Petition No. 118 of 1937.

the two businesses has suffered loss and the other has profits and the assessee has received remittances from both, in determining whether the remittances so received are his income, profits and gains under section 4 (2) of the Indian Income-tax Act of 1922 the results of both the businesses should be considered together and the assessee is entitled to set off his loss in one business against the profits of the other business to arrive at the resultant profit available for remittance to be taxed.

When a person carries on the same kind of business in two places abroad, in order to ascertain whether he has made a profit the result of the working of the two branches must be considered. If at one branch he makes a profit and at the other a loss, the profit in his business can only be the gain made at one branch less the loss suffered at the other branch. There can be no question of a remittance representing profits when no profits have been earned taking the business abroad as a whole.

In the matter of the Indian Income-tax Act XI of 1922 and in the matter of the assessment of S. N. Narayanan Chettiar and Brothers, Karaikudi, Ramnad District.

R. Kesava Ayyangar for assessee.

[THE CHIEF JUSTICE.—We shall hear Mr. Patanjali Sastri first.]

M. Patanjali Sastri for Commissioner of Income-tax.—The assessment in the present case is sought to be made under section 4 (2) of the Act. The only question is whether section 4 (2) proceeds on quite a different basis from that on which section 10 proceeds in regard to businesses in British India.

[VARADACHARIAR J.—What has to be regarded under section 4 (2) is whether the assessee has received profits from abroad. No doubt if a sum is remitted to the assessee from abroad as profits the assessee is liable for tax thereon. But when all that appears is that a particular amount has been remitted to the assessee from one of his foreign businesses, then the law will find out whether, having regard to all the foreign businesses carried on by the assessee, that sum can be said to represent the profits of his foreign businesses. For that purpose all the businesses should be put together and

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it should be seen whether on that basis the assessee has earned a profit. If the assessee has sustained losses in some businesses and earned profits in others, the losses must be deducted from the profits.]

LEACH C.J.

The JUDGMENT of the Court was delivered by LEACH C.J.—The assessee in this case is a Nattukottai Chettiar. He carries on a money-lending business at Karaikudi in the Madras Presidency and at Ipoh and Telukanson in the Federated Malay States. Ipoh and Telukanson lie some fifty miles distance apart. During the year 1934–35 the business at Telukanson showed a profit of $16,047 but that at Ipoh showed a loss of $6,598. In respect of the year 1935–36 the assessee was assessed on a total income of Rs. 20,515 which included a sum of Rs. 20,000 remitted to Karaikudi from Telukanson. The Income-tax Officer treated this as a remittance of profits of a foreign business. In addition to the Rs. 20,000 remitted from Telukanson a sum of $1,954·48 was remitted from Ipoh. In view of the absence of profits at Ipoh the Income-tax Officer did not include the $1,954·48 in the assessment. The assessee contended that the sum of Rs. 20,000 remitted from Telukanson should not be treated wholly as profits. He said that the proper method of calculating the profits of his business abroad was to deduct the loss suffered at Ipoh from the profits made at Telukanson. As the assessee had an agent at each of the two towns and the two branches worked independently of each other the Income-tax Officer held that the profits and losses of the two branches should be considered separately, and consequently refused to allow the loss at Ipoh to be set off against the profits at Telukanson. The Assistant Commissioner of Income-tax agreed with the Income-tax Officer when the matter was before him on appeal, and the Commissioner

of Income-tax refused to state a case to this Court under section 66 (2) of the Income-tax Act on the ground that no question of law arose. This Court, however, considered that a question of law did arise and directed the Commissioner to refer to us the following question:

"Where an assessee carries on two money-lending businesses outside British India in close proximity, both being his sole businesses having current transactions and controlled by him, and where one of the two businesses has suffered loss and the other has profits and the assessee has received remittances from both, in determining whether the remittances so received are his income, profits and gains under section 4 (2) of the Indian Income-tax Act XI of 1922, should not the results of both the businesses be considered together and is not the assessee entitled to set off his loss in one business against the profits of the other business to arrive at the resultant profit available for remittance to be taxed?"

In our opinion this reference must be answered in the affirmative. Section 4 (2) of the Act allows the Income-tax Officer to assess to income-tax income, profits and gains arising out of British India, but in deciding whether sums which are brought in from a business abroad are income, profits or gains he must have regard to the business as a whole. When a person carries on the same kind of business in two places abroad, in order to ascertain whether he has made a profit the result of the working of the two branches must be considered. If at one branch he makes a profit and at the other a loss the profit in his business can only be the gain made at one branch less the loss suffered at the other branch. So far as this case is concerned we know that at one of the branches a profit was made and at the other place a loss was suffered. When the loss in one case is set off against the profit in the other it is clear that the assessee did not make a profit of Rs. 20,000. His profits at Telukanson stated in dollars

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were $16,047 and his loss at Ipoh amounted to $6,598. The profit was therefore $9,449. It was only to this extent that the Income-tax Officer could hold that the remittance was out of profits. The decision on the question whether a particular remittance represents profits or capital will turn on the particular facts of each case, but there can be no question of a remittance representing profits when no profits have been earned taking the business abroad as a whole.

The reference having been answered in favour of the assessee there will be an order for costs in his favour. These we fix at Rs. 250. His deposit will also be refunded.

A.S.V.

APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and Mr. Justice Madhavan Nair.

1938, September 29.

T. MUHAMMAD SHAMSUDDIN RAVUTHAR & BROS. (FIRST DEFENDANT), APPELLANTS,

v.

MESSRS. SHAW WALLACE & COMPANY AND TWO OTHERS (PLAINTIFFS AND SECOND DEFENDANT), RESPONDENTS.*

Indian Contract Act (IX of 1872), sec. 233—Principal and agent—Agent personally liable—If both principal and agent could be sued.

In India under section 233 of the Indian Contract Act a person can sue both the principal and the agent in a case where the agent is personally liable.

The dictum of COUTTS TROTTER C.J. in *Kuttikrishnan Nair* v. *Appa Nair*(1), that the section could only be construed as

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* Original Side Appeal No. 49 of 1936.

(1) (1926) I.L.R. 49 Mad. 900.