PRIVY COUNCIL

*J. C.** 1933 *April*, 28

COMMISSIONER OF INCOME-TAX *v.* BASANT RAI TAKHAT SINGH

[On appeal from the High Court at Allahabad]

Income-tax—Other sources—Deduction—Expenditure—Expenditure not in year of assessment—Income-tax Act (XI of 1922), section 12, sub-section (2).

An expenditure incurred by an assessee to income-tax is not a permissible deduction under section 12, sub-section (2) of the Indian Income-tax Act, 1922, unless it has been incurred in the year in respect of which arise the income, profits and gains forming the basis of the assessment.

Judgment of the High Court reversed.

APPEAL (No. 68 of 1932) from a judgment of the High Court (10th of July, 1931) upon a reference to that Court under section 66 of the Indian Income-tax Act, 1922.

The respondents, a joint Hindu family, had been assessed to tax for the year 1929-30 under the Indian Income-tax Act, 1922, in respect of the income, profits and gains derived by them from, *inter alia*, buildings erected by them upon land leased to them. They had not appealed from the decision of the High Court that the assessment in question was properly made under section 12 ("other sources"), not section 9 ("property"), or section 10 ("business"). The only question arising upon the present appeal by the Commissioner was whether the respondents were entitled under section 12, sub-section (2), to an allowance in respect of expenditure incurred by them before the 1st of April, 1928, in erecting the buildings.

The terms of the reference to the High Court, and the facts of the case, together with the terms of the material provisions of the Act, appear from the judgment of the Judicial Committee.

**Present*: Lord TOMLIN, Lord RUSSELL of KILLOWEN, and Sir GEORGE LOWNDES.

The learned Judges of the High Court (MUKERJI and ALLEN, JJ.) were of opinion that as the assessee would lose the advantage of his expenditure upon erecting the buildings at the conclusion of the lease the expenditure was not of a capital nature and that he was entitled to an allowance in respect of it. They held that the allowance should be in the form of an annual deduction of a thirtieth part of the expenditure,—the lease being for 30 years.

1933. April 27, 28. *Dunne, K. C.*, and *R. P. Hills*, for the appellant:

The only question upon this appeal is whether the allowance claimed is permissible under section 12, sub-section (2) of the Act.

[Lord TOMLIN:—Should not the assessment have been under section 9?]

That question does not arise as the assessee has not appealed from the decision of the High Court that in respect of the income in question he was assessable under section 12, not under section 9 or section 10. The allowance was claimed as a deduction to replace his capital, but the sums deducted formed part of the assessee's income and were not an "expenditure" so as to be a permissible allowance under section 12, sub-section (2). By section 4 "all income" under each of the heads mentioned in section 6 was taxable subject to the deductions specifically allowed. Section 12 does not provide for an allowance for depreciation of capital value. It is a well established principle under the English Income-tax Acts that even if sums are actually set aside for that purpose they still form part of the taxable income. *In the matter of Gooptu Estates, Ltd.* (1), referred to by the High Court, appears to recognize that no allowance could be made under section 12 for the wasting of an asset.

(1) (1929) I. L. R., 57 Cal., 910 (917)

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[Lord RUSSELL of KILLOWEN:—Must not the "expenditure" referred to in section 12, sub-section (2), be made in the year of assessment?]

Yes, each year is a self-contained period for the purpose of assessment: *Income-tax Commissioner* v. *Chitnavis* (1). If the Board take that view, it is not now necessary to discuss further the other question which, however, is very important.

The respondent did not appear.

April, 28. The judgment of their Lordships was delivered by Lord TOMLIN:

This is an appeal by the Commissioner of Income-tax of the United Provinces of Agra and Oudh from a judgment of the High Court of Judicature at Allahabad, dated the 10th of July, 1931, upon a reference of questions made to the High Court by the Commissioner of Income-tax under section 66 of the Indian Income-tax Act, 1922.

The question arises in this way: The assessee is a Hindu undivided family. The assessment in question was an assessment made for the year 1929-30. The assessee was assessed on an income of Rs.57,979. Of this Rs.14,425 were derived from property owned by the assessee and were assessed under section 9 of the Income-tax Act. The remainder, Rs.43,554, were assessed under section 12 and were derived from the rents of buildings erected by the assessee upon land leased from the Agra Cantonment authority.

The assessee appealed and his appeal was rejected by the Assistant Commissioner. He then applied under section 66 that certain questions of law alleged to arise should be referred to the High Court.

The material facts are these: The assessee took a lease for twenty-five years from the Agra Cantonment authority. It does not appear when that lease commenced. Under the terms of the lease he had to erect

(1) (1932) L. R., 59 I. A., 290.

certain permanent buildings which would become the property of the lessors on the determination of the lease. He erected those buildings. As from the 1st of April, 1928, he had a fresh lease of the same property for thirty years. It does not appear whether the second lease was taken at or before the expiration of the first lease. The second lease also contained covenants as to building similar to those in the first lease, but in fact, of course, the buildings had already been erected. Under the second lease the buildings would become the property of the lessors at the determination of the lease. The second lease also contained provisions under which the lessee had the right of renewal for two consecutive periods of thirty years. In the case of each renewal, it was open to the lessors to increase the rent by an amount not exceeding 50 per cent. of the rent for the preceding period.

In those circumstances the Commissioner referred to the High Court three questions. The first was:

"Where the assessee has taken land on a long lease, under which the land, together with the buildings thereon, will revert to the possession of the lessor on the expiry of the lease, has erected thereon masonry buildings and has received rents from lessees of the buildings, is the tax payable by the assessee in respect of the rents to be determined in accordance with section 9, or with section 10, or with section 12?"

The second question was:

"In the circumstances stated in question (1) is the assessee entitled, in accordance with section 12, to allowance for the expenditure incurred in the erection of the buildings?"

The third question was:

"Is the allowance receivable in the form of an annual deduction equal to the amount of the expenditure divided by the years of the term for which the assessee holds the land on lease?"

The first of those questions was answered by the Court holding that the assessment should be made under

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section 12, which was, in fact, the section under which the Commissioner had proceeded.

In regard to the second and third questions, the Court held that the assessee was entitled to a deduction from the rents in order to ascertain the taxable amount and that the deduction for the year of assessment should be one-thirtieth of the amount expended in erecting the buildings.

The assessee has not appealed from the decision of the Court that the assessment was properly made under section 12, but the Commissioner has appealed against the answers to the second and third questions by virtue of which a deduction is to be allowed to the assessee. The assessee has not appeared before their Lordships' Board.

Now the relevant sections of the Act are sections 3, 4, 6, 9, 10 and 12.

Section 3, which creates the charge, says:

"Where any Act of the Indian Legislature enacts that income-tax shall be charged for any year at any rate or rates applicable to the total income of an assessee, tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of, this Act in respect of all income, profits and gains of the previous year of every individual, Hindu undivided family, company, firm and other association of individuals."

Section 4, sub-section (1), is as follows:

"Save as hereinafter provided, this Act shall apply to all income, profits or gains, as described or comprised in section 6, from whatever source derived, accruing or arising, or received in British India, or deemed under the provisions of this Act to accrue, or arise, or to be received in British India."

Then there are certain exceptions which need not be referred to, and section 6 provides: "Save as otherwise provided by this Act, the following heads of income, profits, and gains, shall be chargeable to income-tax in

the manner hereinafter appearing, namely''—then there is a number of items of which the third is ''Property'', the fourth is ''Business'' and the sixth is ''Other sources''.

Section 9 deals with the head ''Property'' and states: ''The tax shall be payable by an assessee under the head 'Property' in respect of the *bona fide* annual value of property consisting of any buildings or lands appurtenant thereto of which he is the owner, other than such portions of such property as he may occupy for the purposes of his business, subject to the following allowances, namely''—then a number of allowances is set forth which may be made.

Section 10 deals with ''Business'' and provides: ''The tax shall be payable by an assessee under the head 'Business' in respect of the profits or gains of any business carried on by him.'' It also makes provision as to how those profits are to be calculated.

Section 12 deals with ''Other sources'' and provides: ''The tax shall be payable by an assessee under the head 'Other sources' in respect of income, profits and gains of every kind and from every source to which this Act applies (if not included under any of the preceding heads).'' It is to be noted that section 12 does not come into operation until the preceding heads are excluded. Then under sub-section (2) of section 12 it is provided: ''Such income, profits and gains shall be computed after making allowance for any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of making or earning such income, profits or gains, provided that no allowance shall be made on account of any personal expenses of the assessee.''

Now in the circumstances of this case and having regard to the course which the case has taken and the attitude of the respondents their Lordships feel themselves constrained to consider the matter upon the footing that

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section 12 is the proper section under which the assessment should be made, and accordingly they propose to deal with the matter upon that footing, but in so doing their Lordships must not be taken to be accepting the view that in fact section 12 is the proper section, or that section 9 is not applicable to this case.

The question, therefore, is whether the allowance which the High Court have considered a permissible allowance is in fact justified by the terms of section 12. In their Lordships' judgment it is not. Under section 12, sub-section (2), is specified what may be allowed as an "allowance for any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of making or earning such income, profits or gains, provided that no allowance shall be made on account of any personal expenses of the assessee." In their Lordships' view, on the true construction of that sub-section, the allowance for any expenditure incurred must be an allowance for expenditure incurred in the year in respect of which arise the income, profits and gains forming the basis of the assessment. Upon that footing, therefore, there can be no justification for deducting from the profits and gains something in respect of expenditure, whether it be regarded as capital expenditure or not, which occurred many years before.

In those circumstances their Lordships are of opinion that upon the footing already indicated the respondent was not entitled to the deduction, and that the answers given to the second and third questions, the subject of this appeal, are wrong and should be reversed and the appeal allowed accordingly. Their Lordships will humbly advise His Majesty to that effect. The respondents will pay the costs of the appeal.

Solicitor for appellant: *Solicitor, India Office.*