

FULL BENCH

*Before Sir John Thom, Chief Justice, Mr. Justice Harries
and Mr. Justice Bajpai*

JOHN (APPLICANT) v. COMMISSIONER OF INCOME-TAX
(OPPOSITE PARTY)*

1938
April, 25

*Income-tax Act (XI of 1922), section 4(1), 4(3)(vii)—“Income”
connotes element of periodical receipt or regularity of monetary
return—“Receipts arising from business”—Casual and
non-recurring nature—General Rules (Civil) 1911, chapter
XVII, rule 15—Commission to auction sale officer where he
is not the court amin.*

The word “income” is not defined in the Income-tax Act, but, as indicated by the Privy Council in the case of *Commissioner of Income-tax v. Shaw Wallace and Co.* (1), the element of periodical receipt or regularity or expected regularity of monetary return is an essential ingredient of “income” under the Income-tax Act. This enunciation of the meaning of income was laid down in that case as a general principle for the guidance of the courts in India on the question as to what can be treated as “income” under the Act, and was not intended to be confined to the particular facts and circumstances of that case.

In execution of a decree obtained by the debenture holders of a company, the company's property consisting of certain mills was sold. The auction sale was conducted not by the court amin but by a private person, Major John, who was the principal debenture holder. Under rule 15 of chapter XVII of the General Rules (Civil) of 1911 he was entitled to a commission of 5 per cent. on the sale price. The debenture holders were the purchasers at the sale, and the sale-price was set off against part of the decretal amount. Poundage was payable to Government by the purchasers at $6\frac{1}{4}$ per cent. of the sale price. Major John obtained an order from the court that after treating 5 per cent. as auctioneer's commission the balance of $1\frac{1}{4}$ per cent. be deposited as poundage, and this was done. Major John was assessed to income tax in respect of the 5 per cent., which came to Rs.1,04,000:

Held that, in the circumstances, nothing was in fact received by Major John as auctioneer's commission; only, the court had

*Miscellaneous Case No. 431 of 1934.

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considered it equitable to relieve the debenture holders of the payment of auctioneer's commission, the auctioneer being one of the debenture holders, and the price realised being far short of the decretal amount. But even if this relief granted to the debenture holders was regarded as a "receipt" by Major John, it could not be regarded as "income" within the meaning of section 4(1) of the Income-tax Act. It was not a receipt "arising from business or the exercise of a profession, vocation or occupation"—which it would be if Major John's business or profession were that of an auctioneer—and was of a "casual or non-recurring nature", and was therefore exempt under section 4(3)(vii) of the Act.

Mr. *B. Malik*, for the applicant.

Dr. *N. P. Asthana*, for the opposite party.

THOM, C.J., HARRIES and BAJPAI, JJ.:—This is a reference by the Commissioner of Income-tax under section 66(2) of the Indian Income-tax Act of 1922.

Two questions are submitted to the Court for decision. These questions are:

(1) In the circumstances of the case, (a) is the item of Rs.1,04,000 liable to tax as income accruing and arising in British India within the meaning of section 4(1) of the Act or (b) constitutes receipts falling under section 4(3)(vii) of the Act and hence exempt?

(2) If the answer to part (a) of question (1) is in the affirmative and to part (b) in the negative, was the Assistant Commissioner justified in holding that the item must be deemed to have been paid to the assessee on the day he deposited the sum of Rs.26,000 representing the difference between the poundage and the commission?

The matter came before a Bench on the 15th of January, 1937. In view of a decision of another Bench of this Court in *Gaya Prasad Chhotey Lal v. Commissioner of Income-tax* (1) the case has been referred to a larger Bench for consideration and decision.

The facts of the case which are set out in detail in the reference may be briefly recapitulated. In 1920 a

limited company, the Agra United Mills Ltd., purchased from Messrs. A. John & Co. three spinning mills and one flour mill, the purchase price being rupees one crore and twenty lakhs. The company issued rupees fifty lakhs of debentures. The company fell into arrears in respect of payment of interest on the debentures and in 1927 the debenture holders sued the company for a sum of Rs.62,00,000. The suit was decreed in February, 1931. Four months were given to the company for payment of the decretal amount; in default of payment the debenture holders were given the right to sell the property. The company did not pay, and on the 20th of January, 1932, the mills were sold. At the time of the sale most debentures were held by Major A. U. John, the assessee. He held rupees forty lakhs of debentures, the other ten lakhs were held by his brother Mr. George A. John.

As is stated in the reference, there were no cash proceeds of the sale since the mills were knocked down to the debenture holders for the sum of Rs.20,80,000. This sum of Rs.20,80,000 was set off against the decretal amount.

Under rule 2, chapter XVII of the General Rules (Civil) of 1911 poundage was payable to the Government at $6\frac{1}{4}$ per cent of the auction proceeds. Six and a quarter per cent. amounted to Rs.1,30,000. Under rule 15 the court may allow commission to the auctioneer up to 5 per cent of the auction price if the auction is conducted by a private person instead of the amin of the court. Now, in the present case, Major A. U. John was appointed auctioneer and after the sale he moved the court to be allowed to deposit poundage at the rate of $1\frac{1}{4}$ per cent instead of $6\frac{1}{4}$ per cent. He prayed that the remaining 5 per cent be treated as auctioneer's commission. To this the court agreed. Five per cent. amounted to Rs.1,04,000. Accordingly, under rule 15 of the General Rules, the assessee, Major A. U. John,

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paid into court on the 9th of March, 1932, Rs.26,000 for poundage and Rs.20,800 for the sale certificate.

The Income-tax Officer claimed to assess Major A. U. John to income-tax for the year 1931-32 in respect of the 5 per cent auctioneer's commission above referred to. Whether or no the assessee is liable to assessment in respect of this sum depends upon whether the sum can be regarded as income within the meaning of the Indian Income-tax Act.

Now, income is nowhere defined in the Act. The question as to what amounts to income under the Income-tax Act however was considered by the Judicial Committee of the Privy Council in the case of the *Commissioner of Income-tax v. Shaw Wallace & Co.* (1). In the course of the judgment of the Board, which was delivered by Sir GEORGE LOWNDES, it is observed :

"The object of the Indian Act is to tax 'income', a term which it does not define. It is expanded, no doubt, into 'income, profits and gains', but the expansion is more a matter of words than of substance. Income, their Lordships think, in this Act connotes a periodical monetary return 'coming in' with some sort of regularity, or expected regularity, from definite sources. The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall. Thus income has been likened pictorially to the fruit of a tree, or the crop of a field. It is essentially the produce of something which is often loosely spoken of as 'capital'. But capital, though possibly the source in the case of income from securities, is in most cases hardly more than an element in the process of production."

It is apparent to us that in making the above observation the Board had in view the various relevant sections of the Act, and that the Board's intention was to lay down for the guidance of the courts in India some general principle on the question as to what can be treated as income under the Act. The terms of that part of their Lordships' judgment above quoted are

undoubtedly general and, in our opinion, were not intended by their Lordships to be confined to the particular facts and circumstances of the case which their Lordships were considering. It appears to us that their Lordships intended to indicate that the element of periodical receipt or regularity or expected regularity of money return was an essential ingredient of "income" under the Indian Income-tax Act. Their Lordships later in their judgment observe:

"The claim of the taxing authorities is that the sum in question is chargeable under head (*iv*), business. By section 2 (4) business 'includes any trade, commerce or manufacture, or any adventure or concern in the nature of trade, commerce or manufacture'. The words used are no doubt wide, but underlying each of them is the fundamental idea of the continuous exercise of an activity. Under section 10 the tax is to be payable by an assessee under the head business 'in respect of the profits or gains of any business *carried on by him*'. Again, their Lordships think, the same central idea: the words italicised are an essential constituent of that which is to produce the taxable income: it is to be the profit earned by a process of production. And this is borne out by the provision for allowances which follows. . . Their Lordships will only add that the reasoning of this judgment would apply equally if the appellant based his claim on head (*vi*), 'other sources', and the corresponding provisions of section 12."

In *Gaya Prasad Chhotey Lal v. Commissioner of Income-tax* (1) a Bench of this Court, however, took the view that the observations of the Privy Council above quoted should be taken in conjunction with the facts of the particular case and that the Board did not intend to lay down any general principle.

We are unable to agree with this view of their Lordships' observation. In our opinion, the intention of the Board was to enunciate a working definition of income for the guidance of the courts in India. We are confirmed in this view by the fact that in a subsequent case, *Maharaj Kumar Gopal Saran v. Commissioner of Income-tax* (2), in which the circumstances were entirely

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(1) (1934) I.L.R. 57 All. 740.

(2) (1935) I.L.R. 14 Pat. 532.

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different, the Board approved of the principle laid down in the case of the *Commissioner of Income-tax v. Shaw Wallace & Co.* (1).

By section 4(3)(vii), the Act shall not apply to "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, or are not by way of addition to the remuneration of an employee." In our opinion it cannot be maintained that the auctioneer's commission in the present instance was a receipt arising from the business or the exercise of a profession, vocation or occupation, or that it was not of a casual or non-recurring nature, or was by way of addition to the remuneration of an employee. Major A. U. John, who sold the debentures belonging to himself and his brother is not an auctioneer and the commission which was earned—if it can be said in the circumstances that he earned commission—did not arise out of the business in which he was engaged nor was it in any way connected therewith.

Sales in execution of a decree of the court are generally carried out by the court amin. Occasionally the duty is assigned to a private person. If that private person is an auctioneer then clearly commission on the sale would be regarded as income. We would observe that not only was the commission unconnected with any business but in fact Major John received nothing at all. The mills were sold at a price a long way below the sum owed to the debenture holders. The court considered it equitable to relieve the debenture holders of the payment of auctioneer's commission, the auctioneer being one of the debenture holders. In the circumstances it would be unreasonable to regard the relief as "income". In our opinion nothing in fact was received by Major A. U. John as auctioneer's commission and that in any event even if the relief granted to the

(1) (1932) I.L.R., 59 Cal. 1343.

debenture holders be regarded as a "receipt" that receipt did not arise out of any business or the exercise of a profession, vocation or occupation and was of a casual or non-recurring nature.

In the result we hold that the Income-tax Officer was not entitled to assess Major A. U. John for income-tax in respect of the sum above referred to.

We would answer the questions referred as follows:

1(a) The item of Rs.1,04,000 is not liable to income-tax as income accruing and arising in British India within the meaning of section 4(1) of the Act.

(b) Even if the same assessee be regarded as having received the sum of Rs.1,04,000, this receipt is exempt under section 4(3)(vii) of the Act.

In view of our answer to question 1, question 2 does not arise.

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MISCELLANEOUS CIVIL

Before Mr. Justice Collister and Mr. Justice Bajpai

KALYAN SINGH (DECREE-HOLDER) v. AJUDHIA PRASAD
 (JUDGMENT-DEBTOR)*

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U. P. Agriculturists' Relief Act (Local Act XXVII of 1934), section 6—"Decree", whether passed before or after the commencement of the Act—"First application for execution" whether made before or after the commencement of the Act—New law curtailing period of limitation—Retrospective effect—Vested rights.

The word "decree" in section 6 of the U. P. Agriculturists' Relief Act applies both to decrees passed prior to the commencement of the Act and decrees passed after it.

The words "first application for execution" in that section refer to the first application for execution, whether it was made before or after the commencement of the Act.

No substantive rights seem to have been interfered with by the enactment of that section. A litigant has no vested right in any period of limitation, and a suit or proceeding is ordi-

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