# REFERENCE UNDER THE INCOME-TAX ACT, 1922.

*Before Dawson Miller, C. J. and Foster, J.*

MAHARAJA GURU MAHADEO ASHRAM PRASAD SAHI BAHADUR

1926.

*July, 11, 12.*

*v.*

THE COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA.*

*Income-tax Act*, 1922 (*Act XI of* 1922), *sections* 8 *and* 12 "*Interest on Securities*"—*Securities pledged with bank to secure overdraft—power-of-attorney given to bank authorising them to transfer the securities to themselves—Interest collected by bank and credited to assessee—Interest on overdraft debited to assessee—Liability of the entire interest on the securities to tax—Nimak sair, whether taxable or not.*

As security for an overdraft an assessee pledged with his bankers his investments in Government Promisory Notes and Municipal and Port Trust Debentures. Some of the securities were endorsed by the assessee in favour of the bankers and the assessee also executed in favour of the bankers a power-of-attorney which authorised them inter alia to transfer all or any of the securities to themselves or to others. A part of the overdraft had been utilized by the assessee in purchasing some of the securities. The bankers collected the income from the securities as it fell due and credited it to the assessee. The interest on the overdraft was periodically debited to the assessee. In assessing the assessee's income for the purpose of income-tax the income-tax authorities included in his income the whole of the income from the securities except such of it as was derived from securities issued free of income-tax and also allowed a deduction in respect of that part of the interest on the overdraft which represented the interest on securities purchased out of the overdraft. The assessee claimed that the interest was not receiveable by him but by the bankers, and, therefore, that he was not taxable in respect of it. He also claimed that in any event he was taxable only in respect of the difference between the income from the securities and the interest on the overdraft.

* Miscellaneous Judicial Case no. 128 of 1925.

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*Held*, (*i*) that although the bank as the assessee's attorney had a charge upon the income for the interest on the overdraft, it was none the less the income of the assessee, and that the latter had received it through his agent the bank; (*ii*) that the assessee's income from securities had been correctly assessed.

Income derived from nimak sair (i.e., income from the settlement of the right to collect a particular kind of earth in a particular area during a particular season, for the purpose of extracting saltpetre) is indistinguishable from the rents or royalties arising from the letting of coal or other minerals in the earth, and, therefore is income from "other sources" within the meaning of section 12 of the Act.

In a reference made to the High Court under section 66 of the Income-tax Act a finding of fact is binding on the court unless it was come to by some improper process or by failure to give effect to some rule of law.

The facts of the case material to this report are set out in the following Order of Reference by the Commissioner of Income-tax, Bihar and Orissa:—

Under section 66(3) of the Indian Income-tax Act, I have the honour to refer the following questions to the Patna High Court. The questions framed by the court are:—

"First, whether from the income of the assessee from his securities the amount of interest charged by the bank on the overdraft of the assessee is deductible for the reason that the bank holds the securities as a pledge and hypothecation against the overdraft allowed by them under express endorsement in their favour or under a power-of-attorney, and whether this income is governed by section 8 or by section 12 of the Act, and secondly, whether the income from nimak sair is not assessable under the law on the grounds that it is the price of the earth sold and is casual and is exempt under the Permanent Settlement Regulations."

2. The facts of the case are as follows:—

The assessee, Maharaja Guru Mahadeo Ashram Prasad Sahi of Hatwa, filed a return showing, inter alia, the following income:—

| | Rs. | A. | P. |
|---|---|---|---|
| Interest on securities, including debentures already taxed ... ... ... | 1,59,523 | 0 | 0 |
| Interest on securities of the Government of India or of the local Government that are to be income-tax free ... ... ... | 2,310 | 0 | 0 |

Appended to the return was a detailed statement of the securities which make up these items. The former consists of the Calcutta Port Trust Debentures of 1897 and 1900, Calcutta Municipal Debentures

of 1909-10, 1912 and 1913, Government Promissory Notes of 1865, 1900-01, 1896-97 and 1865, and War Loan of 1929-47 and the latter consists of income-tax free 5 year bonds of 1926. At the foot of the statement was the following declaration signed by the assessee himself: "I hereby declare that the securities on which interest as above specified has been received are my own property and were in the possession of the Imperial Bank, Calcutta, at the time when income-tax was deducted ".

So far as these two items are concerned, assessment was made by the Income-tax Officer according to the return but I may mention that in review I allowed a deduction of Rs. 19,644, being the interest on a loan taken for the sole and express purpose of purchasing some of the securities.

The assessee now claims to deduct a further sum of Rs. 82,179 being the interest on an overdraft of nearly 13 lakhs granted by the Imperial Bank on security of the stocks in question. He states that nearly 5 lakhs worth of securities were endorsed in the name of the bank and that the bank holds a general power-of-attorney from him in respect of the rest.

3. It seems convenient to consider first the second part of the first question framed by the court, namely, whether section 8 or section 12 of the Act apply to the income in question. Section 6 of the Act enumerates six heads of income chargeable to income-tax, the second of these being interest on securities. Section 8 describes the head of income more fully and enacts that the tax shall be payable by an assessee under the head "interest on securities in respect of the interest receivable by him on any securities of the Government of India or of a local Government or on debentures or other securities for money issued by or on behalf of a local authority or company". I submit that there can be no possible doubt that the debentures and other securities under consideration are securities within the meaning of sections 6(*ii*) and 8. Now, section 12 enacts that 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. By the very words of the Act itself, section 12 cannot apply to interest on securities within the meaning of section 8. In my opinion, therefore, the sums in question are chargeable under section 8 and not under section 12.

4. If the income is chargeable, as I contend, under section 8, then under that section the tax shall be payable in respect of the interest "receivable" by the assessee. The assessee argues that the interest is receivable by the bank and not by him, because some of the securities are endorsed in the bank's favour and in respect of the rest the bank holds a general power-of-attorney from him. I would first refer the Hon'ble Court to the assessee's certificate quoted in paragraph 2 of the statement. He there definitely states that the securities are his own property. In the second place, in my review order of May 29, 1925, I arrived at a definite finding of fact that the interest in question was actually received by the assessee. This finding was arrived at after inspecting the assessee's pass-book voluntarily produced by him which showed that the interest on securities was credited to his account and

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that his account was debited with the interest due from him; so far from the interest not being receiveable by him, it was in fact received by him. I submit that under the law the Hon'ble Court cannot go behind my finding of fact. Moreover under the law someone is chargeable to income-tax in respect of these securities and if the assessee is not chargeable, the bank must be. But if an attempt were made to charge the bank, it would surely object that the interest was not received by it, as it had credited the assessee's account with the interest.

5. (*i*) The assessee's return of income showed Rs. 36,057 from other sources which includes Rs. 3,107 from nimak sair which he has given in the detailed explanation of the return. This figure was accepted and assessment was made according to the return. Nimak sair is the income from the settlement of the right to collect a particular kind of earth in a particular area during a particular season for the purpose of extracting saltpetre. This was admitted by the assessee's agent during the hearing of the review. In the statement appended to the return of income for the year 1923-24, nimak sair is alternatively described as " Income from letting out the right to collect earth for saltpetre ". He thus admitted that it is not the price of earth sold. In a note appended to his return for 1925-26 it is stated that nimak sair should be exempt from taxation, because " it is a sort of ground-rent " The assessee is therefore giving different and irreconcilable descriptions of this source of income in order to evade his liability. I submit that my finding in review that nimak sair is not the price of earth for saltpetre is a finding of fact supported by the assessee's own statement.

(*ii*) Nor again is the income casual. It is shown in the return for 1923-24, 1924-25 and 1925-26. It is thus clearly capable of repetition. A reference is invited to the decision of the Allahabad High Court in Misc. Case no. 307 of 1924 in the matter of *Messrs. Chuni Lall Kalayan Das* (1), printed at page 179 of the Income-tax Manual. That decision is to the effect that a receipt is not necessarily casual because it only occurs once, the test is whether the nature of the transaction is non-recurring. I further submit that under section 4(*3*)(*vii*) a receipt is not exempt merely by being casual but must be both casual and non-recurring. The assessee's own return showed that this does in fact recur. In my opinion therefore the receipt from nimak sair is neither casual nor non-recurring.

(*iii*) As regards the question whether income from nimak sair is " exempt under the Permanent Settlement Regulations ", I submit in the first place that no income is exempt under the Permanent Settlement Regulations which were passed long before the income-tax was enacted. I assume that there is an implied reference to the decision of the Patna High Court in Misc. Judicial Case no. 53 of 1923 that non-agricultural income of permanently-settled estates is not liable to income-tax if it was included in the assets of the estate at the time of the Permanent Settlement and that the real question is whether income from nimak sair is governed by that decision. Now, in the first place, the assessee has at no stage of the case either produced any evidence on this point or even applied for any opportunity to do so. The claim that this sair is governed by the Permanent Settlement was not made

(1) (1925) I. L. R. 47 All. 368.

either in the appeal petition or in the application for review. There is thus no evidence whatever in support of the implicit allegation that nimak sair was included in the assets of the Hatwa Estate at the time of the Permanent Settlement. A reference to the Permanent Settlement Regulations of 1793 further shows that ordinarily only jalkar, bankar, falkar, and ground-rents of markets were allowed to the zamindars and all other sairs were prohibited. If therefore the present contention had been really before me in review, I should have been entitled to find as a fact that income from nimak sair was not included in the assets of the estate at the time of the Permanent Settlement and that it is therefore liable to be assessed to income-tax.

6. On a point of procedure, I beg respectfully to point out that the court has directed me to state a case on an alleged point of law that that was never raised before me. Section 63(3) of the Act provides that the High Court may order the Commissioner of Income-tax to state a case when he has previously refused to state one on the ground that no question of law arose. In the present case I did not refuse to state a case on the question whether income from nimak sair was exempt under the Permanent Settlement Regulations because I was not asked to refer that question. The assessee did not in point of fact definitely frame the question that he wished to be referred; but as he did not even make the claim that is now put forward it is evident that this question of law was not even implicit in his application.

The power of attorney executed by the assessee in favour of the bank was as follows :—

Know all Men by these presents that I do constitute and appoint the Imperial Bank of India, a corporation constituted under the Imperial Bank of India Act, 1920, and every Secretary and Treasurer, Deputy Secretary and Treasure Inspector, Chief Accountant, Chief Cashier for the time being at the local Head Office of the said Bank, the Agent or Sub-Agent for the time being at each of the Branches of the said Bank or any other officer whose appointment in the service of the Bank, or whose power to sign documents on behalf of the Bank shall have been notified as required by section 51 of the Imperial Bank of India Act, 1920, in the Gazette of India, jointly and severally to be my true and lawful Attorneys and Attorney for me and in my name and on my behalf, either individually or jointly with others or as executor or trustee or in any other capacity to sell, endorse, transfer and assign all Government Securities, Shares or Stock in any Joint Stock or Public Company including the said Bank or other Stocks, Funds and Securities of any description whatever and to tender, contract for, and purchase and accept and sign the transfer into my name of any Government Securities, Shares or Stock in any such Joint Stock or Public Company or other Stocks, Funds and Securities of any description whatever, and to apply for and accept allotments of Shares in any such Joint Stock or Public Company and to demand and receive all interest and dividends due or to accrue due on all or any such Shares, Stocks, Funds and Securities, and to demand and receive all debts, sums of money, principal money, interest, dividends and dues of what nature or kind soever (*sic*) which now or at any time hereafter may be due, payable or belong to me on any account or in any capacity whatever, to sign and endorse all Cheques, Promissory Notes, Bills of Exchange, Bills

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of Lading or other orders for payment of money or delivery of property of every description to which my signature may be needed or deemed expedient and for the purposes aforesaid, or any of them to sign application forms, contracts, agreements, transfers, acceptances, receipts acquittances or other documents, and to do all lawful acts requisite for effecting the premises and from time to time to appoint a proxy or proxies for the purpose of representing me and voting at any meeting or meetings of any Joint Stock or Public Company including the said Bank, in respect of any such Shares or Stock as aforesaid and also to endorse and transfer to the said Bank itself any Government Securities, Shares or Stock in any Joint Stock or Public Companies including the said Bank itself or other Stocks, Funds or Securities of any description whatever which may from time to time or at any time be in the possession of the said Bank whether for safe custody or otherwise and which shall be held by the said Bank as security for any money payable to the said Bank by me in respect of any overdraft, general balance of account or otherwise and also to sell, endorse, negotiate, transfer in due course of law or assign all or any such Securities, Shares and Stocks aforesaid and apply the proceeds in satisfaction of any moneys due by me to the said Bank at the time of sale, and generally to act in the premises as effectually to all intents and purposes as I could act if personally present, and also for all or any of the purposes aforesaid to appoint a substitute or substitutes and such substitution at pleasure to revoke, I hereby ratifying and agreeing to confirm whatsoever shall be lawfully done in the premises by virtue of these presents, and I declare that the power hereby conferred shall not be determined or affected by my acting either personally or through another in the premises and in case of my death this Letter of Attorney as to all matters and things which before the fact of my death shall be known to them or him shall be done by my said Attorneys or Attorney by virtue, or under colour, or in pursuance hereof, and all payments made to them or him before the fact of such death shall be known to the person making the payment shall be as binding upon my Executors and Administrators as the same would have been upon me if living

*K. P. Jayaswal* (with him *H. Prasad*), for the assessee.

*C. M. Agarwala*, for the Commissioner of Income-tax.

DAWSON MILLER, C. J.—This case comes before us under section 66 of the Income-tax Act upon a case stated by the Commissioner of Income-tax. The Assessee, the Maharaja Bahadur of Huthwa, complains in respect of two items upon which he has been assessed to income-tax. The first item is the income upon certain Government securities valued at 41 lakhs of rupees which were deposited with the Imperial Bank to secure an overdraft which during the year of assessment has been taken at a sum of

close upon 13 lakhs of rupees. The interest payable upon the overdraft amounted to Rs. 82,179. The securities which were lodged with the Bank to secure payment of the interest upon that overdraft brought in an income in the way of dividends of Rs. 1,59,000. These dividends as they fell due were received by the Bank under a general power of attorney granted by the assessee to the Bank. They were credited to his account and from month to month the sums due for interest on the overdraft were in the same way debited to the assessee's account. The assessee contends that this source of income, at all events to the extent of Rs. 82,179, which represents the interest on the overdraft paid to the Bank, should be deducted from his taxable income. The argument put before us in the case is, in the first place, that these securities having been hypothecated to the Bank by way of security for the overdraft are in fact no longer the property of the assessee and ought to be treated as the property of the Bank. The Bank, however, merely has a charge upon the interest of these properties to secure payment of the interest on the overdraft and possibly a charge upon the corpus to secure repayment of the overdraft itself but the securities in no way cease to remain the property of the assessee and the dividends payable on the securities are undoubtedly part of the income of the assessee.

The main argument addressed to us is an argument based really upon the analogy of the deductions which are made in the case of a business where if the business concerned borrows money from the Bank in order to invest it in the business as part of its capital, then the interest payable to the lender upon the sum so borrowed may be deducted from the profits of the business. The principle in such a case is no doubt a sound one, and it has been recognised by the framers of the Income-tax Act but only in the case of inceme derived from business. Under section 10 of the Income-tax Act the tax is payable under the head "business" in respect of the profits or gains of the

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business carried on by the assessee, but from such profits or gains certain deductions are allowed in computing the taxable income. One of these deductions is,

"in respect of capital borrowed for the purpose of the business where the payment of interest thereon is not in any way dependent on the earning of profits, the amount of the interest paid."

LAWSON MILLER, C.J.

It seems to me quite right and proper, and in fact it is the law, that where persons carrying on business have to borrow money for the working capital of their business, that which they have to expend in order to obtain the capital should be deducted from the actual profits which they make; but in the case of a private individual no such considerations necessarily arise. In the present case it cannot be said that the overdraft was in any way obtained for the purpose of carrying on any business or, except to the extent of about $3\frac{1}{2}$ lakhs, for the purpose of investment producing profits which might be considered as income. In fact we do not know for what purpose the overdraft was taken with the exception of the sum named. Apart from that sum of $3\frac{1}{2}$ lakhs it does not appear that any of it was invested. It is noticeable that in the corresponding section, which applies to the present case, namely, section 8 of the Act, no such deductions are there mentioned. That section says

The tax shall be payable by an assessee under the head "interest on securities" in respect of the interest receivable by him on any security of the Government of India or of a Local Government, or on debentures or other securities for money issued by or on behalf of a local authority or a company.

Had it been intended that where a private individual borrows money either from his Bank, or from any other source, he should be entitled to deduct the interest thereon from his taxable income I have not the slightest doubt that some provision would have been made to that effect in the Act, but in the other sections of the Act, apart from those dealing with income derived from business, we find no such exemption included. Prima facie therefore the assessee is bound to pay income tax upon all the profits which

come under the head of "interest on securities." Section 4 of the Act states in very broad terms what sort of profits and gains are to be taxed. It provides that

"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 receiving in British India, or deemed under the provisions of this Act to accrue, or arise, or to be received in British India."

The income in the present case clearly comes within that section and, unless the assessee can shew that by some provision in the Act he is entitled to deduct the sum claimed from his taxable income, he must prima facie fail. He is unable in the present case to shew any such exemption coming within the Act itself. I have mentioned the fact that a sum of about $3\frac{1}{2}$ lakhs of the overdraft was taken for investment. Those investments form part of the securities deposited with the Bank, and it is interesting to note that the interest on the loan to that extent amounting to Rs. 19,644 has been allowed by the Commissioner as a deduction from the taxable income. This appears to have been done under general instructions from the Central Board of Revenue. Under what provision of the Act it is done has not been discussed, but it seems fair and reasonable that such deductions should be made.

A further point which is of a technical nature was made on behalf of the assessee that the income was not really received by him. It was, however, received by his attorney and received on his account, and although his attorney had a charge upon it for the interest due upon the overdraft that makes it none the less income received by the principal. It was received by the agent on behalf of the principal. On this part of the case therefore I consider that the assessee's claim fails.

The other point relates to a sum of Rs. 3,107 which comes under the head of "Income received from other sources." The actual source from which this income is derived is stated by the Commissioner

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in the case. It is called nimak sair, that is, income from the settlement of the right to collect a particular kind of earth in a particular area during a particular season for the purpose of extracting saltpetre. It appears that earth of this description is found upon the assessee's zamindari. The right to extract that earth is apparently let out to tenants and in return for that right the assessee receives something in the nature of rent or royalty. It was contended that this is merely casual income and non-recurring. That fact, however, seems to be concluded by the findings of the Commissioner. He states in his case that it is not casual income. It is shewn in the return for the years 1923-24, 1924-25 and 1925-26. It is thus clearly capable of repetition, and finally he says that, in his opinion, the receipts from nimak sair are neither casual nor non-recurring. That is a finding of fact and unless that finding of fact was come to by some improper process or by failure to give effect to some rule of law it is binding upon this Court. It has not been shewn to us that the facts before the Commissioner were not such as to justify him in coming to that conclusion and, therefore, by his conclusion we are bound.

It was further argued with regard to this part of the case that the income derived from this source is really not income at all, but in the nature of a sale of a part of the earth appertaining to the assessee's zamindari, in other words that it was a transfer of one kind of capital into another, namely, the transfer of this particular sort of earth into money. It is, however, of a recurring nature and it is not casual and in such cases it seems to me that it is quite impossible to distinguish the rents or royalties, whatever they may be called, arising from this source, from the rents or royalties arising from the letting of coal or other minerals in the earth, or income which arises from the produce of the earth whether it be that on the surface or whether it be that beneath the surface provided that it is not non-recurring or casual, and

provided that it is not in the nature of a sale. On this point therefore I think that the assessee's case must fail.

The result is that the decision of the Commissioner of Income-tax must be upheld and this application must be dismissed. The Commissioner is entitled to his costs in this case.

FOSTER J.—I agree.

## REVISIONAL CRIMINAL.

*Before Dawson Miller, C. J. and Foster, J.*

MAINI MISSIR

*v.*

KING-EMPEROR.*

1926

*July, 14*

*Code of Criminal Procedure, 1898 (Act V of 1898), sections, 17,144 and 195—Disobedience of temporary injunction issued by subdivisional magistrate—complaint by the magistrate—withdrawal of complaint, whether District Magistrate or Sessions Judge has power as to.*

An order under section 144 of the Code of Criminal Procedure, 1898, not having been obeyed by the petitioner, the subdivisional magistrate (with first class powers) who passed the order made a complaint under section 195 (*1*) (*a*) alleging that the petitioner had disobeyed his order and had thereby committed an offence under section 188, Penal Code. The order under section 144 was, however, subsequently complied with and the petitioner then applied to the Sessions Judge to withdraw the complaint made by the subdivisional magistrate. The Sessions Judge decided that he had no jurisdiction to withdraw the complaint and that the application should have been made to the District Magistrate.

*Held*, that for the purposes of the Code of Criminal Procedure, unless it is shown that there is some provision to

* Criminal Revision no. 383 of 1926, against an order, dated the 20th May, 1926, passed by R. Ghose, Esq., Sessions Judge of Purnea, confirming an order of the District Magistrate of Purnea, dated the 4th March, 1926