INCOME-TAX REFERENCE.

Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Das and Mr. Justice Maung Ba.

1931
Feb. 18

COMMISSIONER OF INCOME-TAX, BURMA
v.
SURATEE BARA BAZAAR CO., LTD.*

Income-tax Act (XI of 1922), s. 9.—Bazaar property let out in stalls—"Annual value"—Basis of annual value—Daily rents aggregate—Doctrine of hypothetical tenant—Construction of statute.

Assessee is the owner of bazaar property consisting of a number of stalls let out daily at a small rental.

Held that the property was assessable under s. 9 of the Income-tax Act, by ascertaining the annual value of each of the stalls and taking their aggregate. If the actual daily rents paid were sufficiently stable the Income-tax Officer could accept them as the daily rents at which the stalls could reasonably be expected to let. But whether the annual value would be 365 times the daily rent or less would depend on the facts of each case to be determined by the Income-tax Officer.

The assessee could not in the circumstances of the case ask to be treated as the "hypothetical tenant" of his property, so as to claim a deduction of his estimated profit as tenant before assessment. The provisions of s. 9 of the Income-tax Act were not to be construed in the light of the City of Rangoon Municipal Act.

Commercial Properties, Ltd., In re, I.L.R. 55 Cal. 1057; The *Attorney-General* v. *Mutual Tontine Westminster Chambers Association, Ltd.*, (1876) 1 Ex. D. 469; *Williams* v. *Sanders*, (1927) 2 K.B. 498—*referred to.*

Suratee Bara Bazaar Co., Ltd., The Municipal Corporation of Rangoon—I.L.R. 5 Ran. 715—*distinguished.*

The Suratee Bara Bazaar Co., Ltd., are the owners of bazaars which consist of stalls or shops let out to tenants on the basis of a daily rent. They were assessed to income-tax for the year 1928-29, part of their income being the income from the bazaars. Under s. 66 (2) of the Indian Income-tax Act the Commissioner of Income-tax referred the following question for the decision of the High Court :—

* Reference No. 4 of 1930.

"In respect of income from the petitioner's bazaar properties should the Income-tax Officer have adopted the principles laid down in the case of the Petitioner *v.* The Corporation reported in 5 Rangoon Series, page 715, and having arrived at the annual value in accordance with such principles should he have deducted therefrom the allowances referred to in section 9 of the Act?"

Leach for the assessee: The assessment of the properties is made under s. 9 of the Income-tax Act. Having arrived at the "annual value" in accordance with S. 9 (2), the Income-tax Officer must make the deductions specified in section 9 (1). Section 9 (2) demands the application of the "hypothetical tenant" test. What that test implies had been decided in 5 Rangoon 715. The definition of "annual value" in s. 80 (2) of the City of Rangoon Municipal Act (with which 5 Rangoon 715 dealt) was really the same. The Income-tax Act was a taxing statute and must be construed strictly, the assessee being entitled to the benefit of any doubt. (1892) A.C. 150, (1914) A.C. 765, and 48 Cal. 161. The English Income-tax Act was different to the Indian Act and the cases under the English Act were therefore not applicable.

A. Eggar (Government Advocate) for the Crown. Section 9 of the Income-tax Act lays down the allowances to be made. What allowances are made for rating purposes are not relevant. We have to construe "annual value" in section 9. The Company say that one must arrive at the annual value as in Municipal cases by supposing that the Company is an hypothetical tenant and allowing them to make deductions from the income for their profits and for interest on capital before the rent which they would pay can be ascertained, and then to make deductions allowed by section 9 of the Act. Thus a large sum of profits would escape tax. There is no need to introduce the hypothetical middleman and to put the Company in the

1931

COMMISSIONER OF INCOME-TAX, BURMA v. SURATEE BARA BAZAAR CO., LTD.

place of that man. The actual rents received during the year can be taken as the annual value. *Williams* v. *Sanders*, (1927) 2 K.B. 498; *Attorney-General* v. *The Mutual Tontine Westminster Chambers Association, Ltd.*, (1876) 1 Ex. D. 469.

PAGE, C.J.—The following question has been stated for the decision of the High Court by the Commissioner of Income-tax, Burma :—

"In respect of income from the petitioner's bazaar properties should the Income-tax Officer have adopted the principles laid down in the case of the Petitioner *v.* the Corporation reported in 5 Rangoon Series, page 715, and having arrived at the annual value in accordance with such principles should he have deducted therefrom the allowances referred to in section 9 of the Act ?"

Now, it is common ground that the assessment of these properties was rightly made under section 9 of the the Income-tax Act (XI of 1922) (*In re Commercial Properties, Ltd.*) (1).

The contention on behalf of the assessee, having regard to the provisions of section 9, is that in ascertaining the "annual value" of the property subject to assessment under section 9 (2), upon a true construction of that sub-section it was incumbent upon the Income-tax Officer to treat the assessee, who is the owner of the property, as though he were a tenant of the property, and, if that were done, he, as a hypothetical tenant, would be entitled to certain special deductions in arriving at the annual value of the property ; for instance, a sum representing a fair profit to the assessee upon the hypothesis that he had taken a lease of the premises with the object of acquiring profit or gains therefrom, and a sum representing interest on the capital which it was to be presumed that a tenant would expend upon taking

(1) (1928) I.L.R. 55 Cal. 1057.

a lease of the property with a view thereby to make the lease that he had obtained profitable to him. Deductions of this description were granted to an assessee under the Rangoon Municipal Act in the *Suratee Bara Bazaar Co., Ltd.* v. *The Municipal Corporation of Rangoon* (1). The terms of that Act however are couched in language which is materially different from that which was used by the Government of India in enacting section 9 of the Income-tax Act and in my opinion it would be idle to refer to the principles laid down in connection with the Rangoon Municipal Act in the *Suratee Bara Bazaar Co., Ltd.* v. *The Municipal Corporation of Rangoon* (1) for guidance in construing the provisions of section 9 of the Income-tax Act. Section 9 must be construed according to the terms of that section; and the only question that falls for determination on this reference is as to the meaning of the words "annual value," as defined in section 9 (2) of the Act. Section 9 (2) runs as follows :—

"For the purposes of this section the expression "annual value" shall be deemed to mean the sum for which the property might reasonably be expected to let from year to year."

Whose property is it that is to be assessed? It is the property of the assessee.

Now, this property is bazaar property consisting of a number of stalls let out daily at a small rental, and we are satisfied that in circumstances such as those obtaining in the present case the annual value of each of the stalls must be ascertained, and that the annual value of the stalls taken in the aggregate is the property of the assessee liable to assessment. *Williams* v. *Sanders* (2); see also *The Attorney-General* v. *Mutual Tontine Westminster Chambers Association Ltd.* (3). If the

(1) (1927) I.L.R. 5 Ran. 715.

(2) L.R. (1927) 2 K.B. 498.

(3) L.R. (1876) 1 Ex. D. 469.

1931

COMMISSIONER OF INCOME-TAX, BURMA v. SURATEE BARA BAZAAR CO., LTD.

PAGE, C.J.

contention urged on behalf of the assessee were to be accepted, namely, that although he is the owner of the property he is to be deemed to be a hypothetical tenant thereof for the purposes of section 9 (2), he would be entitled as a hypothetical tenant to make deductions such as we have indicated, and also deductions in respect of repairs, insurance, etc., which he would be entitled to deduct a second time under the provisions of section 9 from the annual value of the property after it had been ascertained. Not only would some of these deductions thus be granted twice over, but the deductions in respect of interest on capital and the profit which it is to be presumed that a tenant taking a lease of the bazaar would make, although in truth and fact these sums are part of the profit accruing to the assessee as the owner of the premises, in such circumstances would escape assessment. In my opinion the contention of the assessee is misconceived, and that on the facts as found there is no room for the doctrine of the "hypothetical tenant" to operate. The meaning and effect of section 9 appears to me to be quite plain. It is a section under which the owner of immoveable property is assessed. What is the subject of assessment? The income and profits derived from the property. How are such income and profits to be ascertained? By finding out "the sum for which the property might reasonably be expected to let from year to year." How is that to be done? In our opinion by ascertaining the annual value of each of the stalls which in the aggregate make up the property to be assessed. In order to discover what that annual value is the Income-tax Officer must have regard to the facts connected with the property which are within his knowledge, and of which he has information. One of the factors that he must take into consideration is the actual daily rent obtained

from the various stalls. If in his opinion the daily rent is sufficiently stable to enable him reasonably to determine that the rent as paid is the letting value of the stall *per diem* it was the duty of the Income-tax Officer to determine as a matter of fact that that was so. The Income-tax Officer has so found, and his finding cannot be challenged on this reference. It is only where the actual rent paid by the lessee is not a safe criterion of the letting value of the property that the Court is compelled to ascertain the sum for which the property might reasonably be expected to let from year to year by considering what a prospective tenant would be prepared to pay as rent, taking into account the various matters in respect of which a deduction is allowed.

In the present case the Income-tax Officer has found as a fact that the daily rent paid in respect of each of the stalls was sufficiently stable to enable him to hold that the daily rents paid for the stalls were the sums for which the stalls might reasonably be expected to let *per diem* ; and if, putting himself in the position of a prospective tenant of each of the stalls, the Income-tax Officer comes to the conclusion that the daily rental multiplied by the number of days in the year would fairly represent the sum for which the property might reasonably be expected to let from year to year, then the aggregate of such sums is the annual value of the property within section 9 (2) of the Income-tax Act. *Primâ facie* it would not appear probable, I think, that a prospective tenant of a stall for a year would be prepared to pay a rent for a whole year that is 365 times the rent that he would be willing to give for a single day or a few days, and we are not satisfied that the Income-tax Officer up till now has applied his mind to the question whether a stall that might "reasonably be expected to

1931

COMMISSIONER OF INCOME-TAX, BURMA v. SURATEE BARA BAZAAR CO., LTD.

PAGE, C.J.

let from day to day at a certain sum might also "reasonably be expected to let" at 365 times that sum from year to year. That is a question of fact to be determined by the Income-tax Officer; and it will be necessary for him to reconsider the annual value of each of the stalls in the light of these observations: see *Williams* v. *Sanders* (1). If the Income-tax Officer comes to the conclusion that the daily letting value multiplied by 365 is the sum at which the stalls might reasonably be expected to let from year to year, then the aggregate of those sums in respect of the stalls will be the annual value of the property to be assessed under section 9 of the Income-tax Act. If, on the other hand, upon a consideration of all the facts, he thinks that the sum for which each or any of the stalls is let *per diem* is not the sum for which the stall might reasonably be expected to let from year to year he must estimate as best he can the sum for which the stall "might reasonably be expected to let" from year to year. The aggregate of the sums so ascertained in respect of each of these stalls will be the annual value of the property to be assessed, and the assessee will be entitled to such deductions from the annual value as are allowed under section 9 (1).

The reference is answered in this sense. There will be no order as to costs.

DAS, J.—I agree.

MAUNG BA, J.—I agree.

(1) L.R. (1927) 2 K.B. 498.