INCOME-TAX REFERENCE.

Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Das and Mr. Justice Mya Bu.

IN RE THE COMMISSIONER OF INCOME-TAX, BURMA

1933

July 12.

v.

THE BENGALEE URBAN CO-OPERATIVE CREDIT SOCIETY, LIMITED.*

Income-tax—Co-operative Society's income—Government of India Notification, dated 25th August 1925—*Exemption of "profits"—Income from investments and house property, when "profits"—Onus of proof—Legislation following a practice—"Income", "profits", "gain"—Income-tax Act (XI of* 1922), *ss.* 6, 8, 9, 10.

The profits of a co-operative society that are exempted from income-tax under the notification of the Government of India dated the 25th August 1925 are the profits accruing to the society from carrying on the business of a mutual co-operative society.

Board of Revenue v. *Mylapore Fund*, I.L.R. 47 Mad. 1; *Carlisle and Silloth Golf Club* v. *Smith*, (1913) 3 K.B. 75; *Gresham Life Assurance Society* v. *Styles*, (1892) A.C. 309; *New York Life Assurance Company* v. *Styles*, 14 A.C. 381; *United Service Club* v. *The Crown*, I.L.R. 2 Lah. 109—*referred to.*

Income accruing to the society from investments or house property is liable to income-tax unless the making of such investments is a part of the business of the society.

Whether the income from such investments is "profits" of a business carried on by an assessee is a question that depends upon the circumstances in each case, and the fact that such income appears as part of the profits in the profit and loss account of the assessee is not conclusive.

Coltness Iron Company v. *Black*, 6 A.C. 32; *Naval Colliery Company* v. *Commissioner of Income-tax*, 12 Tax Cases 1017—*referred to.*

Where *prima facie* such income is chargeable to income-tax, the onus lies on the assessee to show that it is "profits" within the notification and so exempt from income-tax.

Liverpool Insurance Company v. *Bennett*, (1911) 2 K.B. 577; *Madras Central Urban Bank* v. *The Commissioner of Income-tax*, I.L.R. 52 Mad. 640; *Norwich Union Fire Insurance* v. *Magee*, 73 L.T. 733—*referred to.*

Where new legislation follows a continuous practice and repeats the very words on which that practice was founded it may fairly be inferred that the Legislature in re-enacting the statute intended those words to be understood in their accepted meaning.

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* Civil Reference No. 13 of 1933.

1933

In re THE COMMISSIONER OF INCOME-TAX, BURMA v. THE BENGALEE URBAN CO-OPERATIVE CREDIT SOCIETY, LIMITED.

Commissioners of Income-tax v. *Pemsel*, (1891) A.C. 531—*referred to.*

The terms "income" "profits" and "gains" as used in the Indian Income-tax Act are not always synonymous. "Income" as contrasted with "capital" is used in its wide sense and includes "profits" and "gains".

Commissioner of Income-tax, Bengal v. *Shaw Wallace & Co.*, I.L.R. 59 Cal. 1343—*explained.*

In its strict sense as contrasted with "profits" or "gains" "income" connotes incomings without regard to outgoings. "Profits" on the other hand are the surplus by which the receipts from the trade or business exceed the expenditure necessary for the purpose of earning those receipts.

Russel v. *Town and County Bank*, 2 Tax Cases 321—*referred to.*

A Eggar (Government Advocate) for the Crown. In construing the notification issued by the Government of India exempting the "profits" of a co-operative society from income-tax the intention of the Government in making that notification must be kept in view. The notification does not use the words "profits or gains" but merely "profits" or "dividends on account of profits."

[PAGE, C.J. The dividends that members receive from a co-operative society are from different sources—as for instance from investments in securities or out of loans to members. How far does the exemption extend?]

The word "profits" occurring twice in that notification must obviously have the same meaning, the intention being to exempt a special kind of profits from tax, namely, profits earned from transactions with members.

In England it has been held that profits from mutual benefit societies or clubs are not taxable.

[PAGE, C.J. Is there any difference between "profits" and "income"?]

In *The Secretary to the Board of Revenue* v. *Al. Ar. Rm. Arunachallam Chettiar* (1) the distinction is discussed.

(1) I.L.R. 44 Mad. 65.

As pointed out in *Madras Central Urban Bank* v. *The Commissioner of Income-tax* (1), unless it is obligatory on the society or part of its business to invest monies in securities, profits derived from such investments will be taxable.

[PAGE, C.J. The test is whether the investment is in furtherance of the objects of the society.]

In applying this test the intention of the notification should not be forgotten. It seeks to draw a distinction between profits earned from members and profits from other sources; and it has been the practice of the Income-tax authorities, at least from 1923 onwards (see the Income-tax Manual, 1923, p. 77), to tax income derived from investments. Income derived from sources other than loans to members was taxed under its appropriate head in s. 6.

The idea underlying this notification is that a person cannot make a profit out of himself. See *The New York Life Assurance Company* v. *Styles* (2); *Board of Revenue* v. *The Mylapore Hindu Permanent Fund* (3); *The Commissioner of Income-tax, Bombay* v. *The National Mutual Life Association of Australasia, Limited* (4) and *The United Service Club, Simla* v. *The Crown* (5). Though the notification did not purport to be in pursuance of these rulings the principle is the same.

Foucar for the assessee. As pointed out by their Lordships of the Privy Council in *Shaw Wallace's* case (6) there is no distinction between the words "profits or gains" in the Indian Income-tax Act.

(1) I.L.R. 52 Mad. 640.
(2) (1889) A.C. 381.
(3) I.L.R. 47 Mad. 1.
(4) I.L.R. 55 Bom. 637.
(5) I.L.R. 2 Lah. 109.
(6) I.L.R. 59 Cal. 1343, 1350.

1933

In re THE COMMISSIONER OF INCOME-TAX, BURMA v. THE BENGALEE URBAN CO-OPERATIVE CREDIT SOCIETY, LIMITED.

These words in the Act have the same meaning. See ss. 10, 14 (2) and 42.

The word "profits" should be construed in its commercial sense, namely excess of receipts over expenditure, *Gresham Life Assurance Society* v. *Styles* (1). The word "profits" in this notification, therefore, must cover all profits from whatever source they are derived. The object of the exemption is to foster and encourage the co-operative movement in this country. Moreover, the bye-laws of the society show that it is one of the objects of the society to invest monies in securities, that is to say, it is part of its business to do so.

If the intention of the Government was to exempt only one kind of profits from tax the Legislature would have said so.

The dividends are in fact paid from profits derived from all kinds of sources.

PAGE, C.J.—The question propounded is :

"What portion of the income of the society shown in its assessment order for 1932-33 is exempt from income-tax by virtue of the notification of the Government of India, dated 25th August 1925."

Under the notification the Governor-General in Council directed that the following class of income shall be exempt from the tax payable under the said Act, namely :—"the profits of any co-operative society other than the Sanikatta Salt Owners' Society in the Bombay Presidency for the time being registered under the Co-operative Societies Act, 1912 (II of 1912), the Bombay Co-operative Societies Act, 1925 (Bombay Act VII of 1925) or the Burma Co-operative Societies Act, 1927 (Burma Act VI of 1927)

(1) (1892 A.C. 309, 315.

or the dividends or other payments received by the members of any such society on account of profits."

The Income-tax Officer determined the assessee's total income for the year of assessment 1932-33 to be as follows :

	Rs.	A.	P.	Rs.	A.	P.
I. Income from Securities—						
Tax Free ...	135	0	0			
Taxed (gross) ...	278	0	0			
				413	0	0
II. Income from Property—						
Total Rents ...	6,875	0	0			
Service taxes ...	851	0	0			
Annual value ...	6,024	0	0			
Less 1/6th of Annual value	1,006	0	0			
Insurance ...	134	0	0			
Ground rents ...	336	0	0			
Collection charges 6 per cent	360	0	0			
Vacancies ...	440	0	0			
	2,276	0	0			
				3,748	0	0
III. Profits of Co-operative Credit Society—						
Net profits as per accounts	13,162	10	2			
Deduct—Previous year's profit	48	5	10			
Interest on securities ...	337	14	0			

1933

IN RE THE COMMISSIONER OF INCOME-TAX, BURMA v. THE BENGALEE URBAN CO-OPERATIVE CREDIT SOCIETY, LIMITED.

PAGE, C.J.

	Interest in Post Office Savings Bank Account	Rs.	A.	P.		Rs.	A.	P.	Rs.	A. P.
		12	13	5						
	Interest on Bank deposits ...	834	12	9						
	Net receipts of house-rents	4,364	0	0						
	House-rents accrued ...	436	0	0						
		6,023	14	0						
						7,138	12	2		
Add—	Depreciation on safe ...	36	0	0						
	Depreciation reserve for houses ...	700	0	0						
	Expenses for collecting rents ...	726	0	0						
		1,462	0	0						
						8,600	12	2		
Deduct—	Honoraria to Secretary, etc. ...	1,960	0	0						
						6,640	12	2		
	Profits of Co-operative Credit Society, in whole rupees				...				6,641	0 0
									10,802	0 0
IV.	Income from other sources— Bank interest ...				...				835	0 0
					Total income ...				11,637	0 0

Income-tax was assessed upon heads I, II, and IV, of the assessee's income upon the ground that such income was not part of the "profits" of the

assessee exempted from income-tax under the notification of the 25th August 1925. Now it appears to me that the intention of the Governor-General in Council was to exempt from income-tax under the notification the profits accruing to co-operative societies from carrying on the business of a mutual co-operative society upon the ground that "a man cannot make a loss or profit out of himself" (per Buckley L.J. in *Carlisle and Silloth Golf Club* v. *Smith* (1); see also *Gresham Life Assurance Society* v. *Styles* (2); *New York Life Assurance Company* v. *Styles* (3); *United Service Club, Simla* v. *The Crown* (4); *Board of Revenue* v. *Mylapore Fund* (5) and in this way to encourage and foster co-operative societies which were brought into being as the result of a movement to improve the conditions under which cultivators of the land in India and Burma lived and worked. Mutual Co-operative undertakings have always been held liable to pay income-tax upon income derived from investments and house property [see *New York Life Assurance* v. *Styles* (3); and *United Service Club, Simla* v. *The Crown* (4); *Commissioner of Income-tax* v. *National Mutual Life Association of Australasia* (6)]. Moreover, the Governor-General in Council while the notification of 1925 was under consideration must have been aware that before the year 1925 it had been the practice of the Income-tax authorities to assess and levy income-tax upon the income of co-operative societies derived from interest on securities (see Income-tax Manual, 1923, p. 77, and Income-tax Manual, 1932, p. 146) and as Lord Macnaghten

(1) (1913) 3 K.B. 75.
(2) (1892) A.C. 309.
(3) (1889) 14 A.C. 381.
(4) (1921) I.L.R. 2 Lah. 109.
(5) (1923) I.L.R. 47 Mad. 1.
(6) (1931) I.L.R. 55 Bom. 637.

1933

IN RE THE COMMISSIONER OF INCOME-TAX BURMA v. THE BENGALEE URBAN CO-OPERATIVE CREDIT SOCIETY, LIMITED.

PAGE, C.J.

observed in connection with the Income-tax Act in England,

"I cannot help reminding your Lordships, in conclusion, that the Income-tax Act is not a statute which was passed once for all. It has expired, and been revived, and re-enacted over and over again; every revival and re-enactment is a new Act. It is impossible to suppose that on every occasion the Legislature can have been ignorant of the manner in which the tax was being administered by a department of the State under the guidance of their legal advisers, especially when the practice was fully laid before Parliament in the correspondence to which I have referred.

It seems to me that an argument in favour of the respondent might have been founded on this view of the case. The point of course is not that a continuous practice following legislation interprets the mind of the Legislature, but that when you find legislation following a continuous practice and repeating the very words on which that practice was founded, it may perhaps fairly be inferred that the Legislature in re-enacting the statute intended those words to be understood in their received meaning. And perhaps it might be argued that the inference grows stronger with each successive re-enactment.

[*Commissioners for Special purpose of Income-tax* v. *Pemsel* (1); *Madras Provincial Co-operative Bank, Limited* v. *Commissioner of Income-tax Madras* (2).]

It is urged that the assessee society has not previously been assessed upon the income it has received from investments or house property, but in considering what was the intention of the Legislature when it issued the notification in question that fact does not appear to me to be of importance. The main contention on behalf of the assessee is that what matters is not what the Governor-General in Council intended but what he did, that "income" "profits" and "gains" as used in the Indian Income-tax Act are synonymous terms, and that the

(1) (1891) A.C. 531, 591. (2) O.P. No. 44 of 1932.

whole of the society's income is exempt from income-tax under the notification.

In support of his argument the learned advocate for the assessee cited the following passage from the judgment of the Judicial Committee of the Privy Council in *Commissioner of Income-tax, Bengal* v. *Shaw Wallace & Co.* (1):

"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."

Now, in that case the Judicial Committee were considering the meaning of "income" as contrasted with "capital", and no doubt as income-tax is a tax upon income, in the wide sense of the term "income" when contrasted with "capital" means and includes not only income in its strict meaning, but also profits and gains. But, in my opinion, it is not true to say that in the strict meaning of those terms as appears from an examination of the various sections of the Indian Income-tax Act "income" is used in the same sense as "profits" or "gains".

In s. 6 six heads of income profits and gains are made chargeable to income-tax as therein provided, head (ii) being "interest and securities", (iii) "property" (iv), "business", and under s. 10 income-tax is "payable by an assessee under the head 'Business' in respect of the profits and gains of any

(1) (1932) I.L.R. 59 Cal. 1343, at p. 1350.

1933

In re THE COMMISSIONER OF INCOME-TAX, BURMA *v.* THE BENGALEE URBAN CO-OPERATIVE CREDIT SOCIETY, LIMITED.

PAGE, C.J.

business carried on by him", whereas the tax upon "interest on securities" is payable under s. 8, and upon "property" under s. 9. In my opinion, "income" as contrasted, not with capital, but with "profits" or "gains" in the Indian Income-tax Act, means "a periodical monetary return 'coming in'" and accruing to the assessee independently, and not as the nett proceeds, of a business carried on by the assessee as defined in s. 2 (*4*) of the Act. "Income" in this sense connotes incomings without regard to outgoings. On the other hand "profits" in this connection are "the surplus by which the receipts from the trade or business exceed the expenditure necessary for the purpose of earning those receipts", [per Lord Herschell in *Russel* v. *Town and County Bank* (1); *Alianza Company, Limited* v. *Bell* (2); *Naval Colliery Company, Limited* v. *Commissioners of Income-tax* (3)].

In my opinion, the term "profits" in the notification of 25th August 1925 is used in this latter sense, and *primâ facie*, therefore, neither interest from securities nor income derived from property are "profits" within the meaning of that term as used in the notification.

The learned Government Advocate on behalf of the Commissioner of Income-tax contended that as the income derived from investments and from property is classed and chargeable under separate heads of income in s. 6 of the Act, it is *nihil ad rem* that such income may also in the circumstances of any particular case fall within the head "business", for such income, being chargeable as "interest on securities" or as "property", is not to be regarded or

(1) 2 T.C. 321, at p. 327. (2) (1904) 2 K.B. 666.
(3) 12 T.C. 1017, at p. 1047.

treated as "profits" but as "income" in the strict meaning of those terms, and therefore is outside the ambit of the notification.

I am not able to accept this contention. It may be that the investment of capital in property or securities is part of the business of an assessee, and in such a case, in my opinion, the nett income accruing from such investments would be, and be chargeable as, profits of the business. Whether such investments are profits of a business carried on by an assessee, in my opinion, is a question that depends upon the circumstances of each case, and in considering that question the fact that such income appears as part of the profits in the profit and loss account of the assessee is not conclusive. [*Coltness Iron Company* v. *Black* (1) ; *Naval Colliery Company* v. *Commissioners of Income-tax* (2).]

In the present case where the assessee is claiming an exemption from income-tax in respect of income that *primâ facie* is chargeable to income-tax the onus, of course, lies upon the assessee to prove that the income for which the society claims exemption is "profits" within the notification. [*Madras Central Urban Bank, Limited* v. *Commissioner of Income-tax* (3) ; *Madras Provincial Co-operative Bank, Limited* v. *Commissioner of Income-tax* (4) ; *Norwich Union Fire Insurance* v. *Magee* (5) ; *Liverpool and London and Globe Insurance Company* v. *Bennett* (6).] Neither the Income-tax authorities nor the assessee appear to us to have approached the consideration of the case from the right point of view, the Commissioner of Income-tax relying upon the classification of heads of income under s. 6, the assessee upon

(1) (1880) 6 A.C. 32.
(2) 12 T.C. 1017, at p. 1047.
(3) (1929) I.L.R. 52 Mad. 640.
(4) O.P. No. 44 of 1932.
(5) 73 L.T. 733 ; 3 T.C. 457.
(6) (1911) 2 K.B. 577.

1933

In re THE COMMISSIONER OF INCOME-TAX, BURMA v. THE BENGALEE URBAN CO-OPERATIVE CREDIT SOCIETY, LIMITED.

PAGE, C.J.

the contention that the words "income" "profits" and "gains" in the Income-tax Act bear the same meaning. The Income-tax authorities, upon such material as is or may be placed before them, must now determine whether or not the income accruing to the society under items I, II, and/or IV forms part of the profits of the business carried on by the society. That question, in our opinion, has not yet been fully ventilated, and after determining it the assessment will be made in accordance with the construction that the Court has put upon the term "profits" as used in the notification. I would answer the question propounded in this sense.

DAS, J.—I agree.

MYA BU, J.—I agree.

CRIMINAL REVISION.

Before Sir Arthur Page, Kt., Chief Justice, and Mr Justice Mya Bu.

1933

July 19.

KING-EMPEROR *v.* KARAPAN AND OTHERS.*

Burma Municipal Act (III of 1898), ss. 124 (a) and 142 (r)—Burma Municipal (Public Health) Amendment Act (I of 1931), ss. 9, 10—Bye-laws made under s. 142 (r)—Repeal of s. 142 (r)—Re-enactment of provisions of clause (r) as s. 124 (a)—General Clauses Act (I of 1898), s. 24—Force of the old bye-laws.

Clause (r) of s. 142 of the Burma Municipal Act, 1898 was deleted by s. 10 of Act I of 1931, but its provisions in identical terms were re-enacted as s. 124 (*a*) of the former Act by s. 9 of the latter Act. Under s. 24 of the General Clauses Act any bye-laws made under the repealed section continue in force unless and until superseded by bye-laws made under the new section.

In the absence of fresh bye-laws made under s. 124 (*a*) of the Burma Municipal Act, a person is liable to be convicted for keeping a larger number of cattle in his compound than is permitted under the bye-law made by a Municipal Committee under s. 142 (*r*) of the Act.

Karapan Chettyar v. *King-Emperor*, Cr. Rev. 198B of 1932, H.C. Ran.—*overruled.*

* Criminal Revision No. 149B of 1933 from the orders of the Township Magistrate of Myingyan in Criminal Regular No. 29 of 1933.