

INCOME-TAX REFERENCE.

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

1933
July 3.

IN RE THE COMMISSIONER OF INCOME-TAX,
BURMA

v.

J. I. MILNE.*

Income-tax—Loan by mine owner to mining engineer—Agreement to pay one-third of sale-proceeds of mine for loan—Consideration whether profits of assessee's business—Receipt of a casual nature—Fee accompanying application for reference—Fee as part of costs of reference—Refund of fee—Income-tax Act (XI of 1922), ss. 4 (3) (7), 10, 12, 66 (2).

The assessee, a tin mine owner and tin mine worker, lent to a mining engineer various sums of money from time to time to enable the latter to work a tin area. These loans were not repaid. Thereafter the assessee lent Rs. 10,000 to the engineer who required the sum to do certain work at his mine which he had a reasonable prospect of selling. In consideration of the loan the borrower undertook, in the event of the property being sold, to allocate and pay to the assessee one-third of the total sale-proceeds received by him. The property was sold, and the assessee received his agreed share of the consideration in cash and shares. The Income-tax authorities claimed that the cash was business profits of the assessee.

Held, that (1) the consideration received by the assessee under the agreement was not profits or gains of any business carried on by him within s. 10 of the Income-tax Act, (2) it was not profits or gains derived from other sources within s. 12, (3) it was a receipt of a casual and non-recurring nature within s. 4 (5) (7) of the Act, and was not liable to income-tax.

Held also that the fee of Rs. 100 which must accompany an application for a reference under s. 66 (2) of the Act, forms part of the costs of and incidental to the reference, which the Court in its discretion may award in a proper case to the assessee.

A. Eggar (Government Advocate) for the Crown. The assessee in the present case is in the habit of buying and selling mines or mining concessions, and also of lending money to mining prospectors. See the case of *S. Warwick Smith v. The Commissioner of Income-tax* (1) where the borrower in the present case was held assessable on a transaction similar to the

* Civil Reference No. 11 of 1933.
(1) 5 I.T.C 451.

one in question. The only question here is whether the profit made by the assessee in his transaction with Warwick Smith is one arising in the course of his business or is of a casual and non-recurring nature. Each case depends on its own facts, and if there were materials before the Income-tax authorities to justify a finding that the assessee was carrying on the business of buying and selling mining concessions such a finding cannot be disturbed.

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The facts of the present case may be compared with those in *The Board of Revenue v. Arumachalam Chettiar* (1), a decision under the 1918 Act, where it was held that it was a question of fact whether a certain stray transaction was really part of the business of the assessee.

A single receipt of income may be taxable as was shown in the case of *Turner Morrison & Co., Ltd.* (2) where compensation paid to the assessee on liquidation of the principal company was held taxable. *Shaw Wallace's* case (3), although there a different view was taken from that in *Turner Morrison & Co., Ltd.*, was concerned with the question whether the *solatium* paid for the loss of agency was in the nature of a capital receipt, and no question whether it was a casual and non-recurring receipt arose.

[The question of costs and of the refund of the fee deposited by the assessee with his application for a reference was argued after the decision of the Court on the reference.]

The fee of Rs. 100, or any lesser sum that may be prescribed in this behalf, under s. 66 (2) of the Income-tax Act should be regarded as the fee for drawing up the reference. Such a fee is not to be

(1) I.L.R. 47 Mad 197.

(2) I.L.R. 56 Cal. 211.

(3) I.L.R. 58 Cal. 1153; S.C. on appeal I.L.R. 59 Cal. 1343.

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refunded except as provided in the proviso to s. 66 (2), and is not to be treated as advance costs. S. 66 (6) deals with costs, and is silent on the point whether this fee is to be included in the cost or not. The practice of the Income-tax Department has been to regard the fee as not being refundable except under the circumstances specified in s. 66 (2), proviso; see the Income-tax Manual, 1932, p. 262. Moreover, as the Objects and Reasons show, the deposit of the fee is to prevent vexatious and frivolous applications.

The High Courts of Allahabad, Patna, Madras and Lahore have, however, taken the view that the fee is part of the costs of the reference. See *In the matter of Radhey Lal Balmukund* (1); *Maharaja Garu Mahadeo v. Commissioner of Income-tax, Bihar & Orissa* (2); *Shib Lal Ganga Ram v. Commissioner of Income-tax, United Provinces* (3); *Radha Kishen v. Commissioner of Income-tax, Punjab and North-West Frontier* (4); *Massev & Co. v. Commissioner of Income-tax, Madras* (5); and *P.L.S.L.P.L. Firm v. Commissioner of Income-tax, Madras* (6).

Foucar for the assessee. The assessee does not carry on the business of buying and selling mining concessions. He has never made any offers to sell his mines; and even when he once sold a mine the offer to purchase came from the prospective purchaser.

A successful litigant ought to be reimbursed all his costs. If the Court does not order a refund of the fee deposited it ought to increase *pro tanto* the costs awarded on the reference.

PAGE, C.J.—It appears that the assessee, who is a tin mine owner and tin mine worker, lent certain

(1) I.L.R. 52 All. 991.

(2) 2 I.T.C. 281, 286.

(3) 2 I.T.C. 425, 427.

(4) 3 I.T.C. 73, 76.

(5) 3 I.T.C. 302, 308.

(6) 5 I.T.C. 50, 55.

sums of money from time to time to a Mr. Warwick Smith for the purpose of enabling Mr. Warwick Smith to work a tin area known as Tonbu-chaung. The sums which the assessee lent to Mr. Warwick Smith for this purpose between 1924 and 1926 amounted to over Rs. 20,000. No part of this loan has been repaid to the assessee. In 1927 Mr. Warwick Smith again approached the assessee with a view to obtaining from him a further loan to enable Mr. Warwick Smith to take a lease of Tonbu-chaung. The assessee was disinclined to lend Mr. Warwick Smith any further sum, but eventually was persuaded to lend him two sums of Rs. 3,000 and Rs. 5,000. In March, 1928, Mr. Warwick Smith, who had been working the mine at Tonbu-chaung informed the assessee that he thought that there was a reasonable prospect of selling it, but that there was a certain amount of work to be done before the examining engineers arrived, and that it was necessary for Mr. Warwick Smith to find another Rs. 10,000 in order that the work should be carried through. The assessee was not prepared to lend Mr. Warwick Smith this sum without some sort of security, but on the 14th of March, 1928, he was persuaded to enter into the following agreement :

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"In consideration of the sum of Rs. 10,000 (Rupees ten thousand only), the receipt of which sum from James Ingram Milne is hereby acknowledged by me, I, the undersigned S. Warwick Smith, Mining Engineer of Palauk, Palaw Township, Mergui District, Burma, my heirs, executors and assigns hereby agree and promise to pay to the aforesaid James Ingram Milne, Mining Engineer of Palauk, Palaw Township, Mergui District, Burma, his heirs, executors and assigns a sum equal to *one-third* of the total consideration received by me, my heirs, executors and assigns directly or indirectly for the sale of all mining areas at present held by me under Mining Lease or Prospecting License or under application by me for Mining Lease or Prospecting

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License, in the Palauk Village-tract of Palaw Township, Mergui District, Burma, the amount payable to be paid as and when the sale consideration is received by me, my heirs, executors and assigns."

In my opinion that transaction upon the face of it was a private venture by which the assessee took the chance of obtaining repayment of the sum which he had lent to Mr. Warwick Smith in the event of the property being sold and a profit accruing from the proceeds of the sale. It does not appear to me that it was a business transaction in any sense, but was only a mode by which the assessee sought to secure himself against loss if he lent to Mr. Warwick Smith this further sum of Rs. 10,000. In the event it turned out to be a profitable investment, because the mine was sold in 1929 for £25,000 in cash and £45,000 in shares, and the assessee received in cash under the agreement £6,000 and shares of the face value of £9,000. It is in respect of this £6,000 that income-tax is claimed from the assessee.

The ground upon which the assessment is supported is that the assessee "deals in mines or mining concessions", which I take to mean that he carries on the business of buying and selling mines or mining concessions, and that the effect of the agreement was that the assessee bought for Rs. 10,000 a third share in the mining properties which were the subject-matter of the agreement.

The only material before the Income-tax Officer upon which he could have found that the assessee was carrying on the business of buying and selling mines or mining concessions was that in 1919 the assessee had in fact sold a tin dredging area to the Indo-Burma Corporation, Limited. We are not concerned in this reference to determine whether or not there were materials upon which the Income-

tax Officer could find that the assessee carried on the business of dealing in mining concessions, because it is clear, to my mind, upon the face of the agreement that the transaction out of which the £6,000 accrued to the assessee formed no part of any business that the assessee was carrying on. In my opinion there were no materials upon which the Income-tax Officer could hold that the receipt in question, *viz.* £6,000, was a taxable profit. There was no evidence upon which the Income-tax Officer could hold that the effect of the agreement under consideration was that the assessee actually bought a third share in the mining properties which were the subject-matter of the agreement. The assessee acquired no right or interest whatever in the property, the effect of the agreement being that in consideration of Rs. 10,000 lent by the assessee to Mr. Warwick Smith, Mr. Warwick Smith undertook, in the event of the property being sold, to allocate and pay to the assessee one-third of the total consideration received by Mr. Warwick Smith. In my opinion the £6,000 under consideration did not form part of the profits or gains of any business carried on by the assessee within s. 10 of the Income-tax Act; nor was it profits and gains derived from other sources within s. 12, because as I understand the transaction it was a receipt, not being a receipt arising from business, of a casual and non-recurring nature within s. 4 (3) (7) of the Act.

For these reasons, in my opinion, the answer to the question propounded is in the negative.

The question of costs is adjourned; the matter can be mentioned later.

DAS, J.—I agree.

MYA BU, J.—I agree.

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[The case was further considered in respect of costs and the refund of Rs. 100 deposited by the assessee with his application for reference to the High Court.]

PAGE, C.J.—A question relating to procedure in Income-tax References is involved in this application. Under s. 66 (2) :

“Within sixty days of the date on which he (*i.e.* the assessee) is served with notice of an order under s. 31 or s. 32 or of a decision by a Board of Referees under s. 33A, the assessee in respect of whom the order or decision was passed may, by application accompanied by a fee of one hundred rupees or such lesser sum as may be prescribed, require the Commissioner to refer to the High Court any question of law arising out of such order or decision, and the Commissioner shall, within sixty days of the receipt of such application, draw up a statement of the case and refer it with his own opinion thereon to the High Court:

Provided that if in exercise of his power of revision under s. 33, the Commissioner decides the question, the assessee may withdraw his application, and if he does so, the fee paid shall be refunded.”

Sub-section (6) states :

“Where a reference is made to the High Court on the application of an assessee, the costs shall be in the discretion of the Court.”

Now, it has been the practice of the Income-tax authorities in Burma to retain this fee of Rs. 100 whether or not a reference to the High Court is made under s. 66 ; and if the matter had been free from authority I should have been inclined to think that the view taken by the Income-tax authorities was right. It seems to me that the fee of Rs. 100, which has to be paid at the time when an application under s. 66 (2) is filed, was intended partly to cover the expenses of the Commissioner that would be incurred by reason of the application, and partly

as a safeguard against frivolous applications; and in such circumstances it would be not unreasonable to hold that the fee was not recoverable by the assessee. On the other hand the High Courts of Madras, Allahabad, Patna and Lahore have held that this fee of Rs. 100 is to be treated as part of the costs of the reference deposited by way of security, and for this reason it has been held that the fee forms part of the costs of and incidental to the reference which may be refunded to the assessee in the discretion of the Court under s. 66 (6). In matters of procedure it is important, wherever it is possible, that the practice of the High Courts should be uniform, and we are not prepared to differ upon this matter from the Madras, Allahabad, Patna and Lahore High Courts. The result is that, in our opinion, the fee of Rs. 100, which must accompany an application for a reference under s. 66 (2), forms part of the costs of and incidental to the reference which the Court in its discretion may award in a proper case to the assessee. We order that the assessee should have his costs, ten gold mohurs, and in addition that the Rs. 100 that he has deposited under s. 66 (2) should be refunded to him.

DAS, J.—I agree.

MYA BU, J.—I agree.

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