INCOME-TAX APPLICATION.

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

1933

May 9.

V.P.R.P.L. FIRM

v.

THE COMMISSIONER OF INCOME-TAX, BURMA.*

Income-tax Act (XI of 1922), s. 66 (3)—Remittance to assessee from foreign business—Profits or capital—Question of fact—"Legal presumption"—Inference from facts.

There is no *praesumptio juris et de jure* that a sum received by an assessee from his foreign partnership business is remitted out of the profits of that business. In every case where the question is whether a particular sum is "profits" or "capital", the question is one of fact to be determined by the Income-tax authorities upon the materials before them.

The expression "legal presumption" ought not to be applied to an inference which the Court may reasonably draw from certain facts before it in a particular case.

Scottish Provident Institution v. *Allan*, 4 Tax Cases 409; 1903 A.C. 129; *Subbiah Ayyar* v. *Commissioner of Income-tax, Madras*, I.L.R. 53 Mad. 510—*explained.*

Clark for the appellants. An advance made by a foreign branch of a firm to another branch in Burma has been treated by the Income-tax Officer in Burma as profits of the business and has been assessed to income-tax, even though there were enough materials before him to show that it was an advance.

[PAGE, C.J. That is a question of fact and a reference to the High Court on questions of fact is not permissible.]

Whether the ordinary presumption that money remitted from a foreign business and received in this country is out of profits can apply to the facts of a particular case is a mixed question of law and fact. See *Subbiah Ayyar* v. *The Commissioner of*

* Civil Misc. Application No. 18 of 1933.

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Income-tax, Madras (1); *Scottish Provident Institution* v. *Allan* (2).

[PAGE, C.J. There can be no legal presumption to that effect; it is only an inference that may reasonably be drawn from certain proved facts.]

Questions of law and fact are sometimes difficult to disentangle, and the proper legal effect of a proved fact is a question of law. *Nafar Chandra Pal Chowdhury* v. *Shukur Sheikh* (3).

A. Eggar (Government Advocate) for the Crown was not called upon.

PAGE, C.J.—This application must be dismissed.

An undivided Hindu family, carrying on a money-lending business in Rangoon and elsewhere, the members of which were entitled collectively to a half share in a money-lending business carried on in partnership between the members of the assessee firm and a firm in Negambo, Ceylon, were assessed to income-tax in respect of the financial year 1931-32 in a sum of Rs. 18,666, upon the ground that that sum represented the assessees' share of the profits earned in the business at Negambo.

At the investigation before the Income-tax Officer the following facts were common ground:

(i) that the assessee firm was carrying on a money-lending business for profit;

(ii) that it was entitled to a half share of the profits earned by the Negambo firm;

(iii) that during the year of assessment there were remitted by the Negambo firm to the assessee firm in Rangoon two sums of Rs. 30,000 and Rs. 25,000; and

(iv) that these two sums of Rs. 30,000 and Rs. 25,000 were remitted out of the funds of the Negambo firm.

(1) I.L.R. 53 Mad. 510, 518. (2) 4 Tax Cases 409.
(3) I.L.R. 46 Cal. 189, 195.

The assessees stated that these two sums were not remitted to them by the firm in Negambo as representing the profits earned by the assessees in Negambo during the year of assessment, but were capital sums received by way of loan from the Negambo firm by the assessees, and, therefore, were not profits or gains liable to assessment for income-tax. In support of their contention the assessees adduced two letters purporting to have been written during the year of assessment by a member of the firm in Negambo to the assessees in Rangoon, from the terms of which the assessees invited the Income-tax Officer to draw the inference that the two sums of Rs. 30,000 and Rs. 25,000 had been remitted as a capital sum by way of loan, and not as representing the assessees share of the profits earned in the Negambo business.

The Income-tax Officer, upon the materials before him, found as a fact that the two sums of Rs. 30,000 and Rs. 25,000, included the sum of Rs. 18,666 being the amount of the assessees' share of the profits that had been earned by the business in Negambo during the year of assessment.

On appeal to the Assistant Commissioner the assessment by the Income-tax Officer was affirmed. Thereupon the assessees applied to the Commissioner of Income-tax that he should state the following case and refer it to the High Court for determination :

"Whether or not the evidence tendered before the authorities did rebut the legal presumption that the remittance received from the foreign partnership business is out of profits ?"

The Commissioner of Income-tax expressed the opinion that the question that it was sought to refer was a question of fact and not of law, and refused to state a case or refer it to the High Court.

The assessees have now presented an application under s. 66 (*3*) of the Income-tax Act that the Court

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should require the Commissioner of Income-tax to state the question under consideration, and refer it to the High Court for determination.

Now, there lurks under the question as framed what I regard as a fallacy. There is no *praesumptio juris* that a sum received from a foreign partnership business is remitted out of the profits of that business.

I have before now had occasion to observe that what is a reasonable inference to draw from facts is frequently stated to be a presumption which the Court will regard as raised by certain facts. It is no such thing. The expression "legal presumption" that is found in the question that has been propounded has been used, I think, because of certain observations made by the Court of Session in *Scottish Provident Institution* v. *Allan* (1). The facts of that case were not dissimilar to those in the present case. It appears that the assessees in Edinburgh, who had sent a large amount of capital to Australia for investment, had received from Australia during the year of assessment remittances amounting to £716,500. The question that fell for determination was whether this sum of £716,500 or any part thereof was to be regarded as profits of the assessees earned in Australia and remitted to Great Britain, or as a return *pro tanto* of the capital that had been sent from Scotland to Australia by the assessees in order to be invested there. Notwithstanding the fact that at the time when all the remittances (except one) were sent to the United Kingdom a covering letter was forwarded to the following effect:

"For your guidance in dealing with the Inland Revenue Department the above amount represents proceeds of the draft for

(1) 4 Tax Cases 409, at p. 413.

£25,000 drawn by the attorneys of the Institution on 21st May, 1886,"

the Commissioners of Income-tax held

"that the sum of £217,350 admittedly received by the Institution in the United Kingdom from Australia during the year ending 31st December, 1898, and for convenience taken as the year of assessment, must be regarded as consisting of interest assessable in terms of the fourth case of Schedule D, 5 and 6 Vict., cap. 35."

On appeal to the Court of Session, save in respect of a sum of £5,000, the decision of the Commissioners was upheld, and a further appeal to the House of Lords was dismissed. In the course of his judgment in the Court of Session, the Lord President observed,

"It further appears to me that, under the circumstances, indefinite remittances to this country must be presumed to consist of interest, not of capital, so long as the amount of capital remitted to Australia for investment still remains invested there."

And Lord McLaren added :

"But, where a capitalist company, as in the present case, has invested large sums for a period of fifteen years in a Colony, and has an agent employed not only to receive interest, but also to receive the capital of the investment when paid up, and to reinvest it, even if unappropriated remittances are made to this country, I think every one would agree that they must be dealt with according to the ordinary course of business, and these remittances must be presumed to be paid in the first place out of interest so far as they are income, and in the second place out of principal or capital. I think that rule results from the fact that no prudent man of business will encroach upon his capital for investment when he has income uninvested lying at his disposal."

Now, I venture to think that all that the learned Judges in the Court of Session meant by their observations was that there was material before the Commissioners upon which they were justified in finding as a fact that the remittances were profits and not capital, and

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that an inference to that effect that had been drawn by the Commissioners was the inference which in the circumstances any reasonable business man would draw from the materials before them. I do not myself think that their Lordships intended to hold that there was a *praesumptio juris* or a *praesumptio juris et de jure* that in such circumstances the remittances were profits and not capital.

In *S. A. Subbiah Ayyar* v. *The Commissioner of Income-tax, Madras* (1), a Full Bench of the Madras High Court expressed the opinion that

" if an assessee's foreign business remits money to him in a country in which his profits from his business in that country are assessed to income-tax, the presumption is that the remittance is a remittance from out of the profits of the foreign business ; *Scottish Provident Institution* v. *Allan* (2), followed in *In re Murugappa Chettiar* (3)."

Their Lordships after setting out the passage to which I have referred in the judgment of Lord McLaren in *Scottish Provident Institution* v. *Allan's* case (4), proceeded to hold that the presumption as to the remittances being profits of a foreign business was rebuttable and not a *praesumptio juris et de jure*, and on the facts had been rebutted.

It appears to me, with great respect to the learned Judges of the Madras High Court, that in every case when the question is whether a particular sum is " profits " or " capital ", the question is a question of fact to be determined upon the material before the Income-tax authorities, and that the case of *Scottish Provident Institution* v. *Allan*, and *Subbiah Ayyar's* case are useful merely for the purpose of guiding the authorities concerned, when they are considering facts to which the observations in those cases might

(1) (1930) I.L.R. 53 Mad. 510.
(2) (1903) A.C. 129.
(3) (1925) I.L.R. 49 Mad. 465.
(4) 4 Tax Cases 409, at p. 413.

reasonably be regarded as apt, as to how they should approach the question of fact which they are called upon to decide.

In the *Scottish Provident Institution* v. *Allan* (1), the House of Lords made no reference to any " presumption " in law in connection with such remittances, and, so far from regarding the question whether such sums were " profits " or " capital " as a question of law or of mixed law and fact, the House of Lords laid down in plain terms that in their opinion the question was solely one of fact. Lord Halsbury L.C. observed :

" I think this is really a question of fact. The question is what inference can properly be drawn from the facts as stated by the Commissioners."

And Lord Shand added,

" The question is, as your Lordship has put it, entirely one of fact."

Now, the Commissioner of Income-tax stated that in his view the question which he was invited to refer to the High Court was "a pure question of fact". I am of the same opinion. In such circumstances the only question of law that can arise is whether there was material before the Income-tax authorities upon which they could find that the sum of Rs. 18,666 was profits or income earned by the assessees and remitted during the year of assessment to Burma. The very form in which the question is propounded connotes that there was material upon which the Income-tax authorities could have reached the conclusion at which they arrived. Indeed, I did not understand the learned advocate for the assessees to contend that there were no materials before the Income-tax authorities upon which their finding could have been based. The contention on behalf of the assessees was that the question whether the evidence tendered by the assessees ought to be

(1) 4 Tax Cases 591.

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regarded as rebutting the inference which otherwise might have been drawn from the facts, namely, that these remittances were profits earned at Negambo and not capital sums sent to Rangoon by way of loan, was not a question of fact but a question of law. In my opinion such a contention cannot be sustained. The question being one of fact, and the finding upon the question being based upon materials before the Income-tax authorities, no question of law arises.

The result is that the application fails, and it is dismissed with costs, ten gold mohurs.

DAS, J.—I agree.

WORKMEN'S COMPENSATION ACT REFERENCE.

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

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May 16.

IN THE MATTER OF MAUNG YA BA, DECEASED.*

Workmen's Compensation Act (VIII of 1923), Sch. II, cl. 12—Workman employed in a hand-dug well.

A workman employed in a hand-dug well may come within the ambit of clause 12 of Schedule II of the Workmen's Compensation Act.

On the 27th October 1932 the Commissioner for Workmen's Compensation, Yenangyaung, made a reference to the High Court; and the question of law submitted by him is set out in the judgment. The High Court returned the proceedings to the Commissioner to ascertain whether the employment of the deceased workman Maung Ya Ba was of a casual nature, and the work in which he was employed when he met his death. The succeeding

* Civil Reference No. 16 of 1932.