1933

THE R.E.T. & S. CO., LTD. v. KING-EMPEROR.

MYA BU, J.

as soon as it passes through the meter, and it would be opposed to the real facts to say that the line in question was under the consumer's control. I am unable to subscribe to the view that the point of measurement of the supply, which is a matter affecting only the licensee and the consumer, affects the question of control over the supply line with reference to the regulating of responsibility in a matter of public concern, so as in law to run counter to the real facts.

I agree that the conviction and sentence passed by the trial Court in the alternative should be set aside, and that instead the appellant company should be convicted of an offence punishable under Rule 107 read with Rule 37 of the Indian Electricity Rules, 1922, and sentenced to pay a fine of Rs. 51.

INCOME-TAX REFERENCE.

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

1933

Feb. 7.

IN RE THE COMMISSIONER OF INCOME-TAX, BURMA

v.

BOMBAY BURMAH TRADING CORPORATION. *

Income-tax Act (XI of 1922), ss. 7 (1), 18 (2)—Salaries—Provident Fund—Contributions by employer—Interest on contributions—Fund usable by employer—Payment to employé on termination of service—Fund when taxable as salary.

Where an employer holds a provident fund for his employés with power to utilise the money in the fund for his business, sums standing to the credit of the employés are taxable as "salaries" when paid to them, including the employer's contributions and the interest on such contributions, and the tax is to be deducted by the employer when the sums are so paid out.

Unless and until the salary has been received by the employé and has been paid by the employer to him, such salary is not assessable to income-tax.

Commissioner of Income-tax v. *The Burma Corporation, Limited*, I.L.R. 7 Ran. 608; *Commissioner of Income-tax, Madras* v. *The Nedungadi Bank*, I.L.R. 49 Mad. 910; *London County Council* v. *The Attorney-General*, (1901) A.C. 26—*referred to.*

* Civil Reference No. 2 of 1933.

1933

In re THE COMMISSIONER OF INCOME-TAX, BURMA v. B.B.T.C.

The Commissioner of Income-tax Burma referred the following case to the High Court under the provisions of s. 66 (*1*) of the Income-tax Act :—

In connection with the 1931-32 assessment on certain employés of the Bombay Burmah Trading Corporation, Limited (hereinafter called the company), the Income-tax Officer, Salaries Circle, Section II, Rangoon, claimed from the company a sum of Rs. 2,484-8-0 being income-tax due on the salaries paid to these employés during the year ended the 31st March 1931.

The statement attached to the letter of demand of the Income-tax Officer shows that the payments which the Income-tax Officer classed as "Salaries" included (*a*) actual salary, (*b*) the company's contributions to the Provident Fund and (*c*) the interest on the amount at the employés' credit in the Provident Fund. This latter amount consists of interest on the employés' own contributions and interest on the company's contributions. It is in respect of this latter item only that this reference is made.

According to Rule 3 of the company's Provident Fund Rules the company has power to employ the Fund's monies in its business and they are so employed. Interest on the company's contributions is credited annually to the account of each member and debited to the company's interest account, but under Rule 15, no member has any right of property in this interest. The Provident Fund is not a recognised fund under the provisions of Chapter IXA of the Indian Income-tax Act.

The demand of the Income-tax Officer was made under s. 18 (7) of the Indian Income-tax Act on the ground that this interest was income under the head "Salaries" as defined in s. 7 of the Act and that the company should have deducted tax from it at the time of payment. The company contends that the interest does not fall under the head "Salaries" and that tax is not therefore liable to be deducted from it at source. Accordingly the question that I refer is "whether the interest paid by the company to a member of its Provident Fund on the company's own contributions to the Provident Fund account of that member is income falling under the head 'Salaries' as defined in s. 7 of the Indian Income-tax Act"?

1933

In re THE COMMISSIONER OF INCOME-TAX, BURMA. v. B.B.T.C.

When the accumulated balance at the credit of a member of the Provident Fund is paid to him, it consists of the following sums :—

(*a*) his own contributions,
(*b*) the company's contributions,
(*c*) interest on his own contributions, and
(*d*) interest on the company's contributions.

(*a*) His own contributions are taxed when his salary is paid to him and no question about them arises ; (*b*) the company's contributions are taxed as salary when they are paid to him and no question about them arises ; (*c*) this Department admits that interest on the members' own contributions is not taxable as "Salaries" and (*d*) this Department contends that the interest on the company's contributions is on the same footing as the contributions themselves.

The company contends that it has no more right to deduct tax from this interest than it has to deduct tax from interest on the member's own contributions. It says that such interest is merely interest on a deferred deposit payable to the employé under certain conditions and that it is precisely on the same footing as interest on the member's own contributions.

I think that there is a real difference between the two kinds of interest. In the case of his own contribution, the member lends the money (compulsorily) to the company and the company has to pay him interest for the use of it. But the company's contribution is on a different footing. At the time this contribution is credited to the member's account, the member acquires no right of property in it, and it does not become a debt to him payable at some future date. All it indicates is that provided he fulfils certain conditions the company will pay him a sum equal to that amount when he retires from the company's service. From the income-tax point of view, the company's contribution is not an allowable expense of the company year by year as it is credited to the member's account ; it is only an expense of the company when it is actually paid out to the member. For all the purposes of the Income-tax Act until it is paid out to the member, it is part of the funds of the company invested in the company's business. The company therefore has nothing to pay to the employé for the use of its contribution and what is called interest on the company's

contribution is to my mind only a further contribution from the company from its own funds under the company's Provident Fund Scheme. It is in no way different from the original contribution the interest on which it is alleged to be. Both contributions come, I think, under the head "Salaries" as defined in s. 7 of the Act.

In my opinion, the answer to the question is in the affirmative.

A. Eggar (Government Advocate) for the Crown. The Provident Fund of the company is neither recognised by the Provident Funds Act, nor by Chapter IXA of the Income-tax Act. The money contributed to the fund is not transferred to any trustees, but is utilised by the company in its business. These contributions by the company and interest thereon are in the nature of a "perquisite" and come within the definition of "salary" in s. 7 of the Act. The company should, under s. 18, deduct the income-tax payable on such salaries at source, and on failing to do so would be personally liable for the same.

It is admitted that contributions to the fund by the company are in the nature of a "perquisite," and the only dispute is whether the interest on such contributions stands on a different footing. There can be no distinction between the two.

The following cases, *Commissioner of Income-tax* v. *The Nedungadi Bank, Limited*, (1) and *Commissioner of Income-tax* v. *The Burma Corporation, Limited*, (2) show that the contributions by the employer can be deducted as "capital expenditure" for the purposes of exemption only in the year in which they are actually paid, and the contributions should have borne tax when actually paid out to the employés.

(1) I.L.R. 49 Mad. 910. (2) I.L.R. 7 Ran. 608.

1933

In re THE COMMISSIONER OF INCOME-TAX, BURMA *v.* B.B.T.C.

McDonnell for the assessee company. The importance of the question when a particular amount ought to bear taxation lies in the fact that the rate of tax varies every year. The contributions made by the company to the fund are in the nature of salary, and ought to be taxed year by year.

[PAGE, C.J. Is it an annual "payment" of salary within the meaning of ss. 7 and 18 of the Act? Is the intention of the Act to tax "potential income" or "actual income"?]

The amount whether actually received or not should be taxed year by year. Failure to do so renders it incompetent for the income-tax authorities to claim tax for any period prior to two years from the date of demand.

Smyth v. *Stretton* (1) was a case where there were no trustees, and the money was merely credited in the books of account of the school. The contributions by the governors to the masters of the school were held to be "salary" taxable year by year, though the employé might not, under certain contingencies, receive a portion of the amount.

It makes no difference whether the contributions are compulsory under an Act of Parliament, or purely voluntary. In either case, they are "salary." See *Bell* v. *Gribble* (2).

A. Eggar in reply. It is now agreed that the amount in question is "salary." The English cases cited merely say that the sums in question there were also "salaries," but did not state when they were to be taxed.

In Chapter IXA of the Act special provisions have been made in the case of provident funds which

(1) 5 Tax Cases 36. (2) 4 Tax Cases 522.

seek recognition under the Act. In such cases the contributions are deemed to be paid year by year. And where the money is actually transferred to trustees, under s. 58-E, the money so transferred is to be deemed to accrue from year to year. But the fund in question is not a recognised fund, and consequently the amount is taxable when actually paid to the employé.

PAGE, C.J.—The material facts are set out in the order of reference and need not be re-stated.

The question propounded is :

"Whether the interest paid by the company to a member of its Provident Fund on the company's own contributions to the Provident Fund account of that member is income falling under the head "Salaries" as defined in s. 7 of the Indian Income-tax Act."

The scheme of the Income-tax Act is to levy income-tax not upon potential but actual profits. As Lord Macnaghten, with a touch of his native wit, observed in *The London County Council and others* v. *The Attorney-General* (1)

"Income-tax, if I may be pardoned for saying so, is a tax on income. It is not meant to be a tax on anything else."

S. 7 of the Indian Income-tax Act (XI of 1922), so far as material, runs as follows :

"7 (1) The tax shall be payable by an assessee under the head 'Salaries' in respect of any salary or wages, any annuity, pension or gratuity, and any fees, commissions, perquisites or profits received by him in lieu of, or in addition to, any salary or wages, which are paid by or on behalf of Government, a local authority, a company, or any other public body or association, or by or on behalf of any private employer."

I have no doubt that the interest paid by the company on the contributions which the company makes to the Provident Fund is a perquisite in addition to the salary or wages of the employés of

(1) (1901) A.C. 26 at p. 35

1933

In re THE COMMISSIONER OF INCOME-TAX, BURMA v. B.B.T.C.

PAGE, C.J.

the company. It is a sum that accrues to the members of the Provident Fund because they are under a contract of service with the company, and as such it falls within the ambit of the term "Salaries" in section 7 (*1*) of the Income-tax Act. The learned advocate for the company has contended that the present case is governed by the decision of Channell J. in *Smyth* v. *Stretton* (1). In *Smyth* v. *Stretton* the scheme provided that an addition should be made to the salary of the assistant masters, and that a further sum equal to the increase of salary granted to each master should be contributed by the governing body. The additional salary although ultimately payable to the masters, was not paid to them when it was earned, but was retained by the governing body, and accumulated at compound interest for the benefit of the Provident Fund; and in like manner the sum contributed by the governing body and the interest thereon was not payable to the masters except in certain events as provided under the scheme, and if not so paid was to "remain as a credit to the fund for the purpose of enabling the governors to deal with any exceptionally special cases requiring and deserving assistance." It is to be observed that after these contributions had been made by the governing body to the Provident Fund the governing body was not in any event to withdraw them from the fund, or to treat such sums as belonging thereafter to the governing body.

The question which fell for determination in that case was whether an assistant master was entitled to deduct from his assessable income the amount of £35, which represented not only the increase in his salary that was retained by the governing body, but

(1) 5 Tax Cases 36; 90 L.T. 76.

also the sums contributed by the governing body. In respect of that portion of the sum of £35 which represented the contributions of the governing body it was contended that income-tax was not payable because the contributions of the governing body were not in fact part of the assessee's salary. Channell J. held that the sum of £35 in its entirety was salary assessable to income-tax. The provisions of the English Income-tax Act upon which that case was decided differ materially from the language in which s. 7 of the Indian Income-tax Act is couched, and, as I understand his judgment, the learned Judge based his decision in that case upon the ground that the contributions of the governing body must be deemed to be salary accruing to and received by the master in the current year of assessment, notwithstanding that in truth and in fact the additional salary represented by such contributions was not so received by the assessee and in the event might never be received by him. Channell J. stated that he regarded the case as one of difficulty, and I am bound to say with all due deference that, if the present case fell within *Smyth* v. *Stretton*, as at present advised I should not be disposed to follow that decision, which, in my opinion, is not in consonance with the general principle underlying the scheme of the Income-tax Acts, namely, that the tax is to be levied upon actual and not potential sources of income. I am of opinion, however, having regard to the terms of s. 7 (*1*) of the Indian Income-tax Act, that the answer to the question that has been referred is free from difficulty. The term "Salaries" in s. 7 is defined as "any salary or wages, any annuity, pension or gratuity, and any fees, commissions, perquisites or profits *received* by him in lieu of, or in addition to, any salary or wages, which are *paid*

1933

In re THE COMMISSIONER OF INCOME-TAX, BURMA *v.* B.B.T.C.

PAGE, C.J.

by or on behalf of Government, a local authority, a company, or any other public body or association, or by or on behalf of any private employer."

In my opinion, upon a true construction of s. 7 (*1*), unless and until the salary has been received by the employé and has been paid by the company to him, such salary is not assessable to income-tax. The construction that I am disposed to put upon s. 7 (*1*) is supported by the terms of s. 18 (*2*), which is to the following effect :

> " (2) Any person responsible for paying any income chargeable under the head ' Salaries ' shall *at the time of payment* deduct income-tax on the amount payable at the rate applicable to the estimated income of the assessee under this head."

When is the interest on the company's contributions to the Provident Fund under consideration payable to and receivable by an employé? In my opinion only when the employé's service with the company has been terminated in such circumstances that under the scheme the amount standing to the credit of the employé in the Provident Fund becomes payable to and receivable by him. Unless and until the employment of the member of the Provident Fund has been determined in the manner prescribed in that behalf under the scheme the employé has no right of property in the amount of the company's contribution standing to his credit in the fund. Further, so long as the employé has not become entitled to receive payment of the amount standing to his credit in the Provident Fund the company is empowered under the scheme " to employ the moneys of the fund in the Corporation's own business and/or to invest them in such other manner as they deem fit," and, in my opinion, until the sum representing the contributions of the company standing to the credit of the employé in the Provident Fund has been paid

by or on behalf of the company to the employé as provided in the scheme the amount of such contributions could not be deducted by the company under s. 10 (2) (ix) from the profits and gains of the company assessable to income-tax in any particular year of assessment, as being "an expenditure incurred solely for the purpose of earning such profits and gains." *The Commissioner of Income-tax, Madras* v. *The Nedungadi Bank, Limited, Calicut*, (1) and *The Commissioner of Income-tax* v. *The Burma Corporation, Limited* (2). In my opinion, upon a true construction of s. 7 (*1*) of the Indian Income-tax Act, as and when the interest on the company's own contributions to the Provident Fund is paid by the company and received by the employé, the sum so paid is "Salary" within the meaning of that term as used in s. 7 (*1*) of the Indian Income-tax Act.

I would answer the question propounded in the affirmative, with costs, ten gold mohurs.

MYA BU, J.—I agree.

BAGULEY, J.—I agree.

(1) (1926) I.L.R. 49 Mad. 910. (2) (1929) I.L.R. 7 Ran. 608.