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MA MAW
v.
MAUNG YAW
HAN.
MAUNG HLA
MYINT
v.
DOROTHY
HLA MYINT.
MA NGWE
AUNG
v.
MAUNG
KYAW HLA
AUNG.
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the records to the District Courts. But District Judges must be careful to see that the due provisions of the law are complied with in a matter which so greatly affects the status of the parties.

Upon the merits in each case the petitioner has proved a right to a dissolution of the marriage. In each case the decree for dissolution of marriage will be confirmed.

DAS, J.—I agree.

MYA BU, J.—I agree.

INCOME-TAX REFERENCE.

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

1933

Jan. 4.

IN RE THE COMMISSIONER OF INCOME-TAX, BURMA

v.

THE RANGOON ELECTRIC TRAMWAY & SUPPLY CO., LTD.*

Income-tax Act (XI of 1922), ss. 7 (1), 18—Salaries—Bonus scheme for employees—Assessee company's shares as bonuses—Shares transferred by trustees to employee on termination of service—Transfers whether "salaries"—Company's interest in the shares.

The assessee company gave annual bonuses to their employees in the shape of the company's shares purchased in the joint names of the managing agents of the company and the employee on whose behalf they were purchased. Dividends on the shares were paid to the employees as they arose. On the termination of an employee's engagement with the company, the managing agents as trustees transferred his shares to the employee. The Commissioner of Income-tax claimed that this transfer was a payment of "salaries" within the meaning of s. 7 (1) of the Indian Income-tax Act, the tax on which the company was bound to deduct and pay over to the Income-tax Office under s. 18 of the Act.

Held, that such a transfer of shares by the trustees to an employee was not a payment of "salaries" within s. 7 (1) of the Act. The effect of the company's scheme was that after the shares had been transferred into the joint names of the managing agents and an employee as trustees for the employee the company did not possess any legal or beneficial interest in the shares.

* Civil Reference No. 17 of 1932.

McDonnell for the assessee company. The assessee company paid annually bonus shares to its employees, which were purchased in the joint names of some of the directors of the company and the employee concerned. The shares were payable to the employee on the termination of his engagement. The moment these shares were transferred to the joint names of the "trustees" and the employee concerned, the company ceased to have any control over them. These shares cannot therefore be described as "salary" within the meaning of s. 7 of the Income-tax Act, because they were not paid "by or on behalf of the company" on the termination of the employee's services. The Commissioner of Income-tax has proceeded on the line that the whole transaction is only a colourable device by the company to hold its own shares. In the circumstances no tax is payable on these shares when they are transferred to the employee.

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A. Eggar (Government Advocate) for the Crown. S. 18 (2) of the Income-tax Act states that the person responsible for the payment of any "salary" shall, at the time of payment, deduct any income-tax due. No income-tax was deducted by the company when the shares were transferred to the employees annually and so the company has now been called upon to pay the amount.

The Act does not intend that a mere technical transfer to an intermediary before payment to the employee removes the salaries so paid from the operation of the Act. Further there is nothing in the Act to show that "payment" by the employer must be contemporaneous with "receipt" by the employee. The amount may pass through half a dozen hands before reaching the assessee, but none the less it will be taxable.

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These bonus shares are in the nature of a "perquisite" and, reading ss. 7 and 18 together, they are taxable as "salary."

McDonnell in reply. A share cannot be "paid" within the meaning of s. 18 (2). Even if it can be so held, the amount ought to have been assessed years ago at the time of the first transfer; s. 46 (7) operates as a bar to the recovery of any tax now.

PAGE, C.J.—The question propounded is whether on the facts of this case the transfer to the company's employees on the termination of their employment with the company of shares representing bonuses is a payment to them falling under the head "Salaries" as defined in s. 7 of the Income-tax Act.

S. 7 (1) runs as follows :

"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."

What are the facts of the case?

On the 20th of March 1918 the Rangoon Electric Tramway & Supply Co., Ltd., passed the following resolution :

"In consideration of the general rise in salaries, and with the view of stimulating the employees' interest in the company, the Managing Director proposes that an annual bonus be granted upon the salaries of all employees who are members of the Provident Fund. The bonus to be payable in the ordinary shares of the company, and to be calculated at the same rate as the dividend declared on the ordinary shares in each year. The shares so

granted as bonus to become the absolute property of the employee at the termination of his engagement with the company whenever that may happen."

Now, the scheme set out in the above minute of the company's proceedings on the 20th of March 1918 was carried out in the following manner, as set out in the reference :

"In accordance with the scheme each year a bonus equal to that proportion of his salary represented by the dividend for the year on the company's shares is set aside for every member of the company's Provident Fund. With this bonus shares in the company are purchased, and any balance insufficient for the purchase of a share is paid to the employee in cash. The shares when purchased are transferred into the joint names of the company's managing agents and the employee on whose behalf they were purchased. Dividends on the shares are paid to the employees as they arise."

It is common ground that if the amount of the bonus had been paid in cash year by year by the company to the employee such a bonus would fall within the head "Salaries" in s. 7 (1) of the Income-tax Act. And it must be borne in mind that on the present reference the question does not arise whether the payment to the trustees for the benefit of the employee of the money with which the shares were purchased was a payment of salary within s. 7 (1) of the Income-tax Act; and we refrain from expressing any opinion on this question. We are concerned in the case now under consideration with another and different transaction, namely, the transfer by the trustees to the employees of the shares standing to their credit in the names of the trustees. The question that falls for determination is; was the transfer of the shares by the trustees to the employee at the termination of his employment perquisites or profits received by the employee in addition to his salary or wages and paid by

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or on behalf of the company? In our opinion the transfer of the shares in such circumstances is not a payment of "salary" within s. 7 (1) of the Act. We are of opinion that the effect of the scheme is that after the shares have been transferred into the joint names of the managing agents and the employee as trustees for the employee the company did not possess any legal or beneficial interest in the shares; it possessed no legal interest in the shares because the legal estate passed to the trustees on the registration of the transfer, and it possessed no beneficial interest in the shares because after the transfer to the trustees the shares thereafter were held by the trustees for the employee as the person entitled to the beneficial interest therein. When the trustees at the termination of his employment transferred to the employee the legal estate in the shares of which he already possessed the beneficial interest, in our opinion it cannot be maintained that the transfer of the shares amounted to the receipt by the employee of a perquisite or profit in addition to his salary paid by or on behalf of the company, because at the time when the transfer by the trustees to the employee was made the company had neither a legal nor a beneficial interest in the shares. Test it in this way. Had the company any right to compel the trustees to refrain from transferring the shares to the employee at the termination of his engagement? Clearly not, because they had no interest in the shares. Could an employee compel the company at the termination of his engagement to transfer the shares to him? Clearly not, because under the scheme the company did not retain any interest in the shares or in the money provided for purchasing them and was incapable of causing a transfer to be made.

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

We make no order as to costs.

DAS, J.—I agree.

MYA BU, J.—I agree.

INCOME-TAX REFERENCE.

*Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Baguley and
Mr. Justice Mackney.*

IN RE THE COMMISSIONER OF INCOME-TAX, BURMA

1933
Jan 10.

v.

A.A.R. CHETTYAR FIRM.*

*Income-tax Act (XI of 1922), s. 28—Assessment under s. 23 (4)—Imposition of
penalty—Assessee's evidence of his real income to oppose or reduce penalty—
Admissibility.*

The assessee declared a certain income for the 1930-31 assessment. The Income-tax Officer held that the assessee had concealed the particulars of their income, and made an assessment under s. 23 (4) of the Income-tax Act. The validity of the assessment was not challenged. The Income-tax Officer then imposed on the assessee, under s. 28, the maximum penalty, which was the difference between the tax on the income declared by the assessee and the tax on the income assessed. The assessee objected to the penalty, and desired to adduce evidence as to their actual income in the penalty proceedings; but the Income-tax Officer refused to allow them to do so.

Held, that in an enquiry whether a penalty ought to be imposed under s. 28, and if so to what extent, an assessee is entitled to be heard, and evidence adduced by him purporting to disclose his real income is relevant and admissible, not for the purpose of varying or affecting the assessment made for the purpose of imposing the tax under the Act, but in order to show either that no penalty ought to be imposed, or that the amount of the penalty ought to be less than the maximum prescribed under s. 28.

Young for the assessee. The penalty sought to be imposed under s. 28 of the Income-tax Act must be the result of a judicial determination. If "in the course of any proceedings under this Act," the Income-tax

* Civil Reference No. 12 of 1932.