that the sentence is but another way of saying that the loan made by the Nizam was an isolated transaction. It is a comment on the absence of one of the conditions which one would ordinarily expect to find in a case where there was a business connexion. The sentence in my opinion does not imply either that it was a necessary condition or that it was the sole determining condition.

INCOME-TAX REFERENCE.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, Mr. Justice Leach, and Mr. Justice Mackney.

1937

Apl.2.

THE COMMISSIONER OF INCOME-TAX, BURMA

v.

A.S.A. CONCERN.*

Income-tax—Object of Income-tax Act—Money-lender's income—Capital sent abroad—Capital received in Burma with interest earned—Loss on exchange—Loss an expenditure—Tax on interest earned—Income-tax Act (XI of 1922), ss. 4 (2), 10 (2) (ix).

The object of the Income-tax Act is to tax "income" which connotes a periodical monetary return "coming in" with some sort of regularity or expected regularity from definite sources. The taxable income of a money lender is interest received from loans made by him, but until he actually receives the interest it is not taxable.

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

Where the money-lender sends his capital abroad for investment and receives it back together with the interest earned, the rate of exchange is an important factor and must be taken into consideration in estimating the profits. Loss on exchange must be allowed as an expenditure incurred solely for the purpose of earning profit within the meaning of s. 10 (2) (ix) of the Act, and cannot be treated as a loss of capital.

Punjab National Bank, Ltd. v. *The Crown*, I.L.R. 7 Lah. 227; *Reid's Brewery Co., Ltd.* v. *Male*, (1891) 2 Q.B.D. 1; *S.P.S. Ramaswami Chettiar* v. *Commissioner of Income-tax, Madras*, I.L.R. 53 Mad. 904, referred to.

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* Civil Reference No. 10 of 1936.

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Clark for the assessee. The assessee invested some of her monies in Saigon, and in 1933 she decided to recall her investments. In order to determine the profits that she has made from the Saigon transactions it is necessary to have regard to the rate of exchange that prevailed at the time she decided to recall her monies. The sum which is taxable as income is the amount of profit which is actually received in British India [s. 4 (*2*)], and not the profits made by the assessee at Saigon which were never actually received in British India. The Income-tax Act is an Act to tax income ; *Commissioner of Income-tax, Bengal* v. *Shaw, Wallace & Co.* (1) ; and it is the resultant actual gain or loss that is taxed and not any notional figure.

The investment of monies in Saigon is part of the business of the assessee, and any loss incurred by her by reason of a fall in exchange should be allowed to be set off against the taxable profits, because such loss is an expenditure necessary for the purpose of earning the profit. The assessee is not a dealer in exchange. There is a distinction between a person who deals in exchange and a person in whose business exchange is an important factor for consideration. *McKinlay* (*H.M. Inspector of Taxes*) v. *H. T. Jenkins & Son* (2) ; *Reid's Brewery Co., Ltd.* v. *Male* (3) ; *Board of Revenue, Madras* v. *R.M.A.R.R.M. Chettiar* (4).

Admittedly no capital expenditure would be deductible under s. 10 of the Act. *Punjab National Bank* v. *The Crown* (5) ; but the case of a money lender whose stock-in-trade is money which is lent out and recovered is different. If the loss was incurred *in connection with the business* it must be allowed to be set off. *S.P.S. Ramaswami Chettiar* v. *Commissioner*

(1) I.L.R. 49 Cal. 1343.
(2) 10 T.C. 372.
(3) (1891) 2 Q.B.D. 1.
(4) I.L.R 47 Mad. 197.
(5) I.L.R. 7 Lah. 227

of Income-tax, Madras (1)—a case of theft of assessee's monies by outsiders. The test is whether the loss can be said to be an expenditure necessary for the purpose of earning the profit. *Lachhmi Narain* v. *Commissioner of Income-tax* (2).

Lambert (Assistant Government Advocate) for the Crown. The evidence shows that the assessee does not carry on a regular business of money-lending in Saigon. She left her money in Saigon for nearly six years, and it was brought back because some decrees had to be satisfied. The loss on exchange, in the circumstances, was a loss of capital and not a loss which can be set off under s. 10 (2) (ix). The assessee did not recall all her investments from Saigon, and the Income-tax authorities were therefore correct in the estimation of the taxable profit.

LEACH, J.—This is a reference by the Commissioner of Income-tax, Burma, under the provisions of section 66 (2) of the Indian Income-tax Act, 1922. The assessee carries on a money lending business at Bassein under the *vilasam* of A.S.A. In 1925 the assessee remitted to her agent in Saigon three sums of money aggregating Rs. 1,30,737-15-0 to enable the agent to lend out these moneys at interest in Saigon. In other words, she wanted to do through her agent in Saigon a similar business to the business which she was doing at Bassein. The moneys, of course, were received by the agent in Saigon in dollars. The agent obeyed these instructions and the loans made by him on behalf of the assessee earned in interest $25,813 before the beginning of the financial year 1929-30 and in the three financial years, 1929-30, 1930-31 and 1931-32 they earned $21,988. In 1931 the assessee decided

(1) I.L.R. 53 Mad. 904. (2) I.L.R. 16 Lah. 494.

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to bring back most of her money from Saigon and in accordance with her instructions her agent remitted $1,25,000, which, when received in Bassein in rupees, amounted to Rs. 1,32,375. Only $5,500 remained in the hands of the Saigon agent.

When the Income-tax Officer came to assess the assessee for the year 1932-33, he discovered that the sum of $21,988 had been earned in interest on the Saigon loans during the three years I have mentioned, and he decided that the assessee should pay income-tax on this amount. The rupee equivalent of the $21,988 is Rs. 23,252. His decision was based on the presumption that profits are remitted before capital and that the sum of Rs. 1,32,375 received by the assessee in 1931 from her Saigon agent included this amount. The assessee contended, however, that the total profits received from Saigon amounted only to Rs. 1,637, (Rs. 1,32,375 less Rs. 1,30,738). This was the result of the rate of exchange being against her when the Saigon agent remitted the money to Rangoon. The assessee appealed to the Assistant Commissioner against the decision of the Income-tax Officer but her appeal was disallowed. She accordingly required the Commissioner of Income-tax to refer the matter to this Court, which he has done, framing the question as follows :— " Whether on the facts of this case the whole sum of Rs. 23,252 is taxable under section 4 (*2*) or whether it should be reduced by the loss in exchange ? "

Under section 4 (*2*) of the Act, profits and gains of a business accruing or arising without British India to a person resident in British India shall, if they are received in or brought into British India, be deemed to have accrued or arisen in British India and to be the profits and gains of the year in which they are so received or brought, notwithstanding the fact that they did not accrue or arise in that year,

provided that they are received or brought in within three years of the end of the year in which they accrued or arose. Therefore, the assessee is clearly liable to be taxed on the profits made in Saigon and brought into this country. But it is equally clear that the profits brought in did not amount to Rs. 23,252 as the Income-tax authorities would have, but only to Rs. 1,637.

The Judicial Committee of the Privy Council pointed out in the case of *Commissioner of Income-tax, Bengal* v. *Shaw, Wallace and Company* (1) that the object of the Act is to tax "income" which here connotes a periodical monetary return "coming in" with some sort of regularity or expected regularity from definite sources. The taxable income of the assessee is interest received from loans made by her, but until she actually receives the interest it is not taxable. When she sent the money to Saigon to be utilized there in the course of her business she had of necessity to change the rupees into dollars and when she wished to bring back the money she had to change the dollars into rupees. The rate of exchange was an important factor. An adverse exchange meant less profit to her; a favourable exchange meant more profit. It is impossible to make a true estimate of the assessee's profits on the Saigon business without taking into consideration what she lost or gained on the rate of exchange. Moreover, section 10 (2) (ix) of the Act provides that in computing profits allowance may be made for any expenditure (not in the nature of capital expenditure) incurred solely for the purpose of earning such profit. The conversion of rupees into dollars and dollars back again into rupees was necessary to enable the assessee to earn profits in Saigon and to be put in possession of those profits.

(1) (1932) I.L.R. 59 Cal. 1343.

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Then it must be remembered that a money lender's stock in trade consists of the money which he has for the purpose of carrying on his business—*Punjab National Bank, Limited* v. *The Crown* (1); *S.P.S. Ramaswami Chettiar* v. *The Commissioner of Income-tax, Madras* (2). When a money lender makes a bad debt in the course of his business that loss is allowed as a deduction for income-tax purposes—*Reid's Brewery Company, Limited* v. *Male* (3). In these circumstances the loss on exchange cannot be classified as a loss of capital. The Income-tax Officer started off with a presumption which he was not entitled to draw in face of the facts, and as his presumption goes so must his assessment.

The answer to the question referred is that the whole of the sum of Rs. 23,252 is not taxable under section 4 (2) and must be reduced by the loss on exchange. The assessee is entitled to the costs of this reference which we fix at 15 gold mohurs. She is also entitled to the return of the Rs. 100, the deposit made in connection with the reference.

ROBERTS, C.J.—I agree.

MACKNEY, J.—I agree.

(1) (1926) I.L.R. 7 Lah. 227. (2) (1930) I.L.R. 53 Mad. 904.
(3) (1891) 2 Q.B.D. 1.