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British India and chargeable to income-tax as such, and I would therefore answer the question propounded in the affirmative.

LEACH, J.—I agree.

MACKNEY, J.—I agree.

INCOME-TAX REFERENCE

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

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THE COMMISSIONER OF INCOME-TAX, BURMA

v.

P.V.R.M. VISALAKSHI ACHI.*

Income-tax—Money lender residing and carrying on business outside British India—Isolated loans to persons in British India—"Business connection"—Income-tax Act (XI of 1922), s. 42 (1)—Reference by Commissioner—Right to begin.

A person residing and carrying on money-lending business in a Native State and making single loans to three or four persons residing or carrying on business in British India only once in the course of the assessment year cannot be said to have a business connection in British India within the meaning of s. 42 (1) of the Income-tax Act. The mere fact that a business transaction like a loan takes place between two parties does not mean that a business connection has also been established between them. Business connection means an adventure or concern in the nature of trade, commerce or manufacture with which a person is connected, and isolated loan transactions entered into outside British India do not come within the purview of the section.

The Commissioner of Income-tax, Bombay v. Currimbhoy Ebrahim & Sons, I.L.R. 60 Bom. 172, followed.

Commissioner of Income-tax, Bombay v. Bombay Trust Corporation, I.L.R. 52 Bom. 702; I.L.R. 54 Bom. 216, distinguished.

When at the instance of the assessee the Commissioner of Income-tax refers a question of law to the High Court under s. 66 (2) of the Act, the assessee has normally the right to begin. Only in special circumstances, the Commissioner may be heard first.

* Civil Reference No. 9 of 1936.

Board of Revenue, Madras v. Ramanadham Chetty, I.L.R. 43 Mad. 75; *Re John & Co.*, I.L.R. 43 All. 139; *Killing Valley Tea Co. v. Secretary of State for India*, I.L.R. 43 Cal. 139, referred to.

Clark for the assessee. The items in Schedule B are not assessable to British Indian income tax. They represent profits from loans made outside British India, and such profits cannot be said to have accrued or arisen in British India. The only question is whether these profits can be "deemed to have accrued or arisen" in British India within the meaning of s. 42 (1) of the Income-tax Act. To make that sub-section applicable it must be shown (1) that the person sought to be assessed resides outside British India, (2) that he has a business connection in British India and (3) that the profits arose or accrued to him through such business connection.

In this case, the assessee had no business connection in British India so far as these loans are concerned. She only made two or three loans to different persons and this cannot constitute a "business connection" with each borrower. The Act uses the term "business connection" advisedly, in order to distinguish it from "business relation" or "business transaction." A man may have several dealings with a single person, but the circumstances may be such that even then there is no business connection between the two. Moreover s. 42 (1) makes the agent responsible as assessee.

The Commissioner of Income-tax v. Currimbhoy Ebrahim & Sons (1) would govern the decision in this case. The transactions were isolated ones and it was held that such transactions cannot establish a business connection. See also *The Commissioner of Income-tax v. Bombay Trust Corporation* (2); *Rogers*

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(1) I.L.R. 60 Bom. 702.

(2) I.L.R. 52 Bom. 702; I.L.R. 54 Bom. 216.

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Pyatt Shellac Co. v. Secretary of State for India (1); and *Commissioner of Income-tax v. Remington Typewriter Co.* (2).

Lambert (Assistant Government Advocate) for the Crown. Annexure "C" to the order of reference shows that the assessee carries on a regular business of lending money to persons in British India. S. 42 (1) of the Act is a charging section and is not merely a machinery section, and the words "shall be deemed to accrue or arise" are very significant. The section is not confined to cases where an agent of the non-resident principal carries on business in British India on behalf of the non-resident principal. It has a wider application. *The Commissioner of Income-tax v. Messrs. Steel Bros.* (3). See also *The Oriental Investment Corporation, Ltd. v. The Commissioner of Income-tax, Bombay* (4); *MacLaine & Co. v. Eccott* (5); *E. & P. Gavazzi v. H.M. Inspector of Taxes* (6).

ROBERTS, C.J.—This is a reference made by the Commissioner of Income Tax to the High Court under section 66 (2) of the Indian Income Tax Act, 1922, for the determination of a question of law.

The Assessee P.V.R.M. Visalakshi Achi resides in Royavaram, Pudukotta State, outside British India and carries on the business of a money lender.

First she carries on this business in Pudukotta and she lends money to persons in Burma. Some of these loans took place in Burma and accordingly the profits arising from them were assessed to income tax under section 4 (1) of the Act. These items are enumerated in Schedule A and they do not form the subject matter of any existing dispute.

(1) I.L.R. 52 Cal. 1.

(2) 58 I.A. 42.

(3) I.L.R. 3 Ran. 614.

(4) 7 I.T.C. 211.

(5) 10 T.C. 481, 582.

(6) 10 T.C. 698.

Secondly other loans have been made by the assessee outside British India altogether, three to residents in British India and one to a non-resident who nevertheless has a business in British India and has used the loan in question in that business. The profits arising from these loans were assessed under section 42 (1) of the Act and the items are enumerated in Schedule B. The assessee contended that section 42 (1) did not apply.

Section 42 (1) of the Act runs as follows :

“In the case of any person residing out of British India, all profits or gains accruing or arising to such person, whether directly or indirectly, through or from any business connection or property in British India shall be deemed to be income accruing or arising within British India and shall be chargeable to income tax in the name of the agent of any such person, and such agent shall be deemed to be for all the purposes of this Act, the assessee in respect of such income tax.”

It is admitted that the respondent resides in Pudukotta. The sole question is whether the items in Schedule B must be deemed to be income accruing or arising within British India : for that purpose it is necessary to see whether they accrue or arise, directly or indirectly through or from any business connection or property in British India. The question propounded is :

Whether there was any material before the Income Tax Officer upon which he could find that the sum of Rs. 2,048-6-0 or any part of it accrued or arose to the assessee, whether directly or indirectly, through or from a business connection in British India and as such was assessable to income tax for the year 1934-5 under section 42 (1) of the Act ?

In addition to her own money lending business in Pudukotta the respondent was also a partner in the P.V. Bogale money lending firm at Pyapôn in Burma. There is no evidence whatever that the loans made to

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the persons mentioned in Schedule B were effected through or from the business connection which the assessee had as a partner in the P.V. Bogale firm. Arising from her business connection as a partner in the P.V. Bogale firm the respondent might lend money outside British India to persons residing in British India or for use in their businesses in British India, and if there were evidence that she did so, she would clearly be liable to assessment for income tax purposes on the profits of such loans. But it is not contended here that the loans had anything to do with the business connection which the respondent had with the P.V. Bogale firm even in an indirect manner. The persons who borrowed from her outside British India are not shown to have done so because she was a partner in the P.V. Bogale firm.

Apart from the P.V. Bogale firm did the respondent have any business connection in British India from which the profits on these loans accrued or arose? The answer to this question must depend on the interpretation of the phrase "business connection" in section 42 (1) of the Act.

Now it is clear that there must be a business in British India from which the business connection arises, and the Commissioner's case is that the respondent carried on a money lending business and lent money to many persons in Burma then a part of British India, and that from this business the business connection arose. It is contended that when a person carries on the business of lending money each loan emanates from a business connection with the borrower. If this contention is right then the words "business transaction" might aptly have been used in the Act. But the mere fact of a business transaction having taken place between two parties does not, to my mind, show that a business connection has also been established between them.

In the *Commissioner of Income Tax v. Bombay Trust Corporation* (1), the Hongkong Trust Corporation lent deposits to the Bombay Company amounting to over 15 crores annually, this was about 16 times the paid up capital of the Bombay Company ; there appears to have been no security and it was held on a review of the facts that a business connection had been established. On the other hand in *The Commissioner of Income Tax v. Currimbhoy Ebrahim and Sons* (2), their Lordships of the Privy Council held that where the Nizam of Hyderabad (residing out of British India) in an isolated transaction lent money to the respondents in Bombay no business connection within the meaning of section 42 (1) had been established. The Nizam was not carrying on the business of a money lender in British India or in Hyderabad, and thus there was no business from which a business connection might arise. In the present case the respondent was carrying on the business of a money lender and the question is whether a business connection arose from it. There is nothing in the Letter of Reference to show that these loans were other than isolated transactions between the parties. True there may have been many loan transactions between persons in Burma and the respondent, but there is no evidence of a course of dealing between the respondent and these particular borrowers (using the words of Sir George Rankin at page 180) "Such as might fairly be described as a business connection previously subsisting between them." Sir George Rankin remarked that the mere fact that Messrs. Currimbhoy Ebrahim and Sons used the loan from the Nizam in connection with their own business did not bring the Nizam any nearer to being a person who had a business connection in British India. It was not shown that he

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(1) (1928) I.L.R. 52 Bom. 702 ; (1929) I.L.R. 54 Bom. 216.

(2) (1935) I.L.R. 60 Bom. 172.

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had any interest direct or indirect with the respondent company. Similar observations might be applied to the present case.

It is contended that in Annexure C to the Letter of Reference it is shown that the Assistant Commissioner of Income Tax found as a fact that "appellant makes contracts with these Chettyar firms to finance them" and that that shows she has a business connection with them. In one sense anyone who lends money to another is financing that other person, but I cannot find that such a series of loans were advanced, or that the interest taken by the lender in the borrower's business was such, as to constitute a course of dealing amounting to a business connection with the firms enumerated in Schedule B.

The other authorities cited to us, *Oriental Investment Corporation, Limited, Bombay v. Commissioner of Income Tax* (1) and *Income Tax Commissioner v. Remington Typewriter Company, Bombay* (2), are very different from the present case, among the distinguishing features being in the first case the amount of the loan and the fact that it remained outstanding, and in the second the mutual interest of the two typewriter companies concerned. I would answer the question propounded in the negative.

There remains one other matter. Mr. Clark for the respondents claimed the right to be heard first. When an assessee is aggrieved the Commissioner is bound to refer the question in dispute to the High Court for determination and I am of the opinion that the practice laid down in *Board of Revenue of Madras v. Ramadhan Chetty* (3), should be followed and that the assessee should normally be heard first. I do not say that circumstances might never arise in which it might

(1) 7 I.T.C. 211.

(2) (1930) 58 I.A. 42.

(3) (1919) I.L.R. 43 Mad. 75.

be desirable to hear the Commissioner of Income Tax first, but the Madras practice is in conformity with that of the Calcutta and Allahabad High Courts [see *Killing Valley Tea Company v. Secretary of State for India* (1), *Re John & Co.* (2)] and good reason should be shown before any departure is made from it.

The Commissioner of Income Tax must pay the costs of this reference, 20 gold mohurs and in addition the Rs. 100 deposited under section 66 (2) should be refunded to the Assessee.

LEACH, J.—I agree that the question propounded must be answered in the negative. There is no evidence that the profits which the income-tax authorities seek to tax have arisen from any business connection in British India. On the facts stated in the reference the loans can only be treated as isolated transactions entered into outside British India. I also agree with the remarks of the learned Chief Justice with regard to the right to begin.

MACKNEY, J.—I agree. The reference has been worded in rather a curious manner; for evidently the point upon which our opinion is desired is whether the Income-tax Officer in applying his mind to the facts of the case has employed an interpretation, correct in law, to sub-section (1) of section 42 of the Indian Income-tax Act.

With regard to sub-section (1) of section 42 of the Indian Income-tax Act, it appears to me that the expression "business connexion" is a composite expression. Its meaning can best be ascertained on a consideration of its context: "all profits or gains accruing or arising, whether directly or indirectly, through or from any business connexion * * * * * in

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(1) (1915) I.L.R. 43 Cal. 161.

(2) (1920) I.L.R. 43 All. 139.

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British India." Profits must arise through or from business dealings: they can be ascertained only by looking at the profit arising through or from such dealings. "Profit" in the general sense may arise through or from a "business connexion", (taking that phrase in the special sense of "existence of a regular clientele") where the existence of such regular clientele brings fresh business, but clearly the actual profits or gains which it might be possible to tax arise through or from the fresh business itself. Inasmuch therefore as in this section the reference is to actual profits or gains, the expression "business connexion" must denote something which produces profits or gains, and not a mere state or condition which is favourable to the making of profit.

Again if the word "business" only qualifies the word "connexion" by describing the *sort* of connexion (taking the word in the sense of "a being connected") we meet with the same difficulty in the phrase "profits arising through or from" such connexion, *i.e.* profits do *not* arise through or from the fact of connexion.

The word "business" must therefore have the significance indicated in section 2 (4) of the Act and denote an adventure or concern in the nature of trade, commerce or manufacture: and the word "connexion" must be used in the sense of "that with which one is connected" so that in order to make clear the meaning of the expression "any business connexion" we may expand it thus—"any adventure or concern in the nature of trade, commerce or manufacture being a business with which he (that is the person residing out of British India) is connected."

That there must be some "adventure or concern" is clear from the fact that under sub-section (1) the person residing out of British India is chargeable to income-tax in the name of the agent of any such

person. Section 43 of the Act explains the use of the word "agent":

"Any person employed by or on behalf of a person residing out of British India, or having any business connection with such person, or through whom such person is in the receipt of any income, profits or gains upon whom the Income-tax Officer has caused a notice to be served of his intention of treating him as the agent of the non-resident person shall, for all the purposes of this Act, be deemed to be such agent :

Provided that no person shall be deemed to be the agent of a non-resident person, unless he has had an opportunity of being heard by the Income-tax Officer as to his liability."

"Having any business connexion with such person" must be interpreted consistently with what has been said in the foregoing and must mean "conducting a business being a business with which such person is connected." And "through whom such person is in the receipt of any income" does not mean "from" whom: that is, a person paying interest to a person out of British India on a loan taken by him from that person is not one *through* whom income is received but one *from* whom income is received and he cannot be deemed to be an agent of that person.

Now P.V.R.M. Visalakshi Achi referred to as the assessee has no agent nor any seat of business in British India. She is a partner in a money-lending firm in Burma known as P.V. Bogale, but the loans in question have nothing to do with that firm. She also carries on a money-lending business in Royavaram which is out of British India. The loans in question (shown in Schedule B) were made at Royavaram in the course of that business. Many of the loans shown in Schedule A were also made in Burma in the course of the same business to persons in Burma. There is no business in Burma of which these loans were the acts. The series of loans does not constitute a business (as

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defined) in Burma : it is no more than a section of the business dealings of the business in Royavaram. Nor could a series of her own business dealings be reasonably described as a "business with which she is connected."

Is there any evidence of any business connexion between the assessee and the individuals to whom the loans were made? There is none. The Assistant Commissioner of Income-tax, it is true, in his appellate order (see Annexure C to the Commissioner's reference) says "Appellant makes contracts with the proprietors of these Chettyar concerns and finances them." If this were a fact of course the case would be entirely different : but the Commissioner makes no reference to this statement and it is apparent that the Assistant Commissioner is using the word "finance" merely in the sense of "lending money." The mere lending of money, purely as a loan, to a person in business does not establish a business connexion with the person : the business of the borrower does not thereby necessarily become connected with the lender. He is indifferent to it—unless indeed his money is jeopardized, in which case he may take steps to become connected with the business.

The view here set out appears to me to be consistent with all the decisions to which our attention was directed. As regards the passage in *The Commissioner of Income-tax, Bombay v. Currimbhoy Ebrahim and Sons, Ltd.* (1) on which the Commissioner of Income-tax has relied so strongly, ("There is no proof that the Nizam is carrying on business of money lending either in Hyderabad or British India."), I do not think it bears the interpretation which it is sought to fasten upon it. Looking at the context it is clear

(1) (1935) I.L.R. 60 Bom. 172, 181.

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.

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*Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, Mr. Justice Leach,
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THE COMMISSIONER OF INCOME-TAX, BURMA

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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 on 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 Cheltiar v. Commissioner of Income-tax, Madras, I.L.R. 53 Mad. 904, referred to.

* Civil Reference No. 10 of 1936.