INCOME-TAX ACT REFERENCE.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, Mr. Justice Mya Bu, and Mr. Justice Dunkley.

1938
Feb. 3.

IN RE THE COMMISSIONER OF INCOME-TAX, BURMA

v.

N.S.A.R. CONCERN.*

Income-tax—Business comprising agricultural income and other income—expenditure in earning agricultural income—Claim to deduct such expenditure from taxable income—Agricultural income—Business—Profits or gains of business—Burma Income-tax Act, ss. 2 (1) (a), 4 (1) and (3) (viii), 6, 10 (1) and (2) (ix).

Where the business of an assessee comprises both agricultural income, as defined in the Income-tax Act, and other taxable income, the assessee is not entitled, under s. 10 (2) (ix) of the Act, to deduct from such other income the expenditure incurred for the purpose of earning the agricultural income.

The effect of the saving words in ss. 4 (*1*) and 6 of the Act is to exclude agricultural income altogether from the scope of the Act. "Business", as defined in s. 6 (iv), does not include the business of leasing agricultural land and receiving the rents, and the expression "profits or gains of any business" as used in s. 10 (*1*) does not include "agricultural income." Hence, the expression "such profits or gains" in clause (ix) of s. 10 (2) does not include "agricultural income."

Commissioner of Income-tax, Bihar and Orissa v. *Maharajadhiraj of Darbhanga*, I.L.R. 14 Pat. 623, followed.

M.T.T.K.M.M.S.M.A.R. Chettyar v. *Commissioner of Income-tax, Madras*, 2 I.T.C. 505; *Provident Investment Co. Ltd.* v. *Commissioner of Income-tax, Bombay*, 6 I.T.C. 21, referred to.

S.A.S.S. Chettiar v. *Commissioner of Income-tax, Madras*, I.L.R. [1937] Mad. 734, considered.

Hughes v. *Bank of New Zealand*, [1936] 3 All. E.R. 975, distinguished.

Clark for the assessee. The assessee, a Chettyar money-lender has been obliged to take up lands in satisfaction of debts due to him by his debtors, and in maintaining such lands he has to spend money. He is not a cultivator, but a money-lender, and the lands represent, so to say, his present capital. The assessee should therefore be allowed to deduct all expenditure incurred in earning the profits of his business, no

* Civil Reference No. 12 of 1937.

matter whether the income from part of his capital is taxable under the Income-tax Act or not. The Income-tax authorities erred in not allowing the assessee the benefit of s. 10 (2) (ix) of the Act. *S.A.S.S. Chellappa Chettiar* v. *Commissioner of Income-tax, Madras* (1); *Hughes* v. *Bank of New Zealand* (2).

[DUNKLEY, J. The English case stands on a different footing. It is a case where the tax would have been payable on the security but for the fact that it was made tax-free. In England no class of income is outside the scope of the Act, but in Burma the Income-tax Act is framed on different lines.]

The English case affords strong support to the contention that the expenditure claimed in this case is deductible, because both agricultural income and other income are taxed, though in different ways. Land revenue is collected from agricultural lands, and this is the reason for the exemption. When, in England, an expenditure incurred in earning a tax-free income is allowed to be deducted, *a fortiori*, in Burma, expenditure incurred in earning profits, which though not taxable under the Income-tax Act are still taxable in another form, should be allowed to be deducted.

One should not read s. 10 as though it only referred to "taxable" profits, and gains. There is no justification for reading into an enactment words which are not there. The term "profits or gains" is not a term of art, and does not merely refer to taxable profits or gains. Sections 10 and 12 stand on different footings, and the Income-tax authorities were in error in disallowing an expenditure merely because the income in respect of that item is not taxable under the Act. If the Court were to read the word "taxable" before "profits or gains" in s. 10, the Court would be doing violence to

(1) I.L.R. [1937] Mad. 734, 743. (2) (1936) 3 All. E.R. 975.

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the plain provisions of s. 12 (*2*) where special provision is made for deductions which would otherwise be useless.

This is not a case where an assessee carries on two different businesses in which appropriations to each head of business could easily be made.

Sir Arthur Eggar (Advocate-General) for the Crown. The word "taxable" is inherent in s. 10 (*2*) (ix). There is no need to put that word in because the meaning is obvious. The origin of the exemption of agricultural income lies hidden in the permanent settlement, and it is not correct to say that the exemption is merely due to the fact that land revenue is paid in respect of lands. See s. 9 (*1*) (v) which gives express exemptions in respect of land revenue paid for property.

The exemption of agricultural income is not akin to any system of exemption in English law. *Hughes* case (1) would fall into line with s. 8 proviso (*2*), but is not relevant for the purposes of this case.

The case of *Commissioner of Income-tax, Bihar and Orissa* v. *Maharajadhiraj of Darbhanga* (2) can be summarized by saying that a money-lender can be an agriculturist. It has no further effect in this case. The exemption goes with the income, regardless of the person into whose hands it may fall. Agricultural income is outside the scope of the Act, and is put outside the machinery of the Act altogether.

It would be absurd to say that a Chettyar money-lender can set off an item of expenditure incurred in respect of a non-taxable head towards income which is taxable under the Act. In Civil Ref. 1 of 1928 the converse case of setting off agricultural losses against taxable profits was raised, but the reference was

(1) (1936) 3 All. E.R. 975. (2) I.L.R. 14 Pat. 623.

withdrawn. The heading to Chapter III uses the words "taxable income" and obviously that is what is meant. See *M.T.T.K.M.M.S.M.A.R. Chettyar* v. *Commissioner of Income-tax, Madras* (1); *Sachindra* v. *Commissioner of Income-tax, Bihar and Orissa* (2); *The Provident Insurance Company* v. *Commissioner of Income-tax, Bombay* (3).

Clark in reply. The *M.T.T.K.M.M.S.M.A.R.* case is in favour of the assessee. That was not a case of one business. The case of *Sachindra* v. *Commissioner of Income-tax* is not apposite because it was a case under s. 12, and ss. 10 and 12 stand on different footings. The *Provident Insurance Company*'s case is distinguishable because it dealt with a case outside British India.

DUNKLEY, J.—In this reference, under the provisions of section 66 (2) of the Burma Income Tax Act, the question referred for our decision by the Commissioner of Income Tax, Burma, is as follows :

"The assessee having a business which comprises both agricultural and other receipts, is he entitled under section 10 (2) (ix) of the Act to deduction of all expenditure (including that incurred for the special purpose of realising the agricultural receipts) after exclusion of the gross agricultural rents in accordance with sections 4 (3) (viii) and 2 (1) (a) ?"

The material facts can be briefly stated. The assessees, N.S.A.R. Chettyar, a Hindu undivided family business, carry on the usual type of Chettyar banking business at various places in Burma. In the course of that business, they have taken over, in satisfaction of otherwise unrealizable debts, considerable areas of agricultural land, and having become the owners of this land they lease it annually to tenants and receive as part of the profits of their business the rents realized

(1) 2 I.T.C. 505, 508. (2) 5 I.T.C. 396.
(3) 6 I.T.C. 21.

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from the tenants in respect thereof. The income-tax return of the business for the 1936-37 assessment showed on the credit side only the "non-agricultural" receipts, the rents and profits of the agricultural land owned by them being left out of account; but on the debit side all expenses (except land revenue) were entered. The assessees themselves, in their return, deducted from the gross expenses a sum of Rs. 5,500 as being that portion of their expenses which was attributable to the expenses of realizing the agricultural income. The Income Tax Officer increased the amount of this deduction by Rs. 9,719, and thereupon the assessees appealed to the Assistant Commissioner of Income Tax against this decision of the Income Tax Officer. Meanwhile they had been provided with a new ground of objection by the decision of the High Court of Madras in *S.A.S.S. Chellappa Chettiar* v. *Commissioner of Income-tax, Madras* (1), and relying on this decision they contended that no part of the sum of Rs. 9,719 ought to have been disallowed; in fact, it was part of their contention that they were in error in themselves making the original deduction of Rs. 5,500. The Assistant Commissioner of Income Tax overruled this contention, but on a consideration of the facts he reduced the deduction from gross expenses made by the Income Tax Officer by a sum of Rs. 2,795. The question of law now before us for decision is whether, when the income of a business consists partly of rents and profits derived from agricultural land and partly of receipts from other and taxable sources, income tax shall be payable only on the taxable receipts less the gross expenditure incurred in carrying on the whole business, including the expenditure incurred in carrying on that part of the business which is not subject to tax. In our opinion,

(1) I.L.R. [1937] Mad. 734.

the answer to this question is clearly in the negative, and that only that portion of the expenditure which is attributable to the "taxable" part of the business may be deducted.

The section of the Income Tax Act under which the profits of a business are taxed is section 10, and the part of this section which is relevant for the present purpose reads as follows :

"10. *(1)* The tax shall be payable by an assesse under the head 'Business' in respect of the profits or gains of any business carried on by him.

(2) Such profits or gains shall be computed after making the following allowances, namely :—

* * * * *

(ix) any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains."

The Madras case of *S.A.S.S. Chellappa Chettiar* (1) was principally concerned with the application of the provisions of clause (iii) of sub-section (2) of section 10 to a business of the kind which we are now considering, and the question of the extent to which clause (ix) was applicable was merely incidentally considered in the last paragraph of the judgment, where the following sentence occurs :

"The answer to the second question will admittedly follow from the decision on the first and the answer to it therefore is also in the affirmative."

This is the only reference to clause (ix) in the judgment, and no reasons for this decision are given, and plainly the decision went by default. We therefore refrain from further comment on the Madras case beyond saying that we by no means agree with the

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admission made before the Madras Court, that the decision regarding clause (ix) necessarily follows the decision regarding clause (iii).

Before us, on behalf of the assessees great stress has been laid on an English decision of the Court of Appeal, *Hughes* v. *Bank of New Zealand* (1), which was referred to in *S.A.S.S. Chellappa Chettiar*'s case (2) as having been received in Madras after the arguments in that case had been heard. But extreme care must be taken in applying English decisions to cases under the Burma Income Tax Act, because the scheme of the English Income Tax Act, 1918, and the scheme of the Burma Income Tax Act, 1922, are entirely different. In England a person is assessed to income tax in respect of his income, while under the Burma Act it is the income which is taxed. Under the English Act no class of income is outside the scope of the Act, whereas by section 4 (*3*) of the Burma Act the Act is made inapplicable to a number of classes of income ; the English Act merely confers certain exemptions on a person in respect of his income up to a certain amount or of certain kinds, similar to the exemptions conferred on certain classes of income by the provisos to sections 8 and 9 of the Burma Act. Moreover, the "expenses deduction" clause (if it may be so called) of the English Act is in different and far wider terms than that of the Burma Act. The rule in the English Act in respect of such deductions reads :

> " In computing the amount of profits or gains to be charged, no sum shall be deducted in respect of —
>
> (*a*) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment or vocation. "

The distinction between the expression "incurred solely for the purpose of earning such profits or gains"

(1) (1936) 3 All. E.R. 975. (2) I.L.R. [1937] Mad. 734.

and the expression "expended for the purposes of the trade, profession, employment or vocation" is so manifest as to need no comment. The question before us for decision therefore has to be decided with reference to the provisions of the Burma Income Tax Act and a reference to decisions under the English Act will afford no assistance.

Now "agricultural income" is defined in section 2 sub-section (*1*) of the Act, and so far as it is relevant for the present purpose means—

> "(*a*) any rent or revenue derived from land which is used for agricultural purposes, and is either assessed to land revenue in Burma or subject to a local rate assessed and collected by officers of Government as such ;
> (*b*) any income derived from such land by agriculture."

Section 4, sub-section (*3*), clause (viii), of the Act enacts that the Act shall not apply to agricultural income. In *Commissioner of Income-tax, Bihar and Orissa* v. *Maharajadhiraj of Darbhanga* (1) their Lordships of the Privy Council held that by this clause agricultural income is altogether excluded from the Act, howsoever and by whomsoever it may be received. Section 6 of the Act enacts—

> "6. Save as otherwise provided by this Act, the following heads of income, profits and gains shall be chargeable to income tax in the manner hereinafter appearing, namely :
> * * * * *
> (iv) Business."

Section 4, sub-section (*1*) enacts—

> "4. (*1*) Save as hereinafter provided, this Act shall apply to all income, profits or gains as described or comprised in section 6."

Their Lordships of the Privy Council held in the *Maharaja of Darbhanga*'s case (1) (at page 632) that

(1) (1935) I.L.R. 14 Pat. 623.

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the effect of the saving words at the beginning of each of these two sections is to exclude "agricultural income" altogether from the scope of the Act. Hence "business", as defined in section 6 (iv), does not include the business of leasing agricultural land and receiving the rents, and the expression "profits or gains of any business", as used in section 10 (*1*), does not include "agricultural income" It therefore follows that the expression "such profits or gains", in clause (ix) of section 10 (*2*), does not include "agricultural income", and consequently, when the business of an assessee comprises both agricultural income, as defined in the Act, and other (taxable) income, the assessee is not entitled, under section 10 (*2*) (ix), to deduct from such other income the expenditure incurred for the purpose of earning the agricultural income.

Mr. Clark, for the assessees, has sought to draw a distinction between section 12 and section 10 of the Act, and has urged that because the words "from every source to which this Act applies" are used in section 12, but are omitted in section 10, therefore section 10 must be held to refer to profits or gains of every kind. The distinction is merely imaginary. It was necessary to insert these words in section 12 for otherwise the words "every source" would include sources which are outside the scope of the Act, and if Mr. Clark's argument were to be accepted then agricultural income would be taxable under section 10 if it formed part of a business, a result which would be contrary to the decision in the *Maharaja of Darbhanga*'s case (1).

In my opinion, the case of agricultural income of a business is comparable to that of the profits of a foreign branch of a business (which profits are not brought into

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Burma); both are entirely outside the scope of the Act. [*M.T.T.K.M.M.S.M.A.R. Somasundaram Chettyar* v. *Commissioner of Income-tax, Madras* (1), and *The Provident Investment Co., Ltd.* v. *The Commissioner of Income-tax, Bombay* (2).] It would never, I imagine, be contended that, where a business in Burma had a branch abroad, the profits of which branch were not assessable, the expenses of running the foreign branch could be deducted under section 10 (*2*) (ix).

The question referred must therefore be answered in the negative. The Commissioner of Income Tax is entitled to his costs of this reference, advocate's fee 20 gold mohurs.

ROBERTS, C.J.—I agree.

MYA BU, J.—I agree.

APPELLATE CIVIL.

Before Mr. Justice Baguley, and Mr. Justice Mosely.

K.K.K.M. CHETTYAR *v.* SELLAMI ACHI.*

1938

Feb. 17.

Execution—Decree of a British Indian Court transferred to Burma for execution prior to 1st April 1937—Application for execution after 1st April 1937—Jurisdiction—Foreign Court—No reciprocal arrangement—Application to bring legal representative of deceased judgment-debtor on record—Application to executing Court—Irregularity—Civil Procedure Code, ss. 2 (5) and (6), 44A ; O. 21, rr. 10, 11—Adaptation of Laws Order, para. 10.

Where the decree of a Court in British India has been transferred to a Court in Burma for execution prior to 1st April 1937, but no application for execution has been made in the Court in Burma until after 1st April 1937, the Court in Burma has no jurisdiction to execute the decree. The receipt of the decree on transfer is a mere ministerial act, and it is the application for execution which initiates the proceedings in execution. Since 1st April 1937 the decree of the British Indian Court has become a foreign decree and cannot be executed in Burma on an application without reciprocal arrangement to that effect.

Paragraph 10 of the Adaptation of Laws Order deals with substantive rights and not matters of procedure.

R.M.K.A.R. Chettyar v. *R.M.K.A.R.V. Chettyar* [1938] Ran. 176, referred to.

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(1) 2 I.T.C. 505. (2) 6 I.T.C. 21.

* Civil First Appeal No. 163 of 1937 from the order of the District Court of Henzada in Civil Execution No. 8 of 1937.