1937

GANPAT MAL-SUNDAR DAS
v.
KEHR SINGH-BALWANT SINGH & Co.

TEK CHAND J.

Having regard to the facts that none of the parties has been wholly successful, I would leave them to bear their own costs throughout.

SKEMP J.—I agree.

A. N. C.

Appeal accepted in part.

CIVIL REFERENCE.

Before Addison and Din Mohammad JJ.

1937

Feb. 8.

IN THE MATTER OF THE AMRITSAR PRODUCE EXCHANGE LIMITED, (INCOME-TAX FOR 1935-1936.)

Civil Reference No. 34 of 1936.

Indian Income-tax Act (XI of 1922), SS. 4 (3) (vii) and 10 — Burden of proving exemption — whether on assessee — Nature of receipts — to be determined from assessee's intention — Profits from sale of investments of money deposited by clients — when taxable — S. 48 (1) and (2): Excess assessment in past years — whether can be claimed in reduction of subsequent assessment.

The assessee who does business as a produce exchange and receives a large amount of deposits from his clients in the course of his business, invested such deposits in Government securities and in the accounting period he sold these securities on profit. The assessee contended that the investment was in the nature of fixed capital and not of stock-in-trade, and consequently the profits realized were not gains of business. He further urged that the profits were of a casual and non-recurring nature and therefore exempt from payment of Income-tax under S. 4 (3) (*vii*) of the Indian Income Tax Act. On the other hand the Income-tax Department maintained that the profits accrued to the assessee in the course of his business and were, therefore, assessable under S. 10 of the Act.

Held, that what has to be determined in every case on its own facts is whether the investment was a part of the ordinary business of the investor or otherwise. If it is found that the

investment had been made for the purpose of permanently excluding a certain sum from the floating capital of a concern, it may be permissible to hold that that sum was intended to serve as a reserve or, in other words, as fixed capital, having no concern with the stock-in-trade. If on the other hand, the facts relating to that investment unequivocally point to the conclusion that the investment is to all intents and purposes part of the business and that the sum so invested is intended to serve as stock-in-trade, the profits arising therefrom will form part of the income of the concern.

Punjab National Bank, Ltd. v. *Commissioner of Income Tax, Punjab* (1), explained — Other case law discussed.

Held also, that if exemption is claimed for any item of income received by an assessee from his clients in the course of business it is for him to show that the receipt does not arise from business and is of a casual and non-recurring nature. If he fails to establish either of these conditions, he cannot bring his case within the purview of S. 4 (3) (*vii*) and will be liable to pay income-tax on the item of income so received.

Held further, that in order to find out whether certain receipts are of a casual and non-recurring nature, or whether they are part of the assessee's business, it is the intention of the assessee that is to be considered, and when once it is found by the department as a matter of fact that the intention was to make profits from these investments as part of the assessee's business it is doubtful whether the High Court can go behind that finding.

Case law discussed.

Held also, that the question whether anything was taken over comes into Capital or Revenue account would depend upon evidence of intention at the time.

Held lastly, that S. 49 (1) and (2) comes into play only when the income-tax has been actually *paid* in excess and not earlier, and consequently the assessee cannot during the course of assessment have his subsequent assessment reduced by the amount already paid in excess.

(1) (1926) 2 I. T. C. 184.

1937

IN THE MATTER OF AMRITSAR PRODUCE EXCHANGE, LIMITED INCOME-TAX.

Case referred under section 66 (2) of the Indian Income Tax Act, by Mr. A. M. Bown, Commissioner of Income Tax, Punjab, with his letter No. S. 13/A.R. 36, dated 14th November, 1936, for orders of the High Court.

KIRPA RAM BAJAJ, for (Assessee), Petitioner.

S. M. SIKRI, for JAGAN NATH AGGARWAL, for (Commissioner of Income Tax), Respondent.

The order of the Court was delivered by—

DIN MOHAMMAD J.—Under section 66 (2) of the Indian Income Tax Act, the Commissioner of Income Tax has referred the following three questions to us :—

(1) Was there no material enabling a finding that the proper ' account-attribution ' for the profit on sale of Government Securities within the account period was to Profit-and-Loss (and not to Capital) account ?

(2) The only relevant evidence in respect of the profit on sale of property being that the said property was acquired in connection with the business of the assessee for the purpose of realising moneys, and that this realisation was actually effected within a short time of acquisition, was this such conclusive proof of the profit being outside the scope of the Act, that as a matter of law the Assistant Commissioner could not hold that this was not proved ?

(3) The assessee having in past assessment erroneously attributed part of the cost of an asset other than stock-in-trade to interest account, and having also returned " interest on securities " in excess of what was actually then receivable and chargeable under section 8, is he entitled as a matter of law to have his current assessment reduced by the over-assessment (or by any detail entering into that over-assessment) ?

The facts bearing upon the first question formulated by the Commissioner are these. The assessee does business as a Produce Exchange and receives a large amount of deposits from his clients in the course of his business. These deposits he had invested in Government securities and in the accounting period he sold these securities on profit. A question arose whether this profit was on capital account or on revenue account and it is this question that has been formulated by the Commissioner in the form indicated above. The controversy existing between 'capital' and 'revenue' has defied solution so far and it is difficult, therefore, to lay down any general considerations which would conclusively determine whether a certain income falls under one head or the other. In this case, however, it is more a question of fact than of law and it is on that basis that we propose to decide the matter at issue. It is not even denied by the assessee that the deposits that were invested in the shape of securities represented the moneys received by him from his clients in the course of business and the burden lies on him therefore to prove that the profits realized therefrom could not be charged to income-tax.

Counsel for the assessee contends that the investment in question was in the nature of 'fixed capital' and not in that of 'stock-in-trade', and consequently the profits realized from the securities could in no way form part of his profits or gains of business as contemplated by section 10 of the Income Tax Act. He has further urged that the profit realized from these securities is covered by the exemption provided in section 4 (3) (*vii*) and that as these profits are of a casual and non-recurring nature, the Act does not apply to them. In suport of his contention, he has relied on *In re The*

1937

IN THE MATTER OF AMRITSAR PRODUCE EXCHANGE, LIMITED INCOME-TAX.

Tata Industrial Bank, Ltd. (1), *Punjab National Bank, Ltd.* v. *Commissioner of Income-Tax, Punjab,* (2), *Commissioner of Income-Tax, Bengal* v. *Messrs. Shaw, Wallace and Company* (3), and *J. I. Milne* v. *Commissioner of Income-Tax, Burma* (4). But in our view, these authorities are not applicable in this case.

In *In re The Tata Industrial Bank, Ltd.* (1), a banking concern claimed to deduct from the taxable profits a certain sum which represented the amount of depreciation on war bonds and securities belonging to it. A Division Bench of the Bombay High Court held that that deduction could not be allowed under section 9 of the Income-Tax Act of 1918 (corresponding to section 10 of the Income Tax Act of 1922). The *ratio decidendi* of that judgment was that the assessing officer was not entitled in his discretion to allow any deduction for sums paid or debited other than those properly paid and debited as detailed in sub-section (2) of section 9. It would be observed that that judgment does not touch the points awaiting solution before us. Section 10 of the present Act which corresponds to section 9 of the old Act does expressly mention certain deductions which are permissible, and whenever a deduction is claimed an assessee is bound to bring his case under one clause or another. Here, the assessee has put forward a claim, not for deduction but for exclusion, on the ground that the income earned by him cannot be computed in calculating his total taxable income, and the question whether a certain income is or is not profit or gain within the meaning of sub-section (1) of section 10 has nothing to do with the deductions permissible under sub-section (2) thereof. Counsel for the assessee, however, urges that the

(1) (1921) 1 I. T. C. 152.
(2) (1926) 2 I. T. C. 184.
(3) (1926) 6 I. T. C. 178 (P. C.).
(4) (1933) 7 I. T. C. 67.

converse of the principle laid down in the Bombay judgment holds good in the present case, but we do not agree with him. That judgment did not deal with the question of profits and concerned itself only with the point whether a certain deduction fell within the four corners of section 9. It will not, therefore, be a safe guide in this matter.

In *Punjab National Bank, Limited* v. *Commissioner of Income Tax, Punjab*, (1), the Punjab National Bank, Limited had invested some moneys in Government securities and claimed deduction on account of some depreciation in the value of those securities. A Division Bench of this Court disallowed the claim on the ground that the investment in question represented 'fixed capital' and not 'floating capital' of the Bank. The learned Judges remarked, "It cannot be denied that the Bank purchased these securities, not for the purpose of trading in them, but for the purpose of retaining them permanently for use in an emergency. It is the practice of all properly managed Banks to invest a portion of their capital in high class securities in order to have a readily available supply of cash in a crisis. Those securities were not held by the Bank as floating capital; they were not held by the Bank with the object of being dealt in day by day in the ordinary course of business. They were held as an emergency reserve and were regarded as the equivalent of ready cash with this considerable advantage over ready cash that they brought in a small, but secured amount of interest." A superficial reading of the judgment no doubt supports the contention of the assessee to some extent, but in our view what the judgment intends to lay down is that in every case it is to be determined on its own facts whether the investment

(1) (1926) 2 I. T. C. 184.

1937

IN THE MATTER OF AMRITSAR PRODUCE EXCHANGE, LIMITED INCOME-TAX.

was part of the ordinary business of the investor or otherwise. If it could be found that an investment had been made for the purpose of permanently excluding a certain sum from the floating capital of a concern, it might be permissible to hold that that sum was intended to serve as a reserve or, in other words, as fixed capital having no concern with the stock-in-trade. If, on the other hand, the facts relating to that investment unequivocally point to the conclusion that the investment is to all intents and purposes part of the business and that the sum so invested is intended to serve as stock-in-trade, the profits arising therefrom will form part of the income of the concern. If the learned Judges, however, intended to lay down a rule of general application that in every case an investment in the shape of securities made by a concern should be treated as fixed capital, we respectfully beg to differ from that conclusion. In our view, a sweeping assertion of that nature would be altogether opposed to law.

In *Commissioner of Income-Tax, Bengal* v. *Messrs. Shaw, Wallace and Company* (1), the question before their Lordships of the Privy Council was whether a sum of money received as compensation for loss or cessation of an agency was not income, profits or gains within the meaning of the Income Tax Act, and their Lordships came to the conclusion that it was not. "Income did not include receipts of any kind which were not specially exempted under the Act," and "the object of the Indian Act is to tax 'income' which is expanded into 'income' profits and gains though the expansion is more a matter of words than of substance." In their Lordships' view, "income in the Indian Income-tax Act connotes a periodical

(1) (1932) 6 I. T. C. 178 (P. C.).

monetary return, coming in with some sort of regularity or expected regularity from definite sources. The source is not necessarily one which is expected to be continuously productive but it must be one whose object is the production of a definite return excluding anything in the nature of a mere windfall." Their Lordships further thought that the expression 'receipts' arising from business as used in section 4 (3) (*vii*) meant receipts arising from the carrying on of business. We are in respectful agreement with the principles laid down by their Lordships of the Privy Council, but we fail to realise how they help the assessee. As indicated above, in every case that arises it is to be determined whether a certain profit is in the shape of a windfall or it is part of a periodical monetary return with some sort of "regularity" or "expected regularity," and if it is found that the assessee intended to make these profits regularly the judgment of their Lordships of the Privy Council will not stand in the way of the Income Tax Department assessing those profits. Besides, the Commissioner here contends that these profits arose from the carrying on of the normal business of the Company, and if that be so the exemption claimed by the assessee will not be available to him even under the Privy Council judgment. It may further be noted that in *Gopal Saran* v. *I. T. Commissioner* (1), at page 145 their Lordships of the Privy Council have observed: "The word 'income' is not limited by the words 'profits' and 'gains.' Anything which can properly be described as income, is taxable under the Act unless expressly exempted."

In *J. I. Milne* v. *Commissioner of Income-Tax, Burma* (2), the assessee was a tin mine owner who had

(1) (1935) A. I. R. (P. C.) 143,145. (2) (1933) 7 I. T. C. 67.

1937

IN THE MATTER OF AMRITSAR PRODUCE EXCHANGE, LIMITED INCOME-TAX.

been lending money to a mining Engineer for working a tin area. He made a further advance to him of a considerable amount of money under an agreement stipulating for payment of a share of the price of the mining area then contemplated to be sold and received a large sum of money under the agreement. The Income-Tax Department contended that the profits made by the assessee were taxable. The assessee, however, resisted it on the ground that they did not form part of a regular business. It was held by a Division Bench of the Rangoon High Court that these profits were covered by section 4 (3) (*vii*) of the Income Tax Act. Page C. J. who delivered the principal judgment remarked, " It does not appear to me that it was a business transaction in any sense, but was only a mode by which the assessee sought to secure himself against loss if he lent to Mr. W. S. this further sum of Rs.10,000. * * * * * It is clear to my mind upon the face of the agreement that the transaction out of which the £6,000 accrued to the assessee formed no part of any business that the assessee was carrying on. * * * * The transaction was a receipt, not being a receipt arising from business, of a casual and non-recurring nature within section 4 (3) (*vii*) of the Act." With the principles underlying these remarks we are in respectful agreement, but the question still remains whether they apply to the case before us.

On behalf of the Commissioner, on the other hand, reliance has been placed on *Parashram Chintaman Joglekar* v. *The Commissioner of Income Tax, Central Provinces and Berar* (1), *In the matter of Chunni Lal-Kalyan Das* (2), *Northern Assurance Co.* v. *Russell* (3),

(1) (1931) 6 I. T. C. 74. (2) (1924) 1 I. T. C. 419.
(3) (1890) 2 I. T. C. 571.

Westminster Bank, Limited v. *Osler* (1), *Thew* v. *The South-West Africa Company Limited* (2), and *Californian Copper Syndicate* v. *Harris* (3).

In Parashram Chintaman Joglekar v. *Commissioner of Income Tax, Central Provinces and Berar* (4), the assessee had purchased a plot of land with the idea of parcelling it into small plots and selling them as building sites at a profit and he sold some plots in furtherance of this intention. Later, the land remaining unsold, was acquired by Government on payment of compensation. The Department assessed the profits which had thus accrued to the assessee and the assessee contested their right to do so. It was held that the transaction was an adventure in the nature of trade coming within the definition of ' business ' in section 2 (4) of the Income Tax Act and that the receipts from the sales were profits of business and not casual receipts exempt from assessment.

In the matter of Chunni Lal-Kalyan Das (5), the assessee, who was once in regular business as a cloth and grain merchant which he had given up, received a sum as brokerage for the sale of certain mills and this brokerage transaction was an isolated one in the year of assessment. On a question raised by the assessee that the sum as received by him was not assessable to income-tax, as it fell within the meaning of section 4 (3) (*vii*) of the Income Tax Act, a Division Bench of the Allahabad High Court decided against him and held that the transaction came within the definition of ' business ' and was not therefore exempt under section 4 (3) (*vii*). The learned Judges in the course of their judgment remarked, " In taking the view we do, we found ourselves mainly upon the use

(1) (1932) 17 T. C. 381.
(2) (1924) 9 T. C. 141.
(3) (1914) 5 T. C. 159.
(4) (1931) 6 I. T. C. 74.
(5) (1924) 1 I. T. C. 419.

1937

IN THE MATTER OF AMRITSAR PRODUCE EXCHANGE, LIMITED INCOME-TAX.

of the word ' nature ' in the exemption. The word is not ' occurrence.' If the language were ' a casual or non-recurring occurrence ' there would be much to be said for the contention of the assessee. But the expression ' nature ' appears to us to be a word used independently of the accident of the event happening in fact once only or more often in a fortunate year. It connotes a class of dealing which might occur only once, but which might occur several times. Now the adventure of a business man who is enabled through his business associations to negotiate a large transaction and thereby to earn a heavy commission, may undoubtedly be in fact non-recurring in the sense that so successful an adventure would not be likely to occur again. But, on the other hand, it is a class of transaction which might occur to any such business man once only or half a dozen times again, during the course of the year.''

In Northern Assurance Co. v. *Russell* (1), at page 578, the Lord President remarked, " Where the gain is made by the Company by realising an investment at a larger price than was paid for it, the difference is to be reckoned among the profits and gains of the Company.''

In *Westminster Bank, Limited* v. *Osler* (2), certain Banks converted their holdings of National War Bonds into 5 *per cent.* War Loan and $3\frac{1}{2}$ *per cent.* Conversion Loan, the value of the stocks received in exchange being greater than the cost to the Banks of the National War Bonds converted. It was held by Rowlatt J., " They have got a new thing and at the moment they get it they have got something which is worth more than that which it represented in their

(1) (1890) 2 T. C. 571, 578.

(2) (1932) 17 T. C. 381.

books as the thing they got it for. That is the whole of it, and it seems to me that for the purpose of arriving at this system of making profits, which is a perfectly proper system, there is a profit here, and therefore the Crown must succeed in this case."

In *Thew* v. *South-West Africa Company, Limited* (1), it was held by the High Court of Justice (King's Bench Division) that any profits derived by the Company from sales of land must be taken into account in computing for income-tax purposes the profits arising from the trade, adventure, or concern in the nature of trade exercised by the Company. Pollock, M. R., observed, " The question that we have to determine is whether the moneys derived from those sales of land fall into income or are to be treated as capital of the Company. That is the question which often gives rise to difficulties and gives rise to different opinion. * * * * * * * We have to decide upon the substance of the case and not upon what any individual company may deem the particular item in the course of its trading. * * * * * I think the Company could, if they please, deal with the proceeds of the sale of land either as capital or in profit and loss account according as they determined to be right. * * * The facts are not for us; the facts are for the Commissioners who had the case before them."

In *Californian Copper Syndicate* v. *Harris* (2), it was held that the difference between the purchase price and the value of the shares for which the property was exchanged is a profit assessable to income-tax. There the assessee which was a company formed for the purpose, *inter alia*, of acquiring and reselling mining

(1) (1924) 9 T. C. 141. (2) (1914) 5 T. C. 159.

1937

IN THE MATTER OF AMRITSAR PRODUCE EXCHANGE, LIMITED INCOME-TAX.

property had after acquiring and working various properties resold the whole to a second Company receiving payment in fully paid shares of the latter Company.

The assessee contends that the English authorities are not of much help in the solution of the problem before us. As remarked by their Lordships of the Privy Council in *Commissioner of Income Tax, Bengal* v. *Messrs. Shaw, Wallace and Company* (1), " The Indian Act is not *in pari materia*; it is less elaborate in many ways, subject to fewer refinements and in arrangement and language it differs greatly from the provisions with which the Courts in this country have had to deal. Under such conditions their Lordships think that little can be gained by attempting to reason from one to the other, at all events in the present case in which they think that the solution of the problem lies very near the surface of the Act, and depends mainly on general consideration." This is true and we propose, therefore, that the decision of this case should proceed on its own facts and in the light of the Indian judgments, if any. We, however, consider that the English judgments, can be utilised as aids in the interpretation of analogous provisions of law, though not as binding authorities on those matters where the language of the English and Indian Acts differs.

The word ' business ' has been defined in the Indian Income Tax Act as including " any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture." The term ' total income ' has been defined as meaning " total amount of income, profits and gains from all

(1) (1932) 6 I. T. C. 178 (P. C.).

sources to which this Act applies computed in the manner laid down in section 16." Under section 6 those headings of income have been enumerated which are chargeable to income-tax, and under section 10, sub-section (1) it is provided that the tax shall be payable by an assessee under the head 'business' in respect of the profits or gains of *any* business carried on by him. Section 4 (3) (*vii*) exempts only those receipts which are not receipts arising from business or the exercise of a profession, vocation or occupation and are of a casual and non-recurring nature. The combined effect of all these provisions of law appears to us to be this: If exemption is claimed for any item of income received by an assessee, it is for him to show that the receipt does not arise from business and is of a casual and non-recurring nature. If he fails to establish either of these conditions, he cannot bring his case within the purview of section 4 (3) (*vii*) and he will be liable to pay income-tax on the item of income so received.

We have already indicated that the business of the assessee was a quasi-banking business and it received moneys from its clients for the purposes of the business. It is further clear to us that the investments that had been made had also been made as part of the same business and the receipts arising therefrom were to all intents and purposes receipts from business. In these circumstances, even if the receipts were of a casual or non-recurring nature, they will not be covered by section 4 (3) (*vii*). Apart from this, it is the intention of the assessee that is to be considered in such matters, and when once it is found by the Department as a matter of fact that the assessee's intention was to make profits from these investments as part of the assessee's business, it is doubtful whether we can go

1937

IN THE MATTER OF AMRITSAR PRODUCE EXCHANGE, LIMITED INCOME-TAX.

behind that finding. On these grounds, our reply to question No. 1 will be in the affirmative.

The second question need not detain us long. The property in question had been taken over by the old Company from a debtor in discharge of his loan, and the new Company realized profits out of it. As remarked by the Commissioner, the question whether anything taken over comes into capital or revenue account would depend upon evidence of intention at the time. The finding at which the Department arrived was that " the object of purchase was reselling at a profit as soon as a suitable opportunity arose." The assessee has failed to establish that the property was not acquired with the primary object of yielding a surplus on realization or that it was a mere windfall. We accordingly answer this question in the negative.

Coming now to question No. 3. It is admitted by the Department that the assessee was in the habit of compiling his account on the strictly mercantile basis even with regard to the interest on securities. The interest due on the securities was accordingly brought into the profit and loss statement last year, even though it had not been actually received. The Income Tax Officer, however, adopted the cash basis in the present year and assessed the amount actually received by way of interest. The procedure adopted by the Income Tax Officer will no doubt result in double assessment, but whether this is illegal or not will depend on the true interpretation to be put on section 48-A (1) and (2). Further, that section comes into play only when the income-tax has been actually paid in excess and not earlier and we have not been referred to any other provision of law which we can invoke at the present stage of the assessment to grant to the assessee the

relief prayed for. We are consequently constrained to answer this question too in the negative.

We answer the three questions referred to us accordingly and order the assessee to pay the costs of the Commissioner

P. S.

Reference answered.

1937

IN THE MATTER OF AMRITSAR PRODUCE EXCHANGE, LIMITED INCOME-TAX.

APPELLATE CIVIL.

Before Addison and Din Mohammad JJ.

LAL KHAN AND ANOTHER (INSOLVENTS) Appellants.

versus

OFFICIAL RECEIVER, FEROZEPORE, AND OTHERS (CREDITORS) Respondents.

1937

Feb. 17.

Civil Appeal No. 280 of 1936.

Punjab Debtors' Protection Act (II of 1936), S. 4 (1) — Official Receiver — whether precluded from selling Insolvents' land — Provincial Insolvency Act (V of 1920), SS. 28, 59.

In the case of the appellants (Insolvents) the Official Receiver was conducting proceedings in relation to the temporary alienation of their land and it was contended on their behalf that he had no jurisdiction to do so, in view of the provisions of S. 4 (1) of the Punjab Debtors' Protection Act, 1936. The High Court having allowed the appeal to be heard as a Revision under the proviso to S. 75 (1) of the Provincial Insolvency Act—

Held, (overruling the contention) that a sale by an Official Receiver of the property of an insolvent is not a sale in execution of an order of a Civil Court and therefore the provisions of law contained in sub-s. (1) of S. 4 of the Punjab Debtors' Protection Act are not applicable. The "Court," though it includes an Insolvency *Court*, does not include a Receiver in Insolvency.

Sheobaran Singh v. Kulsum-un-Nissa (1), *Basava Sankaran* v. *Garapati Anjaneyulu* (2), *M. T. T. K. M. M. N.*

(1) I.L.R. (1927) 49 All. 367 (P.C.). (2) I.L.R. (1927) 50 Mad. 135 (F.B.).