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section 133, Criminal Procedure Code, was apprehended and not otherwise. Such "serious injury" or "imminent danger" is non-existent in this case. Reference in this connection may also be made to Form XIX of Schedule V to the Criminal Procedure Code.

I am, accordingly, constrained to hold that the order was *ultra vires* of the Magistrate and I have no option but to set it aside.

P. S.

Revision accepted.

FULL BENCH.

Before Monroe, Bhide and Din Mohammad JJ.

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Feb. 26.

B. C. G. A. (PUNJAB) LIMITED, KHANEWAL (ASSESSEE) Petitioner

versus

COMMISSIONER OF INCOME-TAX, PUNJAB—Respondent.

Civil Reference No. 1 of 1937.

Indian Income-tax Act, XI of 1922, sections 10, 13 — Account kept on mercantile system — Interest included in the account, but subsequently taken to suspense account — whether excluded from computation of profits — Indian Partnership Act, IX of 1932, section 4 — Partnership — explained — Assessee carrying on several trades — One resulting in losses and closed down long before the account year — whether assessee can claim a set-off on account of such losses against profits in the other businesses — Bad debt — what is — Findings thereon by tax department — whether interfered with by High Court.

Held, that under section 13 of the Income-tax Act, if an assessee has been regularly following what is known as the mercantile system of account under which entries are made in the accounts on the date, not of receipt or expenditure of money, but on the date of transaction, irrespective of the date

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of payment, the assessee can ordinarily be said to have received a certain amount of interest as soon as the transaction in question has been entered; no matter whether the interest has actually been realized or not.

Held also, that the assessee could not exclude such interest from the computation of profits simply by taking it to a suspense account, which was not done previously and was not in accordance with its general system of accounts.

And that, therefore, there was evidence before the Assistant Commissioner of Income-tax to justify him in including the interest item in the accounts of income, the assessee having placed no material on the record supporting its exclusion.

Feroz Shah v. Income-tax Commissioner, Punjab (1), referred to.

Held further, that where the assessee had started a separate business and joined with himself a person who was to be allowed a definite share in the profits of the venture, but was saddled with no liability for its losses, the business was a partnership, *vide* section 4 of the Indian Partnership Act, 1932.

Lindley on Partnership, 1933 Edition, page 47, and *Badeley v. Consolidated Bank* (2), referred to.

Held, also, that a person carrying on two different trades is entitled to set off, for purposes of income-tax, the loss incurred by him in respect of one against the profits made by him in the other, but the condition precedent is that both businesses should be alive during the current year. A dead business' loss cannot be set off against a living business' gains—nor can capital losses be set off against revenue profits.

Arunachalam Chettiar v. Commissioner of Income-tax, Madras (3), and *South Indian Industrials, Ltd. v. Commissioner of Income-tax, Madras* (4), relied upon.

And, that the question as to whether certain debts were bad or not, as also the question as to when those debts became bad, must be determined by the appropriate tribunal and

(1) I. L. R. (1933) 14 Lah. 682 (P. C.)
(2) (1888) L. R. 38 Ch. D. 238.
(3) (1936) L. R. 63 I. A. 233.
(4) (1934) 8 I. T. C. 128.

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while the department held otherwise. The question now before us, in plain language, is whether this exclusion can be upheld.

Counsel for the assessee has, at the outset, urged that the question has not been properly framed, and that the *onus* of proving that the amount in question could not be excluded or, in other words, was taxable, should have been placed on the income-tax authorities and not on the assessee. In my view, the true legal position is this. By section 13 of the Income-tax Act, income, profits or gains are to be computed for the purposes of section 10, with which alone we are at present concerned, in accordance with the method of accounting regularly employed by the assessee, and it is common ground that the assessee has been regularly following what is known as the mercantile system. Under that system entries are made in the accounts on the date, not of receipt or expenditure of money, but on the date of transaction, irrespective of the date of payment Ordinarily, therefore, as soon as the transaction in question was entered, the assessee could be said to have received the sum of Rs.12,447 by way of interest, whether it was actually realized or not. In fact, the assessee admitted before the Assistant Commissioner that no other similar item had been credited to the Suspense account and further that the opening of the 'Suspense account' was not in accordance with its general system of accounts. Interest debited to the debtor's personal accounts had in every other case been credited to the interest account and the only reason advanced for this variation was that the assessee was not hopeful of recovering it. It was on this account that the income-tax authorities came to the conclusion that this item should have been included in the accounts of income and that its exclusion was

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'out of ordinary course' and 'for reasons not to be justified.' In these circumstances, whatever the form of the question, in my view, in the words of their Lordships of the Privy Council in *Feroz Shah v. Income-tax Commissioner, Punjab* (1), the only question open to judicial determination is, whether there was any evidence before those officers upon which they might find that the appellant's system of accounting required the inclusion in his accounts of this item.

Now, the assessee justifies the exclusion of this item before us on the grounds, first, that it was a part of its regular system of accountancy to exclude such items inasmuch as it had similarly excluded an item in the preceding year without any protest on behalf of the income-tax authorities, and second, that in spite of the mercantile system, this item was liable to exclusion, as it was not under its control in such a way as to be convertible into cash at any time that the assessee liked. In support of the first ground the assessee relies on its balance sheet for the year ending 30th September, 1933. It is true that in that balance sheet, a sum of Rs.18,000 odd was credited to the Suspense account and it was left unchallenged by the income-tax authorities; but that solitary instance is not, in my opinion, enough to establish that the exclusion of that item was based on any system adopted by the assessee or that that system was regular. An assessee is, no doubt, at liberty to adopt any system of account that he likes, but as indicated in para. 50 (*i*) of the Notes and Instructions regarding the Income-tax Law and Rules, it must be one that clearly reflects his income in respect of the fixed period of the 'previous year' and that it is the one regularly adopted by him for the purposes of his business. In this case, the

(1) I. L. R. (1933) 14 Lah. 682 (P. C.).

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assessee's own admission, that this crediting to the Suspense account is not based on any regular system, clinches the whole matter. The first ground urged by the assessee, therefore, fails.

Coming now to the second ground, the assessee has relied on *Secretary, Board of Revenue v. Arunachalam Chettiar* (1) (particularly the remarks made by Sadasiva Ayyar J.), *Pandit Pandurang v. Commissioner of Income-tax, Central Provinces* (2), *Seth Nanhelal v. Commissioner of Income-tax, Central Provinces* (3) and *Rai Bahadur Sahu Jagmandar Das Vaish v. Commissioner of Income-tax, Central and United Provinces* (4). In *Secretary, Board of Revenue v. Arunachalam Chettiar* (1), it was held by the majority of the Court that interest which accrued due to a money-lending firm in the year of account was not assessable as a profit of the business unless it was received or realized in that year. In the course of his judgment Sadasiva Ayyar J. expressed an opinion that an income to be assessed must accrue or arise in the sense that it should be so completely under the assessee's control that in the language of Lord Fitzgerald "by an act of his will he could have it actually transferred to his bankers." This judgment, however, has lost its force as the Act was amended afterwards apparently to nullify its effect and is, therefore, no longer good law. See Sundaram's Law of Income-tax in India, page 458.

In *Pandit Pandurang v. Commissioner of Income-tax, Central Provinces* (2), the assessee contended that he was not liable to be assessed on prospective interest, not actually realized by him or payable during the assessment period and on this ground a mandamus was

(1) I. L. R. (1921) 44 Mad. 65.
(2) (1925) 2 I. T. C. 69.
(3) (1928) 3 I. T. C. 28.
(4) (1934) 8 I. T. C. 59.

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issued to the Commissioner to state the case. All that was decided in this case was that the question whether such interest was taxable or not was a question of law.

In *Seth Nanhelal v. Commissioner of Income-tax, Central Provinces* (1) the method of accounting was mercantile, but it was held that sums shown in accounts as having fallen due but not received or paid in cash or by adjustment of accounts could not be treated as assessable income.

In *Rai Bahadur Sahu Jagmandar Das Vaish v. Commissioner of Income-tax, Central and United Provinces* (2), a Division Bench of the Allahabad High Court, mainly relying on the three judgments mentioned above, held that an unrealized decree, although shown in the account books, was not taxable.

These judgments, however, in my view are not applicable in the present case, as, in all of them, the assessee does not appear to have shown the interest accrued as interest received, while in the present case it is not denied that any sum entered in the interest account, although not actually received in cash or realized, is all the same received under the system of account adopted by the assessee. The only ground for exclusion relied upon by the assessee is that there was no hope of its recovery and apart from the fact that that is a different matter, there was not a shred of evidence before the Assistant Commissioner to substantiate that plea.

On behalf of the Commissioner reliance has been placed on *Subramanyam Chettiar v. Commissioner of Income-tax, Madras* (3), *V. S. A. R. Firm v. Commissioner of Income-tax, Burma* (4), *Jupudi Kesava Rao*

(1) (1928) 3 I. T. C. 28.
(2) (1934) 8 I. T. C. 59.
(3) (1927) 2 I. T. C. 365 (F. B.).
(4) (1935) 8 I. T. C. 171.

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v. Commissioner of Income-tax, Madras (1) and *Feroz Shah v. Income-tax Commissioner, Punjab* (2). In *Subramanayam Chettiar v. Commissioner of Income-tax, Madras* (3), a Full Bench of the Madras High Court held that the assessee having adopted the mercantile system of accountancy must be assessed upon that basis alone, and so assessed, the amount of interest entered in the accounts as a profit and as money actually received like other interest entries, was income accruing or arising within the meaning of section 4 (1), read with sections 10 and 13 of the Income-tax Act.

In *V. S. A. R. Firm v. Commissioner of Income-tax, Burma* (4), in a case where the assessees treated as realized in the interest account as well as in the debtor's accounts the interest included in fresh promissory notes or mortgages taken in a settlement of account to cover outstanding principal and interest and were assessed to income-tax on the interest so included in the previous year, a Full Bench of the Rangoon High Court held that there was material to justify the finding that the said sum was interest on loans that had accrued to the assessee during the accounting year and as such assessable to income-tax. In that case, all the relevant judgments of their Lordships of the Privy Council were duly considered and explained.

Similarly, in *Jupudi Kesava Rao v. Commissioner of Income-tax, Madras* (1), a Full Bench of the Madras High Court held that where, in accordance with the method of accounting regularly followed by the assessee in his money-lending business year after year, interest

(1) (1935) 8 I. T. C. 217 (F. B.).
(2) I. L. R. (1933) 14 Lah. 682 (P. C.)
(3) (1925) 2 I. T. C. 365 (F. B.).
(4) (1935) 8 I. T. C. 171.

included in renewed promissory notes and mortgages was debited to the debtors' accounts and credited to the interest or profit account at the time of renewal, interest so included could be considered as income realized for purposes of assessment to income-tax.

In *Feroz Shah v. Income-tax Commissioner, Punjab* (1), their Lordships of the Privy Council recognised that the outstanding feature of the mercantile system of account was that transactions were recorded on the dates when they were effected, whether cash payment was then made or not.

The two judgments reported in *V. S. A. R. Firm v. Commissioner of Income-tax, Burma* (2) and *Jupudi Kesava Rao v. Commissioner of Income-tax, Madras* (3) are distinguishable inasmuch as the account had been adjusted in those cases, but the other two judgments relied upon by the Commissioner do bear out his contention.

In view of the above discussion, I would hold that there was evidence before the Assistant Commissioner to justify the course adopted by him and that the assessee had not placed any material on the record which would have warranted the exclusion of the item in dispute from its total income.

Questions Nos.2 and 3 relate to one and the same matter and may be set out together. They have been formulated as follows :—

Question 2.—" The assessee having been the sole financing partner in a business which had been discontinued, leaving sums due to the partnership from third parties in respect of their liabilities on contracts made on their behalf was it impossible in law

(1) I. L. R. (1933) 14 Lah. 682 (P. C.). (2) (1935) 8 I. T. C. 171.
(3) (1935) 8 I. T. C. 217 (F. B.).

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to find that the deficit in the account of the assessee with the partnership was not established by the assessee-claimant to lie in revenue charge?"

Question 3.—" The assessee having claimed as his deficit in the above account, the amount of sums due to the partnership which reached limitation in and before the year of account: and having failed to produce evidence to the Assistant Commissioner (who had material for ascribing their badness to an earlier year), either that the amounts reached *de facto* irrecoverability in the year of account, or that there had been any regular practice of *prima facie* ascription of badness to the limitation year: *query*, was it impossible in law for the Assistant Commissioner to find that the said amount was not proved to be a deficit in account with the partnership, reaching irrecoverability in the said year?".

The material facts are these. In 1928, the assessee started a separate business under the style of the " Seeds Department " at Khanewal, Okara, Mian Channu and Vihari. At Mian Channu and Vihari the business was conducted through paid employees while a partner each was taken at Khanewal and Okara. These partners were allowed a definite share in the profits of the venture but were saddled with no liability for its losses. The business was, however, to be financed by the assessee alone. The account books were maintained at Khanewal and contained separate ledger accounts for each branch. The assessee suffered heavy losses in this business and had to close it in 1931. For some of the moneys outstanding against the debtors, bonds were accepted which, however, could not be realized and which eventually became time-barred in the account year. These bonds were of the

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value of Rs.1,78,052. In the present assessment the assessee claimed to exclude these bond debts as irrecoverable loans and both the Income-tax Officer and the Assistant Commissioner disallowed the claim on the following grounds :—

(*a*) That the claim related to a business which was discontinued in 1931 and was thus inadmissible under section 10 of the Income-tax Act, which was confined to a current business alone.

(*b*) That the claim related to distinct firms since discontinued.

(*c*) That there was no evidence that the loans became irrecoverable during the account year inasmuch as the mere fact that limitation had expired during the account year was not enough to prove their irrecoverability during that year.

The Commissioner in his statement of the case has endorsed these views and has further remarked that in his opinion the amount claimed was not a 'revenue loss' but a 'capital loss.'

The assessee contends at the outset that even on the facts found, the income-tax authorities were not justified in holding that there was any partnership in existence and that the so-called admission attributed to it was not conclusive, inasmuch as it had used the word 'partnership' loosely in order to denote the nature of its relationship with the two outsiders at Khanewal and Okara, respectively. In support of its contention that the relationship in question did not constitute partnership in the eye of law, the assessee has relied on *Commissioner, Income-tax v. Mahomed Kasim* (1). There several persons had executed an agreement in favour of the assessee by which each of

(1) 1927 A. I. R. (Mad.) 1053.

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the executants was to have a certain share in the profits of the business when ascertained. No provision was made for their liability in case of loss and the complete control of the business was retained by the assessee who had contributed the whole capital. Not only was the assessee to have the control of the business but even persons holding power-of-attorney from him were to exercise the same power. Further the executants had agreed to be bound by his orders and the orders of his attorneys, and had also agreed that if they contravened the provisions of the agreement, they could be dismissed. The assessee as proprietor had also the power of altering their shares. It was in these circumstances that the learned Judges of the Madras High Court held that there was no 'valid and genuine' partnership. That judgment is obviously of no relevancy in the present case, as the facts on which it proceeds are entirely different from the facts before us.

The mere circumstance that a person is to share profits only and not losses does not by itself militate against the presumption of partnership. Under section 4 of the Indian Partnership Act, 1932, 'partnership' is defined as "the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all." In English Law, where the Act merely says that the receipt by a person of a share in the profits of a business is *prima facie* evidence that he is a partner in the business, it has been held that "the inference that where there is community of profit there is partnership is so strong that even if community of loss be expressly stipulated against, partnership may nevertheless subsist." (See Lindley on Partnership, 1935 edition, page 47). The same learned author at page

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41 observes: "The effect of sharing profits as *prima facie* evidence of partnership was considered by the Court of Appeal in the case of *Badeley v. Consolidated Bank* (1) and was there explained to be, that if all that is known is that two persons are participating in the profits of a business, this, unless explained, leads to the conclusion that the business is the joint business of the two, and that they are partners." I am of opinion, therefore, that the business in the name of the 'Seeds Department' was to all intents and purposes a partnership business. In fact from the various orders of the income-tax authorities it appears that throughout the proceedings before them, the assessee had maintained that position and the only plea raised was that the amount represented 'valid bad debts.'

This being so, the question arises whether the assessee can claim any relief on account of those losses, the business having been long discontinued before the year of account. The answer is clearly in the negative. In *South Indian Industrials, Ltd. v. Commissioner of Income-tax, Madras* (2), in a case where the assessee had carried on several separate businesses before, but in the account year some of those businesses had closed, a Special Bench of the Madras High Court held that the assessee could not set off the losses of the discontinued businesses against the profits of the current businesses, inasmuch as section 10 of the Income-tax Act dealt with businesses that were being carried on and not with businesses which had ceased to exist, and further that the losses were capital losses and not revenue losses. It is indisputable that where a person carries on two different trades, he is entitled to set-off for purposes of income-tax the loss incurred by him in

(1) (1888) L. R. 38 Ch. D. 238. (2) (1934) 8 I. T. C. 128.

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respect of one against the profit made by him in the other. This principle was recognized by their Lordships of the Privy Council in *Arunachalam Chettiar v. Commissioner of Income-tax, Madras*, (1) and has been followed in several Courts in India, [see among others, *Commissioner of Income-tax v. Arunachalam Chettiar* (2)], but for this principle to apply the condition precedent is that both businesses should be alive during the current year. A dead business' loss cannot be set-off against a living business' gains. I would, therefore, answer question No.2 in the negative.

In view of my finding on question No.2, as was conceded by the assessee in the course of arguments, question No.3 does not arise.

I now come to question No.4. It reads as follows :—

"The Assistant Commissioner having reason to believe that debts in business account totalling Rs.14,775 reached *de facto* irrecoverability in a prior account, and the assessee having declined to give any evidence of date of this *de facto* irrecoverability, was the Assistant Commissioner bound in law to allow claim on the ground of limitation reached in the account period."

The facts bearing on this question are simple. The assessee as a money-lender advanced certain loans to its tenants, which became time-barred in the year of account. These items were consequently claimed as bad debts, but the claim was disallowed both by the Income-tax Officer and the Assistant Commissioner. Both officers mainly relied on the balance sheet of the assessee for the year ending 30th September, 1933, and remarked that the assessee having itself considered

(1) (1936) L. R. 63 I. A. 233. (2) I. L. R. (1924) 47 Mad. 660.

these debts as bad in that balance sheet could not urge that they had become bad during the account year merely because their limitation had expired in that period. The Commissioner while agreeing with this view has left the question of their admissibility open, even if it were held that the debts had become bad during the 'previous year.' Counsel for the Commissioner has drawn our attention to *Commissioner of Income-tax, Central Provinces and Berar v. Sir S. M. Chitnavis* (1) and *Dinshaw v. Commissioner of Income-tax, Bombay* (2) and has urged that it is not open to us to go behind the finding arrived at by the appropriate tribunal as to when the debts had become bad. In *The Commissioner of Income-tax, Central Provinces and Berar v. Sir S. M. Chitnavis* (1), their Lordships of the Privy Council observed: "Whether a debt is a bad debt, and if so, at what point of time it became a bad debt, are questions which in their Lordships' view are questions of fact, to be decided in the event of dispute by the appropriate tribunal, and not by the *ipse dixit* of any one else. The mere fact that a debt was incurred at a date beyond the period of limitation will not of itself make the debt a bad debt; still less will it fix the date at which it became a bad debt. A statute-barred debt is not necessarily bad; neither is a debt which is not statute-barred necessarily good. The age of the debt is no doubt a relevant matter to take into consideration. In every case it is a question of fact to be determined after consideration of all relevant circumstances." The same principle was re-affirmed in *Dinshaw v. Commissioner of Income-tax, Bombay* (2). There the debts were due from a going concern and in the judgment under appeal

(1) (1932) 6 I. T. C. 453 (P. C.). (2) I. L. R. (1934) 58 Bom. 579 (P. C.).

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it had been remarked that to constitute moneys due by a company a bad debt or a business loss to the creditor, it is necessary that the company should have ceased to be a going concern. Animadverting on these remarks, their Lordships remarked :

" Their Lordships know of no principle or authority upon which these views of the learned Chief Justice can be supported. Whether a debt is wholly or partly and to what extent bad or irrecoverable is in every case (and whether the debtor is a human being or a Joint Stock Company or other entity) a question of fact to be decided by the appropriate tribunal upon a consideration of the relevant facts of that case. There is no justification for the suggestion that a practice should prevail in the Commissioner's office under which a debt due from a limited Company which is still a going concern is incapable of being treated as a bad debt."

In view of such clear pronouncements of their Lordships of the Privy Council, I consider that the only thing open to us in this matter is to determine whether the finding arrived at by the appropriate tribunal is vitiated on any ground or, in other words, is perverse or unwarranted by the material on the record. If once it is found that the finding is based on relevant and admissible evidence, our interference will be barred.

As stated above, the finding of the Assistant Commissioner that these debts had become bad during the preceding year is based on the balance sheet for the year ending September, 1933, where these debts were shown under the head 'Bad and Doubtful.' It is further remarked by the Assistant Commissioner that the assessee has adduced no evidence to show that the

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debts had become bad during the year of account and that it has solely relied on the limitation test which is not final. In these circumstances, it cannot be said that this finding is bad in law. It may be an erroneous finding of fact but nevertheless it is conclusive. It has been remarked by their Lordships of the Privy Council in the case of second appeals, that however gross the error, High Courts have no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact. *Durga Chowdhrani v. Jewahir Singh Chowdhri* (1) and *Raja of Pittapur v. Secretary of State* (2). The same principle applies here. I would, accordingly, answer question No.4 in the negative.

Question No.5 is as follows :—

" The assessee having an amount due from an insolvent estate, as to the badness of which the only evidence was that petty realisations were received during the prior year and the subsequent year, was it impossible in law for the Assistant Commissioner to find that badness thereof did not eventuate in the year of account?"

This question relates to a transaction which the assessee had with a trading concern known as Dart and Company. It is common ground that the Official Assignee in whom Mr. Dart's estate vests at present has not wound up the whole affair and has even after the year of account paid paltry dividends to the creditors of the estate. The Income-tax Officer, however, came to the conclusion that the debt had in fact become bad long before the commencement of the previous year and consequently disallowed the item. The Assistant Commissioner agreed with the Income-tax Officer but

(1) I.L.R. (1891) 18 Cal. 23 (P.C.). (2) I.L.R. (1929) 52 Mad. 538 (P.C.).

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on grounds which were not correctly expressed. In fact, his reference to the previous balance sheets was erroneous. The Commissioner pointed out the mistake but supported the final conclusion on the ground that the scheme of the Act did not favour ' piecemeal write-off.' He observed " The loss eventuates when the whole balance of any item reaches irrecoverability. On this footing the amount in issue certainly did not fall bad until after the period." The assessee contends that the mere expectation of a negligible dividend does not keep the debt alive but, in my view, in maintaining this position, the assessee lays itself open to the criticism advanced by the Income-tax Officer and the Assistant Commissioner, and invites the finding that the debt may have become bad prior to the year of account. As I read the Commissioner's order, however, that finding has been set aside and has now been replaced by a finding that the debt had not become bad even during the year of account. To my mind, this position in the circumstances of the case is most reasonable. So long as there is any ray of hope left to recover a debt, however dim it may be, and so long as a debt is in the process of realization, it cannot be said that it has become irrecoverable. I would, therefore, support the Commissioner's view in this matter in preference to the finding of the Assistant Commissioner and answer question No.5 in the affirmative.

MONROE J.

MONROE J.—I agree.

BHIDE J.

BHIDE J.—I agree.

P. S.

Reference answered.