

**CIVIL REFERENCE.***Before Addison and Din Mohammad JJ.*

PUNJAB CO-OPERATIVE BANK LTD..

AMRITSAR—Petitioner.

*versus*

THE COMMISSIONER OF INCOME-TAX—

Respondent.

**Civil Reference No. 31 of 1937.**

*Indian Income-tax Act (XI of 1922), SS. 4 (3) (vii) and 10 — Profits from sale of securities — when assessable — Investment whether part of ordinary business or otherwise — finding of fact — decision of Income-tax authorities conclusive — unless based on no material.*

The assessee—a banking concern—made profits from the sale of securities and shares. It was found that the assessee had securities worth more than thirty lacs as part of its circulating capital and that the securities sold were not earmarked. The profits, however, were not utilized by the assessee in the revenue account but were carried to its reserve account *en bloc*. The Income-tax authorities came to the conclusion that the profits were trading profits and were taxable. It was contended by the assessee that the investment was in the nature of fixed capital and the profits realized were not gains of business but were a casual and irregular money return and were not an assessable income under the Act.

*Held*, that the question that arises for determination in every case on its own facts is whether the investment was a part of the ordinary business of the investor or otherwise and the finding of fact arrived at by the Income-tax authorities is conclusive unless it is found that that finding was based on no material.

*Held further*, that in the circumstances of the present case, it cannot be said that the decision of the Income-tax authorities was based on no material.

*In the matter of Amritsar Produce Exchange, Ltd.* (1), relied upon and other case law discussed.

*Case referred under section 66 (2) of the Income-tax Act, by Mr. K. C. Basak, Commissioner of Income-tax, Punjab, with his letter No. S. 1/AR-37, dated 13th November 1937, for orders of the High Court.*

MEHR CHAND MAHAJAN and RATAN LAL CHAWLA, for  
Petitioner.

JAGAN NATH AGGARWAL and S. M. SIKRI, for  
Respondent.

The order of the Court was delivered by—

DIN MOHAMMAD J.—The facts involved in this reference are fully set out in the statement of the case drawn up by the Commissioner of Income Tax under section 66 (2) of the Income-Tax Act and need not be recapitulated. The questions propounded by the Commissioner are:—

(1) Whether in the circumstances of the case the amount of Rs. 1,42,588 realised by the assessee on the sale of securities and shares over their cost price is taxable? and

(2) Whether under the circumstances of the case the net interest amounting to Rs.2,764 received from vendees of securities on *de die in diem* basis is taxable?

We may at the outset point out to the Commissioner the desirability of framing questions on a more precise and definite basis so that the issues of law referred to this Court may not admit of any ambiguity. The words “in the circumstances of this case” inserted in both the questions reproduced above leave the matter vague and indefinite. The facts are to be determined finally by the Income-Tax authorities and the findings of fact arrived at by them are not liable to be disturbed by this Court. By using the words “in the circumstances of the case” the duty is, so to say, cast upon this Court to search out the

1938

PUNJAB CO-  
OPERATIVE  
BANK, LTD.,  
AMRITSAR

?.  
THE  
COMMISSIONER  
OF INCOME-TAX.

1938

PUNJAB CO-  
OPERATIVE  
BANK, LTD.,  
AMRITSAR  
v.  
THE  
COMMISSIONER  
OF INCOME-TAX.

circumstances on which the questions are founded and this is not the right way of dealing with the matter.

It is common ground that the assessee is a banking concern and that the profits in question accrued from the sale of securities and shares. The only question that falls to be judged, therefore, is whether these profits form part of the capital or the revenue account of the assessee. If they are in the nature of capital, they are exempt but if on the other hand, they are in the nature of revenue, they are taxable.

The Income Tax Officer while dealing with these profits observed:—

“ Apart from bringing in any such considerations whether the Bank is dealing in securities or not, the income is taxable on the footing that when a person is dealing not in goods, but in money and is taking money from his customers, and has to hold that money as a part of his business, and does so in the ordinary business course in the form which is most profitable having in mind the security and the requisite degree of liquidity, then all his dealings in that money lie in revenue account with this difference that investments are not stock-in-trade and to be valued as stock, but only brought in when there is realisation in some form. I therefore hold that the profit is taxable.”

On appeal the Assistant Commissioner also adopted the same view and upheld the decision of the Income Tax Officer. While disposing of the assessee's application under section 66 (2), the Commissioner has stated that although the profits realised from the sale of securities and shares were utilised in increasing the reserve fund, the only inference possible is that the assessee had been dealing in securities and shares as part of his business since 1934. The Commissioner,

however, did not reject the conclusions arrived at by the Income Tax Officer and the Assistant Commissioner and considered that that was also a permissible way of looking at the matter.

The assessee contends that the opinion of the Commissioner as well as that of his subordinate officers is wrong and that inasmuch as the profits have admittedly gone to swell the reserve fund, they cannot be taxed. In support of his contention he has relied on *Commissioners of Inland Revenue v. The Scottish Automobile & General Insurance Co. Ltd.* (1), *Punjab National Bank Ltd. v. Commissioner of Income-tax, Punjab* (2), *In the matter of Amritsar Produce Exchange Ltd.* (3), *Hira Nand-Jairam Singh v. Commissioner of Income-tax, Punjab* (4), and *Van Den Berghs Ltd. v. Clark* (5).

In *Commissioner of Inland Revenue v. The Scottish Automobile & General Insurance Co., Ltd.* (1), the assessee was an insurance company and like most insurance companies it had a reserve fund. The company sold a small part of the Government securities in which that reserve fund was invested and invested the proceeds in other Government securities of a different denomination, making a substantial profit. The question arose, whether the profit so made was a profit of the company's business. The General Commissioners held that it was not a trading profit. On appeal, the Lord president remarked that the question whether a person is or is not engaged in a trade is not a question of law but a question of fact and that the finding is only open for consideration if it was possible to say that there was no evidence before

1938

PUNJAB CO-  
OPERATIVE  
BANK, LTD.,  
AMRITSAR

v.

THE

COMMISSIONER  
OF INCOME-TAX.

(1) (1931) 16 T. C. 381.

(3) I. L. R. [1937] Lah. 706.

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

(4) (1935) 8 I. T. C. 395.

(5) (1935) 19 T. C. 390.

1938

PUNJAB CO-  
OPERATIVE  
BANK, LTD.,  
AMRITSAR  
v.  
THE  
COMMISSIONER  
OF INCOME-TAX.

the Commissioners upon which they could reasonably arrive at their conclusion. In this connection his Lordship did not attach any importance to the fact that under the Articles of Association there was a power to invest the funds of the company in certain classes of securities and also to vary the investments of the company and observed "it does not necessarily follow from the circumstance that the company sees fit to sell a block of its Government securities, whether the purpose be to get a better return, or whether the purpose be to increase the reserve fund by taking profit from the realisation of a particular block, that therefore the company is trading in the purchase and sale of the securities forming its reserve fund." In a concurring judgment delivered by Lord Sands, it was said "If the directors treat the profit from appreciation just as a trading profit, this may help the inference that the company was trading." On the finding that the assessee company was not carrying on the business of an investment company, the appeal was disallowed.

In *Punjab National Bank Ltd. v. Commissioner of Income Tax, Punjab* (1), the assessee, a banking concern claimed deduction on account of depreciation in the value of Government securities held by it, and it was held that the deduction claimed was not permissible under the Act as the securities are permanent investments of part of the fixed capital so retained as an emergency reserve and not part of the stock-in-trade.

In *In the matter of Amritsar Produce Exchange Ltd.* (2), this Court considered the true implications of *Punjab National Bank Ltd. v. Commissioner of Income Tax, Punjab* (1), and remarked that it was

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

(2) I. L. R. [1937] Lah. 706.

not possible to lay down a rule of general application that in every case an investment in securities should be treated as fixed capital. It was however observed that 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 had no concern with the stock-in-trade. It is upon this observation that the assessee relies in connection with this case.

In *Hira Nand-Jairam Singh v. Commissioner of Income Tax, Punjab* (1), where the assessees who were general produce dealers trading in salt had on the abolition of the system of deferred payment for salt sold the Government securities deposited by them with the Commissioner of Salt, it was held that the loss incurred by the sale was a capital loss and not one sustained in business.

In *Van Den Berghs, Ltd. v. Clark* (2), Lord Macmillan drew a distinction between fixed and circulating capital in the following terms: "Circulating capital is capital which is turned over and in the process of being turned over yields profit or loss. Fixed capital is not involved directly in the process and remains unaffected by it."

The assessee has further relied on *The Commissioner of Income Tax, Bengal v. Messrs. Shaw Wallace & Co.* (3) and urged that in view of the definition of income as given by their Lordships of the Privy Council, such casual and irregular monetary return in the shape of profits on the sale of securities as is involved in this case cannot be treated as assessable income under the Act.

1938

PUNJAB CO-  
OPERATIVE  
BANK, LTD.,  
AMRITSAR  
v.  
THE  
COMMISSIONER  
OF INCOME-TAX.

(1) (1935) 8 I. T. C. 395. (2) (1935) 19 T. C. 390, 432.

(3) (1932) 6 I. T. C. 178 (P. C.).

1938

PUNJAB CO-  
OPERATIVE  
BANK, LTD.,  
AMRITSAR  
v.  
THE  
COMMISSIONER  
OF INCOME-TAX.

On behalf of the Commissioner, reliance has been placed on *In re The Tata Industrial Bank Ltd.* (1), *Scottish Investment Trust Company v. Forbes* (2), *Californian Copper Syndicate Ltd. v. Harris* (3), *The Rees Roturbo Development Syndicate Ltd. v. The Commissioners of Inland Revenue* (4), *The Royal Insurance Company, Ltd. v. Stephen* (5) and *Westminster Bank, Ltd. v. Osler* (6).

In *In re The Tata Industrial Bank, Ltd.* (1), the assessee, a banking concern claimed to deduct from the taxable profits a certain sum said to be the amount of depreciation on war bonds and securities belonging to it and its claim was rejected.

In *Scottish Investment Trust Company v. Forbes* (2), it was held that if an Investment Trust Company takes powers in its Memorandum of Association to vary its investments and generally to sell or exchange any of its investments, the net gain by realising investments at larger prices than were paid for them constitutes profits chargeable with Income Tax. It was remarked by the Lord President who delivered the judgment that the power of varying the investments and turning them to account "took their place among what are the essential features of the assessee's business and were the appointed means of the company's gains."

In *Californian Copper Syndicate Ltd. v. Harris* (3), a company formed for the purpose, *inter alia*, of acquiring and reselling mining property after acquiring and working various property, resold the whole to a second company, receiving payment in fully paid

(1) (1921) 1 I. T. C. 152.

(2) (1893) 3 T. C. 231.

(3) (1904) 5 T. C. 159.

(4) (1928) 13 T. C. 378.

(5) (1928) 14 T. C. 22.

(6) (1932) 17 T. C. 381.

shares of the latter company. 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. While differentiating between cases where enhanced values on realisation of investments are assessable and those where they are not, the Lord Justice Clerk observed: "What is the line which separates the two classes of cases may be difficult to define and each case must be considered according to its facts; the question to be determined being—Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?"

In *The Rees Roturbo Development Syndicate Ltd. v. The Commissioner of Inland Revenue* (1), Scrutton L.J. at pages 390-391 of the report observed that the question whether a trade is being carried on is a question of degree and fact and it was impossible to say that there was no evidence on which the Commissioners could find that the transactions were part of, incidental to and arose out of the appellants' trade or business.

In *The Royal Insurance Co., Ltd. v. Stephen* (2), it was held that the surrender of the old stocks enabled the result of the company's holding of those investments to be definitely ascertained and was equivalent to a realisation. In this case the company admitted that any profit made on the realisation of an investment was part of its profits for Income Tax purposes.

In *Westminster Bank, Ltd. v. Osler* (3), it was held that the conversion of war bonds was equivalent

1938

PUNJAB CO-  
OPERATIVE  
BANK, LTD.,  
AMRITSAR

2.  
THE  
COMMISSIONER  
OF INCOME-TAX.

(1) (1928) 13 T. C. 378.

(2) (1928) 14 T. C. 22.

(3) (1932) 17 T. C. 331.



1938

PUNJAB CO-  
OPERATIVE  
BANK, LTD.,  
AMRITSAR

v.

THE  
COMMISSIONER  
OF INCOME-TAX

to the realisation of investments. Here also it was admitted by the assessee that profits on realisation of investments should be included in their profits for Income Tax purposes.

On a review of the authorities cited at the Bar we are again led to the same conclusion as was arrived at in *In the matter of Amritsar Produce Exchange Ltd.* (1), viz., that in every case that arises, it is to be determined on its own facts whether the investment was a part of the ordinary business of the investor or otherwise, and in this matter, the finding of fact arrived at by the Income Tax authorities is conclusive unless it is found that that finding was based on no material. On going through the two balance-sheets put in by the assessee as also the Auditor's note Exhibit F and taking into consideration the fact that the assessee held securities worth more than 30 lacs as part of its circulating capital and that the securities which were sold were not earmarked, it is difficult to say that the opinion of the Income Tax authorities is based on no material. It is true that the profits have not been utilised in the revenue account and that they have been carried to the reserve capital *en bloc* but that circumstance is quite consistent with the finding of the Income Tax authorities that they were trading profits. The fact that no securities were sold during the first six years of their purchase was also present to their minds and if they still did not draw a conclusion favourable to the assessee, they were at liberty to do so. In this view of the case the income derived by the assessee as remarked in *In the matter of Amritsar Produce Exchange, Ltd.* (1) can on no account be deemed to be casual. We consider, there-

fore, that the answer to the first question should be in the affirmative and we answer it accordingly.

The assessee admits that the answer to the second question depends on the decision given on the first question and we answer that question too in the affirmative. Even otherwise there is against the assessee a clear authority of this Court reported as *Haveli Shah-Sardari Lal v. Commissioner of Income Tax* (1).

The Commissioner will get his costs from the assessee

A. N. K.

*Reference answered.*

### LETTERS PATENT APPEAL.

*Before Addison and Abdul Rashid JJ.*

SADHU RAM (DECREE-HOLDER) Appellant

*versus*

KISHORI LAL (JUDGMENT-DEBTOR) Respondent.

Letters Patent Appeal No. 160 of 1937.

*Provincial Insolvency Act (V of 1920), SS. 4, 13 and 24 — Enquiry under S. 24 as to whether a debtor entitled to present a petition — Questions under — S. 4 whether covers such questions arising before adjudication — Expression “of any nature whatsoever” in S. 4 (1) — Interpretation of.*

K. applied to be adjudicated an insolvent giving the names of four creditors and stating his assets to be Rs. 2,000 odd and his debts to be Rs. 11,000 odd. His petition was dismissed on the ground that he was able to pay his debts as three of them were bogus and the remaining debt was less than the assets shown. The debtor did not appeal but S. (one of the alleged bogus creditors) appealed to the District Judge from the finding that his debt was bogus. His appeal was dismissed on the ground that he was not competent to appeal. Subsequently S., holding a decree against K., took out execution proceedings against him who pleaded

1938

PUNJAB Co-  
OPERATIVE  
BANK, LTD.,  
AMBITSAR  
v.  
THE  
COMMISSIONER  
OF INCOME-TAX.

1938

Feb. 22.