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Bisheshar Nath (1) Walsh J. observed that where a suit is duly authorised, the proper signing of the plaint is a matter of practice only and if a mistake or omission has been made it may be amended at any time. In *Mahomed Jafar* v. *Sheikh Ahmed* (2) an appeal had been presented by a pleader duly appointed to act on the appellant's behalf by virtue of a power of attorney having been signed and in these circumstances the non-filing of the power of attorney in Court was condoned.

In the result, we allow the petition and set aside the order of the Subordinate Judge restoring the suit. The petitioner will get his costs from the respondent.

A. N. K.

Revision accepted.

CIVIL REFERENCE.

Before Addison and Din Mohammad JJ.

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Jan. 6.

GOPI NATH-VIR BHAN (ASSESSEE) Petitioners,

versus

THE COMMISSIONER OF INCOME-TAX— Respondent.

Civil Reference No. 23 of 1937.

Indian Income-tax Act (XI of 1922), S. 10 (2), Cls. (i) and (ix) — share of net profits paid by assessee — whether 'rent' or 'expenditure' incurred solely for earning profits within the meaning of the section.

The assessee entered into an agreement with a Company for the ginning of his cotton at a ginning factory taken on lease by the latter, stipulating to pay it, besides the ginning charges, one-third of the net profits. He paid to the Company Rs.22,000 odd as one-third of the net profits and claimed to deduct this sum from his total income under s. 10 (2), cls. (*i*)

(1) I. L. R. (1918) 40 All. 147. (2) 1926 A. I. R. (Bom.) 336.

and (*ix*) of the Indian Income-tax Act. He also claimed to deduct other two items which he stated he had paid to two persons as interest on capital alleged to have been borrowed by him from them.

Held, that it is a well settled principle that if any deduction is claimed, it is for the assessee to prove that that deduction is legally allowable to him, and if he fails to do so, the amount so claimed is liable to be assessed.

Held also, that the sum claimed not being expressed in the agreement and being a fluctuating item could not, under the circumstances, be deducted as rent paid for the premises in which the assessee carried on the business, within the meaning of cl. (*i*) of s. 10 (2) nor was it expenditure incurred solely for the purpose of earning profits or gains within the meaning of cl. (*ix*) of s. 10 (2) as it was appropriation of profits after they had been earned.

Indian Radio and Cable Communication Co., Ltd. v. *The Commissioner of Income-tax, Bombay* (1), *Pondicherry Railway Co., Ltd.* v. *Commissioner of Income-tax, Madras* (2), *Union Cold Storage Co., Ltd.* v. *Adamson* (3), and *Tata Hydro Electric Agencies, Ltd., Bombay* v. *Commissioner of Income-tax, Bombay* (4), followed.

Held further, that it is a question of fact whether the advance made by a partner is a loan to the partnership or an increase in the capital of the firm and when once the Income-tax authorities have held that it was by way of an increase in the capital of the firm and not a loan independent of the partnership capital, the High Court is not competent to interfere.

Case referred under section 66 (3) of the Indian Income-tax Act, by Mr. K. C. Basak, Commissioner of Incom-tax, Punjab, with his letter No.S-3/MG-36, dated 11th October, 1937, for orders of the High Court.

KIRPA RAM BAJAJ, for Petitioners.

(1) (1937) 5 I. T. R. 270 (P.C.).
(2) (1931) 5 I. T. C. 363 (P.C.).
(3) (1931) 16 T. C. 293 (P.C.).
(4) (1937) L. R. 64 I. A. 215 (P.C.).

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DIN MOHAMMAD J.

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

The order of the Division Bench was delivered by—

DIN MOHAMMAD J.—This is a case stated by the Commissioner of Income-tax under sub-section (3) of section 66 of the Income-tax Act. The two questions that were formulated by this Court for the opinion of the Commissioner were couched in the following terms :—

1. Whether the sum of Rs.22,429 paid by the assessee to Jagan Nath Syal and Company, under the agreement between the assessee and Jagan Nath Syal and Company, is a legitimate deduction under Section 10 (2), clauses (*i*) and (*ix*) of the Income-tax Act; and

2. Whether the assessee is entitled to deduct Rs.2,109 and Rs.2,622 paid to Fateh Chand Jai Ram Das and Shanti Sarup, respectively, as interest on capital alleged to have been borrowed from them by the assessee.

In the opinion of the Commissioner both questions should be answered in the negative and we have no hesitation in agreeing with him.

The sum involved in question No.1 was paid by the assessee to Jagan Nath Syal and Company, hereinafter called the Company, in the following circumstances :—

The company took on lease a cotton ginning factory and the assessee entered into an agreement with the company for the ginning of his cotton. It was stipulated between them that besides the ginning

charges, which were fixed in the agreement, the company would be entitled to one-third of the net profits calculated "after deducting all ginning charges at the above mentioned rates and all other expenses connected with sale and purchase of cotton and seed, insurance interest at 6 *per cent. per annum*, travelling, food of workers and employees, staff salaries, etc., bad debts and irrecoverable items." In case of loss no sum was to be paid to the company nor was the company liable to any contribution on that account. In the accounting year the assessee paid to the company Rs.68,000 odd towards ginning charges and in addition Rs.22,429 were paid to it which represented one-third of the net profits earned by the assessee after making the necessary deductions specified in the agreement. It is the latter sum which the assessee claims to deduct from his total income and the Income-tax authorities have refused to allow him to do so on the ground that it was covered neither by clause (*i*) nor clause (*ix*) of sub-section (2) of section 10 of the Income-tax Act. It is a well-settled principle that if any deduction is claimed, it is for the assessee to prove that that deduction is legally allowable to him. If he fails to do so, the amount so claimed is liable to be assessed. It is obvious that clause (*i*) of sub-section (2) of section 10 does not cover the amount and it is significant that throughout the proceedings before the Income-tax authorities prior to the issue of mandamus by this Court the assessee never based his claim on that clause. Had the sum in dispute been rent, it could easily have been so expressed in the agreement entered into between the assessee and the company. This however, was not done nor can a fluctuating item like this be treated as rent. The following observations of their Lordships of the Privy Council in *Indian Radio*

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and Cable Communications Co., Ltd. v. *The Commissioner of Income-tax, Bombay* (1) are pertinent in this respect :—

" Circumstances of greater importance are that the sum payable may be small or great or nothing—a most unusual feature in the case of rent—and that it is impossible to presume or infer that the half share or profits is being paid only as rent, or as a similar payment, in consideration merely of the use of the plant."

We hold, therefore, that the sum in dispute could not be deducted as rent paid for the premises in which the assessee carried on his business.

It now remains to be seen whether it is " expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains." Here too, as remarked above, we are inclined to agree with the Commissioner that the payment of the sum in dispute was an appropriation of profits after they had been earned and not an admissible expenditure incurred for the purpose of earning those profits. In a case reported as *Indian Radio and Cable Communications Co., Ltd.* v. *The Commissioner of Income-tax, Bombay* (1), their Lordships of the Privy Council had occasion to consider a somewhat similar matter and observed as follows :—

" The sum is in truth made payable as part of the consideration in respect of a number of different advantages which the appellants derive from the agreement and not all of them can be shown to be of a purely temporary character. The agreement as a whole is much more like one for a joint adventure for a term of

(1) (1937) 5 I. T. R. 270 (P.C.).

years between the appellant company and the Communications company than one for a lease for that period * * *".

"Their Lordships recognise the difficulty which may often exist in deciding whether expenditure not in the nature of capital expenditure has been incurred solely for the purpose of making or earning 'income. profits or gains' and they agree that it may be impossible to formulate a test which will always suffice to discriminate between the expenditure which is and which is not allowable for the purpose of income-tax but in the present case they have little hesitation in coming to the conclusion that the proposed deduction is not allowable."

In that case the Communications Company and the Radio Company entered into an agreement to the effect that their businesses in India should be combined and conducted by the Radio Company for a certain number of years. The Communications Company agreed to deliver all the plant, machinery, fittings, etc., of their business in India to the Radio Company to be used by the latter during the period of the agreement and the latter agreed to pay one-half of its net profits for each of its financial years to the Communications Company. It was this half share of the net profits which was claimed by the Radio Company as a permissible deduction.

In *Pondicherry Railway Co., Ltd.* v. *Commissioner of Income-tax, Madras* (1), again a case that went to the Privy Council, their Lordships held that in computing the assessable profits or gains of the assessee's business no allowance was deductible in

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respect of the half share of the net profits payable by the assessee to the French Colonial Government. Lord Macmillan, who delivered the judgment, observed as follows:—

"It is claimed for the Company that when it makes over to the Colonial Government their half of the net profits it is making an expenditure incurred solely for the purpose of earning its own profits. The Court below has unanimously negatived this contention and in their Lordships' opinion has rightly done so. A payment out of profits and conditional on profits being earned cannot accurately be described as a payment made to earn profits. It assumes that profits have first come into existence. But profits on their coming into existence attract tax at that point and the revenue is not concerned with the subsequent application of the profits."

In two subsequent cases his Lordship threw further light on these observations and tried to explain as to what his real import was in using these words. In *Union Cold Storage Co., Ltd.* v. *Adamson* (1), at page 331, his Lordship remarked:—

"When, therefore, in the passage referred to by the Attorney-General in the *Pondicherry* case I said that 'a payment out of profits and conditional on profits being earned cannot accurately be described as a payment made to earn profits,' I was dealing with a case in which the obligation was, first of all, to ascertain the profits in a prescribed manner, after providing for all outlays incurred in earning them, and then to divide them."

(1) (1931) 16 Tax cases 293 P.C.).

In *Tata Hydro-Electric Agencies, Ltd., Bombay* v. *Commissioner of Income-tax, Bombay* (1), his Lordship once more adverted to the *Pondicherry* case and observed as follows :—

"In the *Pondicherry* case the assessees were under obligation to make over a share of their profits to the French Government. Profits had first to be earned and ascertained before any sharing took place."

His Lordship further added :—

"Their Lordships recognise, and the decided cases show, how difficult it is to discriminate between expenditure which is, and expenditure which is not, incurred solely for the purpose of earning profits or gains. In the present case their Lordships have reached the conclusion that the payments in question were not expenditure so incurred by the appellants. They were certainly not made in the process of earning their profits; they were not payments to creditors for goods supplied or services rendered to the appellants in their business; they did not arise out of any transactions in the conduct of their business. That they had to make those payments no doubt affected the ultimate yield in money to them from their business, but that is not the statutory criterion. * * * In short, the obligation to make these payments was undertaken by the appellants in consideration of their acquisition of the right and opportunity to earn profits, that is, of the right to conduct the business, and not for the purpose of producing profits in the conduct of the business."

In the present case also the assessee had the advantage of securing a monopoly of ginning his own

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cotton and this was a substantial advantage that he had gained. We are even prepared to go further and say that in the present case the company and the assessee had started a *quasi* partnership business in which the company had to receive certain definite sums as ginning charges and had in addition to receive certain profits after making certain deductions and not to be responsible for any losses. The profits were to be paid to the company after they were earned and as such they cannot in any way be treated as an expenditure which the assessee had to incur for earning them.

The second question can be disposed of on the short ground that it is a question of fact whether the advance made by a partner is a loan to the partnership or an increase in the capital of the firm, and when once the Income-tax authorities have held that it was by way of an increase in the capital of the firm and not a loan independent of the partnership capital, we have no authority to interfere.

We accordingly answer both questions in the negative. The assessee will be liable to pay the costs of this reference to the Commissioner.

A. K. C.

Questions answered in the negative.