CALCUTTA HIGH COURT

East India Prospecting Syndicate

Vs.

Commissioner of Excess Profits Tax

Reference under Indian Income-tax Act No. 3 of 1946

(Harries, C.J. and Chatterjee, J.)

08.04.1949

JUDGMENT

Harries, C.J.

1. This is a Reference made by the Income-tax Appellate Tribunal, Calcutta Bench, in respect of the assessment of the East India Prospecting Syndicate, Calcutta, to excess profits tax.

2. The Syndicate claimed that it was not liable to pay excess profits because it was not carrying on a business within the meaning of Section 2 (5) of the Excess Profits Tax Act, 1940. The Tribunal found that it was carrying on a business but it was requested by the syndicate to state a case for the opinion of this Court. The Tribunal stated a case and formulated the following question for the opinion of this Court.

> "Whether in the facts and circumstances of the case, the assessee can be said to be carrying on a 'business' within the meaning of S, 2 (5) of the Excess Profits Tax Act, so as to bring the income in question within the charge to excess profits tax?"

3. The facts of the case giving rise to this dispute can be shortly stated as follows :

4. Sometime in the year 1919 the Villiers Colliery Company Limited obtained a prospecting licence from the Raja of Talchar in respect of about 8 sq. miles (less 1000 bighas) of land under which there were seams of coal. On August 5, 1920 a partnership was formed which was named the East India Prospecting Syndicate, Calcutta, and this partnership originally consisted of two limited companies and three individuals as partners. Subsequently, one of the individuals died arid the partners of the syndicate at all material times consisted of these two limited companies and two individuals.

5. The objects for which this partnership was created are set out in the instrument of Partnership. The partnership was formed : (1) to purchase from the Villiers Colliery Company Limited their coal prospecting rights held under that company's prospecting license with regard to the area in

question; (2) to take all necessary steps to give effect to the several terms and conditions contained in such license; and (3) to promote a company or companies with limited liability for the purposes of acquiring at a profit to this syndicate all or any of the properties including the benefit of the prospecting : license.

6. It was provided that the consideration for the sale or disposal of any of the rights or interests of the syndicate should be utilized and employed, first, in paying all debts and liabilities of the syndicate; secondly, in repaying; any capital contributed by the members in respect of their shares; and thirdly, the surplus should be divided among the members in proportion to their respective shares.

7. In pursuance of this deed the syndicate acquired the prospecting license from the Villiers Colliery Company Limited for a consideration of Rs. 10,00,000 . Rs. 4,00,000/- was paid in cash and the Villiers Colliery Company Limited were given a share in the syndicate to the value of Rs. 8,00,000/- in discharge of the balance of the purchase price.

8. In April 22, 1921, the syndicate entered into an agreement with the Raja of Talchar for a mining lease in respect of about 5000 acres of this coal bearing land for a term of thirty years with an option to renew.

9. This mining lease gave the syndicate the usual powers given by a mining lease and subjected them to the usual liabilities. They were given power and liberty to enter upon the lands and to search for, win, work and raise and carry away the minerals there under. The syndicate were under a liability to pay certain dead rents and royalties - the royalty being at the rate of two annas per ton. The syndicate were also to pay rent in respect of surface lands occupied by them for the purposes of mining.

10. The syndicate then promoted a company known as the Talchar Coalfield Limited and agreed with that company to sublet to it this mining property. A sub-lease was executed on September 26, 1924, which was to have effect from December 1, 1921 in consideration of Rs. 20,00,000/- which was to be paid and satisfied as to Rs. 15,00,000/- by allotment to the syndicate or their nominees of 1,50,000 fully paid up shares of Rs. 10/- each in the Talchar Coalfields Limited and as to the balance of Rs. 5,00,000/- by payment in cash. The provisions in this sub-lease with regard to the rights and liabilities of the sub-lessees were similar to those contained in the indenture of lease dated April 22, 1921 made by the Raja of Talchar to favour of the syndicate. However, the Talchar Coalfield Limited were bound to pay not only the half yearly dead rent but had to pay during the subsistence of this lease a certain amount based on the output of steam coal, rubble and dust coal. The amount so payable periodically was considerably in excess of the amount payable by the syndicate to the Raja. The sublease was therefore a profitable undertaking, because the syndicate received from the sub-lessees, the Talchar Coalfield Limited a half yearly sum which was considerably in excess of the half yearly sum payable by the syndicate to the lessor, the Raja of Talchar.

11. For the financial year ending March 31, 1942 the syndicate's net income on account of rent and royalty under this sub-lease was computed at Rs. 1,20,877/-. The standard profit after necessary adjustments for the purposes of ascertaining the excess profits was taken to be Rs. 1,04,856/-. The excess profits were therefore Rs. 16,021/- from which sum was deducted a sum

of Rs. 5152/- representing the deficiency which had been brought forward. In the result the applicant was assessed to excess profits tax on the sum of Rs. 10,869/- for the period ending March 31, 1942. It appears that for the chargeable accounting period ending March 31, 1943 there were no excess profits which could be subjected to tax.

12. The Excess Profits Tax Officer treated this income arising from the sub-lease as the profits of a business and assessed the assessees to excess profits tax. The assessees contended before the Tax Officer that they were not carrying on any business and that their income was merely income from property. The Tax Officer however rejected that view and assessed them to excess profits tax. The syndicate appealed and the Appellate Assistant Commissioner reversed the finding of the Tax Officer and set aside the assessment. The department then appealed to the Tribunal which in turn set aside the finding of the Appellate Assistant Commissioner and affirmed the finding of the Excess Profits Tax Officer.

13. Mr. Atul Gupta who has appeared on behalf of the appellant has contended that the Appellate Tribunal were clearly wrong because upon the plain terms of the Excess Profits Tax Act the income of the syndicate could not be taxed.

14. The charging section of the Excess Profits Tax Act, 1940 (Act XV (15) of 1940) is Section 4 which is in these terms :

> "Subject to the provisions of this Act, there shall, in respect of any business to which this Act applies, be charged, levied and paid on the amount by which the profits during any chargeable accounting period exceed the standard profits a tax (in this Act referred to as 'excess profits tax') which shall in respect of any chargeable accounting period ending on or before the 31st day of March, 1941 be equal to fifty per cent. of that excess ....."

15. It is quite clear from the terms of this section that this tax can only be levied on profits of any business to which the Act applies and cannot be levied on any profits except from such business.

16. The term 'business' is defined in Section 2 (5) of the Act in these terms :

> "'Business' includes any trade, commerce or manufacture or any adventure in the nature of trade, commerce or manufacture or any profession or vocation, but does not include a profession carried on by an individual or by individuals in partnership if the profits of the profession depend wholly or mainly on his or their personal qualifications unless such profession consists, wholly or mainly in the making of contracts on behalf of other persons or the giving to other persons of advice of a commercial nature in connection with the making of contracts :
> Provided that where the functions of a company or of a society incorporated by or under any enactment consist wholly or mainly in the holding of investments or other property, the holding of the investments or property shall be deemed for the purpose of this definition to be a business carried on by such company or society."

17. Mr. Atul Gupta's argument was that the assessee syndicate were not carrying on any business to which the Act applied and therefore they were not subject to excess profits tax. Mr. Gupta relied upon the proviso to Section 2 (5) of the Act. He has contended, and I think rightly, that the proviso makes it clear that the functions of anybody which consist wholly or mainly in the holding of investments or other property cannot amount to a business, because it is said in the proviso that in certain cases the holding of investments or property shall be deemed for the purpose of this definition to be a business. Where an Act states that certain activities are deemed to amount to a business it is clear that such activities would not normally amount to carrying on business. But where an Act provides that such activities shall be deemed to be carrying on a business then for the purposes of that particular Act the activities which do not usually amount to carrying on business will be regarded for that Act and that Act only as amounting to carrying on business. It seems to me that the proviso makes it clear that any company or incorporated society or individuals would not be carrying on business merely because they were holding securities or property. But for the purposes of the Excess Profits Tax Act an exception is made in the case of companies or societies incorporated under any enactment. The proviso states that a company or an incorporated society will for the purposes of the Act be regarded as carrying on business where its functions wholly or mainly are the holding of investments or other property. It will be seen that the proviso only makes the holding of investments or property by limited companies and incorporated societies tantamount to carrying on business. On the principle 'expressio unius exclusio alterius' it follows that if only companies and incorporated societies are to be deemed to carry on business by holding securities or property then all other bodies or individuals do not carry on business where their functions are wholly or mainly holding such securities or property. The syndicate is neither a limited company nor an incorporated society. It is a partnership and as such is not covered by the proviso. Therefore it seems to me clear upon the plain words of sub-section (5) and the proviso thereto that the syndicate cannot be said to carry on business if its function is wholly or mainly holding property.

18. There can be no doubt that this syndicate came into existence to acquire what was thought to be valuable mineral rights and to develop to the profit of the syndicate such rights when they had been acquired. In due course the syndicate acquired a lease of a large area of land with a right to work the minerals thereunder. The syndicate however never worked the minerals themselves, but granted a sub-lease to a coal mining company which worked the minerals thereafter. It is common ground that after this sub-lease the syndicate merely collected the rent and royalties payable under such sub-lease and retained as their profit the excess of the payments received over the payments made to the Raja of Talchar under their lease.

19. Dr. Gupta who has appeared on behalf of the department has had to concede that in the years 1941, 1942 and 1943 the syndicate did not carry on any mining operations and that all they were entitled to at that time was to receive the rents and royalties under the sublease.

20. It seems to me clear therefore that the functions of this partnership consisted wholly in the holding of property and they had no other functions whatsoever. If this sub-lease had been granted by a limited company or by an incorporated society the net profit could be regarded as profits for the purposes of Excess Profits Tax Act by reason of the proviso to Section 2 (5) of the Act. But being neither a company nor an incorporated society, the net profit cannot be regarded as the profits of business and therefore they cannot be taxed under Section 4 of the Act. It appears to me that the terms of Section 2 (5) make it clear that the profits of this syndicate cannot

be regarded as profits of the business so as to make them taxable under the Excess Profits Tax Act.

21. Dr. Gupta on behalf of the department further argued that the profits of this syndicate were rightly assessed to excess profits tax by reason of sub-rule (4) of Rule 4 of Schedule I of the Excess Profits Tax Act, 1940. That sub-rule is in these terms :

> "In the case of a business which consists wholly or partly in the letting out of property on hire, the income from the property shall be included in the profits of the business whether or not it has been charged to income-tax under Section 9 of the Indian Income-tax Act, 1922, or under any other section of that Act."

22. It is urged that this rule makes it clear that in the case of every business which consists wholly or partly in the letting out of property the income thereof must be regarded as profits and gains of a business for the purposes of the Act.

23. It is to be observed that the rule only applies to cases where a business consists wholly or partly in letting out property. In short, the letting out of property must amount to a business, and if it does not then the sub-rule can have no application. The proviso to Section 2 (5) of the Excess Profits Tax Act makes it clear that the holding of property which of course must include its management and letting it out for profit is not a business, but it is deemed to be a business in the case of companies or societies incorporated under any enactment if the functions of such bodies consist wholly or mainly in holding property. Individuals or partnerships do not fall within this provision and therefore the holding of a property by a partnership even if it is its sole activity is not a business and as not to be deemed to be a business. Therefore the holding of property by the syndicate does not constitute a business and it cannot be said that its business consists in letting out the minerals which it held. That being so it appears to me that sub-rule (4), R. 4 of Schedule I of the Excess Profits Tax Act, 1940 cannot assist the department. Unless this construction is put on the sub-rule, the sub-rule will be in conflict with the definition of "business" given in the Act and clearly the rules made under the Act must be construed to avoid such a conflict and to harmonies with the substantive provisions of the Act.

24. The Tribunal has dealt with this case at very great length and considered a large number of English and Indian authorities, but strange to say, it never gave the proviso to Section 2 (5) of the Act any consideration whatsoever. It appears to me that the definition contained in that sub-section and proviso makes it clear that any partnership which merely derives its income from some property by way of rent, royalty or such like cannot be said to carry on business for the purposes of the Indian Excess Profits Tax Act.

25. The Tribunal however, as I have said, considered a large number of cases, particularly English cases and on a consideration of these authorities it came to the conclusion that the syndicate was in fact carrying on business and therefore was liable to pay the tax under Section 4 of the Act. The Tribunal considered the purpose for which this syndicate came into existence. It points out that it came into existence for the purposes of acquiring and exploiting certain mineral rights and making a profit therefrom. It is true that the syndicate did not proceed to carry on the business of coal-mining, but they effected their purpose of making a profit by granting this sub-

lease on most advantageous terms. The Tribunal thought that the granting of this sub-lease was merely carrying out one of the purposes for which the syndicate was formed and therefore a part of the exploitation of these mineral rights. The Tribunal was of opinion that the syndicate was engaged in the business of exploiting these mineral rights and that in receiving the rent and royalties due under the sub-lease it was receiving the profits of the business of exploiting these rights. The Tribunal laid great stress on an English case - *'Inland Revenue Commissioners v. Korean Syndicate Ltd*[1]*.',* In that case a company was incorporated as a limited company having for its principal object the acquisition and working of concessions and turning the same to account. In 1908 the company entered into an agreement to lease a concession in Korea which it had acquired in consideration of the lessees paying what was therein described as a royalty, but which was in fact a percentage based on the profits made by the lessees. The company also received the interest on a certain sum of money on deposit at a bank. The company's operations were confined to the collection and distribution of these two sources of income and to the payment of the premiums on a sinking fund policy.

26. Rowlatt, J., held that the receipts of this company were not the profits of a business. But on appeal the Court of Appeal held that upon the construction of the memorandum and articles and the agreement of 1908 with the lessees the company was carrying on the business for which it was incorporated, namely, the acquisition of concessions and the turning of the same to account and was therefore carrying on a business within the meaning of Section 39 of the Finance (No. 2) Act, 1915 and was accordingly liable to be assessed to excess profits duty under the Act.

27. It is to be observed that the definition of 'business' in the Finance (No. 2) Act of 1915 was very different from the definition contained in the Indian Act of 1940. Section 39 of the English Act was as follows :

> "The trades and businesses to which this Part of this Act applies are all trades or businesses (whether continuously carried on or not) of any description carried on in the United Kingdom, or owned or carried on in any other place by persons ordinarily resident in the United Kingdom, excepting :
> (a) husbandry in the United Kingdom; and
> (b) offices or employments; and
> (c) any profession the profits of which are dependent mainly on the personal qualifications of the person by whom the profession is carried on and in which no capital expenditure is required, or only capital expenditure of a comparatively small amount,
> but including the business of any person taking commissions in respect of any transactions or services rendered, and of any agent of any description (not being a commercial traveler, or an agent whose remuneration consists wholly of a fixed and definite sum not depending on the amount of business done or any other contingency)."

28. It will be seen therefore that practically all activities connected with any trade or business could be regarded as trades or businesses within that Act with very few

[1](1921) 3 KB 258

exceptions. The definition is in the very widest terms and is very different from the definition in the Indian Excess Profits Tax Act, 1940.

29. Further Lord Sterndale M. R. and Younger, L.J., were clearly of opinion that the so-called lease by the Korean Syndicate Ltd. to the partnership in Korea was not in the true sense a mining lease at all. At page 271 Lord Sterndale M.R. observed :

> "That is the agreement which the Commissioners call a lease. I do not think they meant in any way to beg any question by calling it so; they thought it was a convenient term by which to describe it. As I have said, in my opinion it is not a lease, nor are the sums payable under it in any way like the royalties that are paid under an ordinary mining lease. The Commissioners offer no opinion at all as to what is the effect of that agreement. In my opinion the effect of that agreement is that it is a carrying out of the object which the Syndicate undertook to attain and which is mentioned in sub-clause 1 of clause 3 of memorandum which I have already read of acquiring a concession and working, exploiting and turning the same to account, the same words as are used in the agreement of February 7, 1905. That is not in any way like the case of a person who holds certain investments and merely draws the interest from them or of an owner of mines who simply leases them in consideration of the payment to him of royalties. It is nothing in the least like either of those cases, but it is a carrying out of that object mentioned in the memorandum, and which the Syndicate hopes to attain."

30. At page 277 Younger, L.J., observed :

> "I think that in the last analysis the real question here is whether this agreement of March 25, 1908 is what apparently it was regarded by the Commissioners as being merely a lease of this Syndicate's interest in this concession, at a royalty, or whether it is not the embodiment of an arrangement by vitrue of which the Syndicate turned to account its interest in this concession, an interest which it had acquired for the purpose of turning it to account and thereby earning profit for itself. It seems to me that the latter is the true view of the arrangement embodied in the agreement."

31. Atkin, L.J., took a somewhat different view, but it is clear that the view of the majority in this case was that the so-called lease granted by the assessee was not in the true sense a lease at all. It is to be observed for example that the so-called lessors were entitled to a share of the profits made by the so-called lessees, and in the view of the majority this sub-lease was only a means of giving effect to the objects of the company, namely, exploiting the property for their profit. The terms of the so-called lease showed that the relationship between the assessees and their so-called lessees were very different from the relationship normally existing between landlord and tenant. The so-called landlords were vitally interested in the development and actually received a proportion of the profits earned. That being so, the Court of Appeal was of opinion that the receipt of payments due under this lease was profit of a business and therefore liable to excess profits tax.

32. This Korean case is only an authority for the meaning of the term 'business' in the English Act and it seems to me that the Tribunal in this case has overlooked the words of Sir George

Lowndes in the case of *'Commissioner of Income-tax v. Shaw, Wallace and Co*[2]*.',* at p. 212. Sir George Lowndes in delivering the judgment of the Board observed :

> "Again their Lordships would discard altogether the case law which has been so painfully evolved in the construction of the English income-tax statutes - both the cases upon which the High Court relied and the flood of other decisions which has been let loose in this Board. 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 these 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 considerations."

33. I have already pointed out that in my view the solution of this case depends upon a consideration of Section 2 (5) of the Indian Act of 1940. But unfortunately the proviso to that section was never considered at all by the Appellate Tribunal.

34. It appears to me that this English Case can have no application to the case before us. It is to be noticed that the term 'business' was defined in the Act under consideration by the English Courts in the widest possible terms, whereas the definition in the Indian Act of 1940 is very much narrower.

35. In the English Income-tax Acts 'business' is not defined, but in the Indian Income-tax Act it is defined as including

> "any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture."

It was essential that business should be defined in the Indian Income-tax Act because of the mode of taxation adopted in Section 6 of the Act. Section 6 of the Indian Income-tax Act provides :

> "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 :
> (i) Salaries.
> (ii) Interest on securities.
> (iii) Income from property.
> (iv) Profits and gains of business, profession or vocation.
> (v) Income from other sources....."

36. It will be seen therefore that the Indian Income-tax Act draws a distinction between income derived from property or other sources and income being profits and gains of business. It was therefore necessary strictly to define business, otherwise it might well be

[2]59 Ind App 206

held that certain income was income derived from property or other sources as well as being the profits and gains of business. It seems to me quite clear that the Indian Income-tax Act regarded interest on securities, income from property or other sources and profits and gains of business as entirely different sources of income and it seems to follow that what must be regarded as income from property or other sources or interest on securities cannot be regarded as profits and gains of business. Further, I think it clear from the terms of the proviso to Section 2 (5) of the Excess Profits Tax Act, 1940 that holding securities or property cannot amount to a business and that must be so by reason of Section 6 of the Income-tax Act. Section 2 (5) of the Excess Profits Tax Act makes the holding of securities or of property business merely for the purposes of the Act in the case of companies or incorporated societies. The mere holding of property or securities cannot in my view however amount to a business within the meaning of that term as used in the Income-tax Act and can only amount to a business as the term is used in the Excess Profits Tax Act by reason of the proviso to Section 2 (5) of that Act. It appears to me that the 'Korean Syndicate case', 1921-3 KB 258, is clearly distinguishable from the present case and in no way compels us to hold that the assessee in this case was carrying on a business.

37. The Tribunal also relied upon the English cases of *'South Behar Rly. Co. Ltd. v. Commissioners of Inland Revenue*[3]*',* and *'Commissioner of Inland Revenue v. Budderpore Oil Co., Ltd*[4]*.',* Again these are cases on the English Acts and it appears to me that the *'South Bihar Rly. Co., Ltd. v. Commissioners of Inland Revenue'*, would have to be differently decided in this country but for the proviso to Section 2 (5) of the Indian Excess Profits Tax Act, 1940. The South Bihar Railway Company was at the time of assessment a company which functioned wholly as a company holding securities. The sole function of the company was holding certain securities, collecting dividends and distributing the same. Such would not be a business under the 1940 Indian Act but for the proviso to Section 2 (5) which says that for the purposes of this Act it shall be deemed to be a business. *'Commissioners of Inland Revenue v. Budderpore Oil Co. Ltd.'*, would also have to be decided differently in India but for the proviso to Section 2 (5) of the Indian Excess Profits Tax Act, 1940. In that case the company was formed for the purposes of developing certain oil bearing properties in Assam. The properties were duly acquired and the company proceeded to develop the properties. Later they transferred their rights under a lease to another company and at the time of assessment they were merely lessors receiving rent and royalty. It appears to me that in this country they would have to be regarded as the holders of property and therefore they would not be liable to pay excess profits duty but for the fact that the holding of property by a limited company is deemed to be a business for the purposes of the Indian Excess Profits Tax Act. It seems to me that little assistance can be obtained from these English cases which are decided upon different Acts in which the term 'business' has a very different meaning.

38. The Tribunal also relied upon two Madras cases, namely, *'Commissioner of Income-tax, Madras v. Sri Umamaheswara Gin and Rice Factory, Gunter*[5]*',* and *'Commissioner of Income-tax, Madras v. Bosetto Brothers, Limited*[6]*.',* In the former case a limited company incorporated for the purposes of milling rice leased out buildings, plants machinery etc. to another company for a fixed annual rent.

[3](1925) 12 Tax Cas 657 [5]50 Mad 529

[4](1925) 12 Tax Cas 467 [6]1940-8 ITR 41 (Mad)

Under the lease the lessees were to do the necessary repairs and to hand back the mills in good working order while the lessors were to bear the loss by depreciation and wear and tear caused by

the working of the mill. On an assessment to income-tax of the rent received under the lease the company claimed an allowance for depreciation under Section 10 (2) (vi) of the Income-tax Act. On the facts it was held that the company was carrying on a business of letting rice mills and as such was entitled to a deduction for depreciation in the lettable value of its property by reason of wear and tear of the machinery which the company had to bear under the lease.

39. In the latter case a company which carried on a hotel business at Madras and Ootacamund and was empowered under its articles of association to lease its premises, leased a hotel situated in Ootacamund along with furniture and fittings to a firm which carried on the business of hotel there. The company claimed depreciation of the building and furniture leased to the firm. It was held that the letting of the premises was part of the business of the company and so it was entitled to an allowance for depreciation.

40. In both these cases the Madras High Court had held that leasing or letting of the property was within the memorandum and articles of association and therefore within the objects for which the companies were formed. The leasing formed the business of the company and therefore the rent which they received could be regarded as the profits of the business and therefore allowances could be made for depreciation.

41. These cases are not binding on this Court and with very great respect to the learned Judges of the Madras High Court I am unable to follow them. What happened in the Madras cases was that companies which could carry on business either ceased to do so or would not do so and leased or let their properties to lessees who carried on business. It appears to me that the rent payable to the companies therefore was rent payable to them as the owners of property and that being so, the rent was liable to tax not as profits and gains of a business, but as income from property under Sections 6 (iii) and 9 of the Indian Income-tax Act. The learned Judges of the Madras High Court seemed to have laid great stress on the fact that letting or leasing these properties was within the objects of the company and permitted by their memoranda and articles of association. But for that fact of course the companies could not hold property or lease it or do anything with it. But it does not follow that because what they did was within the objects of the company they were carrying on business by doing it. It appears to me that when they let or leased these properties they merely became owners deriving income there from and therefore liable to tax on the income from property and that being so it cannot be said that they were carrying on business and that the rents were profits or gains from such business.

42. The view expressed in these Madras cases was dissented from by a Special Bench of this Court in the case of 'In re Commercial Properties Ltd.', 55 Cal 1057. In that case it was held that a company owning house property and carrying on the activities of letting such houses is liable to income-tax under Section 9 of the Indian Income-tax Act, 1922, in the same way as a private individual owning such property. In that case the facts were that the assessee was a registered company and its sole object was to acquire land, build houses, and let premises to tenants in Calcutta or elsewhere in India. The sole assets of the assessee consisted of three properties and the sole business of the assessee was the management and collection of rents from the said properties. At p. 1061 Sir George Rankin, C.J., who delivered the judgment of the Bench observed : "In the present case we have a company which owns three estates. It does not appear that any part of that property is outside the definition given in Section 9. It is found to let the houses from time to time, to see to the payment of rents and (doubtless) the doing of repairs. If that is carrying on a business, then this company carried on a business in the sense in which

every landlord or owner of this type of property must necessarily carry on business. We know from Section 9 itself that it is applicable to property which is let out to tenants, and it has been argued before us that when one looks at the case law one finds that, at all events, where the owner is a company and the objects of the company include the object of owning and managing house property, then the income that is derived from the tenants is an income that is derived from business. It is in that way that it is contended that these assessees should be charged under Section 10. It is said that if the question were to arise under Section 10 these assessees would not be liable to pay incometax at all so that no income-tax would be recovered in respect of any of these estates, the reason being that, in point of fact, they have traded so unsuccessfully during the year in question that they have actually made a loss.....It is obvious too, that if we are to depart in such a case as this from the careful provisions contained in Section 9 for the purposes of computing the correct figure in the case of house property on which tax is to be levied, we will get under Section 10 all sorts of complicated questions special to house property, upon which the law will be absolutely at large. In my judgment, the words of Section 6 and Section 9 and Section 10 must be read so as to give some effect to the contrast that is there made between income, profits and gains from 'Property' and from 'Business', and I entirely refuse my assent to the proposition that because it happens that the owner of a property is a company which has been incorporated for the purpose of owning such property, therefore, the income derived from 'property' must be regarded as income derived from 'business'. In my judgment, income derived from 'property' is a more specific category applicable to the present case."

43. It is to be observed that the English case of *Commissioners of Inland Revenue v. Korean Syndicate Ltd*[7]. cited previously in this judgment was expressly considered by the learned Chief Justice and was not followed as not being applicable to the conditions here. Further it is clear that the view of the learned Chief Justice is diametrically opposed to the view of the learned Judges of the Madras High Court. This case decided by this High Court is binding on us and, if I may say respectfully, I entirely agree with the reasoning of the learned Chief Justice. It appears to me that where a company lets property and its sole activities consist in maintaining that property and collecting the rents, the rents must be regarded as income derived from property and not as the profits or gains of a business.

44. Royalties have been held by their Lordships of the Privy Council in the case of *Kamakshya Narain Singh v. Income-tax Commissioner*[8], to be income arising from other sources under Section 6 (v) of the Indian Income-tax Act. At page 189 Lord Wright who delivered the judgment of the Board observed :

> "Under the English Acts income which consisted of mining royalties was taxed under sch. A, but according to the relevant rules of sch. D. Under the Indian Act the provisions of Section 9 with reference to 'property' (which is head iii in Section 6) are regarded as excluding royalties from being held to come under that head.

[7](1921-3K. B. 258)

[8] B and O 70 Ind App 180

> Royalties cannot be regarded as 'profits or gains' of a business. The sources of the royalties may properly be deemed to be the lessees' covenants to pay them, and hence royalties fall under 'other sources'."

45. It is quite clear from this observation that royalties receivable by a landlord cannot be regarded as profits or gains of a business. But it is contended by Dr. Gupta on behalf of the Commissioner of Income-tax that it can be so regarded in circumstances such as existed in the Korean case (1921-3 K B 258) and such as are said to exist in the present case. It appears to me however that the assessees in the present case after they had subleased the minerals to the Talchar Coalfield Company Ltd. were merely the owners of a lease-hold interest in property and the rent and royalties payable to them must be regarded as income from other sources under Section 6 (v) of the Indian Income-tax Act. 1 cannot see that it would make any difference in India for income-tax purposes even if the lessors of the sublease were a company. In any event the assessees are not a company but are a partnership. Dr. Gupta contended that the Ramgarh case (70 I A 180) could only apply where the owner of property received royalties. But it is quite clear that if a lessee of house property, for example, receives rent such is income from property. Similarly, if a lessee who has subleased certain minerals receives dead rent and royalties he would, in my view, be in precisely the same position in India as the owner of the minerals who had leased them to a lessee.

46. It seems to me that if the principles of the Calcutta case of 'Commercial Properties Ltd', 55 Cal 1057 be applied to the facts of this case, we are bound to hold that what was received by the syndicate in this case cannot be regarded as the profits of a business. The syndicate held certain valuable property which they leased. The rent and royalties, for the reasons given by Lord Wright in the 'Ramgarh case', (70 Ind App 180) cannot be regarded as income from property, but they must be regarded, as the royalty was regarded in the 'Ramgarh case', as income from other sources and not as the profits and gains of a business.

47. A very similar question came before the Chief Court of Lower Burma in 1920, in the case of 'In re Kaladan Suratee Bazar Co. Ltd.', 1 ITC 50 in which it was held that a company registered under the Indian Companies Act owning house property consisting of tenements and stalls let out for rent and distributing the rents collected as dividends to its shareholders is not carrying on a business as defined in Section 2 of the Excess Profits Duty Act and is not assessable thereunder. "Business" in Section 2 of the Excess Profits Duty Act must be given the same meaning as is given in the Income-tax Act. This case it appears to me is a direct authority in favour of the assessees' contention before us.

48. The same question was considered by Rowlatt, J., in the English case of *'Commissioners of Inland Revenue v. Sangster*[9]*',* the facts of which were that the assessee was an inventor who derived considerable sums of money from royalties paid to him by companies of which he was a manager. He had sold one invention, but that was a long time previously and in those circumstances it was contended that he carried on the business of an inventor and was therefore liable under the provisions of the Finance Act of 1915 to excess profits duty. Rowlatt, J., held that he was not carrying on a business

[9](1920) 1 KB 587

because he was an owner of royalties and therefore the income from the royalties was not income from business which should make it assessable to excess profits duty. In India this income from royalties would also in my view be regarded as not income from business, but rather income from other sources and therefore it would not be liable to assessment to excess profits tax.

49. In my judgment no assistance can be obtained from the English cases and it is clear that the

view of this Court is that merely holding property and deriving income therefrom by letting it cannot amount to a business. That being so, even apart from the proviso to Section 2 (5) of the Excess Profits Tax Act 1940, we would be bound to hold that the activities of the syndicate do not amount to a business and that their receipts cannot be regarded as the profits of business. That being so, the dead rents and royalties could not be assessed under the Excess Profits Tax Act.

50. That being so, the answer to the question which I have already set out must be in the negative. The assessees will have their costs of this Reference - the hearing-fee being assessed at five gold mohurs. The assessees will be entitled to refund of the Rs. 100/- deposited.

Chatterjee, J.

51. I entirely agree.

Answer in the negative.