CALCUTTA HIGH COURT

David Mitchell

Vs.

Commissioner of Income Tax

Income-tax Ref. Nos. 70 of 1951 and 38 of 1953

(Chakravartti, C.J. and Sarkar, J.)

25.01.1956

JUDGMENT

Chakravartti, C.J.

1. There are two References before us which are really one. They comprise six questions of law, two referred at the instance of the Commissioner of Income-tax and four referred at the instance of the assessee. The original Reference, which is Reference No. 70 of 1951, comprised five questions. The assessee wanted a sixth question to be referred and applied successfully to this Court under Section 66(2) of the Act. In pursuance of the directions given on that application, the Tribunal has referred a further question by a supplementary statement of case. That Reference is Reference No. 38 of 1953.

2. The References cover two assessment years, namely, 1947-48 and 1948-49. The relative accounting years are different, according as the income concerned is the partnership income of the assessee or income from other sources. With respect to the partnership income, the accounting years are those ended on 30-4-1946 and 30-4-1947, but with those accounting years, we are not concerned. The accounting years relative to income from other sources are the years ended on 31-3-1947 and 31-3-1948.

3. Of the six questions, two concern only the assessment year 1947-48. With the remaining four, both the assessment years are concerned.

4. The assessee is one Mr. David Mitchell who was an Accountant by profession and a partner of Messrs. Lovelock and Lewes, a well-known firm of Chartered Accountants of Calcutta. It appears that sometime before 1946, the promoters of a company, called the Chrestien Mica Industries Limited, engaged the services of Messrs. Lovelock and Lewes to assist them in its floatation and, as it so often happens, the engagement was attended to by Mr. Mitchell as a partner of the firm. After the company had been formed and the engagement of Messrs. Lovelock and Lewes terminated, the promoters who were two persons of the names of Ramkumar Agarwalla and Elbridge Watson, became desirous of retaining the service of Mr. Mitchell, who was apparently about to retire from India, and entered into an agreement with him

on 12-8-1946. It was provided in that agreement that Mr. Mitchell would act as the Administrative Organizer and Financial Adviser to the promoters for a period of three years without liberty to engage directly or indirectly in any other profession or employment or as adviser or organizer of any other company, but with liberty to fulfill his obligations as a member of die firm of Messrs. Lovelock and Lewes. His duties would lie chiefly in England. For his services to the promoters, Mr. Mitchell was to receive no remuneration, but he would be entitled "to retain any profits received by him by way of Director's fees or otherwise as a result of this agreement." The profits he would receive as a result of the agreement were stated to be as follows. The promoters, it was said, had effected five policies of insurance, die names of which were set out in a Schedule to the deed and it was said that all the benefits under the policies would come to belong to and become the property of Mr. Mitchell "for his sole use absolutely" upon the completion of the agreement. The agreement might be terminated either on a six months' notice given by either side or necessarily by the death of Mr. Mitchell, if that event happened. Some provision was made as to how the benefit of the policies or the policy moneys would be apportioned between the promoters and Mr. Mitchell or a nominee of his or his heirs and legal representatives in the event of a termination of the agreement by death or otherwise. It is not necessary For the purposes of this judgment to state what that provision was. The only other term of the agreement to which I need refer is that the promoters undertook jointly and severally to pay all premia that might be payable under the policies as and when the same fell due for payment.

5. During the accounting year relative to the assessment year 1947-48, the promoters paid a sum of Rs. 2,75,191/- by way of premia on the policies and during the accounting year relative to die assessment year 1948-49, they paid a sum of Rs. 78,052/-. The department taxed these sums as the income of Mr. Mitchell on the footing that they constituted advance payment of salary and were therefore assessable under Section 7, Income-tax Act, The assessee's contention was that the amounts of premia paid by the promoters could be no part of his income, they having been neither paid to or received by him. The policies provided for payments of annuities to Mr. Mitchell and his case was that those annuities were the only income that he would receive out of carrying out the terms of the agreement, but the premia paid could on no account be his income. The Tribunal accepted his contention and held that the premia paid on the policies could not be treated as income in the hands of the assessee. Out of the above facts and contentions of the parties arises the first question which has been referred to this Court at the instance - of the Commissioner of Income-tax. The question reads as follows :

> "Whether on the facts and in the circumstances of this case the sums of Rs. 2,75,191/- and Rs. 78,052/- paid as premia by the promoters of the Company For the assessment years 1947-48 and 1948-49 were assessable to income-tax as income in the hands of the assessee ?"

6. It appears that, during the assessment proceedings, the Income-tax Officer examined Ramkumar Agarwalla and Elbridge Watson under Section 37, Income-tax Act and obtained certain statements from them, chiefly, concerning the payment to die assessee of two thousand and five hundred shares of the newly-formed company which is the subject-matter of the next question of law, The Tribunal ruled out these statements in the view that they had been obtained in the absence of the assessee and refused to take any notice of them. The Commissioner of

Income-tax thought that the statements had been wrongly excluded and thereupon he obtained a reference of the second question in the statement of the case which reads as follows:

> "Whether in the circumstances of this case the Tribunal was right in rejecting the statements taken down by the Income-tax Officer under Section 37, Income-tax Act of Ramkumar Agarwalla and Elbridge Watson on 27-3-1948, behind the back of the assessee ?"

7. As I have already stated, even before the agreement of 12-8-1946, Mr. Mitchell had done some work For the promoters as a member of the firm of Messrs. Lovelock and Lewes. The agreement states that he had "assisted the promoters in their company promotion" and "acted as financial adviser to the promoters." Along with his return For the assessment year 1947-48, the assessee sent a letter to the Income-tax Officer on 27-3-1948, by which he informed him that he had received two thousand and five hundred ordinary shares of Rs. 10/- each of the Chrestien Mica Industries Limited from Ramkumar Agarwalla as an unsolicited gift. The Income-tax Officer held that the shares constituted a perquisite received by Mr. Mitchell in addition to his remuneration For the services rendered by him to the promoters and accordingly he assessed the money value of the shares under Section 7 of the Act. The assessee's contention naturally was that the value of the shares did not constitute remuneration for any service rendered, but was merely a payment in the nature of a testimonial and therefore it was not assessable as income at all. That contention was overruled successively by the Income-tax Officer, the Appellate Assistant Commissioner and the Tribunal. Out of the above facts and contentions arises the third question in the statement of the case which has been referred at the instance of the assessee and which reads as follows :

> "Whether on the facts and in the circumstances of this case, the sum of Rs. 25,000/- paid by Ramkumar Agarwalla to the assessee, being the value of : 2,500 shares in Chrestien Miea Industries Limited, is taxable in the hands of the assessee ?"

8. It next appears that during the accounting year relative to the assessment year 1947-48, the assessee made a net gain of Rs. 48,741/- by the sale of certain Indian investments and similarly during the accounting year relative to the assessment year 1947-48, he made a gain of Rs. 20,018. He did not dispute that these were capital gains, but he wanted the gain of 1947-48 to be set off under Section 24(2A) against a loss of Rs. 1,44,40/- which he claimed to have suffered as a capital loss in the relevant accounting year. He claimed further that after the gain of Rs. 48,741/- had been set off against the loss of Rs. 1,44,407/-, he would be entitled under Section 24(2B) of the Act to carry forward to the next year the unabsorbed balance of the loss, amounting to Rs. 95,666/- and set off that loss against the gain of Rs. 20,018/-. His case as to the loss he claimed to have suffered was that as a member of Messrs. Lovelock and Lewes, he had a certain amount of money lying to his credit in an account, known as the Undrawn Profits Account and a further amount of money lying to his credit in another account, called the Capital Account and that both the amounts had been transferred to a third account, called the Taxation Reserve Account, under the terms of an agreement executed by and between the partners of the firm of 29-3-1947. The reason why this transfer was made was stated to have been that provision had not been made in the accounts of the firm for payment of income-tax For the year with respect to which accounts are prepared and for a part of the tax due For the preceding year. The

assessee contended that by allowing the money which he owned personally to be transferred and appropriated to the Taxation Reserve Account of the firm, he had suffered a capital loss to the extent of the amounts concerned and he was entitled to set off such loss against the capital gains he had made. That contention again found no favor with either the taxing authorities or the Tribunal. The view taken by the Tribunal was that similar sums due by the firm to other partners had been similarly transferred to the same account and since the transfers had been made to meet a taxation liability, the assessee had really given up nothing at all and that, in any event, there could be no question of any capital loss to be set off against the admitted capital gain. Out of the above facts and contentions arise the fourth and the fifth questions in the statement of the case which have been referred at the instance of the assessee and which read as follows :

> "Whether on the facts and in the circumstances of this case, the sum of Rs. 1,44,407/- For the assessment year 1947-48 could be said to be a loss falling under 'capital gains' and liable to be set off under Section 24(2A) against the sum of Rs. 48,741/- assessed as capital gains under Section 12B ?"
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> "Whether on the facts and in the circumstances of this case, the sum of Rs. 95,666/- could be said to be the portion of loss not set off in the assessment year 1947-48 and liable to be carried forward and set off under Section 24(2B) against the sum of Rs. 20,018/- assessed as 'capital gains' under Section 12B for 1948-49 assessment ?"

9. It has already been stated that the case made by the assessee before the Tribunal was that the annuities paid to him under the five policies of insurance effected by the promoters could properly be treated as his income, but not the premia paid on the policies. "The appellant did not press before us", observes the Tribunal in its appellate order, "that the annuities received by him should not be subjected to tax." Nevertheless, after the contention of the assessee regarding the premia had been accepted, he wanted the Tribunal to refer a question regarding the annuities as well, when he found that the Commissioner of Income-tax was causing a reference to be made regarding the premia. The Tribunal declined to accede to that request on the ground that the assessee had accepted the position that the annuities would be and were his income. It was pointed out that the assessee had not merely refrained from pressing a case regarding the non-taxability of the annuities, but had definitely given up that case. Thereafter, the assessee moved this Court under Section 66(2) of the Act, his case being that while he would be content to suffer taxation on the annuities if only the annuities were taxed, he was entitled to protest, if the reference made at the instance of the Commissioner of Income-tax succeeded and the premia were held to be taxable. In that event, the premia paid by the promoters and the annuities received by him would both be taxed as his income and he submitted that he was entitled to argue that if it was held against his contention that the premia were in fact his income, then the annuities could not at the same time be treated as also his income and that they ought to be held to be exempt. This Court thought that the question proposed by the assessee arose out of the order, particularly as the Commissioner of Income-tax said in his reply to the Rule issued that the assessee had given up the case regarding the annuities only on the footing that his case regarding the premia would be accepted. The Tribunal was accordingly directed to draw up a supplementary statement of case and refer the question proposed by the assessee. In accordance with that direction, the Tribunal has referred the sixth question which reads as follows:

> "In case the premia mentioned in the question framed in para 4 of the original statement

> of case are held to be the applicant's income assessable in his hands For the two respective assessment years, can the annuities received by him under the policies for which the said premia had been paid be also held to be his income For the said two assessment years ?"

10. For certain reasons which I shall state in a moment, we do not find it possible to answer the first of the questions referred unless some further facts are found. The sixth question is consequential to the first, but apart from that interconnection between the two, certain further facts require to be found with respect to that question as well. We have accordingly decided to send the case back to the Tribunal under Section 66(4) of the Act with respect to those two questions and shall give appropriate directions in that behalf after we have dealt with the remaining questions.

11. The second question regarding the exclusion of the statements obtained from Ramkumar Agarwalla and Elbridge Watson under Section 37 of the Act was not pressed by Mr. Meyer. Accordingly, we need not say anything further about that question.

12. Proceeding now to the third question which concerns the payment of two thousand and five hundred shares of the Chrestien Mica Industries Limited to the assesses, I must first refer to the inconvenience caused to this Court, if an inadequate statement of case is submitted by the Tribunal. Practically, no facts are stated in the statement of the case, nor are any to be found in the appellate order. I might almost say what Lord Atkinson said in the case of - *'Reed v. Seymour*[1]*',* which was concerned with an almost identical point :

> "What has given me most trouble in the case is this the bald, meagre and sketchy way in which the facts of the case have been stated. (See p. 647).

13. However, the relevant facts which are all admitted can be culled from the different orders of the different authorities and other materials contained in the paper book. I have already stated that the fact of the receipt of these two thousand and five hundred shares was communicated to the Income-tax Officer by the assessee himself through his letter dated 27-3-1948 sent along with his return. There, the shares were described as an unsolicited gift. It is not known whether the shares were just handed over to the assessee by Ramkumar Agarwalla personally or whether there was any forwarding letter. The Income-tax Officer did obtain some information from Ramkumar Agarwalla and Elbridge Watson regarding the payment of these shares, but as those statements have been excluded as inadmissible and the Commissioner of Income-tax has abandoned the second question, it is not open to us to refer to them. The only information we can have as to the background of facts against which this payment is to be viewed is furnished by the recitals at the beginning of the agreement of 12-8-1946. It is there stated that the promoters had promoted a public limited liability company 'recently' and that the assessee had assisted the promoters in their company promotion and had acted as their financial adviser. The exact date on which the shares were given to the assessee is again not known, but it is legitimate to infer that they were given soon after the engagement of Messrs. Lovelock and Lewes, in the performance of which the assessee had rendered service to the promoters, had terminated. The Tribunal in its appellate order does not

[1](1927) 11 Tax Cas 625

proceed on any specific facts. It only states that

> "as between Mitchell and Agarwalla the relationship was such that the payment could be made only for help rendered by the appellant (that is the assessee) in his professional capacity."

Any doubt, however, which might exist regarding a connection between the payment and the services rendered by Mr. Mitchell in connection with the promotion of the Chrestien Mica Industries Limited is dispelled by a statement made by the assessee himself in his application for a reference. There, in what is called an 'annexure' attached to the application and which contains a statement of facts admitted and found, occurs the following passage :

> "Before the agreement above referred to was entered into, Messrs. Lovelock and Lewes, while the assessee was still a partner actively engaged in the affairs of that firm, performed various services for Ramkumar Agarwalla in connection with the floatation of a company, called Chrestien Mica Industries Ltd. These services were duly billed for "by the firm and the fee charged was paid in full. Thereafter, as a token of appreciation for die assistance rendered to him by the assessee in connection with the floatation of the company, Ramkumar Agarwalla made an unsolicited gift to the assessee of 2,500 ordinary shares of Rs. 10/- each in Chrestien Mica Industries Ltd."

We have therefore the fact that Messrs. Lovelock and Lewes had been fully remunerated For the services rendered by them to the promoters in connection with the floatation of the company and also that the assessee had no independent claim on the promoters in connection with those services. But we have also the further fact that the shares concerned were given to him by Ramkumar Agarwalla "as a token of appreciation For the assistance rendered to him by the assessee in connection with the floatation of the company." The question therefore is : In those circumstances, were the shares given merely as a personal gift or were they given as remuneration or rather on account of what the assessee had done For the promoters in the exercise of his profession ?

14. I may say at once that I do not think that the taxing authorities were right in assessing the value of the shares under Section 7 of the Act. They could only be described, if they at all came under clause (1) of Section 7, as perquisites or profits, but the section requires that even perquisites or profits must be, if they are to be taxed under the section, "in lieu of or in addition to any salary or wages" which are due to the assessee, whether paid or not. It appears to me that there can be no question of the shares having been paid to the assessee in lieu of or in addition to any salary or wages. The contract of employment in connection with which he had rendered services to the promoters was a contract between them and Messrs. Lovelock and Lewes. The assessee was not an employee of the promoters under that contract as an individual, nor could he claim any salary or wages as such. The contract of employment could neither be enforced against him personally and individually, nor could he, acting as an individual, enforce it against the promoters. He served the promoters only as a member of the firm with whom only there was a contract of employment. Personally, he was not entitled to claim any salary or wages. It is true that if the engagement resulted in profit, the assessee would share the profit as a member of the firm, but such share would not conic to him as salary or wages received from the employers, but

only as a share of the profits of the firm received in an altogether different capacity of a partner. It seems to me to be beyond argument that whether or not the value of the shares was taxable in the hands of the assessee as his income, it was not taxable under Section 7(1). I must add that it was not contended before us on behalf of the assessee that, in any event, the assessment under Section 7 was bad in law, but perhaps that was because if the amount was assessed as the assessee's income, it was of little consequence to him under what section of the Act it was assessed.

15. It could not be disputed that the receipt of the shares was of a casual and non-recurring nature. If it was so, it could, by virtue of the provisions of Section 4(3)(vii), be included in tile assessable income of the assessee only if it came within the exceptions mentioned in that clause. There could be no question of the receipt of the shares being a capital gain, chargeable under Section 12B. I have already held that it could not be an addition to the remuneration of the assessee as an employee. The only exception which remains is whether it was a receipt arising from the exercise of the assessee's profession or vocation. Reading Section 4(3)(vii) along with Section 10(1) of the Act, the question is whether the shares could be said to be profits or gains of the profession or vocation carried on by the assessee. I do not think I need consider Section 12 which is concerned with income from other sources, since such income is not included among the exception.

16. The question whether payments of the present kind constitute only a gift or a windfall which is not income and therefore not assessable to tax or whether it is remuneration for services or gains of a profession or vocation, always presents great difficulty. It has been considered by reference to similar statutory provisions contained in Schedule E to the English Income-tax Act, the language of which is slightly different, though not materially. Prior to the Act of 1918, the provision in the Schedule to the English Act of 1842 was that any person, holding public offices or employments of profit, was liable to be taxed on all salaries, fees, wages, perquisites, or profits whatsoever accruing by reason of such offices or employments. The Act of 1918 slightly varied the language and it said that

> "tax under this Schedule (that is Schedule E) shall be annually charged on every person having or exercising an office or employment of profit mentioned in this Schedule ..... in respect of all salaries fees, wages, perquisites or profits whatsoever therefrom."
> 'Therefrom' meant from the office which was an employment of profit and there was thus no substantial difference between the old and the new provisions. Since Section 7 of the Indian Act is to be excluded in the present case, the question for us is whether the amount in question arose as a gain or profit out of the exercise of : the assessee's profession or vocation. There is thus again no essential difference between the position under the English and the Indian law, although so far as the present case is concerned, employment in the sense of service is to be left out of account.

17. The test to be applied in such cases has been variously stated. In the well-known case of - '*Cooper v. Blakiston*[2]', which is popularly known as the Easter Offerings case and

[2](1909) 5 Tax Cas 347

which is regarded as the root authority on the subject, Lord Loreburn, L. C. made the following

statement of the law :

> "Where a sum of money is given to an incumbent substantially in respect of his services as incumbent, it accrues to him by reason of his office. ..... Had it been a gift of an exceptional kind, such as testimonial, or a contribution for a specific purpose as to provide for a holiday or a subscription peculiarly due to the personal qualities of the particular clergyman, it might not have been a voluntary payment for services, but a mere present." In the case of (1927) 11 Tax Cas 625, which went through all the Courts, Viscount Cave L. C., formulated the test as follows, adopting the same from Rowlatt, J. in the Court of first instance :
> " 'Is it in the end a personal gift or is it remuneration?' If the latter, it is subject to tax; if the former, it is not."

In between Rowlatt, J. and the House of Lords, the Court of Appeal by a majority proceeded on the test laid down by Sir Richard Henn Collins M. R., as he then was, in the case of - '*Herbert v. Mcquade*[3]',

> "The test is," observed the learned Master of the Rolls, "whether, from the standpoint of the person who receives it, it accrues to him in virtue of his office; if it does, it does not matter whether it was voluntary or whether it was compulsory on the part of the persons who paid it."

I might complete the enumeration of the broad principles by referring to two more. On the one hand, the fact that a payment is made after the termination of a service or an engagement entered into in the exercise of a profession does not prevent it from becoming an income in the hands of the recipient.

> "Remuneration for services may take, in part, the form of a payment at the end of the employment, and a payment does not necessarily cease to be remuneration for services, because it is payable when the services come to an end." See - "*Hunter v. Dewhurst*[4]', per Lord Macmillan at p. 653.

On the other hand, the fact that the payment is in some way connected with employment does not necessarily and by itself make it taxable income.

> "The mere fact, "observed Lord Warrington of Clyffe in the same case, "that the payment in question is made to the employee as the result of, or in connection with, his employment is not enough to render it liable to tax." (See p. 643 of the report). How a payment can be connected with service or an engagement in the exercise of a profession and yet be a present or a gift, is illustrated by the language of Rowlatt, J. in the case of '*Reed v. Seymour* '. The payment may have been to the assessee who held an office out of "an admiration for him in respect of that office." (See (1927) 11 Tax Gas 625 (630) (A)).

18. The test, therefore, confining ourselves to the present case, would be this : first, was

[3](1902) 4 Tax Cas 489

[4] (1932) 16 Tax Cas 605

the payment altogether unconnected with the service rendered by the assessee to the promoters in connection with the floatation of their company ? The answer to that primary question has been furnished by the assessee himself. It was not unconnected. Next, though connected with the assistance he had rendered in connection with the floatation of the company as a member of his firm, was it made to him merely out of admiration for his personal qualities displayed in course of the carrying out of the engagement or was it intended to confer a special benefit on him with respect to the services rendered so as to increase his earnings in the exercise of his profession ? I cannot imagine the promoters or Ramkumar Agarwalla having made the payment to the assessee merely as a present and as a token of their or his personal regard for him.

> "Commercial men" as Sir Harold Derbyshire observed in the case of - '*In re Susil Chandra Sen*[5]*',* "rarely pay money without good reason and generally do so in return for property, goods, services or help."

In that case, the assessee had made the income character of the receipt clear by an account given by himself on which the Court relied. In the present case too, the assessee appears to have supplied the information which discloses the true character of the receipt and shows it to be an income receipt. It was contended by Mr. Mitra who followed Mr. Choudhury on behalf of the assessee that his client had not really made any admission that the payment had been made to and received by him as an additional benefit accruing out of the exercise of his profession, but all that he had admitted was that it had been made to him as a token of : appreciation. The appreciation, however, was, as the assessee himself makes clear, an appreciation of the assistance rendered by him and not an appreciation of his personality or character. It came not from third parties, but from persons who had received the benefit of his professional services. In '*Reed v. Seymour*, the payment was not wholly unconnected with the services rendered by the assessee as a professional cricketer belonging to Rent County Cricket Club, but the gate money received at the Benefit Match arranged in his honour was regarded, as it could clearly be regarded, as a tribute paid by the members of the public to a player whom they regarded as a hero For the skill and sportsmanlike qualities which he displayed in the practice of the game. It is impossible to find any such secondary reason in the present case. The plain fact appears to be that the assessee had rendered valuable assistance to the promoters in the course of rendering professional service as a member of Messrs. Lovelock and Lewes and having been highly pleased with the quality of the services rendered by him and the benefit which had resulted to them therefrom, the promoters had decided not to leave him merely to his share of the profits of the engagement as a member of the firm, but had paid him an extra amount as his profit from the engagement which had been attended to and carried out by him. In my view, the value of the shares was an income receipt in the hands of the assessee, as rightly held by the Tribunal, but that it fell to be assessed under Section 10 of the Act and not under Section 7.

19. Passing now to the fourth and the fifth questions, they are interconnected. I have already stated some of the facts, but once again I have to complain of the meagreness of the relevant statements in the statement of the case. From para 10 of that Statement one would think that the assessee had only a single account in the firm, called alternatively an Undrawn Profits Account or a Capital Account and that the amounts standing to his credit

[5] AIR 1941 Cal 666
in that account had for some reason or other been transferred to the Taxation Reserve Account. The actual facts, however, are not so simple. It would appear that the assessee had two accounts in the firm, one known as the Undrawn Profits Account and the other known as the Capital Account. In the former obviously lay the profits earned by him which he had not withdrawn and in the latter lay contributions made by him to the capital of the firm. Both these accounts were accounts maintained for and on behalf of all the partners of the firm, although it is stated that the contributions actually made by the partners to the Capital Account were not in all cases proportionate to their shares. The reason For the transfer of amounts lying in the two accounts to the Taxation Reserve Account is explained in an agreement entered into and executed by the partners on 29-3-1947. The third paragraph of the prefatory recitals refers to the practice followed by the firm as regards charging Income-tax against its profits in making up the accounts. The fourth paragraph states that as a result of that practice having been followed, no provision had been made in the accounts in respect of income-tax on the profits For the year in respect of which the accounts were prepared, nor had provision been made in respect of a portion of the income-tax payable in respect of the profits of the year immediately preceding. It was in order to make good that omission that certain amounts were transferred from the sums lying to the credit of the partners in the two accounts I have mentioned. In other words, the partners who had accumulated profits and kept them in the firm without making provisions for a part of the income-tax due from them as partners, now made the necessary allocation out of the amounts which had been set apart without paying the tax and thus made a new adjustment of the accounts. Confining ourselves to the assessee alone, it would appear that the amount transferred from his credit in the Undrawn Profits Account was Rs. 72,475-13-0 and the amount drawn from his credit in the Capital Account was Rs. 4,399-4-8. It would be remembered that the loss claimed was Rs. 1,44,407/- and therefore the sums transferred from the two accounts could not account for Rs. 67,532/- of the amount of the loss claimed. The Income-tax Officer appears to have noticed that discrepancy, but the assessee stated to him that the amount of Rs. 67,532/- was also due to him by the firm and the right to that amount also had been waived by him. Before us Mr. Choudhuri stated that For the purposes of the present References, he would be content to take the loss as limited to the two sums mentioned in the Agreement, because they would be sufficient to cover the gains of both the years.

20. The assessee's contention, it will be remembered, was that by reason of the transfers to the Taxation Reserve Account he had suffered loss to the extent of the amounts transferred. Translated into the language of Section 12-B of the Act, his contention set out in full would be that the amounts lying to his credit in the two accounts were capital assets; that the transfer from those two accounts to the Taxation Reserve Account was a transfer, as contemplated by Section 12-B; and that such transfer, which involved the renunciation of his personal rights to the amounts, constituted loss arising from the transfer within the meaning of Section 24(2-A) of the Act. If it was such a loss, he was entitled to set it off against capital gains made by him by the sale of investments under the provisions of Section 24(2-A) and he was entitled to carry such portion of the loss as might not be absorbed over to the next year under the provisions of Section 24(2-B).

21. It is necessary to point out here that by the agreement of 29-3-1947, all the partners of the firm, and necessarily the assessee, waived all rights and title to the repayment of the sums transferred from their Undrawn Profits Account to the credit of the Taxation Reserve Account

and renounced all claims in respect thereof which they might have against the firm. Similarly, they waived all rights and renounced all claims in respect of the sums transferred from the Capital Account. It is further stated in the agreement that the partners had agreed that full provision should be made in the accounts of the firm in respect of tax liabilities on profits earned up to 30-4-1947, and that by the agreement it is "agreed and declared that a further reserve shall be created" in the manner stated in the deed.

22. Had not the assessee's claim that by the transfer of the amounts standing to his credit in the two accounts to the Taxation Reserve Accounts he had suffered a loss, been advanced in all seriousness, I could have hardly considered it credible that such a claim could be made. The assessee was voluntarily agreeing to the transfer of the sums to another account and renouncing all claims regarding them as against the firm and he was saying that thereby he had suffered a loss. So might a man make a gift to charity or remove a sum of money from one box to another and say that a loss had been suffered by him. Mr. Choudhury contended that under the Indian Partnership Act, the firm was a distinct entity, separate and different from the partners at least to some extent, and that therefore it was possible that there could be a real transfer from the partners to the firm. Almost inevitably, Mr. Choudhury referred to the observations of the Judicial Committee in die case of - '*Bhagwanji Morarji Goculdas v. The Alembic Chemical Works Co. Ltd*[6]*.',* Assuming that a firm under the Indian Partnership Act is a distinct entity for certain purposes, I asked Mr. Choudhury whether, if his client had received a gift voluntarily made to him by some other person, he would be agreeable to such gift being treated as a capital gain and to suffer taxation thereon. Mr. Choudhury replied with his usual fairness and candour that he felt greatly embarrassed by the question and that he was bound to concede that if a gift or a receipt of a voluntarily contribution made by another person could not be a capital gain, the reverse was also true and that a gift or a voluntary contribution made by a man could not cause him loss according to the common acceptance of that term. I consider it strange that a man should voluntarily make a payment and claim that, by making it, he has suffered a capital loss which he would be entitled to set off against his capital gains. Loss, it seems hardly necessary to explain, must mean loss arising out of the exigencies of some transaction by reason of the circumstances attending it and not a deprivation of property caused by a voluntary and spontaneous act of the person who is deprived of or rather deprives himself of the property. Apart from that general consideration, the assessee's claim may be tested by reference to the terms of the relevant provisions of law.

23. Capital loss is not defined anywhere in the Income-tax Act, but it is perfectly clear it must be a loss arising out of the same transactions as are mentioned in Section 12-B as giving rise to capital gains. In the first place, it must arise out of leaving aside sale and exchange which are not relevant in the present context the transfer of a capital asset. What the assessee did in this case was that he agreed to the transfer of the two sums from his personal account or rather the personal account of all the partners to the Taxation Reserve Account of the firm and he also renounced all claims to the sums in question. I am altogether unable to see how a relinquishment of a right or renunciation of all claims to a property in favor of another person can be called a transfer. In the second place, the so-called transfer was made to the Taxation Reserve Account of the firm. The firm is a

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registered firm and therefore the tax liability would ultimately fall directly on the partners themselves. Although a firm may be, for certain very limited purposes, an entity under the Indian

Partnership Act, the true character of a firm as merely an assemblage or combination of the several partners constituting it has not been affected by the Act. The so-called transfer, if there was a transfer at all, was therefore a transfer from oneself to oneself which cannot, in my view, be considered to be a transfer as contemplated by Section 12-B of the Act. Mr. Choudhuri said that there was a transfer by the assessee to himself and others, but in any event it was an assignment to a body of which the assessee himself was a member.

24. Then again, there has got to be a loss arising out of transfer, I have already pointed out that it is wholly unintelligible how a man can voluntarily forego his right to a particular property and say that he has suffered a loss.

25. In the third place, even assuming that the firm was an entity as distinct from the partners and that a transfer in the real sense of the term was possible, the transfer which took place in this case was, in my opinion, in essence a gift to the firm. On the assessee's case that the moneys were his personal property, the firm had no claim to these amounts, if the firm was a separate entity. The moneys lying to the credit of the partners in the two accounts belonged to themselves. If in those circumstances the ownership of the moneys was transferred to the firm and the transferors renounced all claims in respect thereof as stated expressly in the agreement, the transaction amounted to a gift. If so, it is clear that the third proviso to Section 12-B(1) would apply and that proviso clearly excepts transfers of capital assets under a deed of gift.

26. Looking at the transaction as a whole, its scope and object appears to me to be perfectly plain. The persons who had formed themselves into a firm and were carrying on business as such were liable to pay income-tax on the profits of the firm, or let me consider only the first stage of the assessment of a registered firm, the firm was liable. According to the practice of all well-ordered business concerns, provision used to be made in the accounts of the firm For the payment of income-tax. The practice followed in this particular firm, however, was to charge against the profits of any year only an amount equivalent to 11/12ths of the tax payable For the fiscal year ending within the accounting year and 1/12th of the tax payable For the fiscal year ending within the next accounting year. The result of that practice was that no provision was made in the accounts in respect of the tax payable on the profits of the firm For the year in respect of which the accounts were prepared. The partners, and among them the assessee, when they became aware of that omission, felt convinced of the necessity of making adequate provision For the tax of the current year and had to find money For the purpose. In the meantime, they had built up personal accounts by withdrawing their respective shares of the profits which had been computed and paid to them without setting apart a sufficient sum for paying the tax For the year in respect of which accounts had been prepared. They decided that provision For the tax, so omitted to be provided for, should be made by transferring to the Taxation Reserve Account the amounts which they had withdrawn without first setting apart a sufficient amount for paying the tax payable. It seems to me perfectly plain that what the partners were doing was that they were merely re-adjusting the accounts, putting back the sums they had withdrawn from the profits of the firm to their proper place where they should have been placed, if proper provision had been made For the tax liability before computing the profits of the partners. In essence, the liability for which provision was thus made was the liability of the partners themselves and therefore in part a liability of the assessee. Not having been provided for before it was being provided for now, by putting back into the Taxation Reserve Account sums which had been wrongly appropriated as profits without making provision For the tax liability for which they

were required. Amounts lying in the Capital Account had already been given by the partners to the firm and thrown into the common stock and their transfer to the Taxation Reserve Account was only an allocation for a particular purpose of the firm. Like the Tribunal, I am entirely unable to see any element of an operation of transfer in such re-adjustment of the accounts and any possibility of profits or loss arising to anybody out of the book adjustments. Further what an assessee is entitled to set off against capital gain is only "loss sustained" and such loss falling under the head 'capital gains'. Deprivation of oneself of a property by a voluntary act of surrender is not loss 'sustained'. One does not sustain a loss unless the loss is caused to or forced on him by the exigencies of a transaction in the course of which he does everything in his power to prevent such loss. In my view, whether judged by the concept of a transfer or the concept of a loss or by the essential character of the transaction there was no transfer; as if there was a transfer at all, there was certainly no loss, not to speak of capital loss, which the assessee could claim to have sustained. The claim put forward on behalf of the assessee is, in my view, utterly untenable and he is entitled to derive no benefit from it except compliments for his ingenuity.

27. Reverting now to the first and the sixth questions, we are unable, as I have already stated, to answer them on the facts stated, as it appears to us that a great deal of further information is necessary. In the first place, clause 4 of the agreement of 12-8-1946, speaks of "Policies of Insurance effected by the Promoters (details of which Policies are set forth in the Schedule marked A)". The Schedule has not been printed but we have a mention of the Policies in the assessment order fur 1947-48. The language I have quoted would indicate that at the date of the agreement the Policies had already been effected. Yet, it would seem from such information as is available from the paper-book that one of the Policies, namely, that taken out from the Sun Life Assurance of Canada, was effected on 13-8-1946 and the first payments on the two Policies taken out from the Crown Life Insurance Company in the assessee's own name were made in September and November of that year respectively. Payment in respect of the Policy taken out from the Norwich Union Life Insurance Company which appears to be a single-premium Policy is stated to have been made in August, 1946, but the actual date is not given. Then again, there is a Policy which is said to have been taken out originally by the assessee's wife and subsequently assigned to him for valuable consideration. When that Policy was originally taken out and when it was assigned or who paid the consideration for it and in what form it was paid is not known, except that there is a cryptic statement at p. 78 of the paper-book, against the figure of the annual premium payable, to the following effect : "included in payments made under Policy No. 421870" which is one of the Policies taken out in the name of the assessee himself. Since the Agreement states that the Policies of Insurance had already been effected by the Promoters and it further states that the Promoters were undertaking to pay ail insurance premia payable under them, as and when the same fell due, it is essential to know when the Policies were effected in fact and when the premia payable or at least the first payments thereof fell due. The Tribunal does not seem to have regarded those enquiries to be of any importance, but we do not sec how the question can be properly dealt with without full information on those matters.

28. There are other matters as well. As I have already stated, we have to consider the taxability of both, the premia paid under the Policies and the annuities received under them. It is said with respect to two of the Policies taken out from the Crown Life Insurance Company, namely Policies Nos. 431868 and 421869, that under them, a capital sum was payable at the end of 15 years, but there was an option to take annuities. It is necessary to know whether the option was to take annuities from the beginning or only upon the maturity of the Policy, if the former, whether

the option was exercised.

29. As I also said when referring briefly to the first question at the beginning of this judgment, the Agreement contains provisions For the apportionment of benefits under the Policies in case the Agreement was terminated. It appears as if that contingency did not arise but we have no definite statement as regards whether the full period of the Agreement was served out by the assessee.

30. Lastly, it was the case of the assessee that he had received certain annuities during the relevant accounting years. The supplementary Statement of Case states that in the accounting year relative to the assessment year 1947-48, the assessee received Rs. 4,987/- and in the next accounting year he received Rs. 20,173/-. How these annuities could have been received before the completion of the period of Agreement is a little mystifying and if there is an explanation, the same has not been furnished. Paragraph 4 of the Agreement states that the benefits under the Policies would come to belong to and be the property of the assessee for his sole use absolutely "On the completion of this Agreement". That language would appear to suggest that the benefit of the annuities would begin to be available to the assessee after the expiry of the period of Agreement and that to that extent the Policies were of the nature of deterred annuity Policies. If however, annuities were in fact received even during the accounting years with which we are here concerned, the language I have quoted from the Agreement must have some other meaning. Mr. Meyer suggested that possibly what the parties meant and intended was that prior to the completion of the agreement, the assessee's right to the benefits under the Policies would be of a contingent character, subject to being modified on the termination of the Agreement before the expiry of the full period, but they would become absolute after the completion of the period of the Agreement. That seems to be a plausible meaning, but it is necessary to know exactly what the real meaning was in which the parties actually used the language in clause 4 of the deed. It is also necessary to know from which of the Policies the amounts of the annuities received by the assessee were actually received.

31. Since the matter for enquiry is whether the payments of premia made by the Promoters were, in essence, payments made to the assessee as his remuneration or they were investments of capital by the employers For the purpose of obtaining annuities For the benefit of the assessee which would constitute his only income, it is necessary to know when and in what circumstances the Policies were effected, how and when the premia were paid and what were the actual receipts from the Policies and from which of them. We accordingly think that the Tribunal should be directed to submit a further statement of Case in which they should incorporate findings as respects, inter alia, the following matters :

1. When were the Policies respectively effected, that is,
(a) when were the declarations and proposals made, and
(b) when were the contracts completed so that Policies came into existence ?
2. When, by whom and in what manner were the premia paid particularly in the case of the single premium Policies, who paid the premium, when and in what form ?
3. When were the first payments of annuities due under the several Policies ?
4. What was the nature of the option reserved in the case of the Policies Nos. 421868 and 421869 and was the option exercised ?

5. When was Policy No. 421868 originally taken out by Mrs. Mitchell ? When was it assigned to the assessee ? Who paid the consideration for such assignment ? In what form and on which date ?

6. Under which of the Policies were the annuities amounting to Rs. 4,987/- received in the accounting year relative to the assessment year 1947-48 and to Rs. 20,173/- in the accounting year relative to the assessment year 1948-49 ?

Agreement by serving For the full period in accordance with its terms ?

32. We lealise that it will not be possible For the Tribunal to obtain information on the several points I have indicated unless the assessee cooperates and makes available the relevant Policies of Insurance and such other materials as may be required. I need hardly point out that it will be to his interest to co-operate.

33. We also think that the documents annexed to the further Statement of Case should include the Schedule to the Agreement of 12-8-1946. It will be to the interest of the assessee to make a copy of that Schedule available to the Tribunal.

34. In the result, Questions Nos. 2, 3, 4 and 5 are answered in the following manner : Question No. 2 : 'Not pressed.'

Question No. 3 : 'Yes.'
Question No. 4 : 'No.'
Question No. 5 : 'No.'

35. As regards questions Nos. 1 and 6, we remit the case to the Tribunal under Section 66(4) of the Act in order that the Tribunal may draw up and forward to this Court a further statement of Case, incorporating therein its findings on the several matters we have indicated in this judgment as also such other matters as the Tribunal may consider relevant. The annexure to that Statement should, if possible, contain a copy of the Schedule to the Agreement of 12-8-1946. As the assessee is reported to be in England, the Tribunal is directed to submit the further Statement of Case by 30-11-1956.

36. The order for costs will be made at the time of the final disposal of the References.

Sarkar, J.

37. I agree.

Order accordingly.