

BOMBAY HIGH COURT

Col. Sir. J.N. Duggan

Vs.

Commissioner of Income-Tax

Income-tax Ref. No. 18 of 1950

(Chagla, C.J. and Tendolkar, J.)

07.09.1951

JUDGMENT

Chagla, C.J.

1. The following question of law was referred to the High Court:

"Whether the provision imposing income-tax on capital gains, made by the Indian Income tax and Excess Profits Tax (Amendment) Act, 1947, (XXII [22] of 1947), was ultra vires?"

2. This reference arises a very interesting and important question as to the validity of Act XXII [22] of 1947.

3. The assessee before us are Sir Jamshedji Duggan and Lady Duggan, and the question arises with regard to a certain sum of Rs. 2,40,863 included in Sir Jamshedji's return of income for the assessment year 1947-48. This sum is the profit which Sir Jamshedji made as a result of the sale of certain shares and securities. Lady Duggan likewise, in her return of income for the same assessment year, included as 'capital gains' two sums of Rs. 3,54,168 and Rs. 27,682 arising from the sale of shares and securities. The Income-tax Officer included these capital gains in the assessable incomes of the husband and wife under Section 12B, Income-tax Act. The contention raised by the assessee was that Section 12B, Income tax Act, was ultra vires of the Central Legislature. This contention was overruled by the Tribunal, and the assessee has now come before us on a reference made to us under Section 66 (1), Income-tax Act.

4. Certain important amendments were effected in the Income tax Act by Act XXII [22] of 1947. A new definition of "capital asset" was inserted as Section 2 (4A), and "capital asset" was defined as "property of any kind held by an assessee, whether or not connected with his business, profession or vocation," and the definition then excluded certain properties mentioned in that

clause. The definition of "income" was also expanded, and "income" was defined so as to include "any capital gain chargeable according to the provisions of Section 12B." Section 6, Income-tax Act, was also amended by including therein an additional head of income and that additional head was "capital gains." Then we come to Section 12B, which specifically dealt with "capital gains," and that section provided that the tax shall be payable by an assessee under the head "capital gains" in respect of any profits or gains arising from the sale, exchange or transfer of a capital asset effected after 31-3-1946, and that such profits and gains shall be deemed to be income of the previous year in which the sale, exchange or transfer took place. Then there are several provisos to this section, with which we are not concerned. Then Sub-Section (2) of Section 12B provided that the amount of a capital gain shall be computed after making certain deductions from the full value of the consideration for which the sale, exchange or transfer of the capital asset is made; and one of the important deductions is the actual cost to the assessee of the capital asset. Looking to these provisions, it seems to me clear that what the Legislature taxed was the capital value of certain assets, the capital value being computed in a particular manner. All assets were not taxed, but only those assets which were either sold, transferred or exchanged. On the sale, exchange or transfer of a capital asset, the capital asset was represented by the sale proceeds or, what the capital asset realised. The Legislature did not intend to tax the full value of the capital asset as represented by the sale proceeds, but permitted the assessee to deduct from the sale proceeds the actual cost to him of that capital asset. Therefore, there was no tax on capital value in respect of all assets of an assessee; nor was the tax on the full value of the capital asset. The tax was conditioned by the capital asset being sold, exchanged or transferred; and it was further conditioned by certain deductions which were permissible to the assessee, the most important of them being the cost of the capital asset to him. This being the scope and effect of Act XXII [22] of 1947, the question that arises for our consideration is whether the Central Legislature which enacted this legislation was competent to enact it by reason of the provisions of the Government of India Act, 1935.

5. In order to determine the legislative competence of the Central Legislature, we have to turn to the Seventh Schedule to the Government of India Act. and this is a Central Act, we have to turn to List I of that schedule. The two relevant entries which fall to be considered are entries 54 and 55. Entry 54 relates to taxes on income other than agricultural income; and entry 55 relates to taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies, and taxes on the capital of companies. It is first necessary to consider whether the impugned legislation falls within the ambit of entry 55. Now, entry 55 empowers the Central Legislature to impose taxes not on assets but only on the capital value of the assets: in other words, on the capitalised value of the assets. It is important to see this entry in juxtaposition with certain entries in List II, Entry 42 in List II empowers the Provincial Legislature to impose taxes on lands and buildings, hearths and windows. Now, lands and buildings would undoubtedly be assets. But whereas the Provincial Legislature is competent to impose a tax on lands and buildings, the Central Legislature is empowered under entry 55 of List I to impose a tax not on lands and buildings as such but on the capitalised value of lands and buildings. Therefore, the

power of the Provincial Legislature is restricted to tax on lands and buildings without taking into consideration the capital value of lands and buildings. Again, entry 48 in List II empowers the Provincial Legislature to impose a tax on the sale of goods and on advertisements. Now, if the Central Legislature had, by Act XXII [22] of 1947, purported to tax the sale of assets by an assessee, then undoubtedly it would have trespassed upon the Provincial field. But the tax that is imposed by Act XXII [22] of 1947 is not on the Hale but on the sale proceeds realised after the sale has been effected. Therefore, the scheme of the Government of India Act, as far as taxation of assets is concerned, is fairly clear assets may be taxed in certain cases by both the Central and the Provincial Legislatures; but when the Central Legislature legislates with regard to taxation of assets, it can only do so provided the tax is imposed on the capital value of the assets. With regard to taxes on income, the scheme of the Government of India Act is that all taxes on income can only be imposed by the Central Legislature, with one exception and that is agricultural income. There is one further distinction between entry 54 and entry 55 to which attention may be drawn Entry 54 does not indicate whose income may be taxed by the Central Legislature: no limitation is placed upon the power of the Legislature as to the person who should be taxed in respect of his income. But when we turn to entry 55, a limitation is placed on the tax dealt with in that entry, and that limitation is that the tax on the capital value of assets can only be imposed to the extent that the assets are of individuals and companies. It has been contended by Sir Jamshedji Kanga that entry 55 only empowers the Legislature to impose a capital levy. In other words, according to Sir Jamshedji, only such a tax can be imposed under entry 55 as would affect the total assets of an individual or a company. According to Sir Jamshedji, it is not open to the Legislature to impose a capital tax in respect only of some of the assets or to assess the tax on a value which is not the total value of the assets. To use popular language, Sir Jamshedji's contention is that Parliament sought to empower the Legislature to impose a capital levy under entry 55 and that was the sole purpose of including entry 55 in List I of the Seventh Schedule. I see no warrant whatever for construing entry 55 in that restricted and limited sense. It is well settled by now that a large and liberal interpretation must be placed upon all entries in the Seventh Schedule of the Government of India Act, and that the widest import and significance must be given to the language used by Parliament in these various entries. It must not be forgotten that the Legislature created by the Government of India Act was a sovereign Legislature within its own sphere, and that, when a topic was assigned to a particular Legislature in respect of which it could legislate, then all possible powers with regard to that topic must be attributed to that Legislature. Apart from authorities, I should have thought it inarguable that, if the Legislature could impose a tax on all the assets of an individual or a company and to assess that tax on the full value of the assets, the Legislature could not do something much less than that, namely, impose a tax only on some assets and not on the full value but on a value arrived at after certain deductions. The only justification for such an argument is that found in certain observations in a judgment of this Court in *Sir Byramjee Jeejeebhoy v. Province of Bombay*¹, In that case, a full bench of this Court, consisting of Beaumont, C.J., and Mr. Justice Broomfield and Mr. Justice Kania as he then was, was considering the validity of an Act passed by the Provincial Legislature of Bombay levying a tax called the Urban Immovable Property Tax, which was to be

calculated at 10 per cent. of the annual letting value of buildings or lands. and the view taken by the Full Bench was that the legislation fell under entry 42 of List II of the Seventh Schedule, and not under entry 54 of List I. The learned Judges took the view that the tax was really on lands and buildings, and that the annual letting value was merely the mode of calculating the tax. The Court was also of the opinion that the legislation did not fall under entry 55 of List I. Then, at page 46, Sir John Beaumont, the Chief Justice, made the following observations :-

"If the tax is not a tax on income the further question remains whether it is a tax on the capital value of the assets of the plaintiff within item 55. The Advocate General submits that item 55 is directed only to a tax on the whole of the assets

¹⁴² Bom LR 10.

other than agricultural land of individuals and companies, and that it is directed to what is known as a capital levy. An analysis of the language employed in items 54 and 56 respectively affords scope for this argument, but whether the contention be sound or not, in my opinion, it is impossible to say that this tax although it is a tax on land and buildings, is a tax on the capital value of the lands and buildings. It is imposed without any relation to the capital value except so far as such value can be ascertained by reference to rateable value."

Therefore, all that Sir John Beaumont did was merely to notice an argument advanced by the Advocate-General, and, further, to express the opinion that the argument was not wholly untenable Mr. Justice Broomfield stated (p. 48) :-

"It was rather faintly suggested that if the impugned tax is not a tax on income it must be a tax on capital and within the mischief of item 55. What is meant by the capital value of assets in that item is by no means clear, and the argument threw little light on the matter. It may be that what is intended is a tax on the total value of assets in the nature of a capital levy."

Therefore, here again, the learned Judge merely indicated what the argument was with regard to the construction of entry 55, without deciding the point. Mr. Justice Kania, as he then was, states (p. 55) :-

"I do not think the impugned tax is of a nature to encroach upon item 55 in List I. Under that item the tax should be on the total capital assets, and not on individual portions of a person's capital."

But, at p. 54 the learned Judge himself poses the question :

"The crucial question is this: Is the tax on the lands and buildings or on income of the lands and building?"

Therefore, that was the crucial question which the Court was called upon to consider. and having held that it was a tax on lands and buildings covered by entry 42 of List I, no further question really arose for the determination of that Court. In the first place, the observations of the learned Chief Justice and of Broomfield, J., are not at all helpful; and, secondly, even if they were helpful, they certainly do not decide the question which we have to decide on this reference. The attention of the learned Judges was not seriously drawn to the question of the true interpretation and construction of entry 55 in that matter. This is the only authority to which Sir Jamshedji has been able to draw our attention with regard to the construction of entry 55 in this case. Therefore, we must look upon the question as *res integra*, and I must proceed to decide this question unhampered by authorities.

6. If, therefore, the impugned legislation falls within the ambit and scope of entry 55 of List. I, then no further consideration is necessary as to whether it falls under any other entry. But entry 55 presents a certain difficulty, and that difficulty is one which I have already indicated earlier. A tax which is imposed under entry 55 must be confined to individuals and companies. When we turn to the Income-tax Act, as amended by Act XXII [22] of 1947, we find that the result of the amendment is that the imposition of the tax is not restricted to individuals and companies but is also made applicable to other assesseees who are enumerated in the Act. Because, when we turn to Section 3 of the Act, which is charging section, it provides that the income-tax shall be charged in respect of the total income of the previous year of every individual, Hindu undivided family, company and local authority, and of every firm and other association of persons or the partners of the firm or the members of the association individually. and inasmuch as "capital gains" has been included in the total income by the change in the definition of "income," the charge with regard to this tax would not merely be on individuals and companies but also on Hindu undivided families, local authorities, firms and other associations of persons. Now, in this particular case, we are concerned only with individuals, and the Tribunal has taken the view that members of a Hindu undivided family and trustees would be included in the category of "individuals." I express no opinion on that question, because that question does not arise for determination on this reference. I may only indicate the argument that has been suggested that the word "individual" used in entry 55 should not be given the same connotation as is given in the Indian Income tax Act. But the argument has got to be considered from another aspect, because, according to Sir Jamshedji, inasmuch as the Legislature has legislated under entry 55, not only with regard to individuals and companies but also with regard to other categories of assesseees, the Legislature has exceeded its competence, and, therefore, the impugned Act is invalid. If "individuals and companies" comprise all the categories of assesseees referred to in the Indian Income-tax Act, then there is no substance in this argument. But on the assumption that "individuals and companies" referred to in entry 55 do not comprise all the categories of assesseees made liable to tax under the Indian Income-tax Act, I proceed to consider the argument. Now, the expression "assessee" in the Indian Income-tax Act can be resolved into its component parts; and an assessee may be in one of the different categories to which I have

referred and which are set out in Section 3 of the Act. The Legislature, therefore, has imposed this tax not only on individuals and companies but also on the other categories of assesseees. The question that falls for determination is whether, by reason of the Legislature's exceeding its competence, the whole legislation becomes void, or whether the bad part is severable and can be severed and the good part can be allowed to stand. Now, we have had several occasions in the past to consider what is the proper test that the Court should apply in order to decide whether certain provisions of a statute can be severed from the other provisions. and the test that we have adopted is the test that was laid down by the Privy Council in the well known case of Attorney-General for *alberta v. Attorney-General for Canada*², that (p. 519) :

"... the real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the Legislature would have enacted what survives without enacting the part that is ultra vires at all".

Now, can it be said, in this case, that the imposition of tax on assesseees other than individuals and companies is so inextricably bound up with the imposition of tax on other categories of assesseees that, if we were to separate the two, the legislation with regard to

²(1947) AC 503

imposition of tax on individuals and companies cannot independently survive? The question, to my mind, carries its own answer : it is impossible to suggest that Act XXII [22] of 1947 cannot be given effect to if its operation was limited to individuals and companies. It has been suggested that the Legislature would not have legislated on this topic if it had been conscious of the fact that there would have been inequality in the imposition of tax, and certain categories of assesseees would not have been subjected to this tax. Now, it is always dangerous - and usually futile - to speculate as to what a Legislature would do under given circumstances. Even in the test which the Privy Council laid down with regard to what the Legislature might have enacted, it is put in the alternative to the first test which I have set out, and the second test does not relate to policy but to a consideration whether substantially the valid legislation would have carried out the object of the Legislature. I do not think it proper to assume that, if the Legislature intended to improve the finances of the State by raising taxation or by imposing a tax on capital gains, it would have given up that attempt because it was not open to the Legislature to tax other categories of assesseees than individuals and companies. But I think it sufficient to apply the first test laid down by the Privy Council without launching upon a hypothetical enquiry as to how the minds of the members of the Legislature would have worked if they were confronted with this difficulty. And, as I said before, there can be no doubt in this case that the valid piece of legislation can independently survive although the part which is declared invalid has been removed or deleted from the Act which the Legislature passed.

7. In my opinion, therefore, Act XXII [22] of 1947 is valid, either as a whole or, in any case, to

the extent that it applies to individuals and companies.

8. A very careful and able argument was advanced before us as to whether the legislation does not also fall under entry 54. Strictly, it is unnecessary to consider the question. I should also like to point out that, although the Solicitor-General here has contended that the legislation also falls under entry 54 of List I, no such argument was advanced by the Income-tax Department before the Tribunal. As a matter of fact, the decision of the Tribunal is entirely based upon the consideration of entry 55 of List I. But as the matter is of considerable importance, and as it has been fully and ably argued, I think it right that I should express my opinion as to whether this legislation falls within the ambit of entry 54 or not. Now, to my mind the argument of the Solicitor-General is self destructive. If he contends - as he does contend - that this legislation falls under entry 55, it is impossible to contend at the same time that it also falls under entry 54. If this is a tax on the capital value of the assets, it is difficult to see how, at the same time, it can be a tax on income. The obvious reason why the Solicitor-General is anxious that we should hold that the legislation falls under entry 54 is that, under entry 54, the tax can be imposed without any limitation as to persons. But, surely, it is not permissible, in order to get over the limitations that Parliament has deliberately put upon the competence of the Legislature, to requisition the assistance of another entry in the list when the topic of legislation clearly falls under a specific entry. The argument of the Solicitor-General comes to this : "It is true that this is a tax on the capital value of the assets. But inasmuch as the Legislature cannot tax other assesseees than individuals and companies, I wish to contend that it is also a tax on income." I hope I have not been unfair to the Solicitor-General, but that, to my mind, is, in effect and in substance, his argument. Therefore, if the Solicitor General has to succeed at all, he must satisfy us that the legislation falls under entry 54 and not under entry 55; or, in other words, he must satisfy us that this is a legislation with regard to a tax on income and not a legislation with regard to tax on the capital value of assets. Now, what is a tax on income? Learned lawyers and learned Judges have expended considerable time and labour in order successfully to define "income", and the attempt has not always succeeded. Lord Wright practically gave up the attempt in *Kamakshya Narain Singh v. Commr. of Inc. Tax*³. when he appreciated the difficulty of defining "income" and admitted that it was impossible to define it in any precise general formula, and contented himself by saying that it was a word of the broadest connotation. Therefore, I agree that, in construing "income" in entry 54, we must give to that expression the widest connotation. But however wide, the connotation may be, as I shall presently point out, the connotation cannot possibly convert "income" into "capital." If there is one clear line of demarcation that has always been observed by English lawyers and English jurists, it is the line between income and capital; and English legislative practice has always realized the difference between taxing income and taxing capital. If therefore, the tax in question, namely, the tax on capital gains, is a tax on capital, then by no manner of means, by no stretching of the language of "income" in entry 54, and by no liberal interpretation of that expression, can the legislation be put in that entry. It must also be borne in mind that the Government of India Act was drafted by Parliamentary draftsmen imbued in English legal traditions and familiar with English legislative practice; and if a particular

expression had come to have a certain meaning and a certain connotation, then the draftsmen, when they used that expression, must have used it to convey that meaning and that connotation. "Income" is not a word to which its plain, natural grammatical meaning in English can be given. Such a meaning would be true of a word or an expression which has no legislative background, which has no legislative associations, and which has not been judicially construed. Therefore, to my mind, it is futile to turn to the dictionary meaning of "income" or even to go far and wide and investigate as to what meaning has been put upon that expression either in the Dominions or in the United States of America. We are dealing with a Parliamentary statute; we are dealing with the language used by Parliamentary draftsmen; we are considering the language with Parliament then understood; and we must give to it the meaning which it can bear in its legislative context. In saying this, I do not think I am going counter to the principles to which I gave expression earlier that the most liberal interpretation must be put upon the expressions used in the various entries in the lists to the Seventh Schedule; nor am I in any way restricting the wide import and significance that must be given to all the expressions. The liberal interpretation which must be given must not be an interpretation which is opposed to the legislative practice of the country which was responsible for putting the Act on the statute-book. The liberal interpretation must be consistent with and in conformity with that legislative practice. To ignore legislative practice, to take no notice of it, would be to put a meaning upon an expression which Parliament could never have intended that expression to have. Fortunately, in my opinion, I am completely supported in what I am saying by so high an authority as the Privy Council. In *Wallace Brothers and Co. Ltd. v. Commissioner of Income Tax*³, the Privy Council was considering whether the provision of the Income-tax Act, to the extent that it taxed income which had accrued outside British India of Wallace Brothers and Co. which was a company incorporated in England, was a valid provision; and in deciding that question, they had to consider the very question that we are considering as to what was

³1943 11 ITR 513 (PC)

⁴Bom 75 Ind App 86

the scope and meaning that should be given to the expression "tax on income" as used in entry 54. and the Privy Council confessed, at page 99, that none of the other provisions of the Government of India Act affords any guidance as to the income or persons who may be subjected to tax. Therefore, the Privy Council was confronted with the same difficulty as we are as to what is the income which Parliament contemplated when it used that expression in entry 54. and the difficulty was overcome by the Privy Council by resorting to the legislative practice of the United Kingdom, which they did in the following words (p. 99) :

"Where Parliament has conferred a power to legislate on a particular topic it is permissible and important in determining the scope and meaning of the power to have regard to what is ordinarily treated as embraced within that topic in the legislative practice of the United Kingdom."

They relied for the above proposition on *Croft v. Dunphy*⁵, Then their Lordships go on to say (p. 99) :

"The point of the reference is emphatically not to seek a pattern to which a due exercise of the power must conform. The object is to ascertain the general conception involved in the words used in the enabling Act."

Therefore, the question is : What is the general conception involved in the use of the word "income" in entry 54 in List I? Is a tax on capital gains included in that general conception, or is a tax on capital gains entirely foreign to that conception? If the idea of a tax on capital gains is entirely repugnant to the English legal conception of "income", then, to my mind, it is impossible to hold that, by means of a liberal interpretation, you can change the expression "income" to include something which English lawyers could never contemplate that expression to include. It is suggested that the Privy Council, in this case, was extending the meaning of "income" as used in the Government of India Act.

It is said that, by permitting the Legislature to tax income which had accrued outside British India, it was giving an extra-territorial effect to Indian legislation. I am not prepared to accept that argument. The observations of the Privy Council do not, in any way suggest that the principle laid down by their Lordships is to be availed of only in order to extend the scope of an entry and not to restrict it. There is no question either of extension or of restriction; the question is, what is the true meaning of a particular expression used in an entry, and all that their Lordships say is that if the other provisions of the Government of India Act furnish no guidance, and if a particular word has acquired a particular meaning by reason of legislative practice, then, in order to determine the scope and ambit of the power conferred upon the Legislature, it is both permissible and important to look at the legislative practice of England. Now, on one question in this reference, fortunately, there is no dispute, and it is that the English legislative practice is clear and emphatic that the particular tax with which we are concerned is not a tax which has ever been looked upon as a tax on income. Rowlatt, J., in *Ryall v. Hoare*⁶, at p. 525, emphatically gave expression to these views :

". . . In the first place, it is quite clear that anything in the nature of a capital

⁵1933 AC 156 at p. 165

⁶(1923) 8 Tax Cas 521

secretion is outside the words 'profits or gains', as used in these Acts; that, of course, follows from the scope of the Act, and it is sanctified by the usage now of a century."

Rowlatt, J., was a great authority on income-tax law, and, according to this learned Judge, for a century it has been recognised that capital accretion cannot constitute 'profits or gains' within the meaning of Income-tax Act. Then he goes on to explain what 'capital accretion' is (p. 525) :

"That rules out, of course, the well-known case of a casual profit made upon an isolated buying and selling of some article; that is a capital accretion, and unless it is merged with other similar transactions in the carrying on of a trade, and the trade is taxed, no tax is

eligible in respect of a transaction of that kind. 'Profits or gains' mean something which is in the nature of interest or fruit, as opposed to principal or tree."

Now, I should like to make it clear that the case we are dealing with of Sir Janshedji Duggan and Lady Duggan is a case of an isolated transaction of a sale of shares and securities. It is not suggested that this transaction constituted business, because, if it did constitute business, then it would have been unnecessary for the Department to bring the amount of profit made by the two assesseees within the category of "capital gains". If it was business, then it could have been taxed as profits and gains under the head of 'business' under the ordinary provisions of the Income-tax Act. In "capital gains" we are only dealing with isolated cases where an asset is sold, exchanged or transferred, and the sale, exchange or transfer results in a profit. It has been urged by the Solicitor-General that these observations of Rowlatt, J., are confined to construing the meaning of "income" as used in the English Income-tax Acts, and what we are asked to construe is the expression "income" used in the Constitution Act; and, therefore, the Solicitor-General says that the legislative practice is confined to construing the Income tax Act and not the Constitution Act. Now, the fallacy underlying this argument is obvious. The legislative practice which was referred to by the Privy Council in *Wallace Brothers and Co. Ltd. v. Commissioner of Income-tax* was the legislative practice built up either by legislation or by adjudication by Judges in England upon legislation, and certain words came to have certain meanings in the course of the legislative history of England. The question of construing a Constitution Act can never arise in England, because England, fortunately or unfortunately, is not blessed or troubled with a Constitution Act and no question ever arises in English Courts of any Acts of Parliament being intra vires or ultra vires of the Parliament, the Parliament being completely sovereign and not subjects to any constitution. Then in *Doughty v. Commissioner of Taxes*⁷, at p. 331, the House of Lords points out the difference between a capital sale and a sale which produces income : the same distinction again is kept in mind. Lord Buckmaster, in *Leening v. Jones (H.M. Inspector of Taxes)*⁸, again emphasizes the fact that (p. 357) :

"an accretion to capital does not become income merely because the original capital was invested in the hope and expectation that it would rise in value; if it does so rise, its realization does not make it income."

⁷(1927) AC 327

⁸(1930) 15 Tax Cas 333

And at p. 359, Viscount Dunedin emphasizes the distinction between an isolated transaction and a transaction which is in the nature of a business, and he quotes the well known words of Lord Macnaghten in the *Attorney General v. London County Council*⁹, case when Lord Macnaghten begged to remind people "that income tax was a tax on income." In this case, the Solicitor-General has tried to persuade me at least that income-tax is a tax on capital. In *Californian Copper Syndicate (Limited and Reduced) v. Harris*¹⁰, which is an earlier decision than the one I have referred to for the purpose of citing the judgment of Rowlatt, J., at p. 165 Lord Justice Clerk very lucidly sums up the true position. and even then, Lord Justice Clerk says that it was a well settled principle, which he sums up as follows (p. 165) :

".....where the owner of an ordinary investment chooses to realize it, and obtains a greater price for it than he originally acquired it at the enhanced price is not profit in the sense of Schedule D, Income-tax Act of 1842 assessable to Income tax. But it is equally well established that enhanced values obtained from realization or conversion of securities may be so assessable, where what is done is not merely a realization or change of investment but an act done in what is truly the carrying on, or carrying out, of a business."

9. As against this impressive series of authorities which, as I said before, clearly and emphatically draw a line of demarcation between income and capital, and equally emphatically put capital accretion on the other side of the line - on the side of capital - our attention has been drawn by the Solicitor General to certain Commonwealth and American decisions. Now, as I said before, to my mind these decisions are entirely irrelevant, because the Parliamentary draftsmen who drafted the Government of India Act were more concerned, more conversant, with their own legal system and their own legislative practice than the legislative practice or the legal system of the Commonwealth or the United States of America. But, in fairness to the Solicitor-General, I will just briefly notice the cases on which he has relied. The first is an Australian case : *Resch v. Federal Commissioner of Taxation*¹¹, Now, in the first place, it must be borne in mind that the Australian Court was not faced with two topics used in a legislation in contradistinction to each other, as we find in entries 54 and 55. All that the High Court of Australia was dealing with was Section 85 of the Constitution which did not permit a taxation Bill to deal with more than one topic of taxation, and the question was whether the Income-tax Assessment Act, 1922-1930, and the Income-tax Acts, 1930, infringed Section 55 of the Constitution by reason of their bringing into charge profits of a capital nature as well as profits of the nature of income. The question that fell to be considered by the High Court of Australia was whether profits of a capital nature constituted income, and Starke, J., says (p. 213) :

"Income is as large a word as can be used to denote a person's receipts.....; it signifies that which comes in. An 'Act to impose a tax upon incomes' is not less general in scope, it must be liberally construed, and include everything which by reasonable understanding might fairly be regarded as income. Of course, Parliament cannot by any definition or provision that it may adopt contravene the provisions of the Constitution. But I am by no means convinced that the

⁹(1899) 4 Tax Cas 265 at p. 298

¹¹(1941-42) 66 CLR 198

¹⁰(1904) 5 Tax Cas 159

Parliament cannot under cover of an income-tax tax anything that comes into a tax-payer without regard to the characteristics or attributes of capital and income in the works of economists or in the decisions of the Courts. It is enough, however, for present purposes to say that the Parliament possesses power, without infringing the provisions of Section 55 of the Constitution, to bring to charge in an income tax Act all profits and gains accruing to a taxpayer, without distinguishing whether the profits or gain should be regarded as a receipt on capital or on income or revenue account."

Now, I do not agree for a moment that, in construing the expression "income" in entry 54 of List I, we must be guided by a reasonable understanding as to what "income" means. We must be more guided by the understanding that this word has acquired by legislative practice. Reasonable understanding is a matter of doubt and uncertainty. But as far as legislative practice is concerned with regard to the meaning of "income", there is no doubt whatever as to whether capital accretion is income or not. Then there are three American reports, the earliest of which is *Eisner v. Macomber*¹². That was a case where bonus shares had been issued in respect of the accumulated profits of a company, and the question arose whether the issue of bonus shares constituted income within the meaning of the 16th Amendment to the American Constitution. Now, it should be noted that, under the American Constitution, under Section 2 (3) of Article 1, representative and direct taxes which the Congress can levy have to be apportioned among the several States. To this provision in the Constitution, Amendment 16 provided that the Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration. Therefore, the expression "taxes on income" as used in Amendment 16 was intended to be an exception to the direct and representative taxes referred to in Section 2 (3) of Art. I of the Constitution. The Supreme Court, therefore, in the case to which I have just referred, was called upon to consider whether the issue of bonus share by a company was income within the meaning of the 16th Amendment; and the majority of the Court held that the stock dividends which these bonus shares constituted did not constitute income. Pitney, J., delivering the majority judgment, defined "income" as "the gain derived from capital, from labour, or from both combined"; but he added that it should include profit gained through a sale or conversion of capital assets, as was laid down in an earlier Supreme Court judgment. But he held that the dividend given by the company, which they were considering, did not constitute income because the dividend was not derived from capital. Income, according to him, was not a gain accruing to capital not a growth or increment of value in the investment; but a gain, a profit, something of exchangeable value proceeding from the property, severed from the capital, however invested or employed, and coming in being "derived", that is, received or drawn by the recipient for his separate use, benefit and disposal'; and that, according to him, was income derived from property. and as this dividend did not satisfy the test, Pitney, J., held that it was not income. Holmes, J., who was one of the dissenting Judges, pointed out that the word "incomes" in the 16th Amendment should be read in 'a sense most obvious to the common understanding at the time of its adoption.' Therefore, it is clear that Holmes, J., was considering the view that was taken of the word "income" at the time the Amendment was adopted. and he points out that "the known purpose of this Amendment was to get rid of nice questions as to what might be direct taxes" and he could not doubt

¹²(1919) 252 US 189

that "most people not lawyers would suppose when they voted for it that they put a question like the present to rest." Now surely, this is hardly a test that we can apply to the construction of the expression 'income' in entry 54. As I said before, it is not a case of common understanding. What we have to try and determine is what Parliament understood by the expression "income" when it

put that expression in the Constitution Act. The second case is *Merchants' Loan and T. Co. v. Smietanka*¹³, and I must admit that it is a case directly in point, because it deals with the question of an executor realising the estate of a testator by selling certain shares and securities on which there was a profit. The question was whether that profit constituted "income" within the meaning of the 16th Amendment, and Clarke, J., at page 755 [519] says :

"In determining the definition of the word 'income' thus arrived at, this Court has consistently refused to enter into the refinements of lexicographers or economists, and has approved in the definitions quoted, what it is believed to be the commonly understood meaning of the term which must have been in the minds of the people when they adopted the 16th Amendment to the Constitution."

The meaning of the word "income" referred to here is therefore the commonly understood meaning of the United States of America, in the minds of the people of the United States of America, when they adopted the 16th Amendment. But are we really concerned with what Americans thought of a particular expression when they adopted the 16th Amendment to their Constitution? However remote we may be to-day from the British Parliament, when the Government of India Act, 1935, was passed the only material consideration was what that Parliament thought at the time when it passed that Constitution Act. The last case is *United States v. Stewart*¹⁴, That case also raised the question whether certain capital gains arising out of purchase and subsequent sale of certain bonds was exempt from Federal income-tax as falling outside the ambit of Amendment 16. and Douglas, J., says at pp. 44, 45 [63] :

"To be sure, 'income, is a generic term amply broad to include capital gains for purposes of the income-tax."

The term "income" may be broad enough in the United States of America to include capital gains, but such a notion would be entirely shocking to an English lawyer, as is amply clear from the English decisions to which I have referred. The Solicitor-General has made a point of the fact that even the House of Lords has referred to with approval the case of *Eisner v. Macomber*¹⁵ in *Inland Revenue Commissioners v. Blott*¹⁶, Now, what the House of Lords decided in this case was that bonus shares issued to shareholders in respect of undistributed profits did not constitute income because there was no release of assets and the shares did not represent a release of assets. It is in this connection that the remarks of Pitney, J., in *Eisner v. Macomber* were approved of by Viscount Haldane at page 195, because the judgment of Pitney, J., proceeded on the same principle that the dividends did not constitute income because there was no severance of any part of the capital. Viscount Cave also refers with approval to the remarks of Pitney, J., at page 202. But it is significant to note that Viscount Cave points out that the law in the United States of America on the question of income-tax differs from the law in England.

¹³(1921) 255 US 509

¹⁵(1920) 252 US 169

¹⁴(1940) 311 US 60

¹⁶(1921) 2 AC 171

10. On a careful consideration of these authorities, I still feel that, whatever might be the position

in Australia or in the United States of America, the position under English law is perfectly clear. and if capital accretion could never have been looked upon as income by an English lawyer, then, in construing a Parliamentary statute, to my mind, it would not be correct to give to the expression "income" a connotation so wholly foreign to English legislative practice. It is for this reason that I am unable to accept the contention put forward by the Solicitor-General that "taxes on income" can include taxes on capital accretion.

11. But as I have taken the view that the impugned legislation falls within the scope and ambit of entry 55 in List I of the Seventh Schedule, I am of opinion that Act 22 of 1947 is not ultra vires of the Legislature. I will, therefore, answer the question referred to us by the Tribunal in the negative.

Tendolkar, J.

12. Although I have come to the same conclusion as to the competence of the Legislature, with very great respect to my Lord the Chief Justice, I have come to that conclusion on a wholly different process of reasoning.

13. The question for determination is the competence of the Central Legislature to enact Act XXII [22] of 1947. That Act was enacted in order to amend the Indian Income-tax Act, 1922, and the Excess Profits Tax Act, 1940, for the purposes therein apparent. The relevant provisions of the Act for the purposes of determining the competence of the Legislature are to be found in Section 2, which introduces a new definition as Section 2 (4A), Income-tax Act of the expression "capital asset"; in Section 2 (c) (sic) which amends the definition of "income" given in the Indian Income-tax Act by including within its scope any capital gains chargeable according to the provisions of the newly added Section 12B, Income-tax Act; in Section 5 of the Act, which amends Section 6, Income-tax Act, by adding a new head of income, namely, "Capital gains," to the heads of income enumerated in that section; and in Section 6, which introduces into the main Act Section 12B. Section 12B is a very long section which contains numerous provisos. But the amended definition of 'income,' when it includes a capital gain within its scope, mentions "any capital gain chargeable according to the provisions of Section 12B"; so that Section 12B, in so far as Act XXII [22] of 1947 is concerned, ought to be read in conjunction with Sections 3 and 4, Income tax Act, which are the normal charging sections, as a charging section for the purpose of capital gains. Now, by this charging section, what is sought to be charged is capital gains 'in respect of any profits or gains arising from the sale, exchange or transfer of a capital asset effected after 31 3-1946.'" Then Sub-Section (2) of Section 12B provides how the amount of a capital gain is to be computed; and, in substance, it provides that from the fall value of the consideration for which the sale, exchange or transfer of the capital asset is made shall be deducted the actual cost to the assessee of the capital asset. We then have several other minor amendments made in the Income-tax Act by Act XXII [22] of 1947. But the real effect of the Act is that, by reason of the extended definition of "income" and of the inclusion of "Capital gains" in

the heads of income, as well as by reason of the charging Section 12B read along with the charging Sections 3 and 4, Income tax Act, capital gains were sought to be made liable to tax as defined in the newly added Section 12B, Income-tax Act. Now, the question for determination is whether it was competent to the Central Legislature to enact such a legislation and to impose a tax on capital gains.

14. Now, the competence of the Central Legislature to enact such legislation can be sought, if at all, in Entries 54 and 55 in List I of Schedule 7 to the Government of India Act. Of these two entries, Entry 54 is, in one sense, the more comprehensive, because it includes within its scope not only certain classes of assesseees but all classes of possible assesseees, while Entry 55 restricts itself in terms to individuals and companies. Now, turning to these entries, I will first consider Entry 54, because it is, to my mind, wider in its scope in so far as its applicability to assesseees is concerned. That entry is "taxes on income other than agricultural income." Now, whatever may be the true meaning to be attached to the word "income" - and that is the matter that we have to determine on this reference - under this entry the Central Legislature has undoubtedly the power not only to tax what may be described as "real income," but it also has the power to tax "notional" or "statutory income": and indeed it has already done so without challenge in the case, for example, of income from property under Section 9, Income-tax Act, where the income-tax may have no actual relationship to the nett rent received by the landlord. But what it does tax must of necessity, in my opinion, have some relationship, howsoever remote, to the concept of income. Moreover, the Legislature, whilst enacting legislation for taxing income, would have ample powers to prescribe the conditions under which the tax is payable. So far there can be little dispute. But the real dispute between the parties centres round the true meaning to be attached to the word "income" in this entry. On the one hand, Sir Jamshedji Kanga, for the assessee, has contended that by a long course of Parliamentary usage the expression "income" has acquired a legislative meaning, and that meaning alone should be given to the word "income" in this entry; while on the other hand, the Solicitor-General has urged that the widest possible import ought to be given to every entry in the legislative lists that are found in Schedule 7, Government of India Act. Now, it is well established, both by the decisions of the Federal Court as well as by the decisions of our High Courts, that the widest possible meaning ought to be given to the entries which appear in the legislative lists in Schedule 7, Government of India Act.

A Full Bench of this High Court, to which I was a party, laid down the principle in these terms in *Fram Nusserwanji Balsara v. State of Bombay*¹⁷, (p. 815) :

"... As far as possible an attempt was to be made to reconcile the various entries in the List, and in interpreting any particular entry the widest import was to be given to the language used by Parliament. The attempt of Parliament was to exhaust all spheres of legislative activity by enumerating all conceivable topics of legislation in the three Lists. It was the duty of the Court to make every effort, when a piece of legislation came up before it for consideration, to find that power to legislate had been conferred upon the appropriate Legislature under one or the other entry in one of the three Lists. Section 104

which dealt with residual powers of legislation was rarely to be resorted to. The Court had to lean towards a construction which supported the legislative competence of the Legislature rather than one which assumed that Parliament had overlooked a particular topic of legislation and had left it to be dealt with by the Governor-General under Section 104. Further, it was not necessary that the impugned legislation should be referable to one specific entry in the List. It was sufficient if legislative competence could

¹⁷⁵² Bom LR 799

be deduced from the relevant List or Lists taken as a whole."

These principles, then, being well established, how are they to be worked in practice along with the principle which Sir Jamshedji asks us to accept, namely, that, if by Parliamentary usage a term has acquired a legislative meaning, such legislative meaning alone ought to be given to it? What happens in a case in which the legislative meaning may be narrower than the ordinary plain meaning of the words used in the entry? Is the principle of a liberal construction then to be modified and is it to be said that the entry in the legislative list should then have only the narrow meaning that it had by Parliamentary usage in England? I will presently notice the cases that have been relied upon by Sir Jamshedji Kanga in support of his submission; but it appears to me that the result of those decisions is that, where the language used in any of the legislative entries is plain and unambiguous, the widest possible import must be given to it; but where the language is either ambiguous or of a limited scope only, in its plain meaning, it is not only permissible but indeed expedient to have regard to Parliamentary practice to resolve the ambiguity or to extend the scope of the plain words. I know of no instance - and none has been cited at the Bar - in which Parliamentary practice has been resorted to for restricting the scope of plain words appearing in any entry in the legislative lists.

15. Turning now to the cases relied upon by Sir Jamshedji Kanga the first of these is the decision of the Privy Council in *Wallace Brothers and Co. Ltd. v. Commissioner of Income-tax, Bombay City*¹⁸. Now, in this case, the validity of Section 4(1)(b)(ii), which subjected to tax foreign income of resident companies, as well as the validity of Section 4-A, Income-tax Act, which inter alia defined a "resident company" as a company whose income arising in British India exceeds its income arising elsewhere, was challenged. Lord Uthwatt, who delivered the opinion of their Lordships, points out (p. 99) :

"None of the other provisions of the Act affords any guidance as to the income or persons who may be subjected to tax."

Stopping there for a moment, what was being done was not to interpret the word "income" but to find out whether the concept of income, as understood by Parliamentary usage, threw any light on the question as to the income or persons who may be subjected to tax, in other words, on the two questions of validity that had been raised which had nothing to do with the limits to be placed on the connotation of the word "income" itself. Then his Lordship proceeds to observe (p.

99) :

"Where Parliament has conferred a power to legislate on a particular topic it is permissible and important in determining the scope and meaning of the power to have regard to what is ordinarily treated as embraced within that topic in the legislative practice of the United Kingdom. (See *Croft v. Dunphy*¹⁹, (at p. 165). The point of the reference is emphatically not to seek a pattern to which a due exercise of the power must conform. The object is to ascertain the general conception involved in the words used in the enabling Act." His Lordship then proceeded to observe (p. 99) :

"Income tax legislation in the United Kingdom has - putting the matter broadly –

¹⁸ 75 Ind App 86

¹⁹1933 AC 156

proceeded on the lines that there is subjected to income tax all income arising within the United Kingdom and (independently of remittance to the United Kingdom) some, but not all, income arising abroad belonging to a person resident in the United Kingdom.

The resulting general conception as to the scope of Income-tax is that, given a sufficient territorial connection between the person sought to be charged and the country seeking to tax him, income-tax may properly extend to that person in respect of his foreign income."

It is abundantly plain from this that resort was made to Parliamentary practice because the entry itself was silent in regard to the person or income which could be subjected to tax and there was no other guidance in the statute as to the matter for decision before their Lordships. The reference to Parliamentary practice was in no sense to narrow down the meaning of the word "income" in the entry "Taxes on income."

16. Turning next to the case of *Croft v. Dunphy*²⁰, in that case the power conferred by the Customs Act of Canada to seize and forfeit any vessel engaged in smuggling within 12 miles from the coast of Canada was challenged. The Canadian Parliament had power to enact customs laws for Canada. The question was whether it could legislate beyond its shores, at any rate beyond three miles from its shores which is the internationally accepted limit of territorial waters. The Privy Council held that it had such power, and in doing so the Privy Council relied upon the legislative practice in England. Lord Macmillan observes (p. 165) :

"When a power is conferred to legislate on a particular topic it is important, in determining the scope of the power, to have regard to what is ordinarily treated as embraced within that topic in legislative practice and particularly in the legislative practice of the State which has conferred the power. Thus in considering what might be appropriately and legitimately enacted by the dominion Parliament under the power to legislate in relation to 'bankruptcy and insolvency', it was considered relevant to discuss the usual contents of bankruptcy statutes. Now from early times the customs legislation of the Imperial Parliament has contained anti-smuggling provisions authorizing the seizure

of vessels having dutiable goods on board when found "hovering" off the coast within distances substantially in excess of the ordinary territorial limits."

His Lordship then proceeds to observe, at p. 166, after referring to the Acts of the British Parliament from 1768 onwards :

"It will thus be seen that when the Imperial Parliament in 1867 conferred on the Parliament of Canada full power to legislate regarding customs, it had long been the practice to include in Imperial statutes relating to this branch of law executive provisions to take effect outside ordinary territorial limits."

Quite obviously, therefore, in this case as well, their Lordships of the Privy Council referred to Parliamentary practice, not to narrow down the scope of the power of the Canadian Legislature to have customs laws within its territory, but to extend it to 12 miles beyond the shores of Canada. In a recent case before a Full Bench of this High Court, in

²⁰1933 AC 156

*Fram Nussarwanjee Balsara v. State of Bombay*²¹, which went in appeal to the Supreme Court, one of the matters argued before the Full Bench was that the Bombay Prohibition Act, 1949, fell within Entry 14 of List 2, Schedule 7, Government of India Act, which is "Public health and sanitation." Against this, it was strenuously urged before the Full Bench by Sir Nussarwanji Engineer that, by a long course of legislative practice in England, the words 'public health and sanitation' had come to acquire a particular meaning, and prohibition could not conceivably be included as an item within the scope of the entry "Public health and sanitation." Now, even a cursory acquaintance with English statute law is sufficient to know that, ever since the Public Health Act of 1848 right up to the consolidated Public Health Acts of 1936, what the Public Health Acts embraced were, broadly speaking, such matters of public health and sanitation as were usually entrusted to local bodies, prohibition never having been thought of as any one of such items; and if Parliamentary practice had to be invoked to narrow down the meaning of the expression "public health and sanitation," the Prohibition Act of 1949 could never have been held to fall within the scope of entry 14. The Full Bench did not think it necessary to consider whether it fell within the scope of that entry. But the Supreme Court specifically held, as will be found from *State of Bombay v. F.N. Balsara*²², at p. 490, that the Prohibition Act fell within Entry 14 in List 2 of the Seventh Schedule to the Government of India Act. Of course, it does not appear from the report of the Supreme Court whether the particular argument, that the entry should be read so as to restrict its meaning to the meaning which it acquired by Parliamentary practice, had been pressed before the Supreme Court. It is obvious, nonetheless, that, if Parliamentary practice, with which the Supreme Court must obviously be cognisant, was to be the deciding test, the Supreme Court could not have come to the conclusion that this piece of legislation fell within entry 14 of List II, which is "Public health and sanitation."

17. I am, therefore, of opinion that, if there is a plain natural meaning which can be given to the

words used in any legislative entry in Schedule VII to the Government of India Act, it is not competent to narrow down the meaning of such plain words by giving to the words an artificial meaning which they may have acquired by a long course of Parliamentary practice. Parliamentary practice becomes relevant, and of the utmost importance, when the words themselves are ambiguous or where the Act is silent with regard to the extent of the scope of legislative power. Keeping these considerations in view, I have next to consider what is the true scope of the word "income" in this entry.

18. Now, without resort to any decisions in any country, I would say that "income" in its widest sense includes any profit or gain which is actually received. In order to determine what is the plain natural meaning of an English word, quite apart from any legal meaning that it may have acquired in any particular country, it is legitimate to look at the usage of English speaking nations, whether they are England, America or the Commonwealth of Australia. Undoubtedly, in looking at the usage of these countries, the cases decided by the law Courts of these countries would have to be looked at. But when one looks at those cases, one must distinguish between cases which are of positive help in the interpretation of the word "income" and cases which only give a negative assistance. Thus, for example, where we have cases, such as in England, which merely lay down that "income" in any particular Act or Acts does not include a capital gain, they are, in my opinion, of negative

²¹(52 Bom LR 799)

²²1851-14 SCJ 478

value because they do not determine that the word "income" is incapable of including within its scope capital gains. Now, the series of authorities in England, which my Lord the Chief Justice has set out in his judgment, no doubt make it abundantly clear - and I do not wish to reproduce the authorities - that anything in the nature of capital gains is outside the concept of "income" under the fiscal statutes in the United Kingdom. and as pointed out by Rowlatt, J., in *Ryall v. Hoare, and V. Honeywill*²³, at p. 525, such an interpretation has been sanctified by the usage of a century. But these authorities themselves, or at least most of them, state in terms that the concept of "income" that they are discussing is the concept for the purposes of the taxation Acts in the United Kingdom, and not for the purpose of determining whether the word "income" is capable of including within its scope a capital gain or not. We have, to the same effect, similar decisions under the Indian Income-tax Act. Reference may be made to a decision of their Lordships of the Privy Council in *Income-tax Commissioner v. Shaw Wallace and Co*²⁴. where, at p. 212, Sir George Lowndes observes :

"... Income, their Lordships think, in this Act connotes a periodical monetary return 'coming in' with some sort of regularity, or expected regularity, from definite sources."

His Lordship was particular in emphasizing that he was dealing with "this Act," namely, the Indian Income tax Act; and it is for the purposes of this Act, as it then stood, that "income" connotes a periodical monetary return. This decision stands on the same footing as the decisions of the English Courts and they do not, in my opinion, involve the conclusion that "income" in its

plain natural meaning does not include capital gains. Indeed, it is significant to note that under the Income-tax Act of 1945 capital gains have now been included within the scope of the Income-tax Acts in England.

19. Turning next to the decided cases in other parts of the English-speaking world, I may first refer to a decision of the Supreme Court of Australia in *Resell v. Federal Commissioner of Taxation*²⁵, Now, under Section 55 of the Constitution of Australia, it was provided that taxing statutes should not embrace more than one subject of taxation. In this particular case, the Income-tax Assessment Act, 1922-30, and the Income tax Acts 1930 were challenged on the ground that they brought to charge profits of a capital nature as well as profits in the nature of income, which it was contended were two different subjects of taxation. and the question was whether the Acts were invalid by reason of their dealing with two different subjects of taxation in one statute. Dealing with this question, Rich, J., observed (p. 210) :

"It is maintained that the Act does not confine itself to one subject of income but extends to another subject of taxation, namely, capital profits. The subject is profits or gains, and the distinction between gains of an income nature and gains of a capital nature is neither instituted nor maintained by the assessment Act. An income-tax Act usually groups together more than one subject of income, profit, revenue or receipts, but such a grouping does not necessarily involve the conclusion that these subjects are separate and distinct. It is a question of fact in each case and the substance and provisions of the particular Act must be

²³(1903) 8 Tax Cas 521

²⁵(1941-42) 66 CLR 198

²⁴59 Ind App 206

considered. That a particular label or a general name has been given to the Act is of little or no importance where there is no ambiguity in the provisions of the Act. The word "income" is comprehensive enough to include the subject dealt with in the Act, and its use in this connection is in accordance with common understanding, which is one main clue to the meaning of the Legislature..."

Then Starke, J., observed (p. 213) :-

"Income is as large a word as can be used to denote a person's receipts...: it signifies that which comes in. An 'Act to impose a tax upon incomes' is not less general in scope, it must be liberally construed, and include everything which by reasonable understanding might fairly be regarded as income. Of course, Parliament cannot by any definition or provision that it may adept contravene the provisions of the Constitution. But I am by no means convinced that the Parliament cannot under cover of an income-tax tax anything that comes into a taxpayer without regard to the characteristics or attributes of capital and income in the works of economists or in the decisions of the Courts."

Dixon, J., observed (p. 225) :

"The distinction between profits of a capital nature and profits in the nature of income in the strict sense is not one which the Act maintains. Nor is it a discrimination which the Legislature is bound to regard. Indeed, in the United States, under the 16th Amendment which speaks of 'income', the term is considered to include all profits whether on account of capital or on account of income in the strict sense. In *United States v. Stewart*²⁶, Douglas, J., says: "Income" is a generic term amply broad to include capital gains for purposes of income tax', citing *Merchants' Loan and Trust Co. v. Smietanka*²⁷, "

The observations of these three learned Judges were not based on any peculiarity of the Australian law or on any special meaning attached to the word "income" in that part of the world; but they were dealing with the normal concept of the word "income" and indicating that, in its widest sense, it is capable of embracing any profit or gain which is actually received.

20. I may turn next to the decisions in the United States of America. Now, under the Constitution of the United States of America, Section 8 of Article I conferred upon the Congress power to lay and collect taxes; but Sub-Section (3) of Section 2 of Art, I of the Constitution provided that representative and direct taxes shall be apportioned among the several States in a certain manner indicated in that article. By Amendment 16 of the Constitution, the Congress was given power "to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration". Several cases came up before the Courts challenging taxes on the ground that they offended against Amendment 16 to the Constitution, and that they not being taxes on in. come could not be imposed without providing for apportionment; and in that context, the Supreme Court in America had to

²⁶(1940) 311 U.S. 60

²⁷(1921) 255 U.S. 509

consider the meaning to be attached to the expression "taxes on income" appearing in the 16th Amendment to the Constitution. The first of these cases is *Eisner v. Macomber*²⁸, The question for decision in this case was whether, by virtue of the 16th Amendment, Congress had the power to tax as income of a stock holder a stock dividend made lawfully and in good faith against profits accumulated by a corporation. Pitney, J., in dealing with this matter, observed [p. 523 (206)];

"The fundamental relation of 'capital' to 'income' has been much discussed by economists the former being likened to the tree or the land, the latter to the fruit or the crop; the former, depicted as a reservoir supplied from springs, the latter as the outlet stream, to be measured by its flow during a period of time. For the present purpose we require only a clear definition of the term 'income', as used in common speech, in order to determine its meaning in the Amendment; and having formed also a correct judgment as to the nature of a stock dividend, we shall find it easy to decide the matter at issue.

"After examining dictionaries in common use (Bouvier's Law Dict; Standard Dict.; Webster's Int. Dict.; Century Dict), we find little to add to the succinct definition adopted

in two cases arising under the Corporation Tax Act. . . . : 'Income may be defined as the gain derived from capital, from labour, or from both combined', provided it be understood to include profit gained through a sale or conversion of capital assets, to which it was applied in the Doyle case, (1918-247 US 179).

"Brief as it is, it indicates the characteristic and distinguishing attribute of income, essential for a correct solution of the present controversy. . . ."

Then the learned Judge held that a stock dividend was not something "derived from capital, and on that ground held that it did not fall within the scope of the 16th Amendment. But the passage I have just quoted makes it abundantly plain that, as used in common speech, "income" has a very wide connotation, at least in the United States of America. I next turn to the case of *Merchants' Loan and T. Co. v. Smietanka*²⁹, Now, in this case, what was held was that the gain derived from a single isolated sale of personal property, which had appreciated in value during a series of years, was income within the meaning of the 16th Amendment to the Constitution. This really is on all fours with what is sought to be taxed under Act 22 of 1947 in India as a capital gain and if this was held to fall within the ordinary plain meaning of the word "income" in Amendment 16 to the American Constitution, I am quite unable to see why capital gains in India should not fall within the ordinary plain meaning of the word "income" in Entry 54 of List I, Schedule 7 to the Government of India Act. Lastly, we have a decision in *United States v. Stewart*³⁰, Now, in this case, the facts were as follows. Under Section 22 (a), Revenue Act of 1928 gains, profits and income derived from sales or dealings in property, whether real or personal, were taxable. The question was whether the profits and gains made by sale of farm loan bonds were subject to taxation. Income derived from the bonds was exempted from taxation under Section 26, Federal Farm Loan Act. Douglas, J., observed [p. 44 (63)] :

"To be sure, 'income is a generic term amply broad to include capital gains for purposes of income-tax."

²⁸(1920) 252 US 189

³⁰(1940) 311 US 60

²⁹1921-255 US 509.

But then he proceeded to hold that Section 26, Federal Farm Loan Act, did not exempt simply "income," but that it exempted the income "derived therefrom," and came to the conclusion that this particular income was not derived from mere ownership of the bonds but was derived from dealings or transactions in the bonds which is a wholly different thing. The observations of Douglas, J., also make it abundantly plain that the word "income" is a term of the widest possible import and is capable of including within its scope all actual receipts although they may have been obtained as a result of selling a capital asset.

21. I am, therefore, of the opinion that the true meaning to be placed on the entry "Taxes on income" is income in the widest sense, and certainly income which would include "capital gains" as defined in Section 12B, Indian Income-tax Act, which are gains actually realised as a result of sale, exchange or transfer. That being so, the Legislature clearly had authority under Entry 54 to legislate in respect of such capital gains as they have done by Act 22 of 1947, and in my opinion,

the Act is wholly intra vires.

22. In this view, it becomes unnecessary for me to consider whether the Act is also valid under Entry 55. But it has been urged that, if the Act is valid under Entry 55, since Entry 55 is applicable only to individuals and companies, we should put a narrower interpretation on Entry 54 and exclude from its scope what is included in Entry 55. Now, if we have to give the widest meaning to the entries in the legislative lists, it is possible that a subject of legislation may well fall within the scope of more than one entry, and it does not appear to me to be at all necessary to interpret the entries in the legislative lists as being mutually exclusive. A capital gain, in one sense, may be comprehended in the capital value of an asset; and may, looked at from the point of view of profit or gain still be "income." I do not, therefore, think that it would be correct to place a narrow interpretation on Entry 64 because the subject of legislation may conceivably fall within Entry 55. For myself, I do not consider it necessary, in the view that I have taken, to consider whether this legislation falls under Entry 55.

23. The result is that I agree with the answer suggested for the question referred to us, but for the reasons which I have stated.

24. Per Curiam :- No order as to costs of this reference.
Answer in the negative.