PATNA HIGH COURT

Sir Kameshwar Singh

Vs

Commissioner of Income Tax

Misc. Judicial Case No. 57 of 1955

(Ramaswami, C.J. and Raj Kishore Prasad, J.)

24.04.1957

JUDGMENT

Raj Kishore Prasad, J.

1. Under Section 66 (2), Income-tax Act, 1922, on the requisition of the High Court, the Income-tax Appellate Tribunal has stated a case and referred it for the opinion of the High Court on the following questions of law :

> "1. Whether, in the facts and circumstances of the case, the litigation expenses of Rs. 10,000 in Lala Man Mohan Das's case should have been allowed as a deduction to the assessee ?

2 (a). Whether, in the facts and circumstances of the case, interest paid on Bank overdrafts amoun ting to Rs. 46,633 or any portion of the amount should have been allowed as a deduction to the assessee ?
2 (b). Whether the claim with regard to the deduction of this amount was argued on behalf of the assessee before the Appellate Tribunal as stated in the affidavit filed today in this Court ?

3. Whether in the facts and circumstances of the case the forest income of Kharagpur circle should have been treated as agricultural income, and, hence, not taxable under the Income-tax Act ?

4. Whether, in the facts and circumstances of the case, the forest receipts from the Bankura forests should have been held to be capital receipts, or, in any event, as agricultural income, and there fore not taxable ?

5. Whether, in the facts and circumstances of the case the amount of Rs. 21,274 being the amount paid to the assessee in his character of a Shebait of the Trust properties should have been held to be exempted from taxation on the ground that it is agricultural income?"

2. The assessment year 1950-51, and, the rele vant accounting year is 1356 Fasli, which corres ponds to 19-9-1948 to 7-9-1949. The assessee was assessed under Section 23 (3), of the Act by the Income-tax Officer, Special Circle, on 26-3-1951, on a total income of Rs. 15,73,941. On appeal, this assessment was confirmed by the Appellate Assistant Commis sioner with certain modification on 28-5-1953. Against this order, the assessee as well as the Income tax Department both appealed to the Tribunal, which disposed of both the appeals on 12-4-1954, allowing partly both the appeals. The assessee claimed cer tain deductions under Section 12 (2) of the Act. The ques tions of law, which have been referred for decision of the High Court, relate to the deductions, which have been disallowed as claimed by the assessee.

3. On this reference, therefore, we are only con cerned, if the assessee is entitled to deductions under Section 12 (2) of the Act on account of the different items mentioned in the questions formulated by the Tri bunal.

4. In order to determine the correctness of the contentions raised by Mr. S. K. Mazumdar, on be half of the assessee, it is necessary first to read Section 12 (1) and (2) and to ascertain its scope. Section 12 (1) and (2), as it stood before its amendment by the Finance Act, 1955, with the relevant clauses, was in the following terms :

> "12. Other sources (1) The tax shall be payable by an assessee under the head 'Income from other sources' in respect of income, profits and gains of every kind which may be included in his total in come (if not included under any of the preceding heads).
> (2) Such income, profits and gains shall be com puted after making allowance for any expenditure (not being in the nature of capital expenditure) in curred solely for the purpose of making or earning such income, profits or gains provided that no allowance shall be made on account of
> (a) any personal expenses of the assessee, or
> (b) * * * * *"

5. In computing the income under this head, deduction is to be made in respect of expenditure incurred solely for the purpose of earning such in come, provided the expenditure is not in the nature of capital expenditure or personal expenses of the assessee. No allowance can be granted under this sub-section, unless four conditions are satisfied : (1) the expenditure must be solely incurred for the pur pose of making or earning the income, profits or gains; (2) it must not be in the nature of capital expenditure; (3) It must not be in the nature of per sonal expenses of the assessee; and (4) it must be incurred in the accounting year, and, not in any prior or subsequent year.

6. Bearing this in mind, I will now proceed to answer the different questions submitted by the Tribunal.

7. Question No. 1. - In the assessment year 1950-51, the assessee contributed a sum of Rs. 10,000 towards litigation expenses to one Lala Manmohan Das, and, the assessee claimed deduction of this amount as an expenditure under Section 12 (2) of the Act.

8. The facts which can be gathered from the judgments regarding the nature of this advance are these :
Sometime in 1935, the assessee obtained from one P. L. Jetley 21,500 shares of the Lower Ganges and Jamuna Electric Distributing Co. The assessee obtained the above shares in full satisfaction of his loan to Jetley for which he had brought a money suit against Jetley. The amount unrealised from Jetley was allowed as bad debt in the assessment of the assessee. The money lending investment ended there, and, what he received was transferred to his Investment Department and became an investment in stock and shares, the income whereof was assess able under Section 12 (1) of the Act. The share scripts so obtained were that of an electric concern at Allaha bad, which came into existence in 1930. The Electric Company issued debentures, and, Lala Manmohan Das, who was a share-holder, purchased the bulk of debentures and somehow was appointed a trustee for the debenture holders. In the meantime, the U. P. Government moved the High Court for the winding up of the company and gave a verbal under taking that the Electric Concern will be purchased as a going concern. The share-holders did not op pose the winding up proceedings. Later on, the U. P. Government revoked the undertaking to purchase the concern as a going concern and pressed for win ding up before the High Court which ordered wind ing up on 3-4-1937. Lala Manmohan Das, as trustee of the debenture holders, fought the U. P. Govern ment up to the Privy Council, and, at present, a suit is pending before the Supreme Court of India. To this trustee of the debenture share-holders, Lala Manmohan Das the assessee advanced Rs. 10,000 as a contribution for the expenses of the litigation on the ground that the assessee is a share-holder hav ing held 21,500 shares, and, that he was interested in the existence of the Company and sale of the Company as a going concern.

9. The assessee, therefore, contended that this contribution of Rs. 10,000 was for the purpose of safeguarding his interest in the shares of the Com pany, which was being forced into liquidation. The assessee, therefore, claimed deduction of this amount under Section 12 (2).

10. The Income-tax Department objected to this deduction being allowed on the ground that the appellant was not interested in the case as a deben ture share-holder or as a money-lender coming under Section 10, and, the provisions of Section 12 do not authorise the deduction or allowance of such ex penses against dividends from share, which had become almost barren, and, as such, the expense claimed on this account cannot be allowed as deduc tion under Section 12 (2) of the Act.

11. Mr. Mazumdar relied on a decision of the Bombay High Court in *Commissioner of Income Tax v. Sir Purshottamdas Thakurdas*[1], on a decision of the Supreme Court in *Eastern Investments Ltd. v. Commissioner of Income Tax, West Bengal*[2], on a decision of the Privy Council in *Commissioner of Income Tax, Bihar and Orissa v. Kameshwar Singh of Darbhanga*[3], and on a deci sion of the *House of Lords in Morgan (Inspector of Taxes) v. Tate and Lyle Ltd*[4]., (D).

12. In my opinion, none of these cases have any application to the present case for the simple reason that here the finding of fact reached by the Tribunal is that the assessee was not a debenture holder, and, that there was nothing on record to show that this
amount was spent for litigation to protect the so-called investments. The Tribunal further found that there was no evidence showing the real purpose for which the assessee contributed the expenses, and, that the holding of the shares was in the nature of an investment, and, the ex pense for protecting the investment was not expense incurred for earning dividends of the Company

which ceased to pay dividends since a long time. It will further appear from the judgment of the Appel late Assistant Commissioner that he found that these shares in accordance with the assessee's own claim have been adjudged as investment, pure and simple, and were not stock-in-trade. The Tribunal, therefore, held that under Section 12 (2), only those ex penses which were incurred for the purpose of earning the income can be allowed to be deducted, but where, as here, the expense was not laid out even for the purpose of protecting the investments as alleged by the assessee, the allowance of such expense against the dividends from the share which had become almost barren could not be allowed under Section 12 (2). In my judgment, the decision of the Tribunal is correct, and must be affirmed.

13. It is plain on the language of Section 12 (2) that only such expenditure, which is incurred solely for the purpose of making or earning such income, pro fits or gains shall be allowed as a deduction and not any other expenditure, which is not incurred solely for the purpose of making or earning such income profits or gains. On the finding that this litigation expenditure was incurred not for the purpose of making or earning any income because the shares ceased to earn any dividends since long time it cannot be said that the assessee was entitled to allowance of this expenditure under Section 12 (2).

14. In Bombay case the expenditure incurred was found to be solely for the purpose of making or earning the income as a member of the Local Board of the Reserve Bank of India and therefore, the sum was allowed as a deduction under Section 12 (2) of the Act.

15. In the Supreme Court case it was found that the transaction was voluntarily entered into in order indirectly to facilitate the carrying on of the business of the assessee and was made on the ground of commercial expediency, and as the tran saction was of such a nature, it fell within the pur view of Section 12 (2) and, therefore, the interest paid was a permissible deduction under that sub-section.

16. In the Privy Council case also, it was found that the expenditure was incurred by the assessee solely for the purpose of earning the profits and gains of the money-lending business and, therefore, the assessee was held entitled to the deduction claimed.

17. In the English case the object of the ex penditure being to preserve the assets of the com pany from seizure and so to enable it to carry on and earn profits, it was held that on the evidence it was not to be assumed that the trade of the com pany would have continued, in an income-tax sense, in other hands, after nationalization, and, accord ingly the expenditure was incurred for the purpose of preventing a change of ownership.

18. These cases cannot possibly assist Mr. Mazumdar, because, as stated earlier, here the de finite finding of fact is that this expenditure was incurred not for the purpose of earning any income which only could be allowed to be deducted under Section 12 (2) of the Act.

19. I would, therefore, answer the first question in the negative in favour of the Department and against the assessee.

20. Question No. 2 (a) : - This question relates to interest paid on bank overdrafts amounting to Rs. 46,633/- which the assessee claimed as a deduc tion under Section 12 (2). The Tribunal has

found that these overdrafts were almost wholly for (1) payment of income-tax (both Central and agriculture), (2) Land revenue and cess, (3) call moneys paid for purchase of shares, and, (4) personal drawings and in terest free advance to Raja Bahadur's Estate. Mr. Mazumdar has very frankly and rightly chosen not to press the interest paid on overdrafts on account of personal drawing and interest free advance to Raja Bahadur. He has, however, very strenuously contended that the interest paid on the overdrafts on account of the first three items should have been allowed.

21. In support of this contention, Mr. Mazum dar placed strong reliance on the observation of Bose, J., of the Supreme Court, in (1951) 20 ITR 1 at page 5 : (AIR 1951 SC 278 at p. 279) (B). His Lord ship Bose, J., said :

> "A case somewhat similar to the present is *Famer v. Scottish North American Trust, Ltd*[5]. where it was held that interest paid on an overdraft required for purchasing shares pur chased being retained as security for the overdraft) was an outgoing which could be deducted from the receipts to ascertain the taxable profits and gains which were earned by them."

But, it will appear that his Lordship, at page 7 (of ITR) further observed :

> "On a full review of the facts it is clear that this transaction was voluntarily entered into in order indirectly to facilitate the carrying on of the business of the company and was made on the ground of commercial expediency. It, therefore, falls within the purview of Section 12 (2), Income-tax Act, 1922, before its amendment.

This being an investment company, if it borrow ed money and utilised the same for its investments on which it earned income, the interest paid by it on the loans will clearly be a permissible deduction under Section 12 (2), Income-tax Act. Whether the loan is taken on an overdraft, or is a fixed deposit or on a debenture makes no difference in law. The only argument urged against allowing this deduction to be made is that the person who took the debentures was the party who sold the ordinary shares. It can not be disputed that if the debentures were held by a third party, the interest payable on the same would be an allowable deduction in calculating the total income of the assessee company. What difference does it make if the holder of the debentures is a shareholder ? There appears to be none in principle in view of the fact that no suggestion of fraud is made in respect of the transaction which is carried out between the company and the Administrator and which has been sanctioned by the Court."

Mr. Mazumdar emphasised the principle laid down by the Supreme Court to the effect that (1) it is not necessary to show that the expenditure was a profitable one or that, in fact, any profit was earned, and (2) it is enough to show that the money was expended not of necessity and with a view to a direct and immediate benefit to the trade, but volun tarily and on the ground of commercial expediency, and in order indirectly to facilitate the carrying on of the business."

22. Mr. Mazumdar further relied on a decision of the Madras High Court in *Commissioner of Income Tax, Madras v. Raman and Raman Ltd*[6]. in which it was held, on the facts of that case that the expendi ture was incurred for the purpose of retaining the capital asset of the company

and there was no improvement of its capital asset by reason of the litigation. Consequently, the expenditure incurred was an allowable deduction under Section 10 (2) (xv) of the Act. The answer to this question is that Section 12 (2) is narrower than Section 10 (2) (xv). Section 10 (2) (xv) speaks of an expenditure which is "laid out or expended wholly and exclusively for the purpose of such business, profession or vocation" whereas Section 12 (2) speaks of an expenditure which is incurred "solely for the purpose of making or earning such income profits or gains". On the language of these two sections, it is plain that Section 12 (2) is narrower than Section 10 (2) (xv), and, therefore, unless an expenditure is incurred solely for the purpose of making or earning such income profits or gains which are mentioned in Section 12 (1) such expenditure cannot be allowed as a deduction under Section 12 (2) of the Act. In the present case the definite finding of fact is that the expenditure incurred was not for the purpose of earning or making any income and as such no allowance could possibly be made on that account under Section 12 (2) of the Act.

23. In the Supreme Court case, the interest was paid by the company on the money borrowed by it and utilised for investment which earned income and as such it was held that although the loan was taken on an overdraft as it was utilised for investments on which the company earned income the interest paid by the company on such loan was a permissible deduction under Section 12 (2) of the Act. In the present case however the position is different. The Tribunal has found that the income-tax either Central or Provincial being personal liability was not an ex penditure incurred for earning any income. Similar was the position in law with regard to the payment of interest on overdrafts taken for payment of land revenue and cess.

24. Mr. Mazumdar however strenuously urged that as far as the interest paid on overdrafts for call money for purchasing of shares was concerned this deduction should have been allowed under Section 12 (2) of the Act. The Appellate Assistant Com missioner has found that the assessee paid the call money of shares in companies which were new and which had not declared dividends and as such there was no income to the assessee whatsoever from these sources and therefore if there was no such income that has any inseparable connection with the in terest payment no deduction for interest was per missible. He therefore found that the interest paid on borrowed money for purposes of investment in shares was not expense solely incurred for the purposes of making or earning the income and was on the other hand capital expenditure for acquiring an investment and as such the deduction claimed by the assessee on this account was disallowed.

25. It may be mentioned here that this question was not argued by the assessee before the Tribunal and therefore there is no discussion or any finding on this point in the original order of the Tribunal. The Tribunal, however, in its statement of the case under Section 66 (2) has stated the facts as emerged from the findings of the Income Tax Officer and dealt with the point. In my opinion, the decision of the Tribunal on this question is correct, and the Income tax Officer has rightly disallowed this deduction. I would, therefore, answer question no. 2 (a) also in the negative against the assessee and in favour of the Department.

26. Question No. 2 (b). This question was framed by the High Court on the basis of the affidavit filed by the assessee on 29-3-1955, to the effect that the point raised by question no. 2 (a) was argued by the assessee's counsel before the Tribunal, but it has not been dealt with by it. The Tribunal, however, has definitely stated and has given reasons for coming to the conclusion that

the item, whether the interest paid on bank overdrafts amounting to Rs. 46,633 or any part of it should have been allowed as a deduction was not argued by the assessee's counsel. I am not prepared to go behind the finding of the Tribunal and therefore I would answer this question also in the negative against the assessee and in favour of the Department.

27. Questions Nos. 3, and 4. These two ques tions are covered by a decision of this Court, to which also the present assessee was a party, in *Kameshwar Singh v. Commissioner of Income Tax Bihar and Orissa*[7], in which it was held that income from forest is not "agricultural income" within the meaning of Section 2 (1) of the Act, and as such forest receipts and forest income should be treated as income which is taxable under the Act. In view of this decision of this Court Mr. Mazumdar did not advance any further argument on these two ques tions. I would, therefore, answer these two questions also in the negative against the assessee and in favour of the Department.

28. Question No. 5. The last question is whether the remuneration received by the assessee to the tune of Rs. 21,274 in his character as a shebait of trust property should have been held to be exempt from taxation on the ground that it was agricultural income. ?

29. The facts bearing on this question are these :-

The assessee created a private trust in which certain deities were beneficiaries. According to the trust, he was to receive 15 percent of the gross income as his remuneration for managing the trust properties. The assessee therefore claimed that the sum of Rs. 21,274 which the assessee received as Shebait of the trust property, being "agricultural income" was exempt from taxation. The conten tion put forward by Mr. Mazumdar on this question is that the trust deed, which has been printed in the
paper book, shows that it was in respect of agricultural lands the net estimated income of which was Rs. 1,91,925 out of this income the assessee's re muneration because of being Shebait, was at the rate of 15 percent which came to Rs. 28,789 but in the year of assessment the assessee received Rs. 21,274 only and therefore this receipt was an "agricultural income" within the meaning of Section 2 (1) of the Act, and as such this income was exempt from taxation under Section 4 (3) (viii) of the Act.

30. Mr. Mazumdar has relied on the observation of Lord Thankerton in Privy Council decision in the *Nawab Habibulla v. Commissioner of Income Tax Bengal*[8], (H). The noble lord observed":

> "Their Lordships agree with the High Court in holding that albeit the income received by the wakf estate is within the definition of agri cultural income in Section 2 (1) the sums drawn there-from as remuneration by the appellant are not agricultural income received by the appellant, and the question of law referred to the Court should be answered in the negative. 'Their Lordships desire to add that a different question might have arisen if the appellants remuneration had been by way of a fractional part of the income of the wakf estate, or by a percentage commission. That case may be considered if and when it arises and their Lord ships express no opinion thereon' (underlined by me : here in ' ')".

Mr. Mazumdar relying on the above underlined observation, submitted that here the assessee's remu neration was by a percentage commission, and as such the receipt of his remuneration by the assessee must be considered to be "agricultural income" because it was 15 per cent. of the agricultural income itself. He further relied in support of his argument on another Privy Council decision in *Bejoy Singh Dudhuria v. Commissioner of Income Tax, Bengal*[9] and also on a decision of the Allahabad High Court in *Mohammad Isa v. Commr. of In come Tax, C. P. and U. P*[10]. (J).

31. In my opinion, it is not necessary to notice these cases in detail because they have been consi dered by the Privy Council in a subsequent case in *Premier Construction Co., Ltd. v. Commissioner of Income Tax, Bombay City*[11], Sir John Beaumont, who delivered the opinion of the Board, at page 384 (of ITR) of the Reports observed :

> "In their Lordships view the principle to be derived from a consideration of the terms of the Income Tax Act and the authorities referred to is that where an assessee receives income, not itself of a character to fall within the definition of agri cultural income contained in the Act, such income does not assume the character of agricultural income by reason of the source from which it is derived, or the method by which it is calculated. But if the income received falls within the definition of agri cultural income it earns exemption in whatever character the assessee receives it. In the present case the assessee received no agricultural income as defined by the Act, it received remuneration under a contract for personal service calculated on the amount of
> profits earned by the employer, pay able not in specie out of any item of such profits, but out of any moneys of the employer available for the purpose. The remuneration therefore is not agricultural income and is not exempt from tax".

32. In my opinion, this decision of the Privy Council is settler on the question, and the obser vation made by the Privy Council in its earlier decision in (1943) 11 ITR 295 : 70 Ind App 14 cannot prevail over the concluded opinion of the Privy Council in the sub sequent case.

33. The Tribunal, on a consideration of these two decisions of the Privy Council came to the conclusion that the income received by way of remuneration from the trust property by the assessee was liable to tax the same was not an "agricultural income". In my opinion, the decision of the Tribunal is correct, and it must be affirmed.

34. In the instant case, the assessee was not to receive his remuneration in kind, nor was he to receive any percentage of the agricultural income in kind, but he was entitled to a certain percentage commission on the total estimated income from the trust property calculated in terms of money. The assessee, therefore, received no "agricultural income" as defined by the Act. He received remuneration under a contract for per sonal service on the basis of the deed itself calcu lated on the amount of profits earned by the deities payable not in specie out of any item of such pro perty, but out of the money of the deities available for the purpose. The basis of the remuneration of the assessee was a contract, namely, the trust deed, and that was the source of his rights and liabili ties. In such circumstances it cannot be said that because source of the money was agricultural in come, the remuneration paid out of the total esti mated income available out of the trust properties should be considered to be "agricultural income". In my judgment

therefore, the remuneration of the assessee was not "agricultural income" and, there fore, it was not exempt from tax under Section 4 (3) (viii) of the Act. I would, therefore, answer the fifth questions also in the negative against the assessee and in favor of the Department.

35. All the questions submitted by the Tribunal to this Court for determination under Section 66 (2) are accordingly answered in the negative against the assessee and in favour of the Department. The Department is entitled to its cost from the assessee which is assessed at Rs. 250.

Ramaswami, C.J.

36. I agree.

Answer against assessee.

Cases Referred.

[1](1946) 14 ITR 305
[2](1951) 20 ITR 1
[3](1942) 10 ITR 214
[4](1954) 26 I T R 195
[5](1912 AC 118)
[6](1951) 19 I. T. R. 558
[7](1954) 26 ITR 121)
[8](1943) 11 ITR 295 at p. 299 : (AIR 1943 PC 20)
[9](1933) 1 ITR 135
[10](1942) 10 ITR 267; (AIR 1942 All 194) (SB)
[11](1948) 16 ITR 380 : 75 Ind App 246