and the withdrawal by Gian Singh was in accordance with law. In view of this finding of mine, it is not necessary to decide the first contention raised by the learned counsel for the petitioner. Under these circumstances, the Prescribed Authority was in error in setting aside the election of the petitioner.

The result is that this writ petition succeeds and the impugned order dated 17th October, 1964, passed by respondent No. 2 is, hereby, quashed. Since there is no appearance on behalf of the respondents, there will be no order as to costs.

B.R.T.

INCOME-TAX REFERENCE

Before Daya Krishan Mahajan and S. K. Kapur, JJ.

MANOHAR SINGH,—*Applicant*

versus

THE COMMISSIONER OF INCOME-TAX, DELHI—*Respondent.*

Income-tax Reference 25-D of 1962

1965

February 9th.

Income-tax Act (XI of 1922)—Ss. 9 and 10—Owner of building running paying-guest establishment—Whether liable to be assessed under S. 9 or S. 10.

Held, that where the assessee, the owner of a building, carries on the business of a paying-guest establishment therein, he is liable to be assessed in respect of the income therefrom under section 10 of the Indian Income-tax Act, 1922 as "profits and gains of business" and not under section 9 as "income from property".

Reference under Section 66(1) of the Indian Income-tax Act (Act XI of 1922) made by the Income-tax Appellate Tribunal, Delhi (Bench 'C'), wherein the following law points arise:—

(1) *Whether on the facts and circumstances of the case, the assessee was carrying on business in providing paying guest accommodation?*

(2) *If the answer to the first question is in the affirmative, whether the income from letting out of the rooms to customers was to be separately computed and assessed under Section 9 ?*

A. N. KIRPAL, ADVOCATE, for the Appellant.

H. HARDY AND S. P. AGGARWAL, ADVOCATES, for the Respondent.

JUDGMENT

Mahajan, J.

MAHAJAN, J.—The Income-tax Appellate Tribunal (Delhi Bench 'C') has referred the following two questions of law for decision by this Court:—

(1) Whether on the facts and circumstances of the case, the assessee was carrying on a business in providing paying guest accommodation?

(2) If the answer to the first question is in the affirmative, whether the income from letting out of the rooms to customers was to be separately computed and assessed under section 9?

So far as the first question is concerned, it is not happily worded and, therefore, we have recast this question as follows:—

"Whether, on the facts and circumstances of the case, the rooms were used for purpose of business and income arising therefrom is assessable under section 10?"

It is common ground that if the first question is answered against the assessee, the second must also be so answered.

The assessee is an individual and the matter in dispute relates to three assessment years, 1954-55, 1955-56 and 1956-57. The assessee had purchased a piece of land in the Friends' Colony, Mathura Road, New Delhi, and had built a house consisting of thirteen suites of rooms apart from the residential portion, in which he himself resides. The entire building was not let out as a single unit nor as a block of flats; but the rooms were let out individually. The rooms are of different sizes and have separate bath-rooms attached to them. The building also has a separate dining room meant for the common use of the residents. The assessee supplies lunches and dinners, etc., if the tenants so desire; but they are not bound to have their meals at the premises. The rooms can be had for a short duration and even for a day or so. There are tenants who have lived in the building for months. The rooms are

furnished with curtains, beds, Dunlopillo cushions, cupboards, side tables, ceiling fans and air-conditioners. Bedsheets, bath towels, face towels, blankets, pillow cases are also supplied to each of the tenants. By way of instance as to letting of these rooms, reference may be made to annexure "C", which is printed at page 6 of the Paperbook. The assessee had, on two occasions, published two advertisements in local newspapers advertising for letting out the entire property. The advertisements were even published before the construction of the building was completed.

The stand taken up by the assessee with regard to the rental income of these rooms was that it was income from property and, thus, was to be assessed under section 9 of the Act. The Income-tax Officer, however, negatived this contention and held the income as "income from business" and, therefore, liable to assessment under section 10 of the Indian Income-tax Act, 1922 (hereinafter referred to as the Act).

On appeal by the assessee, the Appellate Assistant Commissioner affirmed the order of the Income-tax Officer. The assessee moved the Tribunal in further appeal and his appeal has been dismissed by the Tribunal. The Tribunal, while dismissing the appeal, found the following facts:—

"(i) The past history of Shri Manohar Singh showed that he is an expert in this line of business, viz., catering and looking after the persons who come and stay in this type of guest houses.

(ii) The past records showed that the assessee in the past derived income from catering from Mandi House Mess and Kotah House Mess. He also did the business of catering in the Western Court. He ran a bakery.

(iii) The layout of the building supports the contention of the department that it was intended to be used as a paying guest house.

(iv) That the assessee not only offered rooms fully furnished, but also offered soft furniture such as bed-sheets, towels, etc. The assessee had a

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well-regulated messing and kitchen arrangement which was intended to supply food to the tenants.

(v) The tenants were usually staying temporarily and were not taking the flats as ordinary residents.

(vi) A rough calculation shows that the assessee could derive an income of Rs. 6,000 per month if all the rooms were let out, i.e., Rs. 72,000 per year whereas the *bona fide* letting value was about Rs. 16,000. Evidently, this extra income arose because of all the amenities and services provided by the assessee. (Municipal valuation of the property during the previous years was Rs. 9,000). A certificate from the Municipal Corporation to the effect is made a part of the case and is as annexure 'F'.

(vii) The Tribunal further found that in spite of what he advertised to do the assessee did not let out the entire building or block."

On consideration of the aforesaid facts, the Tribunal came to the conclusion that, "there was a scheme of profit making and the series of transactions involved some risk, which was a *sine qua non of* business activities. The assessee did not sink his capital in property and derived income from the rent from permanent tenants and was not a rentier. The assessee's income depended upon the reputation, goodwill and efficiency of service, which was the characteristic of this type of business."

The assessee was dissatisfied with the order of the Tribunal, and, therefore, applied under section 66(1) of the Act to the Tribunal to refer to this Court the question of law arising out of the order of the Tribunal. The Tribunal allowed the application and after drawing up a statement of the case has referred the two questions of law, already set out above, for the decision of this Court.

The contention of the learned counsel for the assessee is the same as has been before the Tribunal, namely, that the rent of the rooms is income from property and is assessable under section 9 of the Act. It is strenuously maintained that the income for the three assessment years

in question is not income from business and, therefore, the Tribunal and the Income-tax authorities were in error in assessing the same under section 10 of the Act.

The legal position, so far as the present case is concerned, appears to be well settled. An identical matter came up before the Bombay High Court in *Commissioner of Income-tax, Bombay* v. *National Storage Private Limited* (1). The learned Judge of the Bombay High Court, after an exhaustive review of authorities on the subject, arrived at the following conclusions:—

"(1) Income-tax is a single tax levied on the total income classified and chargeable under the various heads and not on aggregate of the distinct taxes levied separately on each head of income;

(2) That the heads of income in section 6 of the Act are specific heads, which are exclusive and exhaustive;

(3) The income which falls under any of these specific heads has got to be computed under that head only in the manner specified in the following sections 7 to 12;

(4) If the income falls under the head "income from property", which is chargeable under section 9, it has to be taxed under section 9 only and cannot be taken to section 10 on the ground that the business of the assessee was to exploit property and earn income or because the income was obtained by a trading concern in the course of its business;

(5) House-owning, however, profitable, cannot be a business or trade under the Income-tax Act. Where income is derived from house property by the exercise of property rights properly so called, the income falls under the head "income from property" chargeable under section 9. It is the nature of the operations and not the capacity of the owner that must determine whether

(1) (1963) 48 I.T.R. 577.

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the income is from property or from trade. Where the operations involved in the activity of earning income from house property are not different from those of an ordinary house-owner turning to profitable account the property of which he is the owner, the income derived is income from property chargeable under section 9 irrespective of whether the operations are carried on by a company one of whose objects or even the sole object is to indulge in the activity of earning income from house property. Thus, where house property is given on lease or licence basis for earning income therefrom, the true character of the income derived is income from property falling under section 9. The said character is not changed and the income does not become income from trade or business if the hiring is inclusive of certain additional services such as heating, cleaning, lighting or sanitation, which are relatively insignificant and only incidental to the use and occupation of the tenements;

(6) In cases where the income received is not from the bare letting of the tenement or from the letting accompanied by incidental services of facilities, but the subject hired out is a complex one and the income obtained is not so much because of the bare letting of the tenement but because of the facilities and services rendered, the operations involved in such letting of the property may be of the nature of business or trading operations and the income derived may be income not from exercise of property rights properly so called so as to fall under section 9 but income from operations of a trading nature falling under section 10 of the Act; and

(7) In cases where the letting is only incidental and subservient to the main business of the assessee, the income derived from the letting will not be the income from property falling under section 9 and the exception to section 9 may also come into operation in such cases."

It will also be profitable to refer to the decision of the Supreme Court in *East India Housing and Land Development Trust Limited* v. *Commissioner of Income-tax, West Bengal* (2). In this case, the contention was that the rental income of the assessee company from certain buildings was "income from business" and not "income from property", because the assessee company had been formed with the object of promoting and developing markets. The income that the company derived was from markets and stalls erected by it. The assessee was required to obtain a licence from the Corporation of Calcutta and to maintain sanitary and other services in conformity with the provisions of the Calcutta Municipal Act, 1951. Staff had to be maintained and expenditure incurred by the assessee in this connection. Their Lordships, after setting out the six different heads of income specified by section 6 of the Act, observed as follows:—

> "This classification under distinct heads of income, profits and gains is made having regard to the sources from which income is derived. Income-tax is undoubtedly levied on the total taxable income of the taxpayer and the tax levied is a single tax on the aggregate taxable receipts from all the sources; it is not a collection of taxes separately levied on distinct heads of income. But the distinct heads specified in section 6 indicating the sources are mutually exclusive and income derived from different sources falling under specific heads has to be computed for the purpose of taxation in the manner provided by the appropriate section. If the income from a source falls within a specific head set out in section 6, the fact that it may indirectly be covered by another head will not make the income taxable under the latter head."

It was held by their Lordships that the income derived by the company from shops and stalls was income "received from property" and fell for assessment under section 9. Their Lordships relied upon the decision in *Fry* v. *Salisbury House Estates Company Limited* (3), in arriving at the

(2) (1961) 42 I.T.R. 49.
(3) (1930) A.C. 432.

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aforesaid conclusion. This is the very case on which the learned counsel for the assessee places his reliance, for his contention that the rental income of the rooms in question is "income from property" and thus assessable only under section 9 of the Act.

It may be that the assessee's income, in common parlance, can be said to arise partly from the rental of property and partly from the business of running a paying guest establishment, i.e., business. But for the purposes of income-tax, the correct approach is to find out which is the specific head under which the said income falls. The said income may indirectly be covered by another head under section 6; but that by itself will not make that income assessable under the other head. Therefore, in each case, the question that has to be determined is under which head the income directly arises. And if we examine closely the facts of the present case, no manner of doubt is left that the income, in the present case, arises under the head "profits and gains" of business. It is not the case where the assessee is merely earning a rental from property. He is doing something more. That is, he is carrying on the business of a paying-guest establishment and the building, in which this business is carried on, is an integral part of the assessee's business venture. It is not necessary to further dilate on the matter in view of the decision of the Bombay High Court in *Commissioner of Income-tax, Bombay,* which has fully dealt with the matter and has laid down the requirements to be kept in view in determining when rental income from property falls to be assessed under section 9 or under section 10. The present case is covered by proposition No. 6 in the Bombay High Court decision already referred to.

For the reasons recorded above, the first question, as re-framed by us, is answered in the affirmative and the second question is answered in the negative. There will be no order as to costs.

Kapur, J.

S. K. KAPUR, J.—I agree.

B.R.T.