v.
M/s. Hira Mall-Narain Dass, Ludhiana.

Kapur, J.

CIVIL MISCELLANEOUS.

Before Falshaw and Kapur, JJ.

SHRI BIPAN LAL KUTHIALA,—*Petitioner.*

versus

THE COMMISSIONER OF INCOME-TAX, PUNJAB, SIMLA,—*Respondent.*

1953

June, 25th

Civil Miscellaneous No. 494 of 1951 (Income-Tax, Case).

Indian Income-tax Act (XI of 1922)—Section 66(2)—Assessee making sale outside British India but receiving a part of the sale-proceeds in British India—Whether the amount received in British India to be presumed to include profits—Question, whether one of fact or law—Appellate Authority, whether can be asked to state a case for determination of the question.

The assessee made one sale on credit in Jubbal State amounting to Rs. 1,91,000 to one person in one lot out of which Rs. 32,000 were received in British India. The profits earned in the account year were found by the Income-tax Appellate Authority to be Rs. 18,766. The question that arose for determination was whether the sum of Rs. 32,000 which was received in British India should be presumed to include the profits, that is, the sum of Rs. 18,766.

Held, that where remittances have been received by an assessee in British India from any business which is being carried on outside British India, it is always a question of fact, whether the remittances received represent the profit earned in such business and in the absence of any indication to the contrary and in the absence of any explanation by the assessee the Income-tax authorities may well start with the presumption that the remittances represent the profit earned by the assessee or at least include the profits earned by him and can legitimately regard the remittances as representing profit, and this is not a presumption of law but is one of fact and its strength

may vary according to the circumstances of each case. Since no question of law arises in the case, the Income-tax Appellate Tribunal cannot be directed to state a case for the decision of the High Court.

Commissioner of Income-tax, East Punjab and Delhi Provinces v. *Messrs Jankidas Kaluram, Rewari* (1), *Ramaswami Pillai* v. *Commissioner of Income-tax, Madras* (2), *Sonaram-Nihal Chand* v. *Commissioner of Income-tax* (3), *Re-Murugappa Chettiar* (4), *S. A. Subbiah Ayyar* v. *The Commissioner of Income-tax, Madras* (5), *The Scottish Provident Institution* v. *John Allan* (6), *Tara Chand-Pohu Mal* v. *Commissioner of Income-tax, Punjab* (7), relied on; *Vadilal-Lallubhai Mehta* v. *Commissioner of Income-tax, Bombay* (8), *Commissioner of Income-tax, Burma* v. *Bhagwandas Bagla* (9), and *Turner Morrison and Co., Ltd.* v. *Commissioner of Income-tax, West Bengal* (10), held not applicable.

Petition under Section 66(2) of the Indian Income-tax Act, praying that this Hon'ble Court may be consequently pleased to require the Income-tax Appellate Tribunal, Delhi Bench, to state the case and refer the following questions of law :

(I) *Whether in the circumstances of the case, there is any material for the finding that instead of direct remittance the assessee has chosen to instruct a debtor in Jubbal State to discharge a part of his debt by making the payment of Rs. 32,000 in British India.*

(II) *Whether in the circumstances of the case, the receipt of Rs. 32,000 has been correctly held to be a constructive remittance from Jubbal State to British India.*

(III) *Whether, in the circumstances of the case, it has been correctly held that the assessee remitted the entire profits of the account year 1942-43 included in the sum of Rs. 32,000.*

(IV) *Is there any evidence to support the finding of the Appellate Tribunal that the sale proceeds of Rs. 32,000 received in British India includes entire profits earned or accrued in Jubbal State in the account year 1942-43.*

(I.T.A. No. 2453 of 1948-49, R.A. No. 813 of 1949-50 dismisssing the application in the Income-tax Tribunal, Delhi Bench, consisting of A. L. Sahgal, and K. S. Sankararaman, on 7th August, 1950.)

Tek Chand, for Petitioner.

S. M. Sikri, Advocate-General, and Hem Raj Mahajan, for Respondent.

JUDGMENT

Shri Bipan Lal Kuthiala
v.
The Commissioner of Income-tax, Punjab, Simla

Kapur, J.

KAPUR, J. This is a rule obtained by an assessee against the Commissioner of Income-tax, Punjab, to show cause why a case should not be stated under section 66(2) of the Income-tax Act.

The matter relates to the assessment year 1944-45. During the account year 1942-43 the assessee made one sale on credit in Jubbal State amounting to Rs. 1,91,000 to one person in one lot. During the account period 1943-44, he realised from the buyer Rs. 1,57,000 out of which Rs. 1,25,000 were realised in Jubbal State, Rs. 29,000 was paid by the buyer to the assessee in British India and Rs. 3,000 was paid by the buyer to a third person who was a creditor of the assessee. This was also in British India. This amount was squared up, it is so alleged upon the assessee's instructions to his constituents in Jubbal State. The total received in British India was thus Rs. 32,000 and the profit earned in the account year was found by the Income-tax Appellate Authority to be Rs. 18,766.

Upon these facts the assessee asked the Appellate Tribunal to state the following five questions of law :—

"(i) Whether in the circumstances of the case there is any material for the finding that instead of direct remittance the assessee has chosen to instruct a debtor in Jubbal State to discharge a part of his debt by making the payment of Rs. 32,000 in British India.

(ii) Whether in the circumstances of the case the receipt of Rs. 32,000 has been correctly held to be a constructive remittance from Jubbal State to British India.

(iii) Whether in the circumstances of the case it has been correctly held that the assessee remitted the entire profits of the account year 1942-43 in the sum of Rs. 32,000.

Shri Bipan Lal Kuthiala v. The Commissioner of Income-tax, Punjab, Simla

Kapur, J.

(iv) Is there any evidence to support the finding of the Appellate Tribunal that sale proceeds of Rs. 32,000 received in British India include entire profits earned or accrued in Jubbal State in the account year 1942-43.

(v) Whether there is any material on the record to justify a conclusion that sum of Rs. 32,000 received in British India was 'income' and, therefore, liable to be taxed."

But by their order dated the 7th of August 1950, the Appellate Tribunal held that by choosing to realise the sale proceeds in British India rather than in Jubbal State the assessee made constructive remittances of money to British India and it "may conceivably give rise to a question of law", but they were of the opinion that the answer was so obvious that it was useless making reference. They also said that the finding that the sum of Rs. 32,000 included the available profits is a "conclusion of fact" from which no question of law can be raised and this conclusion was arrived at upon an examination of the magnitude and requirements of the business carried on by the assessee.

The assessee then moved this Court with an application under section 66(2) of the Income-tax Act, and the rule was issued by a Division Bench of this Court on the 2nd of August 1951. The questions which the assessee wants to raise for the statement of the case are contained in paragraph 9 of the petition and are—

"1. Whether in the circumstances of the case there is any material for the finding that instead of direct remittance the assessee has chosen to instruct a debtor in Jubbal State to discharge a part of his debt by making the payment of Rs. 32,000 in British India.

Shri Bipan Lal Kuthiala
v.
The Commissioner of Income-tax, Punjab, Simla

Kapur, J.

2. Whether in the circumstances of the case the receipt of Rs. 32,000 has been correctly held to be a constructive remittance from Jubbal State to British India.

3. Whether in the circumstances of the case it has been correctly held that the assessee remitted the entire profits of the account year 1942-43 included in the sum of Rs. 32,000.

4. Is there any evidence to support the finding of the Appellate Tribunal that the sale proceeds of Rs. 32,000 received in British India include entire profits earned or accrued in Jubbal State in the account year 1942-43.

Mr. Tek Chand for the assessee in the first place contended that Rs. 18,766 which was taken to be the profit of Jubbal business was in fact no profit at all as the total receipts by the assessee on this account were less than the total amount invested by him. But this question has never been raised at any stage of the proceedings and does not arise out of the order of the Appellate Tribunal, nor is it covered by any of the questions whether sought to be raised before the Appellate Tribunal or here and, therefore, we have not allowed this question to be raised.

The other question which has been sought to be raised is that although Rs 32,000 was received in British India only the proportionate profit which should be deemed to have accrued from this sum could be computed for the purposes of profit and loss account. This question again does not, in my opinion, arise from the questions which are in paragraph 6 or paragraph 9 of the petition. The purport of the questions which were asked to be stated is, really confined to the question whether the sum of Rs. 32,000 included the entire profits which were made by the assessee in the account period in this account.

The question reduces itself to this : whether the Rs. 32,000 which was received in British India

Shri Bipan Lal Kuthiala
v.
The Commissioner of Income-tax, Punjab, Simla

Kapur, J.

should be presumed to include the profits, that is, the sum of Rs. 18,766.

The learned Advocate-General submits that this question is covered by an authority of this Court in *Commissioner of Income-tax, East Punjab and Delhi Provinces* v. *Messrs. Jankidas Kaluram, Rewari* (1), where it was held that where remittances have been received by an assessee in British India from any business which is being carried on outside British India, it is always a question of fact whether the remittances received represent the profit earned in such business and in the absence of any indication to the contrary and in the absence of any explanation by the assessee the Income-tax authorities may well start with the presumption that the remittances represent the profit earned by the assessee or at least include the profits earned by him and can legitimately regard the remittances as representing profit, and this is not a presumption of law but is one of fact and its strength may vary according to the circumstances of each case. In that case the assessee was carrying on business in British India but was a partner in a firm carrying on business in an Indian State. During the account period remittances were received from and were sent to the Indian State business but the former exceeded the latter by Rs. 7,162. The profit of that year was determined at Rs. 43,531 which the Income-tax Officer assessed as remittances of profits received in British India. This finding was reversed by the Appellate Tribunal which held that this could not be taken as a remittance of the assessee's share of profits earned in an Indian State and the question was whether this was taxable under section (1)(b)(ii) read with section 14(2)(c), and it was held that it was a pure question of fact and it could not be said that on the facts admitted or proved the Tribunal could not take the view that it had taken.

In several cases this question has been raised and decided by the Courts. The first one is

(1) 17 I.T.R. 406

Shri Bipan Lal Kutbiala v. The Commissioner of Income-tax, Punjab, Simla

Kapur, J.

Ramaswami Pillai v. *Commissioner of Income-tax, Madras* (1), where it was held that the presumption that where money is received from a business abroad where profits have been made, is a remittance out of profits is a rebuttable one. But the presumption in that case had been rebutted.

The next case is *Sonaram Nihal Chand* v. *Commissioner of Income-tax* (2), where it was held that it is open to the Income-tax Officer to assume that the amount remitted to British India from the branch of the business outside British India represents profits made in such branch, in spite of the fact that the total amount of such remittances is less than what has been sent from British India to such branch. In this case the assessee failed to produce his account books and led no other evidence to show that the amount received by him did not represent the profit. The Court held that the assessing authority having made a presumption which was one of fact no redress could be given to the assessee on the ground that it could not be said that such a presumption could not be raised by the assessing authorities.

In *re-Murugappa Chettiar* (3), money was remitted to the headquarters of a firm in British India from a branch situate in a foreign country. This was presumed to be profits and not capital and thus assessable to Income-tax unless the assessee could prove the contrary. The learned Judges said at page 467 :—

> "The presumption that the Commissioner made in this case, viz., that *prima facie* all remittances were to be regarded as profits and that the burden of proof was cast upon the assessee to show the contrary, seems to be amply warranted by the authority of that case (1903 A.C. 129). As the Commissioner did not misdirect himself the only questions in the case that remain are purely ques-

(1) 7 I.T.R. 40
(2) A.I.R. 1935 Lah. 727=2 I.T.R. 489
(3) I.L.R. 49 Mad. 465

Shri Bipan Lal Kuthiala
v.
The Commissioner of Income-tax, Punjab, Simla

Kapur, J.

tions of fact and so long as he has approached them without any misconception in his mind as to how they should be dealt with, his findings are conclusive."

In *S. A. Subbiah Ayyar* v. *The Commissioner of Income-tax, Madras* (1), it was held that the ordinary presumption that money remitted from a foreign business and received in British India by an assessee is out of profits and not out of capital is one which can be rebutted by the assessee, and reliance was placed in this case as indeed in the last Madras case on *The Scottish Provident Institution* v. *John Allan* (2).

In *The Scottish Provident Institution case,* (2), £ 1,500,000 had been sent to Australia for investment and after making the remittance in question there were still more than £ 1,800,000 in investment there. The Australian branch office of the company in order to escape Income-tax sent with each of the disputed remittances a letter saying that it was towards particular advances most of them made several years previously. On these facts the Lord President of the Court of Exchequer held that under the circumstances indefinite remittances to this country, must be presumed to consist of interest and not of capital. Lord Molaren, similarly said that the source of the fund remitted, in the absence of evidence to the contrary must be determined according to the ordinary course of business in dealing with uninvested funds. In the House of Lords the Lord Chancellor referred to the instructions and letters above referred to as "mere nicknaming the sum received" and said that the right of the Crown could not be defeated thereby. He also observed at page 134—

> "My Lords, so far as I am concerned I think this is really a question of fact. The question is what inference can properly be drawn from the facts as stated by the Commissioner."

(1) I.L.R. 53 Mad. 510
(2) 1903 A.C. 129

Shri Bipan Lal Kuthiala v. The Commissioner of Income-tax, Punjab, Simla

Kapur, J.

Lord Shand, at page 136 observed :—

"The question.........is entirely one of fact."

Lord Davey was also of the opinion that the question was one of fact and he said at page 137 :—

> "The mere calling it capital for the purpose of the Inland Revenue Department will not make into capital that which is essentially and in truth profit."

Lord Robertson, at page 138 observed :—

> "The inference from these facts is that the moneys remitted were in fact profits, and, in the absence of anything to the contrary, profits of the year in which they were remitted."

The Lahore High Court in *Tara Chand-Pohu Mal* v. *Commissioner of Income-tax, Punjab* (1), following the two Madras cases, also held that the ordinary presumption is that the money remitted to the headquarters of a firm in British India from a branch situate in a foreign country is presumed to be profit and not capital unless the assessee proves to the contrary.

On a review of all these cases Achhru Ram, J., in *Commissioner of Income-tax* v. *Jankidas Kaluram* (2), said—

> "In the absence of any indication to the contrary and in the absence of any explanation by the assessee, the Income-tax authorities may well start with the presumption that the remittances either represent the profit earned by the assessee or at least include the profit earned by him and may be within their limits in assessing him on the remittances to the extent to which they can legitimately be regarded as representing

(1) A.I.R. 1936 Lah. 836
(2) 17 I.T.R. 406, 419

Shri Bipan Lal Kuthiala v. The Commissioner of Income-tax, Punjab, Simla

Kapur, J.

the profit. However, this is by no means a presumption of law and its strength must vary according to the circumstances of each case There may even be circumstances in which it may legitimately be said that even initially no such presumption should be raised. In every case it is a question of fact to be determined with reference to the circumstances of the particular case whether or not to raise such a presumption and whether or not the presumption, if initially raised, has been rebutted."

I am in respectfull agreement with the opinion of Achhru Ram, J., particularly as it is supported by the judgments of the Madras High Court and of the House of Lords.

Mr. Tek Chand drew our attention to several cases, but I cannot see how they are applicable to the facts of this case. The first case he has relied on is *Vadilal Lallubhai Mehta* v. *Commissioner of Income-tax, Bombay* (1), where it was held that even where frivolous questions are raised before the Appellate Tribunal they should be stated by the Tribunal to the High Court and if they are found to be frivolous the assessee will pay costs.

The next case he referred to was *Commissioner of Income-tax, Burma* v. *Bhagwandas Bagla* (2), where it was held that where a sum of money remitted in return for commodity exported is less than the cost price of that commodity, the sum remitted cannot be a profit on the sale thereof. But this question does not arise in the present case.

Mr. Tek Chand strongly relied on a judgment of the Supreme Court in *Turner Morrison & Co., Ltd.* v. *Commissioner of Income-tax, West Bengal* (3). But that case is in my opinion not applicable to the facts of this case. There was no

(1) 3 I.T.R. 152
(2) 10 I.T.R. 35
(3) (1953) 23 I.T.R. 152

Shri Bipan Lal Kuthiala v. The Commissioner of Income-tax, Punjab, Simla

Kapur, J.

question of remittance of money from outside India into India. Turner Morrison & Co., Ltd., were agents of a Salt Association in Egypt and they consigned to Turner Morrison & Co., salt for sale in India. These sales were effected in India by Turner Morrison & Co., through brokers and Turner Morrison & Co., received certain commission on all sales the proceeds of which were collected by them and credited to the account kept in their own name with a bank and after deducting the expenses including their commission they remitted the balance to the Association in Egypt. They were assessed to Income-tax as agents of a non-resident Association under section 4(1)(a) or section 4(1)(c), and it was held that the income, profits and gains derived from the sale of salt in British India were assessable to tax under section 4(1)(a) as being income, etc., received in British India by the company on behalf of the Association. This case has really no application to the facts of the present case, but Mr. Tek Chand referred to a passage at page 160, where Das, J., observed—

> "Of course, if on the taking of accounts it be found that there was no profit during the year then the question of receipt of income, profits and gains would not arise but if there were income, profits and gains, then the proportionate part thereof attributable to the sale proceeds received by the Agents in India were income, profits and gains received by them at the moment the gross sale proceeds were received by them in India and that being the position the provisions of section 4(1)(a) were immediately attracted and the income, profits and gains so received became chargeable to tax under section 3 of the Act."

But this question of proportionate profits does not arise in the present case.

APPELLATE CIVIL

Before Falshaw and Kapur, JJ.

RATTAN SINGH,—*Defendant—Appellant.*

versus

GOSAIN AND OTHERS,—*Respondents.*

Regular Second Appeal No. 522 of 1948.

Custom (Punjab)—Alienation—Widow—Heterogeneous village proprietary body—Locus Standi *of, to challenge widow's alienation.*

In 1865 G. S. purchased the land in dispute from some of the proprietors of the village. His grandson's widow gifted the land to R. S. The proprietors of the village brought the suit for declaration that the gift was against custom and would not affect their reversionary rights. Trial Court dismissed the suit on the ground that the plaintiffs were members of a heterogeneous proprietary body and thus had no *locus standi* to sue. On appeal the District Judge reversed the decision of the Trial Court and held that the gift being to a stranger could be challenged by the plaintiffs. R. S. appealed to the High Court.

Held, that the plaintiffs who were members of a heterogeneous village proprietary body had no right of succession to the estate on the death of the widow and they could not, therefore, challenge the alienation made by the widow.

Regular Second Appeal from the decree of Shri T. C. Sethi, District Judge, Gurdaspur, dated the 13th May, 1948, reversing that of Shri B. L. Malhotra, Sub-Judge, 1st Class, Gurdaspur, dated the 5th January, 1948, and granting the plaintiffs a declaratory decree as prayed for against the defendants and leaving the parties to bear their own costs throughout.

H. R. MAHAJAN and LABH SINGH, for Appellant.

P. L. BAHL and T. S. NARULA, for Respondents.