Senairam Doongarmall vs Commissioner Of Income-Tax, Assam on 13 March, 1961

Equivalent citations: 1961 AIR 1579, 1962 SCR (1) 257, AIR 1961 SUPREME COURT 1579

Author: M. Hidayatullah

Bench: M. Hidayatullah, J.L. Kapur, J.C. Shah

PETITIONER:
SENAIRAM DOONGARMALL

Vs.

RESPONDENT:
COMMISSIONER OF INCOME-TAX, ASSAM

DATE OF JUDGMENT:
13/03/1961

BENCH:
HIDAYATULLAH, M.
BENCH:
HIDAYATULLAH, M.
KAPUR, J.L.
SHAH, J.C.

CITATION:
1961 AIR 1579 1962 SCR (1) 257
CITATOR INFO :
R 1962 SC 429 (6)
RF 1964 SC 758 (12,16)
R 1970 SC1702 (3)
R 1972 SC 386 (17)
F 1973 SC 515 (7,8,9)
F 1987 SC 500 (36,37)
RF 1992 SC1495 (31)

ACT:
Income Tax--Capital or Revenue--Tea estate--Requisition of factories and buildings--Stoppage of tea business--Compensation--Nature of--Indian Income-tax Act, 1922 (11 of 1922), S. 10.

HEADNOTE:

The assessee, a Hindu undivided family, owned a tea estate in Assam comprising a tea garden, factories, labour, quarters, staff quarters etc. On February 27, 1942, the military authorities requisitioned all the factory buildings etc., under the Defence of India Rules but the tea garden, however, was left in the possession of the assessee. The possession of the military continued till the year 1945 and during that period, though the assessee looked after its tea garden, its business as tea-growers and tea-manufacturers could not be continued. Under the Defence of India Rules, the military authorities paid the assessee as compensation a sum of Rs. 2,22,080 for the year 1944, which included Rs. 10,000 for repairs to quarters for labourers, and a sum of Rs. 2,46,794 for the year 1945, which included Rs. 15,231 for repairs. For the assessment years 1945-1946 and 1946-47 the question arose as to whether the aforesaid sums or any portion thereof were capital receipts or were revenue receipts and liable to tax. The facts showed that the business, which the assessee had been carrying on, consisted in growing tea plants and in making tea out of the leaves by a manufacturing process into a commercial commodity, that without the factory and the premises the tea leaves could not be dried, smoked and cured to become tea, and that the result of the requisition of the factories was to stop the business.

Held, that the amounts paid by the military authorities were received by the assessee not as compensation for the loss of profits of the business which it had been carrying on but for the injury to the business as a whole, because the entire structure of business was affected to such an extent that no business was carried on by the assessee during the two years in question. Accordingly, the compensation could not bear the character of profits of a business and was not liable to tax under S. Io of the Indian Income-tax Act, 1922.

Income-tax Commissioner v. Shaw Wiallace & CO., (1932) L.R. 59 I.A. 206, referred to and applied.

Case law reviewed.

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JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 535 of 1958. Appeal from the judgment and order dated March 29,1955, of the Assam High Court in I.T.R. No. 1 of 1954. A.V. Viswanatha Sastri and D. N. Mukherjee, for the appellants.

Hardayal Hardy and D. Gupta for the respondent. 1961. March 13. The Judgment of the Court was delivered by HIDAYATULLAH, J.-This appeal which has been filed with a certificate under s. 66(A)(2) granted by the High Court of Assam against its judgment and order dated March 29, 1955,

concerns the assessment of the appellants, a Hindu undivided family, for the assessment years, 1945-1946 and 1946-1947. The appellants owned a tea garden called the Sewpur Tea Estate in Assam. They had on the Estate, factories, labour quarters, staff quarters etc. On February 27, 1942, the Military authorities requisitioned all the factory buildings, etc., under R. 79 of the Defence of India Rules. Possession was taken sometime between March land March 8, 1942. The tea garden was, however, left in the possession of the appellants. The possession of the military continued till the year 1945, and though the appellants looked after their tea garden the manufacture of tea was completely stopped. Under the Defence of India Rules, the Military authorities paid compensation. For the year 1944, corresponding to the assessment year, 1945-1946, they paid a total sum of Rs. 2,22,080 as compensation including a sum of Rs. 10,000 for repairs to quarters for labourers and Rs. 144 which represented the assessor's fee. For the year 1945, corresponding to the assessment year, 1946-1947, the Military authorities paid a sum of Rs. 2,46,794 which included a sum of Rs. 15,231 for other repairs. The sums paid for repairs appear to have been admitted as paid on capital account, and rightly so. The question was whether the two Sums paid in the two years minus these admitted sums, or any portion thereof, were received on revenue or capital account. The assessments for the two years were made by different Income-tax Officers. For the assessment year, 1945-1946, the Income-tax Officer deducted from Rs. 2,22,080, a sum of Rs. 1,05,000 on account of admissible expenses. He then applied to the balance Rs. 1,17,080, R. 24 of the Indian Income-tax Rules, 1922, and brought to tax 40 per cent of that sum amounting to Rs. 46,832. The assessment was made under s. 23(4). For the assessment year, 1946-1947, the assessment was made under s. 23(3) of the Incometax Act. The Income-tax Officer excluded the sum paid on account of repairs and treated the whole of the amount as income taxable under the provisions of the Income-tax Act, after deduction of admissible expenditure. The appeals filed by the appellants to the Appellate Assistant Commissioner against both the assessments were unsuccessful. On further appeal, the Income-tax Appellate Tribunal (Calcutta Bench) was divided in its opinion. The Judicial Member held that the receipts represented revenue but on account of "use and occupation" of the premises requisitioned. He, therefore, computed the not compensation attributable to such use and occupation at 20 per cent of the total receipts in both the years. He however, observed that if the receipts included income from the tea estate he would have been inclined to apply R. 24 in the same way as the first Income-tax Officer. The Accountant Member was of the opinion that the appellants were liable to pay tax on 40 per cent of their receipts in both the years after deduction of the sums paid for repairs of buildings and the admissible expenditure. He accepted the estimate of expenditure for the account year, 1944,. at RE;. 1,05,000, and directed that the admissible expenditure for the succeeding year be determined and deducted before the application of R. 24.

It appears that through some inadvertence these two orders which were not unanimous, were sent to the appellants and the Department. The Commissioner of Income-tax filed an application under s. 66(1) for a reference, while the appellants filed an application under s. 35 for rectification of the orders, since many other matters in appeal were not considered at all. When these two applications came before the Tribunal, it was realised that the matter had to go to a third Member for settling the difference. The President then heard the appeal, and agreed with the Accountant Member. Though he expressed a doubt whether the appellants were entitled to the benefit of rr. 23 and 24, he did not give an opinion, because this point was not referred to him.

The Tribunal then referred the case to the High Court of Assam on the following two questions:

> "(1). Whether the sums of Rs. 2,12,080 and RE;. 2 31,563 paid by the Government to the assessee in 1945 and 1946 respectively (exclusive of the sums paid specifically for building repairs) were revenue receipts in the hands of the assessee comprising any element of income?
>
> (2). If so, whether the whole of the said sums less the expenses incurred by the assessee in tending the tea bushes constituted agricultural income in his hands exempt from tax under the Indian Income-tax Act, 1922?"

The reference was heard by Sarjoo Prasad, C.J., and Ram Labhaya, J., along with two writ petitions, which had also been filed. They delivered separate judgments, but concurred in their answers. The High Court answered both the questions against the appellants. The writ petitions were also dismissed.

Before we deal with this appeal, we consider it necessary to state at this stage the method of calculation of compensation adopted by the Military authorities. It is not necessary to refer to both the years, because what was done in the first year was also done in the following year except for the change in the amounts. This method of calculation is taken from the order of the Judicial Member, and is as follows:

	Rs. A. P.
Crop-211120 1bs. at 17.85d (half) and at 18.35d (half)	2,12,292 14 0
15480 1bs. at Rs. 0-11-10	11, 449 12 0
52600 1bs. at Rs. 0-15-6	50,956 4 0
	2,74, 698 14 0
Less-Saving of plucking and manufacturing:-	
	Rs.
(a) Expenses at annas 3 per lb.	49,209
(b) Sale of export rights, 1,32,935 1bs.	4,924
(c) Purchase of export rights 78,185 lbs. at annas 4.	1,629
(d) Food and clothing concessions	7,000 62,762 0 0
	2,11,9360 0
Add---For fees of assessors, Rs. 144 Coolie lines repairs, Rs. 10,000	10,1440 0
	Rs. 2,22,08000

From the admitted facts which have been summarised above, it is clear that the business of the appellants as tea-growers and tea-manufacturers had come to a stop. The word "business" is not defined exhaustively in the Income-tax Act, but it has been held both by this Court and the Judicial Committee to denote an activity with the object of earning profit. To say that a business is being carried on, means no more than that profit is to be earned by a process of production. The business of a tea-grower and manu- facturer is not merely to grow tea plants but to collect tea leaves and render them fit for sale. During the years in question, the appellants were tending their tea garden to preserve the plants, but this activity cannot be described as a continuation of the business, which had come to an end for the time being. It would have hardly made any difference to the carrying on of business, if, instead of the factories and buildings, the tea garden was requisitioned and occupied, because in that event also, the business Would have come to a standstill. The compensation which was paid in the two years was no doubt paid as an equivalent of the likely profits in those years; but, as pointed out by Lord Buckmaster in The Glenboig Union Fireclay Co. Ltd. v. The Commissioners of Inland Revenue (1) and affirmed by Lord Macmillan in Van Den Berghs Ltd. v. Clark (2), "there is no relation between the measure that is used for the purpose of calculating a particular result and the quality of the figure that is arrived at by means of the application of that test".

This proposition is as sound as it is well-expressed, and has been followed in numerous cases under the Indian Income- tax Act and also by this Court. It is the quality of the payment that is decisive 1 of the character of the payment and not the method of the payment or its measure'. and makes it fall within capital or revenue.

We are thus required to determine what was it that was paid for, or, in other words, what did the two payments replace, if they replaced anything. The arguments at the Bar followed the pattern which has by now become quite familiar to Courts. We were taken to the 12th Volume of the Tax Cases series, where are collected case,% dealing with Excess Profits Duty and Corporation Profits Tax in England follow- ing the First World War, and to, other English case,-, reported since. These cases have been considered and applied on more than one occasion by this Court, and we were referred to those cases as well.

Now, it is necessary to point out that the English cases were decided under a different system of taxation and must be read with care. A case can only be decided on its own facts, and the desire to base one's decision on another case in which the facts appear to be near enough sometimes leads to error. It is well to (1) (1922) 12 T.C 427.

(2) [1935] A.C. 431.

remember the wholesome advice given by Lord Dunedin in Green v. Gliksten & Son Ltd. (1) that "in these Income Tax Act cases one has to try, as far as possible, to tread a narrow path, because there are quagmires on either side into which one can easily be led....."

The English cases to which we were referred, were used even in England by Lord Macmillan in Van Den Berghs' case (2) as mere illustrations, and when cited before the Judicial Committee in Income-Tax Commissioner v. Shaw Wallace & Co.(3) were put aside by Sir George Lowndes with

this observation "their Lordships would discard altogether the case law which has been so painfully evolved in the construction of the English income-tax statutes--both the cases upon which the High Court relied and the flood of other decisions which has been let loose in this Board".

Most of the cases cited before us deal with Excess Profits Duty and Corporation Profits Tax. In the former group, pre- war profits had to be determined, so that they might be Compared with post-war business for the purpose of arriving at the excess profits, if any. In dealing with the pre-war profits, diverse receipts were considered from the angle whether they formed capital or revenue items. The observations which have been made are sometimes appropriate to the nature of the business to which the case related and the quality of the payment in relation to that business. Similarly, the Corporation Profits Tax was a tax intended to be imposed upon the profits of British Companies (which included some other corporate bodies' carrying on trade or business including the' business of investments. The profits which were taxed under s. 52 of the English, Finance Act were required to be determind according to the principles laid down in that Act.

It is thus obvious that though the English cases may be of some help in an indirect way by focussing one's attention on what is to be regarded as relevant (1) (1929) 14 T.C 364 384 (2) [1935] A.C. 431. (3) (1932) L.R- 59 J.A. 206.

and what rejected, they cannot be regarded in any sense as precedents to follow. Since this Court on other occasions used these cases as an aid, we shall refer to them briefly; but we have found it necessary to sound a warning, because the citation of these authorities has occasionally outrun their immediate utility.

We begin with the oft-cited case of The Glenboig Union Fireclay Co. Ltd. (1). That was a case under the Excess Profits Duty. The facts are so well-known that we need not linger over them. A seam of fireclay could not be worked, and compensation was paid for it. That the clay was capital asset was indisputable, and the portion lost was a slice of capital. The hole made in the capital was filled up by the compensation paid. It was said that a portion of the capital asset was sterilized and destroyed, and even though the business went on, the payment was treated as on capital account. The case cannot be used as precedent, because here, no doubt, the factories and buildings were apart of fixed capital, but the payment was not so much to replace them in the hands of the appellants as to compensate them for the stoppage of business. The Glenboig case (1) does not apply.

The case of Short Bros. Ltd. v. The Commissioners of Inland Revenue (2), another case under the Excess Profits Duty, illustrates a contrary principle. The Company had agreed to build two ship;, 'but the contracts were cancelled and E. 100,000 were paid for cancellation of the contracts. This was held to be a receipt in the ordinary course of the Company's trade. Rowlatt, J., said that it was "simply a receipt, in the course of a going business, from that going business--nothing else". In the Court of Appeal, Lord Hanworth, M.R., affirmed the decision, observing:

> "Looked at from this (business) point of view it appears clear that the sum received was received in ordinary course of business, and that there was not in fact any burden cast upon the company not to carry on their trade. It was not truly compensation (1)

(1922) 12 T.C 427.

(2) (1927) 12 T.C. 955.

for not carrying on their business; it was a sum paid in ordinary course in order to adjust the relation between the shipyard and their customers. "

> The payment was by a customer to the shipyard. Whether the amount was paid for ships built or because the contract was cancelled, it was a business receipt and in the course of the business. In the present case, the payment is not of this character, and Short Bros. case (1) does not apply. The next case-also of Excess Profits Duty-is The Commissioners of Inland Revenue v. Newcastle, Breweries, Ltd. (2). In that case, the admiralty took over one-third stock of rum of the Brewery, and paid to the Company the cost plus 1 s. per proof gallon. Later, the compensation was increased by an amount of E. 5,309 and was brought to tax in the earlier year, when the original compensation was paid. The observations of Rowlatt, J., though made to distinguish the case from one in which the compensation is paid for destruction of business, are instructive. We shall refer to them later. The learned Judge held that this was a case of compulsory sale of rum, and that a compulsory sale was also a sale. The receipt was held to be a profit. The decision was affirmed by the Court of Appeal. This case also, so far as its facts go, was very different, and the actual decision has no relevance.
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> The Commissioners of Inland Revenue, v. The Northfleet Coal and Ballast Co. Ltd. (3) was a case like Short Bros. case (1). ;E. 3,000 in a lump sum were paid to be relieved from a contract, and as the business was a going business, it was held to be profit. In fact, Short Bros. case (1) was applied.

Ensign Shipping Co. Ltd. V. The, Commissioners of Inland Revenue 4 a case of Excess Profits Duty, is interesting. During the Coal Strike of 1920, two ships of the Company were ready to sail with cargoes of coal. They were detained for 15 and 19 days respectively by orders of Government. In April 1924,pound 1,078/were paid as compensation, and were held to be (1) (1927) 12 T.C. 955.

(3) (1927) 12 T.C. 1102.

(2) (1927) 12 T.C. 927.

(4) (1927) 22 T.C. 1169.

trading receipts. Rowlatt, J., laid down that if there was an operation which produced income, it was none the less taxable, because it was a compulsory operation. The learned Judge then observed that he could not hold that this was a case of hire, like Sutherland v. The Commissioners of Inland Revenue (1), because the ships lay idle and their use was interrupted. The learned Judge then concluded:

> "Now it is quite dear that if a source of income is destroyed by the exercise of the paramount right... and compensation is paid for it, that that is not income, although the amount of the compensation is the same sum as the total of the income that has been lost.. but in this case I have got to decide the case of a temporary interference... Here these ships remained as ships of the concern... they merely could not sail for a certain number of days, and in lieu of the value of the use which they would have been to their owners in their profit-earning capacity during those days, in lieu of that receipt, this money was paid to the owners, although they were not requisitioned, as if requisitioned... I think I ought to regard this sum, as the Commissioners have obviously regarded it, as a sum paid which to the shipowners stands in lieu of the receipts of the ship during the time of the interruption."

This decision was approved by the Court of Appeal. Now, the case was one of loss of time during which the ships would have been usefully and profitably employed. It was argued in the Court of Appeal with the assistance of the Glenboig case (2), and it was suggested that the vessels, were `sterilised' for the period of detention. Lord Hanworth said that that was rather a metaphorical word to use, and that the correct way was to look at the matter differently. The Master of the Rolls observed:

> "But in the present case it seems to me that, looked at from a business point of view, all that has happened is that the two vessels arrived much later at the ports to which they were consigned than they would have done, with the consequent result (1) (1918) 12 T.C. 63.
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> (2) (1922) 12 T.C. 427 that for the certain number of days which they were late they could not possibly make any earnings, and it is in respect of that direct loss by reason of the interference with the rights exercised on behalf of His Majesty that they made a claim and have been paid compensations This ruling was strongly relied upon by the Department as one which laid down a principle applicable here. We do not agree. The, payment there was made towards loss of profits of a going business, which business was not destroyed. As a source of income, the business was intact, and the business instead of being worked for the whole period, was worked for a period less by a few days and the profit of that period was made up. That may be true if one is going to determine standard profits of a particular period, because what is paid goes to profits in the period but is of no significance in a case like the present, where during the whole of the year no business at all was done nor profits made. This case also does not help to solve the problem. Charles Brown & Co. v. The Commissioners of Inland Revenue (1) is yet another case of Excess Profits Duty. In that case, the business of the taxpayer was carried on under the control of the Food Controller from 1917 to 1921, and he was compelled to bay and sell at prices fixed by the Controller-. By agreement a 'mill standard' was fixed, and the tax. payer was allowed to retain profits up to that standard, and if there was a shortfall, it was to be made up by the Controller. This amount which the taxpayer retained together. with the amount paid towards shortfall was regarded as profits. The principle applicable is easily

discernible. There can be little doubt that the trade was being carried on, and what was received was rightly treated as profits. Howlatt, J., observed that this was a clearer case than the Ensign case (2). The matter was covered by s.

38 of the Finance (No. 2) Act of 1915, Fourth Schedule, Part 1(1), where the words were "The profits shall be taken to be the actual profits arising in the accounting period". (1) (1929) 12 T.C. 1256.

(1) (1927) 12 T.C. 1169.

In Barr Crombie & Co. Ltd. v. The Commissioners of Inland Revenue (1), the Company's business consisted almost entirely of managing shipping for another Company. When the shipping Company went into liquidation, a sum was paid as compensation to the managing Company. It was held that this was a capital receipt. The reason for holding thus was that the structure (if the managing Company's whole business was affected and destroyed, and this was not profit but compensation for loss 'of capital. Kelsall Parsons & Co. v. The Commissioners of Inland Revenue (2), to which we shall refer presently, was distinguished on the ground that, though in that case the agency was cancelled, the payment was for one year and that too, the final year. This case is important in one respect, and it is that if the entire business structure is affected and destroyed, the payment may be regarded as replacing capital, which is lost. These are cases of Excess Profits Duty where profits for a particular period had to be determined and also the character of the payments in relation to the kind of business, to determine whether to treat them as excess profits or not. In the Glenboig case (1), the payment was not regarded as profit, because it replaced lost capital and so also, in Barr Crombie case(1). These form the first group. Short Bros. case Northfleet case (5) and Ensign Shipping CO's case were of a going business, and what was paid was towards lost profits in a going concern. These form the second group. Newcastle Breweries case (7) and Charles Brown and 60's case (3) were of business actually done and profits therefrom. None of these rulings is directly in point. In the case with which we are concerned, the payment was not towards any capital asset to attract the first group, there was no going business so as to attract the second, and nothing was bought nor any business done with the taxpayer to make the third group applicable. (1) (1945) 26 T.C. 406. (2) (1938) 21 T.C. 608. (3) (1922) 12 T.C. 427. (4) (1927) 12 T.C. 955. (5) (1927) 12 T.C. 1102. (6) (1927) 12 T.C. 1169. (7) (1927) 12 T.C. 927. (8) (1929) 12 T.C. 1256.

We shall next see some cases which involved Corporation Profits Tax. In The Gloucester Railway Carriage and Wagon Co. Ltd. v. The Commissioners of Inland Revenue(1), the Company was doing business of selling wagons and of hiring them out. The Company then sold all the wagons which it was using for purposes of hiring. The receipt was treated as profit of trade, there being but one business and the wagons being the stock-in--trade of that business. In Green v. Gliksten & Son Ltd.(2), stocks of timber were destroyed. Their written down value was pound 160,824 but the Insurance Company paid :E. 477,838. The Company credited E. 160,824 in its trading account but not the balance.- The House of Lords held that the timber, though burnt, was realised, and that the excess of the sum over the written down book value must be brought into account. These two cases throw no light upon the problem with which we are faced, and any observations in them are so removed from the facts of this case as to be of no assistance.

The cases under Sch. D of the Income-tax Act like Burmah Steam Ship Co. Ltd. v. The Commissioners of Inland Revenue(3), a case of late delivery of ships sent for overhaul, Greyhound Racing Association (Liverpool) Ltd. v. Cooper(4), which was a case of surrender of an agreement in which the amounts were treated as trading receipts, are not cases of stoppage of a business and are not relevant. Kelsall Parsons case(5), where one of the agreements of a commission agency which was to run for 3 years was terminated at the end of the second year and compensation of pound 1500/- was paid for the last and final year, was held on its special facts to involve taxable profits of trading. Though the business came prematurely to an end, the struc- ture of the business was not affected because the payment was in lieu of profits in the final year of the business as if business had been done. The payment was held to be within the structure of the business in the same way as in Shove v. Dura Manufacturing Co. Ltd. (6). The converse of these cases is the well-known (1) (1925) 12 T.C. 720.(2) (1929) 14 T.C. 364. (3) (1930) 16 T.C. 67.(4) (1936) 20 T.C. 373. (5) (1938) 21 T.C. 608.(6) (1941) 23 T.C. 779.

Van Den Berghs Ltd. v. Clark (1), where mutual trade agreements were rescinded between two Companies and pound 450,000 were paid to the assessee Company as ",damages". This was treated as capital receipt and not as income receipt to be included in computing the profits of trade under Sch. D Case 1 of the Income-tax Act of 1918. Lord Macmillan observed:

> "On the contrary the cancelled agreements related to the whole structure of the appellants' profitmaking apparatus. They regulated the appellant's activities, defined what they might and what they might not do, and affected the whole conduct of their business. I have difficulty in seeing how money laid out to secure, or money received for the cancellation of, so fundamental an Organisation of a trader's activities can be regarded as an income disbursement or an income receipt".

We have referred to these cases to show that none of them quite covers the problem before us. The facts are very dissimilar, and the observations, though attractive, cannot always be used with profit and often not without some danger of error. We shall now turn to the cases of this Court, which were referred to at the hearing.

The first case of this Court is The Commissioner Income Tax and Excess Profits Tax, Madras v. The, South India Pidures Ltd., Karaikudi (2). The South India Pictures, Ltd., held distribution rights for 5 years of three films towards the completion of which they had advanced money to a film producing Company, called the Jupiter Pictures. When the term had partially run out, the agreement for distribution was cancelled, and the South India Pictures, Ltd., received Rs. 26,000/- as commission. The question was whether this sum was on capital or revenue account. Das, C. J., and Venkatarama Aiyar, J., held that it was the latter, while Bhagwati, J., held that it was the former. The learned Chief Justice came to his conclusion on four grounds: (i) that the payment was towards commission which would have been earned; (ii) that it was not the price of any capital (1) [1935] A.C. 431.

(2) [1956] S.C.R. 223.

asset sold, surrendered or destroyed; (iii) that the structure of the business, which was a going business, was not affected; and (iv) that the payment was merely an adjustment of the relation between the South India Pictures, Ltd. and the Jupiter Pictures. The learned Chief Justice thus rested his decision on, Short Bros'(1) and Kelsall Parsons'(2) cases and not upon Van den Berghs (3) or Barr Crombie's case (4).

Bhagwati, J., who dissented, judged the matter from the angle of business accountancy. He observed that money advanced to produce the cinema pictures, if returned, would have been credited on the capital side as a return of capital, just as expenditure for distribution work was revenue expenditure and the commission, a revenue receipt. On a parity of reasoning, the learned Judge held that money spent in acquiring distribution rights was a capital outlay, and that when distribution rights were surrendered, it was capital which was returned, since the agreement was a composite one, the films were a capital asset and the payment for their release was a return of capital. With due respect, it is difficult to see how the payment could be regarded as capital in that case. The fact which seems to have been overlooked in the minority view was that the entire capital outlay had, in fact, been previously recouped and even the security held by the South India Pictures had been extinguished. It was a portion of the running business which ceased to be productive of commission and by the payment, the commission which would have been earned and would have constituted a revenue receipt when so earned, was put in the pockets of the South India Pictures. The business of the South India Pictures. was still & going business, one portion of which instead of being fruitful by stages became fruitful all at once. What was received was still the fruit of business and thus revenue. The case, though interesting, is difficult to apply'. in the present context of facts, where no business at all was done and what was received was not the fruit of any business. (1) (1927) 12 T.C. 955.

(3) [1935] A.C. 431.

(2) (1938) 21 T.C. 608.

(4) (1945) 26 T.C. 406.

The next case of this Court, Commissioner of Income Tax v. Jairam Valji (1), may be seen. The assessee there was a contractor, and received Rs. 2,50,000 as compensation for premature termination of a contract. This was held to be a revenue receipt. The assessee had many businesses including many contracts, and the receipt was considered as one in the ordinary course of business. All the English decisions to which we have referred, were examined in search for principles, but the principle on which the decision 'was rested, was that the payment wag an adjustment of the rights under the contract and must be referred to the profits which could be made if the contract had instead been carried out. The payment not being on account of capital outlay and the assessee not being prevented from carrying on his business, the receipt was held to be revenue, that is to say, related to income from a contract terminated prematurely. In a sense, the case is analogous to The South India Pictures, Ltd. case which it follows.

In The Commissioner of Income-tax, Hyderabad-Deccan v. Messrs. Vazir Sultan & Sons (3), the assessee held the sole selling agency and distribution rights of a particular brand of cigarette, in the

Hyderabad State on foot of a 2 per cent discount on all business done. Subsequently, the area outside Hyderabad State was also included on the same terms. Later still, the area was again reduced to the Hyderabad State. Rs. 2,19,343 were paid by way of compensation "for loss of territory outside Hyderabad". Bhagwati, J., and Sinha, J., (as he then was), held that the compensation was on capital account, while Kapur, J., held otherwise. The reason given by the majority was that the agency agreement was a capital asset and the payment was in lieu of the loss of a portion of the capital asset. Kapur, J., on the other Wand, held that the loss which was replaced was the loss of agency commission and bore its character. The case furnishes a difficult test to apply. If what was adjusted was the relationship between the parties and if (1) [1959] Supp. 1 S.C.R. 110. (2) [1956] S.C. R. 223. (3) [1959] SUPP. 2 S.C.R. 375.

there was a going business as, in fact, there was, the case comes within the dicta in The South India Pictures Ltd. case (1) and Jairam Valji's case (2). The case can only be a decision on the narrow ground that a portion of the 'fixed capital was lost and paid for.

In Godrej & Co. v. Commissioner of Income-tax(3) the assessee firm, which held a managing agency, released the managed Company from an onerous agreement and inconsideration,, was paid Rs. 7,50,000. It was held that the payment was not made to make up the difference in the remuneration of the managing agency firm bat to compensate it for the deterioration or injury of an enduring kind to the managing agency itself. The injury being thus to a capital asset, the compensation paid was held to be on capital account.

The last case of this Court to which reference may be made is Commissioner of Income-tax v. Shamshere Printing Press (4). That 'was a very special case. There, the premises of the Press were requisitioned by Government, but the Press was allowed to set up its business elsewhere, the charges for shifting the machines, etc., being paid by Government. In addition, Government paid a sum claimed as loss of profits, which was expected to bring up the profits to the level of profits while the business was in its old place. The' assessee claimed that this sum was paid as compensation for loss of goodwill arising from its old locality. There was however, nothing to show that the payment was goodwill and it was held that the compensation paid must be regarded as money arising as profits in the course of business. It was like putting money in the till to bring the profits actually made by the level of normal profits. All these cases were decided again on their special facts. Though they involved examination of other decisions in search for the true principles, it cannot be said that they resulted in the discovery of any principle of universal application. To summarise them: South India Pictures' case (1) was so decided because (1) [1956] S.C.R. 223. (2) [1959] SUPP. 1 S.C.R. 110. (3) [1960] 1 S.C.R. 527.(4) [1960] 39 I.T.R. go.

the money received was held to be in lieu of commission which would have been earned by the business which was still going, and the receipt was treated as the fruit of the business. The same reason was given in Jairam Valji's case (1) and Shamshere Printing Press case (2). In Vazir Sultan's case (3), the compensation was held to replace loss of capital, and in Godrej's case (4), the compensation was said not to have any relation to the likely income or profits but to loss of capital. Each case was thus decided on its facts.

We have so far shown the true ratio of each case cited before us, and have tried to demonstrate that these cases do no more than stimulate the mind, but none can serve as a precedent, without advertence to its facts. The nature of the business, or the nature of the outlay or the nature of the receipt in each case was the decisive factor, or there was a combination of these factors. Each is thus an authority in the setting of its own facts.

Before we deal with the facts of this case and attempt to answer the question on which there is so much to guide but nothing to bind, we will refer to two cases of the Judicial Committee, one of which is Income-Tax Commissioner v. Shaw Wallace & Co. (5), to which we have referred in another connection. In that case, all the authorities prior to 1935 to which we have referred (and some more) were used in aid of arguments; but the Judicial Committee, for reasons which are now illustrated by this judgment, declined to comment on them. Shaw Wallace and Co., did many businesses, and included in them was the managing agency of two oil- producing Companies. This agency wag terminated, and compensation was paid for it. The usual question arose about capital or revenue. The Full Bench of the Calcutta High Court related the payment to goodwill, but the Judicial Committee rejected that ground because no goodwill seemed to have been transferred. The Judicial Committee also rejected the contention that it was compensation in lieu of notice under s. 206, Indian (1) [1959] SUPP. 1 S.C.R. 110.

(3) [1959] SUPP. 2 S.C.R. 375.

(2) [1960] 39 I.T.R. 90.

(4) [1960] 1 S.C.R. 527.

(5) (1932) L.R. 59 I.A. 206.

Contract Act, as there was no basis for it either. The Judicial Committee held that income meant a periodical monetary return coming in with some sort of regularity or expected regularity from a definite source and in business was the produce of something "loosely spoken of as capital". In business, income is profit earned by a process of production, or, in other words, by the continuous exercise of an activity. In this sense, the sum sought to be charged could not be regarded as income. It was not the product of business but some kind of solatium for not carrying on business and thus, not revenue.

The case is important, inasmuch as this analysis of 'income' has been accepted by this Court and has been cited with the further remark made in Gopal Saran Narain Singh v. Income Tax Commissioner (1) that the words "profits and gains" used in the Indian Income-tax Act do not restrict the meaning of the word "income" and the whole expression is 'income', writ 'large. From this case, it follows that the first consideration before, holding a receipt to be profits or gains of business within s. 10 of the Indian Income-tax Act is to see if there was a business at all of which it could be said to be income.

We shall now take up for consideration the facts of our case and see how far any principle out of the several which have governed earlier cases can be usefully applied. The assessee was a tea-grower

and tea. manufacturer. His work consisted in growing tea and in preparing leaves by a manufacturing process into a commercial commodity. The growing of tea plants only furnished the raw material for the business. Without the factory and the premises, the tea leaves could not be dried, smoked and cured to become tea, as is known commercially, and it could not be packed or sold. The direct and immediate result of the requisition of the factories was to stop the business. That the tea was grown or that the plants were tended did not mean that the business was being continued. It only meant that the source of the raw material was intact but the business was gone. (1) (1935) L.R. 62 I.A. 207.

Now, when the payment was made to compensate the assessee, no doubt the measure was the out turn of tea which would have been manufactured; but that has little relevance. The assesee was not compensated for loss or destruction of or injury to a capital asset. the buildings were taken for the time being, but the injury was not So much to the fixed capital as to the business as a whole. The entire structure of business was affected to such an extent that no business was left or was done in the two years.' This was not a case where the interruption was caused by the act of a contracting party so that the payment could be regarded as an adjustment of a contract by payment. It was a case of compulsory requisition, but the requisition did not involve the buying of tea either as raw material or even as a finished product. If that had been the case, it might have been possible to say that since business was done, though compulsorily, profits had resulted. It' was not even a case in which the business continued, and what was paid was to bring up the profits to normal level. The observations of Rowlatt, J., in Newcastle Breweries case (1) distinguish a case where business is carried on and one in which business comes to an end. The learned Judge observes:

> "Now I have no doubt that a Government re- quisition, such as took place during the war, could destroy a trade, and anything which was paid would be compensation for such destruction. I can understand, for instance, if they had requisitioned in this case the people's building and stopped them either brewing and selling or doing anything else, and paid a sum, that could not be taken as a profit; they would have destroyed the trade pro tempore and paid compensation for that destruction; and in fact I daresay if they take the whole of the raw materials of a man's trade and prevent him carrying it on, and pay a sum of money, that is to be taken, not as profit on the sale of raw materials, which he never would have sold,, but as compensation for interfering with the trade altogether."

These observations, though made under a different (1) (1927) 12 T.C. 927.

statute, are, in general, true of a business as such, and can be usefully employed under the Indian Income-tax Act. Our Act divides the sources of income, profits and gains under various heads in s. 6. Business is dealt with under s. 10, and the primary condition of the application of the section is that tax is payable by an assessee under the head profits and gains of a business' in respect of a business carried on by him. Where an assessee does not carry on business at all, the section cannot be made applicable, and the compensation that he receives cannot bear the character of profits of a business. It is for this reason that the Judicial Committee in Shaw Wallace's case (1) observed that the compensation paid in that case was not the product of business, or, in other words, profit, but some

kind of solatium for not carrying on business and thus, not revenue. It is to be noted that Das, C.J, in South India Pictures' case (2), in distinguishing Shaw Wallace's case (1), made the following observation:

"In Shaw Wallace's case the entire distributing agency work was completely closed, whereas the termination of the agreements in question, did not have that drastic effect on the assessee's business at all..... In Shaw Wallace's case, therefore, it could possibly be said that the amount paid there represented a capital receipt."

The observation is guarded, but it recognises the difference made in the Privy Council case and others between payment to compensate interference with a going business and compensation paid for stoppage of a business altogether. This distinction was emphasised in the dissenting opinion in Vazir Sutltan's case (3).

Though the payment in question was not made to fill a hole in the capital of the assessee, as in the Glenboig case (4), nor was it made to fill a hole in the profits of a going business as in Shamshere Printing Press case (5), it cannot be treated as partaking the character of profits because a business not having (1) (1932) L.R. 59 I. A. 206.

(3) [1959] Supp. 2 S.C.R. 375.

(2) [1956] S.C.R. 223.

(4) (1922) 12 T.C. 427.

(5) [1960] 39 I.T.R. 90 been done, no question of profits taxable under s. 10 arose. The Privy Council described such a payment as a solatium. It is not necessary to give it a name; it is sufficient to say that it was not profit of a business.

Once it is held that this was not profit at all, it is clear that Rules 23 and 24 of the Indian Income-tax Rules could not apply, and there was no question of apportioning the amount, as laid down in R. 24. The whole of the amount received by the assessee was not assessable. It remains to consider whether the payment could be treated as income from property under s. 9 of the Income-tax Act. That this was never the case of the Department is clear from the fact that the income was not processed under that section, and even the Judicial Member of the Tribunal, who entertained this opinion, did not express it as his decision in the case. This aspect of the matter not having been considered in the case before, we cannot express any opinion upon it.

In our opinion, the answers to the two questions ought to have been:

Question (1)-no Question (2) -does not arise.

In the result, the appeal is allowed with costs here and in the High Court.

Appeal allowed.