

(1951) 04 PAT CK 0016

In the Patna High Court

Case No : Misc. Judicial Case No. 231 of 1949 and 49 of 1950

Nilkantha Narayan Singh

APPELLANT

Vs

Commr. of Income Tax, B and O

RESPONDENT

Date of Decision : 10-04-1951

Acts Referred:

Income Tax Act, 1922 — Section 12, 4

Citation : AIR 1951 Patna 165 : (1951) 20 ITR 8

Hon'ble Judges : Sarjoo Prasad, J; Ramaswami, J

Bench : Division Bench

Advocate : Mahabir Prasad, S.K. Mazumdar and J.M. Ghose, for the Appellant;
S.N. Dutta, for the Respondent

Judgement

Ramaswami, J.—These references are made by the Income tax Appellate Tribunal u/s 66, Income Tax Act.

2. The assessee Raja Nilkantha Narain Singh of Nowagarh is proprietor of a big zamindari within the ambit of which coal fields are situated. The predecessor of the assessee had leased out the coal fields on long terms basis to three different parties. The average annual income of royalty & rents from these lessees was about Rs. 50, 000 a year. The accounting year is 1352 Bengal Sambat which ends with the corresponding English date of 14-4-1946. In the accounting year the assessee had executed three documents termed "indenture of lease" in favour of Bengal Discount Co. Ltd. conveying his right to collect royalties & rents from these three lessees. In lieu of this the assessee was paid, an immediate amount of RS. 1,00,000, Rs. 40,000 & Rs. 60,000 for the three "indenture of lease". The annual rent reserved was Rs. 10, Rs. 5 & Rs. 5. In the first case the term of the lease was 11 years, in second case 10 years & in third case 15 years. It was stipulated that after the expiry of the period the right of the assessee will be revived in each case & the assessee would be entitled to collect from the original lessees the amount of royalties & rent as before.

3. The amount of Rs. 2,00,000 which the assessee received from the Bengal

Discount Co. was taxed by the Income Tax officer assessable income. On appeal the Appellate" Assistant Commissioner maintained the order of the Income Tax Officer. In second appeal the Appellate Tribunal held that the sum of Rs. 2,00,000 was advance receipt of royalty & was therefore assessable to Income Tax.

4. Another question was also debated before Appellate Tribunal, viz, whether the sum of Rs. 84,000 in possession of the assessee on account of the encashment of high-denomination notes. On the same date the assessee encashed notes to the extent of Rs. 95,000. The Income Tax officer assessed the whole amount as the income of the assessee from undisclosed sources. On appeal the Appellate Assistant Commissioner was satisfied that notes to the extent of Rs. 11,000 were included in the amount of Rs. 2 lakhs which the Bengal Discount Co. had paid to the assessee. He therefore reduced the taxable amount to RS. 84,000. It was argued before the appellate Tribunal that this amount too ought not to be taxed as it was saving of the assessee from the amount he had withdrawn for his personal expense. The Appellate Tribunal held that the explanation was not acceptable & the amount of Rs. 84,000 ought to be assessed to income tax.

5. The following questions have been formulated by the Appellate Tribunal for the determination of the. High Court.

"(1) Whether on the facts & in the circumstances of this case. the Tribunal was right in holding that the sum of Rs. 2 lakhs received from Bengal Discount Co. Ltd. was taxable income, & (2) whether there is any material to justify the assessment of Rs. 84,000 representing the value of high denomination notes which were encashed on 21-1-1946?"

6. As regards the first question it was argued by the learned Advocate-General on behalf of the assessee that the documents executed in favour of the Bengal Discount Co., were "indentures of leases" in which the outright payment of Rs. 2 lakhs has been shown as salami & the annual rent reserved has been fixed at a small amount. Learned counsel maintained that salami was a capital receipt & was not liable to Income Tax Commissioner of Income Tax v. Visheshwar Singh 18 Pat 805 & contended that the premium or salami represented whole or part of the price for the lease executed in favour of the Bengal Discount Co. and so was a capital receipt & ought not to be taxed. Learned Counsel also referred to Shiva Pd. Singh v. Emperor, 4 Pat. 73 in which the question was whether a sum of money received by the assessee by way of salami or premium for granting a mining lease, was taxable. It was held by Sir- Dawson-Miller that the salami was the price for parting with the direct enjoyment of the property & was not taxable. But in my opinion" the material facts of both the cases ought to be distinguished from those of the present case. In 4 Pat 73 the lease was for a period of 999 years. The amount of salami was Rs. 3 lakhs & odd. Tri 18 Pat 805 the settlement was made for an indefinite period & the salami was Rs. 1800 for 4 1/2 bighas of land. Upon the interpretation of the transaction in each case, the High Court held that the salami represented the price for parting with the land & was

not advance rent. In 18 Pat 805 Manohar Lal J. indeed observed that it was impossible to lay down a hard & fast rule that salami can in no case be taxable, that the question would depend on the facts & circumstances of each case,

7. In the present case, the problem is to determine what is the real nature of the transaction between the assesses & the Bengal Discount Company. It is true that the parties have described the contract as "indentures of leases", the lump sum payment of Rs. 2 lakhs as "salami" & the small annual payment of Rs. 10 or Rs. 15 as "rent". But in the application of the law relating to Income Tax the principle is well established that the name given to a transaction by the parties does not necessarily decide the nature of the transaction. It is the substance & not the form of the contract that should be regarded. In analysing the transaction, it is not necessary that the documents should be construed from the purely legal aspect. It is open to the High Court not merely to look at the documents but consider the surrounding circumstances so as to conclude what is the real character of the transaction.

8. The principle is stated by Lord Greene in *Commissioners of Inland Revenue v. 36/49 Holdings, Ltd.* (1944) 25 Tax Cas 173

"The true nature of the sum is not necessarily its nature in law, but its nature in business or in accountancy which ever way one likes to put it, because from the legal point of view there may be no difference whatsoever as between the parties between a capital & an income sum. It may be totally irrelevant to the legal relationships into which they are proposing to enter. When, however, the *tartius gaudens*, in the shape of the Revenue, appears on the scene, that matter which as between the parties may have been a matter of not the slightest importance becomes immediately a matter of very great importance, & it is necessary to examine the circumstances of each individual case, including any documents which require to be construed, in order to ascertain what is the character to be attributed to the payment."

9. The documents must therefore be examined in the light of this principle. Ext. D/1 is described as indenture of sub leases granted by the Raja in favour of the Bengal Discount Co., for a period of 11 years, Clauses 1 & 2 state that the premium of Rs. 1 lakh has been paid, that the rent of the land is fixed at Rs. 10 per year. 01. 4 recites that by virtue of the deed the company will be entitled to realise all the royalties & commission payable by the lessee Rai Sahib Chandanmal Indrakumar by suit or amicably & the company will have the same right as the first party in respect thereof. Clause 5 empowers the Bengal Discount Co. to realise the surface rent from Rai Sahib Chandanmal Indrakumar. But there is an exception that besides surface land required for colliery the Bengal Discount Co. will have absolutely no claim to the remaining surface land. Clause 5 also states that the assessee was giving notice to Rai Sahib Chandanmal Indrakumar to pay royalty & commission to the Bengal Discount Co, for the period of the lease. The other documents, Exs. D/2 & D/3, are couched in similar terms. But in Ex. D/5 there is the important recital that the Raja was not

able to pay Income Tax & road cess & was in need of further money & on this account was giving the lease in respect of his right created by the registered patta dated 9-3-1900 from Messrs Nowagarh Properties limited.

10. It is manifest that the transaction, though in form a sub-lease, was in substance an assignment by the Raja of his right to realise royalties & rents for a term of 10 to 15 years As consideration for the contract the Raja received a lump sum of Rs. 2 lacks, which it is plain is nothing but advance payment of royalty. No other right except the right to collect royalty & rent from the original lessees is transferred by the assessee to the Bengal Discount Co. The assessee has not parted with any interest in the land but has merely assigned his contractual right.

11. Reference may be made in this context to Commissioners of Inland Revenue v. Thomas Nelson & sons (1940) 22 Tax Cas 175 in which the assessee company had lent a sum of money to an Indian company under an agreement which provided that interest was to be paid at 3 per cent, per annum & that on repayment of the, principal sum or any part thereof there should also be paid a premium varying with the date of repayment. The premiums prescribed by the agreement for each of the ten years of the currency of the loan are set out in the agreement, the first of them is at the rate of 2 per cent., the second is at 4 per cent, in each of the next five years there is an increase of 2 1/2 per cent, in arithmetical progression & for the last three years of the ten the rate of increase per annum is 3 per cent. The full amount of the loan was ultimately repaid to the assessee together with the accrued interest & the premiums payable under the agreement. The contention raised by the assessee was that the premiums were part of the principal sums repaid & were capital payments. The Lord President decided the question as a question posed on the particular terms of the contract. In his opinion the premiums were in the nature of annual profits or gains being part of the consideration given by the borrowers for the use of the capital lent to them, & part of the creditor's share of the profit which the borrower is presumed to make from the use of the money & he observed :

"It is not irrelevant to notice that the agreement provides for a payment by way of premium which may be made in each year of the currency of the loan, & that, taken along with the) stipulated interest, the effect of this provision is to give the lender a return on their capital varying between 6 per cent, in the earlier years & something over 5% per cent, in later years, a rate which can only be regarded as a reasonable return for the use of their capital & not as to any extent an accretion to it."

It was, however, pointed out that

"the fact that the borrowers would, under the contract, pay a premium only when they chose to make a capital payment does not necessarily have the effect of making the premium a capital payment, any more than the lenders" waiver of their right to exact payment of interest each year as the effect of converting the payment of arrears of interest into a capital payment."

12. On behalf of the assessee the argument was addressed that income connoted a periodical monetary return, that in the present case the amount of Rs. 2 lacs being a lump sum payment cannot be classed as income. Reference was made to Income Tax Commissioner v. Shaw, Wallace & Co. 59 IA 206 in which at p. 212 Sir George Lowndes observed :

"The object of the Indian Act is to tax income , a term which it does not define. It is expanded, no doubt, into "income, profits & gains", but the expansion is more a matter of words than of substance. Income, their Lordships think in this Act connotes a periodical monetary return, "coming in" with some sort of regularity, or expected regularity, from definite sources. The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall. Thus income has been likened pictorially to the fruit of a tree, or the crop of a field It is essentially the produce of something which is often loosely spoken of as "capital". But capital, though possibly the source in the case of income from securities is in most cases hardly more than an element in the process of production."

But this passage must be read in the context of the material facts of that case. The question before the Judicial Committee was not whether there was a periodical monetary return but whether the sums received by the respondent were taxable income u/s 6(4), Income tax Act. It was held by the Judicial Committee that the fundamental idea of "business" as a source of taxable income u/s 6(iv) was the continuous exercise of an activity that there must be a business "carried on" by the assessee & that the sums received by the respondents in the case were not the produce nor the result of carrying on the agencies of the oil companies in the year in which the sums were received & so the sums were not liable to be taxed. The authority of the definition given by Sir George Lowndes is shaken by the subsequent decision of the Judicial Committee in Kamakshya Narain Singh v Commissioner of Income Tax 22 Pat 713 in which Lord Wright held that mine royalties were clearly income & not capital & were assessable to Income Tax. At p. 723 Lord Wright criticised the definition of Sir George Lowndes in the Shaw Wallace case :

"It is not in their Lordships" opinion correct to regard as an essential element in any of these or like definitions a reference to the analogy of fruit or increase or sowing or reaping of periodical harvests. Lord Cairns (loc-cit) used these expressions because he was distinguishing mineral leases from capital leases. Sir George Lowndes (loc-cit) speaks of income" being likened pictorially to the fruit of a tree or the crop of a field. But it is clear that such picturesque similies cannot be used to limit the true character of income in general, & particularly when it is constituted by mining rent or royalties. These are periodical payments, to be made by the lessees under his covenants in consideration of the benefits which he is granted by the lessor".

At p. 724 Lord Wright states:

"There is therefore in their Lordships" judgment, no real justification for treating the royalties as capital payments. They think that they are "income" within the meaning of the Act, whatever may be the exact definition of that word in the Act. Its applicability may in particular cases differ because the circumstances, though similar in some respects, may be different in others. Thus the profit realised on a sale of shares may be capital if the seller is an ordinary investor changing his securities, but in some instances at any rate it may be income if the seller of the shares is an investment or any insurance company. Income is not necessarily the recurrent return from a definite source, though it is generally of that character. Income again may consist of a series of separate receipts, as it generally does in the case of professional earnings. The multiplicity of forms which "income" may assume is beyond enumeration".

13. On behalf of the assessee, the argument was stressed that the payment of RS. 2 lakhs was made to assessee in a lump sum & so the amount ought not to be classed as taxable income. But there is no magic in the distinction between a lump sum & a periodical sum & the only material question in the case is what is the true nature of the sum In RUSTPROOF METAL WINDOW CO., LTD. Vs. INLAND REVENUE COMMISSIONERS., a patentee entered into a contract conferring on a licensee the right to manufacture up to a stated number of articles in accordance with the patent on condition that the licensee paid a lump sum down & a royalty of so much per article. It was held by Lord Greens M. E. that the lump sum payment was an income, & not a capital receipt, & so was liable to excess profits tax & that the division of the price into separate elements did not by itself have the effect of turning the lump sum into a capital receipt.

14. The observation of Lord Macmillan in Van den Berghs Ltd. v. Clark (1936) 19 TaxCas 390, is apposite :

"Now what were the appellants giving up ? They gave up their whole rights under the agreements for 13 years ahead. These agreements are called in the stated case "pooling agreements," but that is a very inadequate description of them, for they did much more than merely embody a system of pooling & sharing profits. If the appellants were merely receiving in one sum down the aggregate of profits which they would otherwise have received over a series of years, the lump sum might be regarded as of the same nature as the ingredients of which it was composed."

Again, in North Fleet Goal & Ballast Company's case 1928 12 TaxCas 1102 there was contract, subsisting for ten years for the sale of chalk & also for the building of wharf. It was agreed between the quarry company & the purchaser that in consideration of the payment of ₹900 yearly for the remaining four years of the term the purchaser should be relieved of his liability ; subsequently the company accepted a lump sum payment of ₹3000 in lieu of the annual payments. Rowlatt J., held that the payment of ₹3000 was chargeable to excess profits duty as a trading profit as it represented profits in a new form & it was tantamount to income.

15. The case of *Constantinesco v. Rex* (1927) 11 TaxCas 730 is materially in point. In that case an award of ₹70,000 was made by the Royal Commission on Awards to Inventors in respect of the user by the British Govt. during the war of certain gear invented by the assessee for enabling a bullet to be fired between the propeller of an aeroplane. It was held by the Commissioner of Income Tax that the lump sum payment was simply royalty for four years & that Income Tax should be deducted. The decision was affirmed by the House of Lords who agreed that in the circumstances of the case the lump sum payment did not constitute a capital sum but was royalty paid in respect of the user of the patent & was liable to be taxed. At p. 746 Viscount Cave states: "The payment was made in respect of the use of the invention over a period of time. The claim put in was a claim as for royalty in respect of the successive uses of the invention. In the case of patented inventions it was the practice of the Commission, as appears from their Report which has been cited on behalf of the Appellant, to take as a basis of their award a fair royalty as between a willing licensor & a willing licensee, & I have little doubt that that basis was accepted in the present case, subject, no doubt, to certain deductions. Lastly, the patent itself, that is the corpus of the patent, was not taken away from the Appellant & his partner but still remains in them. In view of all the facts I am satisfied that the sum awarded is to be treated as profits or gains, & annual profits or gains, within the meaning of the Income Tax Act." Viscount Dunedin was also emphatic :

"I think, on the real merits of the case, the case was scarcely arguable. This was a patent which remains this man's property. He, in the old days, got royalties for it, & those were the profits of his property. He had taken, by the Crown, the same license of user as private persons had before, & to say that the payments which the Crown make lose their character as income & suddenly become capital is, think, as all the Courts have understood the case, one of the most hopeless contentions I have ever heard urged at your Lordships' Bar."

16. To the same effect is the decision in *Mills v. Jones* (1929) 14 Tax Cas 769 in which an award was made by the Royal Commission on Awards to Inventors in respect of the user, past, present & future, by the . British Govt. (including user by way of selling for use, licensing or otherwise) of the Mills bomb. Over 75 millions of these bombs had been made during war & large stocks were still in existence. The Appellant, as patentee of certain improvements to this Bomb, received sums representing the major part of this award, & as charged to Income Tax thereon. The General Commissioners, on appeal held that the sums received by the appellant were annual profits or gains chargeable to Income Tax under Schedule D. The House of Lords held that the assessee was rightly charged to Income Tax & that the principle of *Constantinesco's* case: (1927) 11 Tax Cas 730 was applicable. At p. 786 Lord Buckmaster proceeded to base the decision on the finding of fact of the Commissioners that the amount of the future user included in the payment was negligible. Lord Dunedin agreed with Lord Buckmaster's opinion & significantly added. "I think the finding of fact is conclusive."

17. My learned brother has referred to *Commissioners of Inland Revenue v. British Salmson Aero Engines Ltd* (1988) 22 Tax Cas 29 but, in my opinion, the ratio of that case is different. In that case the assessee by a certain agreement granted to the licensees an exclusive right for a period of ten years to construct, use & sell in a certain territory Salmson Aero Engines. The consideration for the license was that the licensees were to pay a fixed sum of ₹25,000 payable in three instalments & , in addition to these payments, & as royalty, a sum of ₹2500 & a like sum each twelve months during the following nine years. The Crown contended that all these payments were income & the assessee insisted, on the contrary, that all these payments were in the nature of capital receipts. The Special Commissioners decided that the fixed sum of ₹25000 was capital receipt & the payments of royalty of ₹2500 were assessable to Income Tax. The decision of the Special Commissioners was affirmed by the Court of appeal. In pronouncing judgment Lord Greene, Master of Bolls, treated the question whether a lump sum payment was a capital payment or income payment as a question of fact to be determined in the context of each particular case.

"It seems to me that in the case of patents, as in the case of any other matters, the fundamental question remains in respect to any particular payment: is it capital or is it income? & that question has to be decided, as it has to be decided in reference to other subject matters,, upon the particular facts of each case, including in those fact 3 ,the contractual relationships between the parties. It has been said that the question is one of fact, & it is when one gets to the bottom of it, an accountancy question. In saying that it is a question of fact, one does not mean that, in deciding it, questions of law may not have to be discussed & decided. For example, the construction of A contract may be one of the elements which must be taken into consideration in deciding that question; there may be cases where the construction of the contract (sic) is of itself the really decisive matter in answering the question."

At page 48 Lord Greene again states:

"I do not propose to add anything by way of expression of my own views on the principles on which that question ought to be determined. It is a question which has been investigated very carefully in & number of different connections & different matters of fact have been regarded in different cases as of importance & of weight. It seems to me, on all the facts of this case, including the terms of the contract itself, which is the important, & indeed, the essential fact in the ease, that the Commissioners were perfectly entitled to come to the conclusion to which they did come, that this class of payment was not of an income nature, but of a capital nature. I can find nothing in the facts of the case, or in the construction of the documents, which would justify me in saying that the Commissioners' conclusion is wrong in law; & in my judgment their conclusion is the right one." Scott, L. J. in his concurring judgment emphasised that in so far as the Special Commissioners came to the conclusion that a particular payment had "the accountancy quality" of capital payment, that was a view which the

Court of Appeal was entitled & ought to give great weight. At page 49 Scott, L. J. states: "In my view, that kind of weight ought to be attached to the findings of the Comrnissioners in the present case. It is quite true that they put before us the whole of their Material, & that that material, in substance, consists of agreement made between the licensees & the patentees, & nothing more. But they have taken the view, without hesitation evidently, that these lump sum payments were in the nature of capital payments. If there were any doubt from the purely legal point of view, which I do not think there is, that opinion of the Commissioners ought to weigh in the balance, & in my opinion, this is an additional reason for upholding their finding."

In my opinion this is the proper legal principle of this decision & only on such a principle can the decision be reconciled with Mills case & Constantinesco" s case

18. Reference should be made to *Glasson v. Rongier* (1944) 26 TaxCas 86 in which the assessee who was admittedly carrying on the vocation of authoress, had entered into three agreements with a publishing company in 1925, 1932, & 1935, respectively, whereby she granted limited publishing rights in respect of three books written by her in consideration of payments based on the number of copies sold. In 1940 these agreements were cancelled & the same limited publishing rights were transferred outright to the publishing company in consideration of a lump sum payment. On appeal against an assessment to Income Tax it was contended that the lump sum payment was a capital receipt. Macnaghten J. rejected the contention, holding that the payment in question formed part of the annual profits & gains of the assessee, & was rightly taxed.

19. My learned brother has referred to the fact that in *Salmson Aero Engine*"s case, the decision of Lord Greene was also based on the circumstance that:

"in the agreement there was a fundamental difference in the nature of the two classes of sums, in this sense that the former class starts off by being a lump sum payment definite & fixed, which is then payable by instalments. The other class is not of that description; no lump sum payment is referred to; it is on the face of it, nothing but an undertaking to pay yearly sums as royalty."

But this passage must be read in the context of the whole judgment & the decision of Lord Greene in a subsequent case shows that the circumstance is by no means decisive of the matter. In *Rustproof Metal Window Co. Ltd. v. Inland Revenue Commissioners*, (referred to supra) a patentee had entered into a contract conferring on a licensee the right to manufacture up to a stated number of articles in accordance with the patent on condition that the licensee paid a lump sum down & a royalty of so much per article. Even so Lord Greene held that the lump sum payment was an income & not a capital receipt & so was liable to excess profits tax & that the division of the price into separate elements did not by itself have the effect of turning the lump sum into a capital receipt. At page 66 Lord Greene states :

"The only considerations on the other side, once the company"s arguments

above discussed are rejected, are that the parties themselves call the ₹3000 a capital payment & the agreement separates the ₹3000 from the payments which are described as royalties. I cannot attach to these considerations sufficient importance to outweigh those on the other side. The fact that parties call the ₹3000 a capital sum cannot make it a capital sum if it is not. The word capital is a mere label attached to the ₹3000 with an eye, no doubt, to tax considerations. The fact that the agreement separates the ₹3000 from the royalties is nothing more than a drafting necessity having regard to the fact that the latter are based on the actual number of boxes treated with the process, while the former is paid for the right to apply the process to any number of boxes up to Rs. 75,000. If a patentee negotiating with an intending licensee who wishes to obtain the right to manufacture up to a stated number of articles in accordance with the patent states his terms to be a lump sum down & a royalty of so much per article I can see no reason why the mere division of the price into those separate elements should by itself necessarily produce the result that the lump sum must be regarded for tax purposes as a capital receipt."

19a. It was urged on behalf of the assessee that if the premium in this case is held to be an income receipt it ought to follow as a logical result that the price for an outright sale of the royalties should be classed as income & not as a capital receipt, that such a conclusion was opposed to common sense. But it is not the business of the Court to demarcate the boundary between two categories in a mathematical sense. The indication of the boundary need only be sufficiently distinct for the immediate problem in hand. In this connection reference should be made to *Hobbs v. L. & S. W. Railway*, (1875) 10 QB 111 in which Lord Blackburn observed of the rule in *Hadley v. Baxendale* :

"It is a vague rule, & as Bramwell B. said, it is something like having to draw a line between night and day; there is a great duration of twilight when it is neither night or day; but on the question now before the Court, though you cannot draw the precise line, you can say on which side of the line the case is."

20. For the reasons given I am definitely of opinion that the amount of Rs. 2 lakhs which was paid by the Bengal Discount Co. to the assessee in consideration of the so-called indentures of lease was a taxable income.

21. This question must therefore be answered against assessee.

22. As regards the second question it was argued for the assessee that there was no material upon which the Income Tax Officer could regard the amount of Rs. 84,000 as income from undisclosed source. Mr. Dutt pointed out that three reasons were given by the Appellate Tribunal in support of the inference that the sum of Rs. 84,000 was taxable. In the first place, it was stated that the assessee did not produce any Home Chest Account though it was his case that the high denomination notes were savings from his personal allowance. In the next place, it was pointed out that the assessee could not save any money since in the indenture of lease, Ex. D-3, there is a recital that the assessee was in need of

money to pay the Income Tax & road-cess for the properties. Lastly, it was observed by the Tribunal that the assessee was not in a position to say wherefrom the notes of the value of Rs. 10,000, each were obtained & his failure to do so led to the conclusion that he was unwilling to disclose the source. On behalf of the assessee it was argued that no Home Chest Account was maintained by the assessee & the Tribunal had no warrant for drawing an adverse inference. In my opinion the contention of the assessee is correct. There was no material before the Tribunal to suggest that a Home Chest Account was maintained & the Appellate Tribunal ought not to have drawn an adverse inference because no such account was produced. As regards the recital in Ex. D 3, learned counsel for the assessee stated that the accounts of the amounts withdrawn by the Raja for seven years were produced before the Tribunal, that the accounts showed that the Raja had a balance of Rs. 1,84,000. These account books were accepted by the Tribunal as genuine & there was hence no material upon which the Tribunal could reach the inference that the high denomination notes were not the saving of the Raja out of his personal allowance which he had drawn. It appears that the amount of Rs. 84,000 consisted of three notes to the value of Rs. 10,000 each & the rest of Rs. 1,000 each. The Income tax Officer had asked the Raja to show any lump sum payment of above Rs. 10,000. The Raja actually showed three such receipts, the first dated 15-3-1943 for Rs. 25,563, the second dated 10-2-1945 for Rs. 45,000 & the third dated 24-9-1945 for Rs. 29,534. The Tribunal remarked that there was no evidence that there was a Rs. 10,000 note in any of these receipts & that the Raja & his employees had not disclosed from whom the notes of the value of Rs. 10,000 each were obtained. In my opinion, there is no onus thrown upon the Raja to indicate from whom each note to the value of Rs. 10,000 was received, & no adverse inference ought to have been drawn by the Tribunal against the assessee.

23. In this context reference should be made to *Income Tax Commissioner, Bombay Presidency & Aden v. Bombay Trust Corporation Ltd.* 63 IA 408 in which B, a company registered & carrying on business in British India, was assessed to Income Tax in respect of the year of assessment 1928-29 as agent of H, a company registered & carrying on business outside India. On a reference to the High Court it was held that there was no evidence that in 1927 H received from B, any sums as interest on money lent, and that H, was not therefore in receipt of the profits or gains taxable u/s 42, Sub-section I, & Section 43, Income Tax Act. At p. 418 the report states:

"In their Lordships opinion the High Court at Bombay have rightly answered in the negative the question referred to them. However sceptical the attitude which the Income Tax authorities may think fit to adopt towards the declarations offered & the entries made in the Bombay company's books, it is necessary, if the assessment made is to be supported, that there shall be some evidence to show that in 1927 the loan from the Hong Kong company continued, & that interest "accrued or arose" to that company thereon. If the entries in the books show no payment to the Hong Kong company and nothing due to the Hong Kong

company, the Income Tax authorities cannot, without evidence, insist upon a right to treat entries showing a tael loan of six & a half-crores made by a Shanghai company & interest calculated in taels paid thereon, as evidence that a somewhat similar amount was due from & was being paid by the Bombay company to the Hong Kong company."

24. In the result I hold that there is no material to justify the assessment of Rs. 84,000 representing the value of high denomination notes which the assessee encashed on 24-1-1946. This question must accordingly be answered in favour of the assessee.

25. As the assessee has succeeded in part I do not propose to make any order as to costs of the hearing.

Sarjoo Prasad, J.

26. I agree with my learned brother in the answer proposed by him to the second question under reference, namely, that there was no material to justify the assessment of Rs. 84,000 representing the value of high denomination notes which were encashed on 21-1-1946. But as I am going to indicate, I have felt considerable difficulty & hesitation in according my assent to the answer given by him to the first question under reference, namely, whether on the facts & in the circumstances of the case the Tribunal was right in holding that the sum of Rupees two lakhs received from Bengal Discount Company Limited was a taxable income.

27. The sum of Rs. 84,000 had been assessed by the Revenue Officer as the assessee's income from undisclosed sources. The findings of the Tribunal on that point are not adequate to lead to an inference that the said sum represented some secret profits of the assessee & was, therefore, taxable as income from undisclosed sources. The assessee had submitted his accounts from which it appeared that the assessee had, during the last seven years from 1346 to 1352 B. S., drawn from his serishta various sums of money representing the income from his estate & had from time to time given back to the serishta according to his requirement certain sums of money, & the difference between the two sums represented a balance of Rs. 1,82,000 & odd which amount would be more than sufficient to cover & explain the sum of Rs. 84,000 representing the value of the high denomination notes. These figures have not been contested by the Department, and in fact they have been accepted by the Revenue-authorities. The case of the Department, however, is that this amount must have been spent by the assessee in view of the fact that he entered into the transactions with Bengal Discount Company for the purpose of raising money to satisfy his needs. If the view of the Department is correct, then the money must have been spent before 21-4-1945, when the assessee first entered into transaction with the aforesaid Company & the income aforesaid must have been received by the assessee between this 21-4-1943 & 21-1-1946, when the high denomination notes appear to have been cashed. Now the various sources of the assessee's

income are all stated in the accounts, & if the accounts are held to be genuine, as they have been held to be genuine, I do not see how it can be inferred that this money came from any different source during the period in question. The Revenue authorities appear to have presumed that there was some homechest account kept by the assessee which the latter has failed to produce, & therefore, the presumption must be raised against him. In my opinion, there is no legal foundation for such a presumption as there is no basis for assuming that there was a homechest account maintained by the assessee. My learned brother has elaborately gone into this question, & it would not serve any useful purpose for me to repeat the reasons given by him for coming to the conclusion that there was no justification for the assessment of the said Rs. 84,000.

28. The difficulty, however, arises when dealing with the first question whether the Revenue authorities were justified in assessing the sum of rupees two lakhs received by the assessee from the Bengal Discount Company. This amount represented the salamis received by the assessee on account of three different leases executed by the former in favour of the said Company. The documents are described as indentures of leases & the lump sum payment of rupees two lakhs has been specifically mentioned as salami, while there are small annual payments of Rs 10 or Rs. 15 mentioned in the documents by way of rent. The documents also indicate that they are to operate for the periods of 11, 10 & 15 years respectively, The subject-matter of the lease as mentioned in the documents is a certain area of land being about 323 acres or 544 bighas. The documents proceed to recite that by virtue of the lease in question the lessee will be entitled to realise all the royalties & commissions payable to the lessor by one Rai Sahib Chandanmal Indrakumar who had already taken settlement of the mining rights in the lands from the lessor. The lessee was also given the right to realise rent on account of certain surface rights from the said Rai Sahib, but he had no right whatsoever to the remaining surface lands. The lessee was further placed in the same position as the lessor in regard to the right to realise rents, royalties & commissions from Rai Sahib Chandanmal during the operation of the lease. The document further provided that if during the said period the lessee auction-purchased for arrears of royalties & commissions the interest of Rai Sahib Chandanmal Indrakumar in the lands, then after the expiry of the lease the purchaser lessee would have to pay the rents & royalties as payable by Rai Sahib Chandanmal himself to the lessor. These, in short, are the material terms of the document. It would prima facie appear on the face of the recitals that this lump sum payable under the various leases was payable as salami & was sought to be a distinct payment from the annual payments mentioned therein. There was thus a fundamental difference-in the nature of the two classes of sums payable under the leases in question. The former starts off with a lump sum payment, definite & fixed ; the other class is not of that description. The latter class is indisputably nothing but an undertaking to pay yearly sums as royalty. The parties were thus creating an obligation as between themselves which they chose to describe as rent payable each year in respect of the fixed rate but a

salami in regard to the lump sum payment.

29. It has been held in various cases of this Court that salami is really in the nature of a premium paid for granting a lease; in other words, it was the purchase price of a lease-hold interest-but so far as annual rent or royalty is concerned, it being an annual increment to the income, it was taxable as such. Normally, therefore, salami would be regarded as a capital receipt unless the Revenue-authorities showed that there was some-thing in the circumstances of the case to indicate that it was not a capital receipt but a payment made in lieu of the periodical income or a payment in advance of rent or royalty; see, for instance, *Shiva Prasad v. Emperor* 4 Pat 73 and *Commissioner of Income Tax v. Visheshwar Singh*, 18 Pat 805. There is thus a vital difference between a single payment made at the time of the settlement and recurring payments made during the period of the enjoyment of the property. The parties have themselves chosen to clothe the transaction in that form & the question is whether the presence of *tertius gaudens* in the shape of the Revenue, on the scene would make any material difference, to the real nature of the transaction.

30. It has been urged on behalf of the Department that the Court in construing a document must look to the substance of the transaction; in other words, the Court must tear off the veil & look in the face of the transaction itself. It is pointed out that the substance of the transaction in the present case is more or less this: that a lump sum of royalty is being paid in advance to the assessee for the period of the lease, & the document does not really transfer any right in the corpus of the property itself but merely a right to realise royalty. Speaking for myself, I do not see why the document cannot be regarded as a transfer of interest in Immovable property itself. It is true that the lessor had at the time only the right to receive the royalty from Rai Sahib Chandanmal but at the same time continued to be the owner of the lands in question, and he purported to transfer a parcel of this right as owner in favour of the lessee which for the time being was demonstrated by his right to realise rents & royalties. Then again the premium or salami paid cannot be assumed necessarily to be a lump sum payment of the royalty in advance. In that case every premium can be treated as a consolidated amount of the rental paid in advance. It goes without saying that premium or price is always fixed after taking into consideration the amount of annual rent "which the lessee is to pay to the lessor, & this ratio of the premium to the annual rent varies almost in each case in the inverse proportion. It is true that; the lessee here gets the right to collect the royalty during this period, but then the position is that for the period of the lease the lessor cannot enforce this right as against Rai Sahib Chandanmal, & it is on account of parting with this right that the lessor-assessee has received the consideration of the premium in question. Besides, the royalty actually realisable by the lessee from Rai Sahib Chandanmal from year to year is a variable & an unknown quantity (though, of course, the minimum royalty may be indicated). Therefore, there is nothing to connect the premium paid with the proportion of the royalty realisable by the lessee himself after the leases began to operate. For all these reasons I was

inclined to think that this salami was not an advance payment of the annual rent or royalty for the period of the lease; although it must be conceded that the period during which the lease is to be operative varies from 10 to 15 years only, & the annual rental payable is a very small amount.

31. I, do not find it easy to distinguish the present case from the ratio decidendi in Commissioners of Inland Revenue v. British Salmson Aero Engines Ltd (1938) 22 TaxCas 29. In that case the assessee by a certain agreement granted to the licensees an exclusive right for a period of ten years to construct, use & sell in a certain territory Salmson Aero Engines. The consideration for the license was that the licensees were to pay a fixed sum of Rs. ₹25,000 payable in three instalments &, in addition to these payments, & as royalty, a sum of ₹2,500 & a like sum each twelve months during the following nine years. The Crown contended that all these payments were income & the assessee insisted, on the contrary, that all these payments were in the nature of capital receipts. The Master of the Rolls in coming to his decision referred to two important circumstances;

"The first thing to notice about it is that it is not merely an agreement under which the English Company receives the right to use a patent: Under this agreement the English Company is entitled to restrain the patentees themselves from exercising the patent in the territory, & it is entitled to call upon the patentees to take steps to prevent others exercising the invention within the territory. Now these rights are to my mind different from the mere right of user."

In the present case even if we regard the leases not as constituting any transfer of interest in Immovable property but as mere license for a certain number of years to collect the rent & royalty, the assessee has certainly parted with his right to make such collection during the period in favour of the licensee who alone could sue for the rent & royalties in question. The other circumstance to which the Master of the Rolls refers is that in the agreement there was a

"fundamental difference in the nature of the two classes of sums, in this sense, that the former class starts off by being a lump sum payment, definite & fixed, which is. then payable by instalments. The other class if not of that description, no lump sum payment is referred to; it is, on the face of it, nothing but an undertaking to pay yearly sums as royalty."

It was accordingly held in the case that the lump sum payment of ₹25,000 was as capital receipt, not liable to assessment but that the further payments of ₹2,500 were royalties & taxable as income of the assessee. It is true that the case was a decision on its own facts but the facts are very significant. The contract was not a lease but a mere license & the period for which it was to operate was only a period of ten years, yet the decision about the lump sum payment was to treat it as a capital payment & not income. :This decision has been very strongly relied upon by Manohar Lal J. in 18 Pat 805 referred to above.

32. The term "income" has nowhere been defined in the Income Tax Act any

more than the case of Shaw Wallace & Co. 59 IA 206 : 59 Cal 1943 the Judicial Committee attempted to describe the term "income" in the following manner :

"The object of the Indian Act is to tax "income" a term which it does not define. It is expanded, no doubt, into "income, profits & gains" but the expansion is more a matter of words than of substance. "Income", their Lordships think, in this Act connotes a periodical monetary return "coming in" with some sort of regularity, or expected regularity, from definite sources. The source is not necessarily one which is expected to be continuously productive but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall. Thus, income has been likened pictorially to the fruit of a tree or the crop of a field. It is essentially the produce of something which is often loosely spoken of as "capital." But capital, thought possibly the source in the case of income from securities, is in most cases hardly more than an element in the process of production."

33. This definition or description of income appears to have been substantially adopted by Lord Russell who further amplified it in the case of Gopal Saran Narain Singh v. Commissioner of Income Tax, B. & O. 62 IA 207. Again in Kamakshya Narain Singh's case, 22 Pat. 713 Lord Wright in adverting to the earlier judgments observed :

"It is not in their Lordships' opinion correct to regard as an essential element in any of these or like definitions a reference to the analogy to the fruit, or increase, or sowing or reaping or periodical harvests.... Sir George Lowndes speaks of income being likened pictorially to the fruit of a tree or the crop of a field. But it is clear that such picturesque similes cannot be used to limit the true character or income in general.....Income is not necessarily the recurrent return "from a definite source, though it is generally of that character. Income again may consist of a series of separate receipts as it generally does in the case of professional earnings. The multiplicity of forms which income may assume is beyond enumeration."

This broader connotation of the word "income" makes it all the more difficult and elusive and it is not easy to specify and define its various characteristics.

34. There has, therefore, often been considerable embarrassment in drawing a line between what is capital receipt and what is revenue receipt or "Income." It was this embarrassment which tempted an eminent Judge to observe that in some cases the matter is so dangerously close to the border-line that it has to be decided, as it were, by the spin of the coin. The cases relied upon on behalf of the Taxing Department are all cases where the lump sum payment specifically carried the attribute of the periodical payment as income & was definitely identifiable as such. It is true that the Income Tax Act is not cast on logical lines and in some cases the line has to be drawn with an arbitrary firmness. This case appears to me to be very much on the border, line, if not, as I tried to show, on the right side of it. My learned brother is very definitely of the opinion that

"the amount of Rupees Two lakhs which was paid by the Bengal Discount Company to the assessee in consideration of the so called indentures of lease was a taxable income."

His decision is in conformity with the decision of the revenue authorities & I do not propose to disturb the status quo unless the circumstances of the case were absolutely compelling & pointed definitely in a contrary direction. I have, therefore, persuaded myself eventually to adopt the answer proposed by my learned brother to the first question as well. The question whether a certain amount is capital receipt or income has always to be decided on the facts & circumstances of each case, & no hard & fact rule can be laid down for the purpose.