Privy Council Appeal No. 75 *of* 1931.
Patna Appeals Nos. 3 *of* 1930 *and* 7 *of* 1931.

The Commissioner of Income Tax, Bihar and Orissa - - *Appellant*

v.

Maharajadhiraja Kameshwar Singh of Darbhanga - - - *Respondent*

Maharajadhiraja Kameshwar Singh of Darbhanga - - - *Appellant*

v.

The Commissioner of Income Tax, Bihar and Orissa - - *Respondent*
(*Consolidated Appeals*)

FROM

THE HIGH COURT OF JUDICATURE AT PATNA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH JANUARY, 1933.

Present at the Hearing:
LORD MACMILLAN.
SIR GEORGE LOWNDES.
SIR DINSHAH MULLA.

[*Delivered by* LORD MACMILLAN.]

Their Lordships have to dispose of two consolidated appeals from a judgment of the High Court of Judicature at Patna, dated the 25th November, 1929, dealing with certain questions referred to the Court by the Commissioner of Income Tax, Bihar and Orissa, under section 66 of the Indian Income Tax Act, 1922. The questions all relate to the assessment for tax purposes of the income for the year 1926–27 of the Maharajadhiraj of Darbhanga, who died on the 3rd July, 1929, and is now represented in these proceedings by his eldest son. As regards two of the questions, the Commissioner of Income Tax is appellant; as regards the rest the assessee is appellant.

By section 3 of the Act of 1922, income tax is chargeable in India " in respect of all income, profits and gains of the previous

year." The assessee's practice was to make up his accounts for the Fasli year which ends on 30th September and consequently, under section 2 (11) (*a*) of the Act, the "previous year" in the present case is the Fasli year 1332, which ended on 30th September, 1925. The taxable income of the assessee for the year 1926–27 thus consists of his income, profits and gains for the year ending 30th September, 1925, as computed in accordance with the provisions of the Act.

The assistant commissioner of income tax, acting as income tax officer, having made an assessment of the assessee's taxable income for the year in question, the assessee appealed to the commissioner of income tax, Bihar and Orissa, acting as assistant commissioner, who made an order reducing the assessment in respect of three particular items but otherwise affirming it. The assessee then required the commissioner under section 66 (2) to refer to the High Court certain questions, purporting to be questions of law arising out of his order. The commissioner, as required by the Act, drew up a statement of the case and referred it with his own opinion thereon to the High Court. It is against the answers rendered by the High Court to certain of the questions formulated in the case so stated that the present appeals have been taken.

With one exception, the points which were debated before their Lordships relate to moneylending transactions of the assessee. As the assessee was held not to be carrying on the business of moneylending he was assessed in respect of these transactions, not under section 10 which provides for the computation of the "profits or gains" of a business, but under section 12, which provides for the computation of "income, profits and gains" from other sources. In the one exception, which relates to the carrying on of a colliery taken over by the assessee from a debtor, the assessment was under section 10.

As the questions which have arisen are in large measure due to the assessee's method or want of method in recording his moneylending transactions, it will be convenient to give a description of his practice in the matter as furnished in the case stated by the commissioner. The assessee, it appears, kept "a deposit register in which payments made by debtors are ordinarily first of all recorded but without any allocation between principal and interest. Subsequently, if and when allocation is made, an entry in respect of the interest portion of these payments is made in the interest ledger as well as in the interest account of the general ledger. This allocation is not necessarily made in the year in which the money has actually been paid to the assessee. It may be made in the following year or, indeed, several years later."

Prior to the year 1331 Fasli the assessee produced to the income tax authorities only his interest ledger and did not disclose his deposit register. In these previous years he claimed to be

and was assessed in each year on the total of the sums credited as interest in the preceding year in his interest register. Owing to the system on which the interest register was kept, it is obvious that the assessee was in each year assessed not on the total of the sums actually received by him as interest during the preceding year, but on such sums as the assessee had chosen during that preceding year to allocate to interest and carry to his interest register out of payments received by him in that and former years. In computing the income of the assessee for the year 1331 Fasli the assessing officer had for the first time available to him the assessee's deposit register. On this occasion the officer made his computation by taking first all the sums allocated to interest and entered in the interest register for that year, irrespective of the years in which these sums had actually been received by the assessee ; he then resorted to the deposit register, noted the sums there shown as actually received in that year by the assessee but from which no allocations to interest had been carried to the interest register, made his own calculation of the proportions of interest comprised in such sums and added the result to the sum of the entries in the interest register for that year.

In computing the income of the assessee for the next year, viz., 1332 Fasli, being the income of the year of account with which their Lordships are concerned in this appeal, the assessing officer again took first the amount shown as credited in that year in the interest register, but on this occasion, less the sums which he had in the previous year taken into account from the deposit register and which now appeared in the interest register ; he next examined the deposit register and in the case of sums there shown as received in 1332 Fasli but from which the assessee had made no allocation to interest account he himself calculated the proportion of each receipt which represented interest and added the result to the figure obtained, under the deduction stated, from the interest register.

The commissioner states as follows the general question which in these circumstances arises for decision :—

> 1. " Assessees' method of accounting in respect of receipts from interest on loans being as described above was the assessing officer's action in calculating the profits and gains of the previous year as he has done warranted by law ? "

The commissioner has not attached numbers to the various questions and their Lordships have found it convenient to number those which they have had to consider in the order in which they have dealt with them.

The authority empowering the income tax officer to discard the assessee's method of accounting and to adopt a method of his own is to be found in section 13 of the statute which after enacting in general terms that income, profits and gains shall be computed in accordance with the method of accounting regularly employed by the assessee, goes on to provide *inter alia* that " if the method employed is such that in the opinion of the income tax officer the income, profits and gains cannot properly be deduced there-

from, then the computation shall be made upon such basis and in such manner as the income tax officer may determine."

There can be no question that in the circumstances, the income tax officer was entitled to disregard the assessee's method of accounting and adopt a method of computation of his own. But the fact that the income tax officer has justifiably proceeded on a basis and in a manner of his own in computing the assessee's income, profits and gains does not, of course, exempt his computation from examination on appeal and if it appears that he has adopted a wrong method the assessment may be set aside. Their Lordships have therefore to consider whether the commissioner and the learned Judges of the High Court were right in answering in the affirmative, as they did, the question above posed.

Now it will be observed at once that the method adopted by the income tax officer has the result of bringing out a sum composed in part of actual interest receipts of the assessee in the year of computation and in part of sums received in previous years and allocated by the assessee to interest in that year. The question is whether this method or combination of methods was legitimate. That it was legitimate to ascertain in the first place the actual receipts of interest in the year of computation is undoubted. Was it legitimate to add the items which the assessee in the year of computation carried to interest account out of sums received in previous years ? Was the officer entitled to treat these allocations as income of the year of computation ?

Where an assessee keeps his books on a cash basis disclosed to the revenue authorities and the officer accepts that basis, it is clear that the calculation must be based on actual receipts in the year of computation. Here, however, the assessee kept his books on a hybrid system and it was his practice to enter sums as he received them in a deposit register not made available to the revenue authorities, without discriminating between interest and capital payments, and then subsequently to allocate and treat as income certain portions of these sums which he attributed to interest. What the officer is directed to compute is not the assessee's receipts but the assessee's income and *in dubio* what the assessee himself chooses to treat as income may well be taken to be income and to arise when he so chooses to treat it. (See *per* Lord Dunedin in delivering the judgment of the Board in *Commissioner of Taxes* v. *Melbourne Trust, Ltd.* [1914] A.C. 1001 at p. 1011.) The sums which the officer has brought into account from the interest register in so far as consisting of allocations from sums received in previous years have never borne tax and in their Lordships' opinion the assessee cannot complain if the officer agrees with the assessee in treating them as income of the year in which the assessee himself first thought fit so to regard them. Their Lordships see nothing contrary to principle in the computation of an assessee's total income for a particular year

as consisting in part of actual receipts in that year and in part of sums carried by the assessee to income account in that year out of the receipts of previous years which have been held in suspense and no part of which has previously been returned as income. Their Lordships do not find that the income tax officer in the present case has acted in any way illegally in computing the profits of the transactions in question for the year 1332 Fasli by taking into account both actual receipts of interest in that year and sums treated by the assessee in that year as receipts of interest by their transference to the interest register from what for this purpose may be regarded as a suspense account.

Their Lordships accordingly in the result find themselves in agreement with the affirmative answer rendered below to this question.

Their Lordships now pass to the consideration of two particular transactions as to which questions have arisen.

It appears that the assessee in respect of two mortgage decrees which he held against one Damodar Das Burman received payment in the relevant year of two sums of Rs. 3,400 and Rs. 2,78,000. The assessee appropriated the whole of the first of these sums to interest and no question arises with regard to it. As regards the second sum he appropriated only Rs. 18,816 to interest and claimed to attribute the balance towards the discharge of capital. The income tax officer brought the whole sum of Rs. 2,78,000 into computation as an interest receipt and the commissioner and the High Court have agreed with him. The question as framed by the commissioner is as follows :—

> 2. " In the circumstances of this case, what portion of the amount received from Damodar Das Burman in the previous year is legally taxable ? "

The facts as stated by the Commissioner are that the total amount of interest irrespective of whether it was paid or not, which had as a matter of calculation, accrued on the debt from the date of its commencement down to the date of the payment of Rs. 2,78,000 to the assessee in the year 1332 Fasli was Rs. 3,09,281. During the currency of the debt the debtor made regular payments over a number of years to the assessee, the total of which payments is not stated. These payments were entered in the deposit register but no allocations thereof were made as between principal and interest and no part of these payments was carried to the interest register. Consequently, no part of these payments was subjected to tax until the year Fasli 1331, when the deposit register became available to the income tax officer. In that year the deposit register showed the receipt of Rs. 38,091 and on this the officer claimed and was paid tax on the footing that it was attributable to interest and not to principal. The result is that against the total interest on the debt, viz., Rs. 3,09,281 no sums had been attributed by the assessee to interest out of the payments made to him by the debtor down to the date of the receipt by him from the debtor of the sum of

Rs. 2,78,000 in the year Fasli 1332, but that the income tax officer had himself treated the sum of Rs. 38,091 received in the year Fasli 1331 as interest and taxed it accordingly. That leaves Rs. 2,71,190 as the balance of the total interest on the debt during its currency towards which balance the assessee made no attributions of interest out of the payments received by him from the debtor during its currency. No tax has accordingly been paid in respect of any of these receipts other than the Rs. 38,091 which the officer treated as an interest payment in the year 1331 Fasli. How in those circumstances should the receipt of Rs. 2,78,000 in the year 1332 Fasli be treated ? The assessee contends that the whole of this sum, other than a sum of Rs. 18,816 which he admits may be treated as a payment of interest, should be treated as a payment against the capital liability of the debtor. But at the date when the assessee received payment of the Rs. 2,78,000 he had not either in his own books or in relation to the tax collector as yet attributed any sum towards the debtor's liability in interest, apart from the sum of Rs. 38,091 which the officer in the previous year had treated as interest. So far as the assessee's interest register showed he had not treated himself as having received any interest and so far as that book, which he put forward to the revenue authorities as showing the interest which he had received is concerned, there was still outstanding the whole sum of Rs. 3,09,281 of interest, as against which must, of course, be set the sum of Rs. 38,091 taxed as interest in the preceding year. In disposing of the first question dealt with above their Lordships have held that the assessee cannot complain if sums which he himself in a particular year treats in his interest register as interest received in that year are also treated by the revenue authorities as income of that year although such sums were in fact received in previous years. Similarly and conversely, their Lordships are of opinion that the assessee cannot complain if he is treated as not having received any payment of interest in years in which he made no appropriations to interest out of sums received by him in these years and neither disclosed such receipts to the revenue authorities nor made any return of any part of them as income. Their Lordships therefore approach the question of how the sum of Rs. 2,78,000 actually received in the year Fasli 1332 is to be dealt with on the footing that up to then no interest had been treated as paid out of the total of Rs. 3,09,281 due other than the sum of Rs. 38,091. Now where interest is outstanding on a principal sum due and the creditor receives an open payment from the debtor without any appropriation of the payment as between capital and interest, by either debtor or creditor, the presumption is that the payment is attributable in the first instance towards the outstanding interest (*Venkatradi Appa Row* v. *Parthasarathi Appa Row*, 1921, L.R. 48 I.A. 150 at p. 153.) This presumption is no doubt operative primarily in questions between debtor and creditor, but in their Lordships'

view, the income tax officer, finding that the assessee received a payment from his debtor of Rs. 2,78,000 in the year Fasli 1332 and that the assessee had not up till then credited himself as having received any interest or disclosed or accounted for any interest receipts to the revenue authorities. was entitled in the circumstances to treat this sum of Rs. 2,78,000 as applicable to the outstanding interest to the extent of Rs. 2,71,190, and accordingly to treat the payment to that extent as income of the assessee in the year of payment. It will be noted that the result of this is that the assessee will be able to treat all the unallocated payments received by him in the years before 1331 Fasli as payments towards capital and none of these prior payments will have borne or can be called upon to bear tax. Under section 34 of the Act, the income tax officer cannot re-open any assessment after the expiry of one year from the end of the year of original assessment.

Their Lordships therefore agree with the learned Judges of the High Court that the answer to this question is in figures Rs. 2,71,190.

The next question relates to the interest on the debt of one Amarnath Bose, against whom the assessee held a judgment. The debtor in the year 1332 Fasli made a payment to the assessee of Rs. 1,38,955. In his interest register for that year he appropriated and entered Rs. 20,000 out of this sum as interest, but he also entered in his interest ledger for that year a sum of Rs. 1.40,107 being appropriations then first made to interest out of sums received from the debtor in previous years, which. of course, had not borne any tax. The appropriations to interest by the assessee in his interest register for the year in question consequently amounted to Rs. 20,000 + Rs. 1,140,107 = Rs. 1,160,107. But of the Rs. 1,40,107 then first appropriated to interest by the asesssee Rs. 80,000 was actually received by him in the year 1331 Fasli and was in that year subjected to tax by the revenue authorities, so that the balance of Rs. 60,107 represented appropriations to interest by the assessee out of sums received in years before 1331. This sum had never before been appropriated by the assessee to interest or treated by him as income in a question with the revenue and, following the principle already laid down by them, their Lordships are of opinion that it was properly regarded by the taxing officer as income of the assessee in the year in which he appropriated it to income.

The question on this topic which was stated by the Commissioner is thus expressed :—

> 3. " What is the amount of profits and gains arising out of the payments made by this judgment debtor legally taxable in this year ? "

Their Lordships agree with the High Court in answering that out of the appropriations to interest in the year of computation the total amount taxable is Rs. 60,107, over and above the proportion representing interest of the payment of Rs. 1,38,955 actually received in the year 1332, such proportion being admitted

to be Rs. 1,23,906, so that the total sum chargeable with tax is Rs. 1,23,906 + Rs. 60,107 = Rs. 1,84,013.

Passing to the further questions raised in the case and omitting a transaction relating to a loan to a Colonel Lewellyn as to which the assessee has acquiesced in the decision of the High Court, their Lordships have next to consider the estimate made by the income tax officer of the income received by the assessee in the year of computation from the purchase of properties under mortgage decrees. The general question which was raised below on behalf of the assessee was not argued before their Lordships, namely, whether when a mortgagee purchases at auction under a decree of the Court the property which was the subject of the mortgage he can be said to have received to any extent the equivalent of the interest due on his mortgage. This question had been decided in the affirmative in a recent case of *Raja Raghunandan Prasad Singh* v. *Commissioner of Income Tax*, 1929, 10 P.L.T. 729, which their Lordships heard on appeal immediately after the present case and in which they are today delivering an affirmative judgment on this point, to which reference may be made. The assessee in the present case admitted the receipt of income in the year in question from this source to the extent of Rs. 4.364. This sum the income tax officer increased to Rs. 1,04,364 and the question stated by the commissioner is :—

> 4. " Whether the assessing officer was right in making an estimate of Rs. 1,04,364 under this head as he has done ? "

The Commissioner states that the assessee " keeps a suit register in which the progress of each case is supposed to be noted but no attempt is made to keep this register up to date and in fact the sum of Rs. 4,364 referred to above is shown neither in this register nor in the interest account. On referring to the history of assessments made in previous years I find that in the assessment made in the year 1924–25 while the assessee showed no income under this head the assessing officer estimated the income to be Rs. 6,00,000. This sum was reduced on appeal to two lacs and the order on appeal was maintained by the then commissioner. In the assessment made in the year 1925–26 for similar reasons the assessing officer added back a sum of Rs. 3,00,000 without objection by the assessee. In that year assessee showed no income from this source in the return, but admitted in the course of assessment proceedings a receipt of Rs. 20,069 to which the assessing officer added back as stated above a sum of Rs. 3,00,000 without exception on the part of the assessee. Similarly in the year 1926–27 (the assessment with which we are now dealing) the assessee showed no income from this source in the statement filed with his return of income, but subsequently admitted realisation of Rs. 4,364 only." In the High Court the Chief Justice (Courtney Terrell) after pointing out that the question is one of quantum only, says :—" Learned counsel for the assessee has argued that the officer is not entitled to make

a guess without evidence and I agree with that contention, but in this case the state of affairs in the previous years, coupled with the fact that the assessee had a large mortgage loan business and must have enforced mortgages by sale on many occasions, afford ample material for the assessment made. I would answer the question in the affirmative." The other Judges concurred and their Lordships also agree, adding only that if the assessee wished to displace the taxing officer's estimate, it was open to him to adduce evidence of all his purchase transactions during the year and of the financial results thereof, which he apparently made no attempt to do.

Their Lordships next turn to the consideration of a transaction between the assessee and one Kumar Ganesh Singh. In the year 1332 Fasli Kumar Ganesh Singh owed the assessee 32 lacs as principal and Rs. 6,09,571 as interest, or a total of Rs. 38,09,571 in all, in respect of an unsecured loan. In that year the assessee and his debtor entered into an arrangement whereby, as the commissioner states " the assessee took over from the debtor in satisfaction of this amount the following items of property movable or immovable :—

	Rs.
(1) The Kajora Colliery, valued at ..	7,37,339
(2) Shares in different companies, valued at	94,125
(3) Bills receivable by the above brokers [*i.e.*, Ganesh Singh's firm]	48,809
(4) Decree	1,42,594
(5) Transfer of loan to the Agra United Company	10,00,000
(6) Pro-notes and hand-notes [of third parties]	52,106
(7) Hand-notes from Kumar Ganesh Singh	17,34,596
Rs.	38,09,569 "

The Commissioner unfortunately omitted to formulate any question of law arising out of this transaction. The duty of the High Court under section 66 (5) is to " decide the questions of law raised " by the case referred to them by the commissioner and it is for the commissioner to state formally the questions which arise. Here the High Court itself formulated the question to be decided as being—

> 5. " Whether the interest (*i.e.*, the sum of Rs. 6,09,571 due as interest by the debtor) can be considered to have been received and assessable ? "

Their Lordships deprecate this departure from regular procedure, but in the circumstances have not thought it proper to decline to express their view on the question thus informally presented.

The Commissioner's opinion was that the transaction when rightly viewed amounted to the acceptance by the assessee from

his debtor, in lieu and satisfaction of the capital and interest due to him, of assets and securities *prima facie* worth the valuation put upon them and that as the assessee had thus received payment in kind of the interest due to him in full, he should be assessed accordingly. There is, of course, no doubt that a liability to pay interest, like a liability to make any other payment, may be satisfied by a transference of assets other than cash and that a receipt in kind may be taxable income. But for this to be so it is essential that what is received in kind should be the equivalent of cash or, in other words, should be money's worth (*Californian Copper Syndicate* v. *Harris*, 1904, 6 F. 894; 5 Tax Cases 159: *Scottish and Canadian General Investment Company* v. *Easson*, 1922, S.C. 242; 8 Tax Cases 265, both cited by Das J. below). Now here the first six items, amounting to Rs. 20,74,973, may perhaps reasonably enough be regarded as the equivalent of cash, but the seventh item of Rs. 17,34,596, consisting of the debtor's own promissory notes, was clearly not the equivalent of cash. A debtor who gives his creditor a promissory note for the sum he owes can in no sense be said to pay his creditor; he merely gives him a document or voucher of debt possessing certain legal attributes. So far then as this item of Rs. 17,34,596 is concerned the assessee did not receive payment of any taxable income from his debtor or indeed any payment at all. In so holding their Lordships find themselves in agreement with the learned Judges of the High Court who differed on this point from the Commissioner.

This conclusion seems to have been regarded in the High Court as decisive of the whole question, but before their Lordships an argument was submitted for the Crown which does not appear to have been advanced below. Assuming that the first six items, amounting to Rs. 20,74,973, may be treated as money's worth, Counsel for the Crown contended that this sum, which far exceeded the total amount of interest due, must be treated as applicable in the first place to the discharge of the debtor's liability for interest. He relied on the presumption, already invoked in the case of Ramodar Das Burman above, that a creditor is presumed to apply payments received from his debtor towards the extinction of interest claims before capital claims. But the situation which their Lordships are now considering differs materially from that which existed in the case of Ramodar Das Burman. In that case, apart from other specialities, there was no settlement, but merely an open payment to account. Here there was an arrangement affecting the whole indebtedness whereby certain assets were accepted in part satisfaction and promissory notes were taken for the balance. The basis of the presumption, namely, that it is to the creditor's advantage to attribute payments to interest in the first place, leaving the interest-bearing capital outstanding, is gone. Moreover, if the question were one between Kumar Ganesh Singh and the assessee, *i.e.*, between debtor and creditor, the assessee might up to the last moment appropriate

the Rs. 20,74,973 to capital account (*Cory Brothers & Co.* v. *Owners of the "Mecca"* [1897], A.C. 286), and there is authority for the proposition that in a question with the revenue the taxpayer is entitled to appropriate payments as between capital and interest in the manner least disadvantageous to himself (*Smith* v. *Law Guarantee and Trust Society, Ltd.* [1904], 2 Ch. 569). Their Lordships have also not omitted to bear in mind the provisions of sections 60 and 61 of the Indian Contract Act, though these were not relied on in argument as applicable to the case. In the result their Lordships are of opinion that, having regard to the nature of the transaction, the assessee is entitled to say that he has accepted the first six items in discharge *pro tanto* of his debtor's capital liability and that the capital debt now stands discharged to that extent. No part of the sum of Rs. 20,74,973 accordingly was received by the assessee as taxable income in the year of computation. The result is that the Commissioner's appeal against the answer of the High Court to the fifth question fails.

A subsidiary point arose as to the year to which this income, if it was received, ought to be attributed. The commissioner put the question—

> 6. " Whether if any sum is held to have been realised, it was legally recovered in the year 1331 or in the year 1332 ? "

The Judges of the High Court agreeing with the commissioner expressed the view that if there was any receipt of interest it was attributable to the year 1332. The learned Chief Justice stated that it was " conceded on both sides that the instrument of transfer was executed and dated on April 29th, 1925, that is, in 1332, and that the title to the assets conveyed passed on that date. Had the amount of interest been assessable it would have been assessable in respect of 1332." Their Lordships agree, and the answer of the High Court to the question will be affirmed.

The next question is of a different character. When Kumar Ganesh Singh, who was a sub-lessee of the Kajora Colliery, transferred it to the assessee as of the value of Rs. 7,37,339 he represented it to be free from encumbrances. The assessee subsequently discovered that there were arrears of fixed or dead rent due to the superior landlord to the extent of Rs. 67,872. The assessee paid this sum to the superior landlord and now claims to deduct it from his assessment. In this instance, their Lordships are concerned with the computation of the profits or losses of a business under section 10 of the Act, for the assessee was carrying on the business of a colliery owner.

The question arising in respect of this matter is put thus by the commissioner :—

> 7. " Whether the assessee is legally entitled to deduct the arrears of royalty which had accrued in previous years up to the date of his possession ? "

The relevant provisions of the Income Tax Act are contained in section 10 which enacts in sub-section (2) that the profits or gains of a business shall be computed " after making the following allowances, namely :—

(i) any rent paid for the premises in which such business is carried on . . . .

* * * *

(ix) any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains."

Sub-section (3) provides that :—

" In sub-section (2) the word ' paid ' means actually paid or received according to the method of accounting upon the basis of which the profits or gains are computed under this section."

The Commissioner was of opinion that the question which he had stated should be answered in the negative, on the two grounds that " admittedly " the assessee was entitled to recover from Kumar Ganesh Singh the arrears of rent for the period prior to the assessee's possession, and that royalties were not rent within the statutory meaning. The High Court answered the question in the affirmative, holding that royalties may properly be considered as rent ; that it was " a condition without which further mining operations could not be effected " that payment should be made of the arrears which were " of the nature of a charge in the year 1332 " ; and that as the previous tenants had not paid their rent during the period in arrear they had not been able to deduct rent in their returns, and there was no reason why, when the arrears came to be paid, they should not be deducted as though they had accrued in the year in which they were paid.

In their Lordships' view the solution of the problem is to be found in a consideration of the nature of the particular transaction out of which it has arisen. The assessee agreed to accept the transfer of the colliery in part satisfaction of Kumar Ganesh Singh's liability to him on the footing that it was value for Rs. 7,37,399. Had he known, what was concealed from him, that arrears of unpaid rent had accumulated which he would have to pay to the superior landlord, he would have correspondingly diminished the sum at which he was prepared to take over the colliery and, according to the commissioner, it was admitted that the assessee has a claim against Kumar Ganesh Singh for the difference, although he may not be able to recover it. If it were recovered, it would properly be credited in diminution of the figure at which the colliery was taken over and would not enter the profit and loss account of working the colliery. From this it follows that the sum overpaid by the assessee for the colliery cannot properly be described as a loss sustained by him on income account. It is a sum which was payable by him in order to get possession of the colliery, not a sum expended by him in the

carrying on of the colliery. It is not rent for any period of his possession, nor is it an expenditure incurred by the assessee for the purpose of earning the profits or gains of the colliery business. If the assessee paid it without any legal liability or necessity on his part to do so, such a voluntary payment is not a permissible deduction from income. Their Lordships are therefore of opinion that in the circumstances of this transaction the question should be answered in the negative.

Their Lordships have now dealt with all the questions which were argued before them. The result is the affirmation of the decision of the High Court, except as regards question 7 as above numbered, on which their Lordships are of opinion that the appeal of the Income Tax Commissioner should be allowed, the finding of the High Court reversed and the Order of the Commissioner of the 24th May, 1927, restored.

Their Lordships desire to draw attention to the inconvenience which has arisen from the omission on the part of the Commissioner to number the questions which he has stated. It is desirable that the questions of law which the Commissioner refers to the High Court should, for convenience of reference, be assembled and numbered consecutively at the end of the stated case. Their Lordships have also been embarrassed in disposing of the appeal by the absence of a formal decree by the High Court following upon their judgment of the 25th November, 1929. Their Lordships have nothing before them to show whether, and if so how, the costs in the case were dealt with below.

Their Lordships will humbly advise His Majesty that in these consolidated appeals (1) the appeal of the Commissioner of Income Tax so far as relating to the seventh question as above numbered be allowed, the judgment of the High Court reversed, and the Order of the Commissioner of the 24th May, 1927, restored, and as regards the other question on which he appealed be dismissed; (2) the appeal of the Maharajadhiraj of Darbhanga be dismissed; and (3) the case be referred back to the High Court in order that effect may be given to the Order to be pronounced herein by His Majesty in Council.

Inasmuch as the Commissioner of Income Tax has been successful on one of the two points on which he appealed and the assessee has been unsuccessful on all the points of his appeal, the Commissioner will have three-fourths of his costs of the consolidated appeals before this Board. The costs below will be dealt with by the High Court, on the case going back to it.

In the Privy Council.

THE COMMISSIONER OF INCOME TAX, BIHAR AND ORISSA

v.

MAHARAJADHIRAJA KAMESHWAR SINGH OF DARBHANGA

MAHARAJADHIRAJA KAMESHWAR SINGH OF DARBHANGA

v.

THE COMMISSIONER OF INCOME TAX, BIHAR AND ORISSA,

(*Consolidated Appeals.*)

DELIVERED BY LORD MACMILLAN.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1933.