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In the present case on the evidence the Courts have found that the debtor admitted the claim without full knowledge of his legal rights, and that finding must be accepted in second appeal as a finding of fact. The whole question which has presented difficulty to my mind is whether in view of the adjustment of the claim between the parties the application of section 12 of the Dekkhan Agriculturists' Relief Act was not excluded in virtue of the provisions of Order XXIII, Rule 3. But on the special facts of this case, as I have said, it does not seem to me that the application of that section was necessarily excluded. If that section applies it is clear that the conclusion reached by the lower Courts is really a conclusion based on the circumstances and the evidence in the case which must be accepted.

Decree confirmed.

J. G. R.

CIVIL REFERENCE.

Before Sir Nroman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

IN RE THE TATA INDUSTRIAL BANK, LIMITED*.

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Indian Income Tax Act (VII of 1918), section 9—Banking concern—Income tax—Income derived from business—Deduction from assessable income, of depreciation in the value of securities held by the bank—" Profits."

A banking concern was assessed to income tax on profits amounting to Rs. 12,54,130 but claimed to deduct therefrom a sum of Rs. 2,98,000 which represented depreciation on securities, arrived at by comparing the market rates with the valuations in the books of the bank :—

Held, that the deduction claimed could not be allowed under section 9 of the Indian Income Tax Act, 1918.

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The term "profits" in section 9 of the Act means chargeable income and must be computed from the gross income after allowing for the sums paid and debited as detailed in sub-section 2.

THIS was a reference made by J. P. Brander, Chief Revenue Authority, Bombay, under section 51 of the Indian Income Tax Act, 1918.

The reference was in the following terms :—

"As desired by the Tata Industrial Bank, Ltd., I have the honour to refer to your Lordships, under section 51 of the Indian Income Tax Act (VII of 1918), a question of interpretation of section 8 of this Act which has arisen in the course of the assessment proceedings of this company.

"2. *Facts of the case* :—The Tata Industrial Bank, Limited, has its Head office in Bombay and was assessed by the Collector of Income Tax, Bombay, to Income Tax and Super Tax for the year 1920-21 on profits amounting to Rs. 12,96,695-3-2 and Rs. 20,63,155-14-4 respectively. On appeal the Commissioner of Income Tax, Bombay, decided to tax the company on Rs. 12,54,130 on account of Income Tax and Rs. 15,97,959 on account of Super Tax. Before the Collector and Commissioner, the company claimed out of the above taxable profits, a deduction amounting to Rs. 2,98,000 alleged to be the amount of depreciation on war bonds and securities belonging to the said company. This item was not allowed by the said officers on the ground that it was not allowable under section 9 of the Income Tax Act, under which the taxable profits of the company were to be calculated. The company has invested a part of its capital in war bonds and other securities and on account of depreciation in the value of these securities, it has written off from its profits the said sum of Rs. 2,98,000 arrived at as per details given in annexure A. From these details, it will be seen that this item includes (1) Rs. 750 on account of loss on

sale of certain shares; (2) Rs. 47,619 on account of loss in exchange on 500 shares of the British Italian Corporation; (3) Rs. 1,500 on account of sale of 5½ per cent. war bonds by the Cawnpore Branch and (4) Rs. 10,300 on account of Calcutta Trading loss included under 'depreciation' *through oversight* as the company now admits. The balance is on account of depreciation on securities arrived at by comparing market rates with the valuation in the books of the company. From the depreciation thus arrived at Rs. 7,365 on account of appreciation in the value of 5½ per cent. war bonds, 1920, have been deducted. The original value of these war bonds is shown at Rs. 5,44,725, the book value at Rs. 5,37,621 and the market price at Rs. 5,44,986.

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"3. *Question to be decided by the High Court*:—For the purpose of Income Tax, the company is carrying on business and the profits taxable are to be ascertained as laid down in section 9 of the Income Tax Act. Sub-section 2 indicates how the taxable profits are to be ascertained. It states that they are to be ascertained after allowing the deductions mentioned therein. The company admits that none of the deductions specifically mentioned in this sub-section apply to this item of Rs. 2,98,000 and desire your Lordships to decide the following questions:—

"(1) Whether on a true construction of the Indian Income Tax Act of 1918 and in particular section 9, the only allowances and deductions to be made from the gross income in order to arrive at real assessable profits are those mentioned in sub-section 2 of section 9 and whether the said section 9 prohibits any allowances or deductions other than those specifically mentioned therein.

"(2) Whether on a true construction of the said Act and in particular section 9, the assessing officer is not

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entitled in his discretion to allow a deduction which is proper and necessary to be made in addition to those specifically enumerated in sub-section 2 in order to ascertain the real assessable profits.

"(3) Whether the deduction of Rs. 2,98,000 (being the amount of depreciation on war bonds and securities) out of the gross earnings of the assessee is a deduction proper and necessary to be made in order to ascertain the real assessable profits under the said Act, and

"(4) Whether the Act attaches to the expression 'profits' a meaning different from what is known as commercial profits.

"4. As section 51 of the Income Tax Act requires that the Chief Revenue Authority shall, while referring a case to the High Court, give his own opinion as regards the points at issue, I beg to give my opinion regarding these issues, in the following paragraphs.

"5. In section 5 of the Income Tax Act, six classes of income liable to Income Tax are mentioned. Class (IV) applies to the present case in which 'income derived from business' is being taxed. This section 5 lays down that tax is to be levied on these six classes of income in the manner thereinafter appearing. The following six sections, viz., *6 to 11, describe the manner* in which tax is to be levied in the case of each class of income referred *to in this section* 5. Section 9 refers to 'income derived from business' and reading it with section 5, we must infer that 'income from business' is to be charged to Income Tax in the manner specified in section 9. This section 9 is divided into two sub-sections. Sub-section (1) says that "tax shall be payable by an assessee under the head 'income derived from business' in respect of the profits of any business carried on by him." Then follows sub-section (2) which says that the profits to be taxed "shall

be computed after making the following allowances.' These are 9 in number and are evidently meant to be exhaustive as the last allowance, viz., No. (IX) referred to 'any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning the profits to be taxed.' The section seems to have been meant to indicate an exhaustive method of calculating the profits liable to be taxed and leaves no discretion to the assessing officer to make any other allowance beyond those mentioned in it. If the Legislature had intended to leave it to the Collector of Income Tax to make any allowance or deduction whatever which he thought reasonable, it would have specifically stated so. The question of allowing discretion to the Collector seems to have been duly considered and provided for in sub-section (2) (IX). Any expenditure which the Collector thinks to have been incurred solely for earning profits and which is not of the nature of capital expenditure is allowable. The 'allowances' referred to in sub-section (2) are of two kinds, viz., (1) those referring to sums paid and (2) those referring to sums debited in respect of depreciation. Discretion has been deliberately left only in case of (1) in sub-clause (IX). There is no mention at all of depreciation in it and the omission cannot but be intentional. In the 'Notes on clauses' appended to the statement of object and reasons published by the Imperial Government with the draft Income Tax Bill referring to this Act, as regards this section 9 (2) the following note has been expressly published :—'The allowances which can be claimed in computing profits are specifically stated to prevent the diversity of practice which had occurred in the past.' (Vide please page 37, Bombay Income Tax Manual). This leaves absolutely no doubt as to what the intention of Legislature was. What *can be claimed* is specifically

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mentioned. Whatever is not mentioned cannot be claimed. This is the only reasonable inference.

"5-A. On behalf of the company, it has been pointed out that if the Legislature intended to make section 9 (2) exhaustive, they would have used the words 'only' or 'no others' after the words 'the following allowances' in sub-section (2). I am inclined to think that these words have not been added as there was no necessity to do so, the meaning being perfectly clear without them. Section 69 of the Transfer of Property Act had been pointed out to me as showing that such words have been used by the Legislature whenever it was intended to make a section exhaustive. In the present case, however, sub-clause (IX) having been put in, the use of such words seems to have been considered redundant.

"6. It has been further argued on behalf of the company that in this sub-section (2), it is not stated from which sum allowances to be made are to be deducted and so we must infer that we must first ascertain profits by allowing such preliminary deductions as those of the nature of the item of Rs. 2,98,000 and then allow the deductions specifically mentioned in sub-section (2). The company in its petition to me states, 'The item of deduction claimed by your petitioner was not claimed as a deduction specified by the Act, but as a deduction necessary to be made as a preliminary to ascertaining the profits from which the deductions specifically allowed by the Act are to be made.' I am respectfully of opinion that this is going too far. If the Legislature meant that the Collector should first ascertain profits as he liked by allowing whatever deductions he liked and then after doing this, he should make the deductions specified in sub-section (2), would it not have stated so clearly? Such an intention cannot be left to be inferred from the language used in

sub-section (1). The only reasonable construction which can be given to this section is to deduct, out of the gross receipts or profits, the deductions mentioned in sub-section (2) and tax the balance. Depreciation of any kind is never taken into account in arriving at gross profits.

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"7. In support of their contention, the company has quoted before me the following extract from the judgment of Lord Parker in the case of *Usher's Wiltshire Brewery, Limited* v. *Bruce* [1915] Appeal Cases, p. 458:—

'The better view, however, appears to be that, where a deduction is proper and necessary to be made in order to ascertain the balance of profits and gains, it ought to be allowed, notwithstanding anything in the first rule or in section 159, provided there is no prohibition against such an allowance in any of the subsequent rules applicable to the case.'

"8. This case was under the English Income Tax Act and the provisions of that Act in this connection differ so much from the provisions of the Indian Income Tax Act that this decision can throw but little light on the points in dispute. The language used in section 9 of the Indian Income Tax Act, differs from that used in the English Income Tax Act, 1842, 5 & 6 Vict., c. 35 and the rules made thereunder (vide Rules quoted on page 92 of the Income Tax Manual). The Indian Act mentions the allowances which *can be claimed.* The English Act for the most part mentions the allowances which *cannot be claimed.* For the above reasons I think that as regards issue No. 1, the answer must be in the affirmative and as regards issue No. 2, the answer must be in the negative. As regards issue No. 3, my opinion is that as an item of depreciation the amount of Rs. 2,98,000 too cannot be allowed.

"9. A company may keep the book value of its assets at the lowest price they might reach at any time. This

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may be a wise thing to do from a business point of view. It is certainly very wise not to distribute any profit among the shareholders without providing for all contingencies, but that has nothing to do with the payment of income tax which depends upon the provisions of the Income Tax Act alone. The company has drawn my attention to the learned exposition of the word 'profits' by Fletcher Moulton L. J. in *In re the Spanish Prospecting Company, Limited*, [1911] 1 Chancery, p. 92, to which I beg to invite your Lordships' attention. This judgment, in my opinion, seems to prove more the case for the Crown than the present petitioners. The learned Judge says 'profits' implies a comparison between the state of business at two specific dates usually separated by the interval of a year. The fundamental meaning is the amount of gain made by the business during the year. This can only be ascertained by comparison of the assets of the business at the two dates. For practical purposes these assets in calculating profits must be valued and not merely enumerated. Even if the assets were identical at the two periods it would by no means follow that there had been neither gain nor loss, because the market value, the value in exchange of these assets, might have altered greatly in the meanwhile. A stock of fashionable goods is worth much more than the same stock when the fashion has changed. And to a less degree but no less certainly the same considerations must apply to buildings, plant and other fixed assets used in the business, because one form of business risk against which business gains must protect the trader is the varying of the fixed assets used in the business. A depreciation in value, whether from physical or commercial causes which affects their realisable value is in truth a business loss. We start therefore with this fundamental definition of profits

namely if the total assets of business at the two dates be compared, the increase which they show at the later date as compared with the earlier date (due allowance of course being made up for any capital introduction into or taken out of the business in the meanwhile) represents in strictness the profits of the business during the period in question. What the learned Judge meant was clearly that to ascertain the profits of a concern for any particular year, we must take the market value of the total assets (including fixed capital, circulating capital and stock-in-trade) at the beginning and end of the year and the difference between the two valuations would represent profit or loss for the period. The profit thus arrived at would be the net profit and not gross profit from which further deductions are to be made. This is the correct method of ascertaining profits according to this learned Judge, but he says that in practice there are various departures from this method to suit particular concerns. As regards ascertainment of profits for income tax purposes he expressly adds, 'But though there is a wide field for variation of practice in these estimations of profit in the domestic documents of a firm or a company, this liberty ceases at once when rights of third persons intervene. For instance, the revenue has a right to a certain percentage of the profits of a company by way of income tax. The actual profit and loss accounts of the company do not in any way bind the Crown in arriving at the tax to be paid. A company may wisely write off liberally under the head of depreciation, but they will be only allowed to deduct the sum representing actual depreciation for the purpose of calculating the profits for income tax.' If we are to follow this judgment, clearly we must restrict ourselves to the provisions of the Income Tax Act to arrive at taxable profits and allow no depreciation other than allowable

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under it. Under section 9 (2) (VI) of the Income Tax Act the depreciation is allowable only in respect of 'Buildings, machinery or plant' and nothing else. Depreciation on securities is not mentioned in this sub-section (2) (VI) and so cannot be allowed.

"10. In this connection attention is invited to para. 3 above and annexure A giving details as to how this sum of Rs. 2,98,000 is arrived at. If this company habitually uses a part of its resources in the purchase of securities or shares with a view to obtaining a profit, it can be said to be carrying on a trade in securities for the sake of obtaining profit therefrom and allowed to value its securities at the close of each year at cost or market price whichever be the lower, to arrive at the profit earned from this part of its business. The securities in this case will be treated as stock-in-trade and allowed to be valued at cost or market price. This will take account of both depreciation and appreciation in values.

"Appreciation over book values up to cost price will be in this case treated as part of taxable profit. At the time the appeal was heard before the Commissioner, it was stated on behalf of the company that it intended to write down its securities to the lowest market rates reached at any time and to keep their values at these rates without taking into account any subsequent rise in price until the securities were actually sold off. As regards this reference to the High Court, however, the company's Solicitors state as under :—

'Our clients submit that they are entitled to debit to profit and loss account for the purpose of ascertaining profits upon which income tax is payable the difference between (1) the cost of securities purchased during the period of accounts or the value at the date of the commencement of the account, and

'(2) the realisable value at the date of the close of the account.

'If the whole account shows a depreciation, such depreciation is taken into account in arriving at the net profits. We are to submit that the question as to whether appreciation of the securities would have to be brought into account is purely academic at the present stage as no such contingency has arisen and any decision of the Court, thereon, would necessarily be *obiter dicta.*

'Arguments based on such an assumption may be relevant at the hearing, but we do not think that the Court can be asked to decide a question which has not arisen.'

"The whole case for the Crown is that if the company proves that it habitually invests a part of its resources in shares and securities with a view to earn a profit by their sale, it can be allowed to value its securities at the end of each accounting period at cost or market price whichever be the lower as if they were its stock-in-trade. This will make due allowance for any depreciation in the value of its holdings but will at the same time take into account appreciations too up to cost price. If the company is not prepared to prove that a part of its business consists of earning profits by investing its money in shares and securities and to value them at the close of each year at cost or market price whichever be the lower it will not be entitled to any deduction on account of depreciation. Securities are not like machinery or buildings which depreciate with use and become in course of time valueless. They will depreciate and appreciate according to the state of the money market and the demand for them.

"11. The company argues that the securities form part not of its 'fixed capital' but its 'circulating

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capital' that as stated in Buckley on Cos. at page 653 circulating capital means 'property acquired or purchased with a view to resale at a profit' and 'fixed capital' means 'property acquired and intended for retention and employment with a view to profit' and that although the law may be in some state of uncertainty as to whether a company may pay dividends without making good a loss to its fixed capital, there is no room for doubt that the law is that a company is prohibited from paying dividends until it has made good any loss which may have accrued to its circulating capital. As regards this argument it can be very easily met. As stated by Lord Justice Fletcher Moulton in his judgment quoted above for the Income Tax purposes we have to follow the provisions of the Income Tax Act and not the Company's Act or any other Act. Besides the attitude taken up by the company in claiming only depreciation as such without agreeing to take into account appreciation is clearly unreasonable. It would be quite unfair to public revenue to make an allowance for losses which may after all prove to be wholly imaginary. Securities which may depreciate this year to the extent of 3 lakhs may appreciate next year to the extent of 5 lakhs. To revalue them only when they depreciate and not when they appreciate is clearly a one-sided action which is not contemplated at all in the method of calculation of profit as laid by the learned Judge Fletcher Moulton on whose judgment the company itself relies. This Judge lays down that to ascertain profits, all the assets must be valued at the market value at the beginning and end of the year of accounts. The position taken up by the Crown is very reasonable. The company may, as stated above, agree to be treated as dealer in shares and securities and value the stock of these held by it every year at cost or market price whichever be the lower, thus getting full

advantage of all depreciation below cost and taking into account all appreciations up to cost value.

"12. For all these reasons I am clearly of opinion that as regards the item of Rs. 2,98,000 on the understanding that the company is a dealer in shares and securities, it can be allowed to value its stock of these at cost or market price whichever be the lower and any loss or profit worked out thus taken into account. As an item of depreciation pure and simple the above sum cannot be allowed.

"13. As regards the 4th question I would say that I agree with the learned Judge whose judgment is quoted in para. 9 and say that for the purpose of Income Tax 'profit' is what is arrived at after making from the gross profit or receipts the deduction mentioned in section 9 (2) of the Act."

The reference was heard.

B. J. Desai, instructed by Messrs. *Wadia, Gandhy & Co.*, for the Tata Industrial Bank:—Under the Indian Income Tax Act the tax is levied in respect of profits of a business: such profits are computed after making allowances enumerated in section 9 of the Act. The term "profits" is not defined in the Act.

[MACLEOD, C. J.—The word "profits" would ordinarily mean trade profits of the year.]

When the word "profits" is not otherwise defined either by the contract of the parties or by the Legislature, it would mean the gross income less depreciation: see, *In re Spanish Prospecting Company, Limited*[1] and *Verner* v. *General and Commercial Investment Trust*[2].

In the English Income Tax Act, 1842 (5 & 6 Vict., c. 35), the Legislature indicates what allowances should

[1] [1911] 1 Ch. 92. [2] [1894] 2 Ch. 239.

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not be made in estimating profits (see Schedules C and D): whereas, in the Indian Income Tax Act (VII of 1918), section 9, the Legislature provides for the allowances that should be made in arriving at profits. The enumeration of allowances in section 9 is by no means exhaustive. What is intended by the Legislature is that in all cases, the statutory allowances should be compulsorily made; but that leaves quite untouched all reasonable allowances that can and must be made according to the exigencies of each case at the discretion of the deciding authority: *Usher's Wiltshire Brewery, Limited* v. *Bruce*(1). Where the Legislature means to make any enumeration exhaustive it uses the expression "in the following cases and in no others" (see section 69 of the Transfer of Property Act, 1882). The exceptions enumerated in section 9 of the Act are general to every business: they are, therefore, enumerated as obligatory deductions. Beyond these, there still remains a discretion to make certain deductions peculiar to each business; and this discretion is preserved inviolate.

Under sub-section 2 of section 9 of the Indian Income Tax Act, we have not got the first factor from which the allowances are to be made. That first factor is nowhere defined in the Act. It is, therefore, permissible to make a large number of deductions peculiar to each trade.

Bahadurji, acting Advocate General, with *J. C. Bowen*, Government Solicitor, for the Crown:—There are sufficient indications in the Indian Income Tax Act, 1918, to show from what item the deductions enumerated in section 9 (2) are to be made. The Chapter in which section 9 occurs is headed "Taxable income". Section 3 starts with "all income from whatever source it is derived": section 5 enumerates the different classes

(1) [1915] A. C. 433 at p. 458.

of income which are taxable, and class 4 mentions "income derived from business". Section 9 also starts with "income derived from business"; and it goes on to provide how profits are to be ascertained from income. The word "profits" in England means commercial profits: see *Mersey Docks and Harbour Board v. Lucas*[1]. Commercial profits mean the same thing as gross profits, which are arrived at by deducting expenses from income.

Ordinarily, the Collector has first of all to ascertain income; and then to ascertain profits by making deductions under the nine heads from such income.

Clause 6 of sub-section 2 of section 9 refers to depreciations, but such depreciation is confined to "buildings, machinery or plant". There is also a similar provision in section 56 of the Consolidated Income Tax Act (8 & 9 Geo. V, c. 40).

The scheme of the English Income Tax Act is given at p. lxxi of Dowell's Income Tax Act (8th Edn.).

C. A. V.

MACLEOD, C. J.:—This is a reference by the Chief Revenue Authority, Bombay, under section 51 of the Indian Income Tax Act, with regard to the interpretation of section 9 of the Act.

The Tata Industrial Bank was assessed by the Collector of Income Tax for the year 1920-21 on profits amounting to nearly thirteen lakhs. I omit all mention of super-tax as unnecessary. On appeal to the Commissioner a slight reduction was made, but before both authorities an important question was raised by the Bank since they claimed to deduct from the taxable profits a sum of Rs. 2,98,000 said to be the amount of depreciation on war bonds and securities belonging to

[1] (1881) 51 L. J. Q. B. 114 at p. 116 ; (1883) 8 App. Cas. 891 at p. 912.

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the Bank, arrived at by comparing the market rates with the valuations in the Books of the Bank. This deduction was not allowed on the ground that the only allowances and deductions to be made from the gross income in order to arrive at real assessable profits were those mentioned in sub-section 2 of section 9.

The following questions were referred to the High Court for decision :—

(1) Whether on a true construction of the Indian Income Tax Act of 1918 and in particular section 9, the only allowances and deductions to be made from the gross income in order to arrive at real assessable profits are those mentioned in sub-section 2 of section 9 and whether the said section 9 prohibits any allowances or deductions other than those specifically mentioned therein.

(2) Whether on a true construction of the said Act and in particular section 9, the assessing officer is not entitled in his discretion to allow a deduction which is proper and necessary to be made in addition to those specifically enumerated in sub-section 2 in order to ascertain the real assessable profits.

(3) Whether the deduction of Rs. 2,98,000 (being the amount of depreciation on war bonds and securities) out of the gross earnings of the assessee is a deduction proper and necessary to be made in order to ascertain the real assessable profits under the said Act, and

(4) Whether the Act attaches to the expression "profits" a meaning different from what is known as commercial profits.

Section 5 of the Act includes among the classes of income which shall be chargeable to Income Tax "Income derived from business."

Under section 9 (1) the Tax shall be payable by an assessee under the head "Income derived from business" in respect of the profits of any business carried on by him.

Under section 9 (2) such profits shall be computed after making the following allowances in respect of sums paid or in the case of depreciation debited.

Items I to V, VIII and IX are items of actual expenditure, item VII deals with the case of machinery sold

at a less price than the cost less depreciation, item VI deals with the depreciation of machinery, plant and buildings.

It would appear, therefore, that with regard to assets owned by the assessee other than machinery, plant and buildings, a debit for depreciation is not allowed.

The difficulty in the case arises from the fact that various meanings can be ascribed to the word 'profits.'

The petitioners have relied on the definition of "profits" as laid down in *In re Spanish Prospecting Company, Limited*[1]. The claimants agreed to serve the company at a fixed salary which they were not to be entitled to draw except out of profits (if any) arising from the business of the company. The company went into voluntary liquidation. After all the creditors except the claimants were paid and all the capital subscribed was paid to the share-holders, there remained a surplus in the hands of the liquidators which the claimants contended should be treated as profits within the terms of their agreement. Two contributories took out a summons asking for a declaration that the claimants were not entitled to prove in respect of the surplus on the ground that profits should be restricted to profits realized by the company as a going concern.

Fletcher Moulton L. J. said :—

"The word 'profits' has in my opinion a well defined legal meaning, and this meaning coincides with the fundamental conception of profits in general parlance, although in mercantile phraseology the word may at times bear meanings indicated by the special context which deviate in some respects from this fundamental signification. 'Profits' implies comparison between the state of a business at two specific dates usually separated by an interval of a year. The fundamental meaning is the amount of gain made by the business during the year. This can only be ascertained by a comparison of the assets of the business at the two dates. For practical purposes these assets in calculating profits must be valued and

(1) [1911] 1 Ch. 92 at p. 98.

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not merely enumerated.........A depreciation in value, whether from physical or commercial causes, which affects their realizable value is in truth a business loss.........But though there is a wide field for variation of practice in these estimations of profit in the domestic documents of a firm or a company, this liberty ceases at once when the rights of third persons intervene. For instance, the revenue has a right to a certain percentage of the profits of a company by way of income tax. *The actual profit and loss accounts of the company do not in any way bind the Crown in arriving at the tax to be paid.*"

No doubt in the balance sheet of a business the excess of assets over liabilities or *vice versa* is represented by a credit or debit to the profit and loss account, so as to make the totals even. There is not much difficulty in calculating the liabilities, the value of the balance sheet depends on the correct valuation of the assets. It is the reckless or over-sanguine valuation of assets which is the precursor of ruin. Now if it had been intended by the Act that the profits for any particular year should be calculated by the gain in the excess of assets over liabilities during that period nothing would have been easier than to give expression to that intention. But on the one hand, difficulties would arise in the case of every assessment in ascertaining that the assessee had made a fair valuation of his assets, while, on the other, the assessee would be taxed on every appreciation in the market value of his assets, and that is certainly not the object of an Income Tax Act. It must be remembered that the word 'profit' is only used for explaining the method by which taxable income is to be computed. I am, therefore, clearly of opinion that we are not concerned with the legal definition of 'profits' as laid down by Moulton L. J. in the case above cited.

As the learned Lord Justice points out, a firm or a company has a wide field for variation in practice in its estimation of its profits but that liberty ceases

when the rights of a third party intervene. And in the case of Income Tax the Legislature prescribes the manner in which the taxable amount is to be calculated. The income of a business may be defined as the gross earnings either actually received or properly considered as if they had been received, after deducting all ordinary expenses incurred in the earning. These expenses must come under one of the items I to V, VIII and IX of section 9 (2). When the questions arise how the income is to be disposed of, the distinction between income and profits as legally defined above will be clearly seen, and profits may be fairly accurately described as that amount which can be taken out of the business for dividends or private expenses witout impairing its efficiency. Of course out of that amount something may still be left in the business by way of reserve but it is not disputed that any sum credited to reserve is liable to be taxed. It may also be as well to note that we are not concerned with the case of a business which deals in stocks and shares, looking solely for its income to the gains made by buying and selling, for it seems to be admitted that then anticipated losses may be deducted. We have been referred to the corresponding provisions of the English Income Tax Act but it would appear that the Indian Legislature has deliberately refrained from adopting those provisions, and instead of detailing allowances which cannot be deducted mentions specifically those which can. At the same time no English case has been cited to us in which a deduction for depreciation such as is now claimed has been allowed. In the Rules applicable to cases I and II of Schedule D of the Income Tax Act, 8 & 9 Geo. V, c. 5 the only Rule which deals with depreciation is Rule 6 in which a deduction for depreciation of machinery and plant can be allowed from the profits or gain of a trade.

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Apart from that the only deductions which would be allowed if not prohibited would be expenses incurred solely for the purpose of earning the profits, and any other debits for depreciation would not come within this category. It seems to me, therefore, that in construing sections 5 and 9 of the Act, chargeable income is synonymous with profits and section 9 (2) prescribes how those profits are to be ascertained. From the gross income only certain debits for depreciation are to be allowed and this debit asked for by the Bank not being mentioned therein cannot be allowed.

I think this was the obvious intention of the Legislature, since, while depreciation of machinery, plant and buildings can easily be calculated as provided in the Act, it would be a very different matter to have to enter into such calculations with regard to assets other than these. But this much is clear that if the profits of a business are to be calculated according to the legal definition of profits, that method of calculation must be continued from year to year, and an assessee would not be allowed to write down his assets in a year when market values had declined without writing them up when values had increased.

I would answer the questions propounded in the reference as follows:—

1. Profits in section 9 of the Act mean chargeable income and must be computed from the gross income after allowing for the sums paid and debited as detailed in sub-section (2).

2. The assessing officer is not entitled to allow any deduction for sums paid or debited other than those properly paid and debited as detailed in sub-section (2).

3. No.

4. "Profits" in the Act means chargeable income.

The Bank will have to pay the costs of the reference.

SHAH, J:—On this reference the position appears to me to be simple and clear, though on account of the way in which the questions have been formulated it has become unnecessarily difficult. On the interpretation of section 9, it seems to me to be clear that the tax under the head "income derived from business" is payable in respect of the profits of the business carried on by the assessee. The meaning of the word "profits" is not defined: but I agree with the learned Chief Justice on this point in holding that it is the gross income of the business. Even then it may be open to the assessing authority to take into consideration the nature of the business and the losses, if any, in determining the profits or the gross income of the business. The section does not make any provision as to how the profits are to be determined. But it seems to me that where a deduction is proper and necessary to be made in order to ascertain the "profits" or gross income of any business, the assessing authority may allow it in his discretion.

The section, however, makes provision for making allowances in respect of certain sums paid or in the case of depreciation debited by the company or the individual concerned. They are stated in section 9, sub-section (2) and it is clear that those are the only allowances which the party could claim as of right. The Collector is not bound to make any other allowances in favour of the party, nor is the party entitled thereto as of right. In the present case the depreciation claimed by the company is not covered by any clause of section 9 (2) and cannot be allowed as such. This position is not seriously contested before us on behalf of the company. But it is urged that as an item of loss it is open to the Collector to allow it in calculating the profits or the gross income of the business

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during the year in question. As stated in the letter of reference, the attitude taken up by the company before the Revenue Authorities was to claim only depreciation as such without agreeing to take into account appreciation, if any. As regards this point the position for the Crown has been very fairly and in my opinion correctly stated by the Chief Revenue Authority in para. 12 of the reference. This reference must, therefore, be dealt with on the footing that the deduction claimed by the company is in respect of depreciation as such and not as an item of loss or gain in the business during the year. This will prejudice neither the right of the company to claim, nor the power of the Revenue Authorities to make, due allowance for any loss or gain in virtue of depreciation or appreciation of the various securities in the course of and as part of the business in determining the amount of the profits or gross income of that business, if the facts essential for making such allowance are established. It is not easy, in my opinion, to formulate categorical replies to the questions some of which are general. Treating the reference, however, as limited to the claim made before the Revenue Authorities for depreciation as such, I concur in the answers proposed by my Lord the Chief Justice to the questions raised in this reference as also in the order as to costs.

ON the 4th November 1921, the Bank's attorney having moved to have fixed the scale on which costs should be taxed, the Court passed the following order:

MACLEOD, C. J. :—Following our decision in *In re Aurangabad Mills, Limited* [1] the costs will be taxed as on the Original Side. But in order to avoid any question being raised in future whether the Court has jurisdiction in references of this nature to direct costs

[1] (1921) 45 Bom. 1286.

to be taxed on the Original Side scale, it will be advisable to consider whether a Rule should be framed under the Bombay Pleaders' Act, XVII of 1920.

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Answers accordingly.

R. R.

ORIGINAL CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice.

HANIF MAULABAKSH (PLAINTIFF) *v.* KULSAM AND ANOTHER (DEFENDANTS)*.

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October 8.

Civil Procedure Code (Act V of 1908), Order XXV, Rule 1—Security for costs—Plaintiff residing out of British India and not possessing immoveable property within British India—Temporary residence in British India for the purpose of Court proceedings, whether sufficient to dispense with security.

The plaintiff who was a resident of Fatepur Sikur outside British India arrived in Bombay in January 1921 for the purpose of filing a criminal complaint against A for enticing away his wife, K. The magistrate having expressed an opinion in the course of the criminal proceedings that the plaintiff should obtain a declaration of the Civil Court as regards his marriage with K, the plaintiff who had all along remained in Bombay filed a suit in July 1921 against A and K for such a declaration.

Held, on a summons taken out by the defendants, that the plaintiff was bound to give security for their costs under Order XXV, Rule 1, inasmuch as he had been staying in Bombay only for the purpose of taking proceedings to get his wife back, and that did not constitute such residence as would enable him to escape the application of the rule.

CHAMBER Summons for security for costs under Order XXV, Rule 1, of the Civil Procedure Code.

The plaintiff, Hanif, and the defendants, Kulsam and Alladin, were Sunni Mahomedans of Fatepur Sikur, a Native State.

*O. C. J. Suit No. 3083 of 1921.