1945 *Present:* **Jayetileke and Rose JJ.**

RAVANNA MANA EYANNA & CO., Appellant, *and* THE COMMISSIONER OF INCOME TAX, Respondent.

S. C. No. 85—Appeal against an Assessment of Excess Profits Duty.

Excess Profits Duty—Determination of capital of a business—Claim to deduct bad debts—Meaning of "debts due"—Excess Profits Duty Ordinance, No. 38 of 1941, s. 10 (1) (b).

In computing the capital of a business, bad and doubtful debts for which a reduction has not been claimed or allowed under section 9 (1) (*d*) of the Income Tax Ordinance are regarded as debts due to the business within the meaning of section 10 (1) (*b*) of the Excess Profits Duty Ordinance.

A debt, though it is prescribed, can be regarded as still due; the expression "debts due" should not be read in a limited sense as meaning debts, the payment of which can be enforced by action.

APPEAL against an assessment of Excess Profits Duty, under section 13 of the Excess Profits Duty Ordinance, No. 38 of 1941.

N. Nadarajah, K.C. (with thim *N. Kumarasingham*), for the assessees, appellants.—To determine the capital of a business all bad debts should be deducted. The bad debts in the present case amount to Rs. 29,387 and are, in fact, all prescribed. Section 10 (1) (*b*) of the Excess Profits Duty Ordinance speaks of "debts due". The expression "debts due" connotes something different from "debts" and should be limited to recoverable debts. The debts must be presently claimable and would exclude any statute-barred debts.

[JAYETILEKE J. referred to section 46 (2) (*i*) of the Civil Procedure Code.]

Once a debt is prescribed there is no cause of action. The term "debts due" has a limited meaning—Bell's South African Legal Dictionary, p. 159; Stroud's Judicial Dictionary (2nd ed.), p. 478; *Flint v. Barnard* [1]; Sunderam on Income Tax (3rd ed.) p. 643.

H. H. Basnayake, C.C., for the respondent.—There is no finding that the debts in question are prescribed. Even assuming that they are prescribed they can be regarded as "debts due" within the meaning of section 10 (1) (*b*) of the Excess Profits Duty Ordinance. The corresponding enactment in England is the Finance Act, No. 2 of 1939, Schedule 7, Part II., section 1 (1). The expression "debts due" has, therefore, to be given the meaning it has in English law—*Wharaka Investment Co., Ltd. v. Commissioner of Stamps* [2]. It includes, in England, statute-barred debts, for the Statute of Limitations only bars the remedy and does not extinguish the debt—Stroud's Judicial Dictionary (2nd ed.) p. 578; Preston and Newson on Limitation of Actions (1943 ed.) p. 16.

[1] *(1883) L. R. 22 Q. B. 90 at 92.*

[2] *(1932) 34 N. L. R. 266 at 272.*

N. Nadarajah, K.C., in reply.—In England a defendant can, after action is filed, waive the benefit of the Statute of Limitations. In Ceylon, however, under sections 44 and 46 (2) (i) of the Civil Procedure Code a plaint will be rejected by court if the cause of action is prescribed.

Cur. adv. vult.

February 20, 1945. JAYETILEKE J.—

This is an appeal by way of case stated by the Board of Review, at the request of the assessees, for the opinion of this court as provided by section 74 of the Income Tax Ordinance (Cap. 188) the provisions of which have been made applicable to an appeal against an assessment of excess profits duty by section 13 of the Excess Profits Duty Ordinance, No. 38 of 1941.

The facts may be shortly summarised as follows:

The 1st appellant and one Krishnapullai carried on business in partnership as Commission Agents and General Merchants under the name of Suna Einna Keena & Co., at Norris road and Fifth Cross street in Colombo. On June 8, 1932, by an indenture marked " A " they admitted one Gopalkrishnapillai as a partner and changed the name to Ravenna Mana Eyanna and Co. Clause 6 of " A " reads—

> " All and singular the debts now due to the partnership business of S. E. A. & Co. and also the debts due to the said Ekambarampillai under deed No. 690 dated November 11, 1931, attested by R. Mahendra of Colombo, Notary Public, in respect of the firm of S. S. V. Paramanayagampillai all aggregating to Rs. 30,619 (after having deducted all debts due to the said partnership) shall form the capital of the said partnership business created by this indenture and shall belong to all the parties in equal shares."

On June 4, 1937, Gopalkrishnapillai retired from the business and on the same day by indenture marked " B " the remaining partners admitted one Devanayagampillai as a partner. The indenture provided that all three partners should be entitled to the stock-in-trade, book and other debts. On July 9, 1940, Krishnapillai died. On July 10, 1940, the remaining partners looked into the accounts of the business and decided to write off Rs. 29,387 as debts that had become bad prior to April 1, 1938.

The Excess Profits Duty Ordinance came into operation on October 5, 1941. In computing the pre-war capital for the purpose of section 11 of the Ordinance the appellants claimed that the debts which they had written off should be excluded. The assessor excluded a sum of Rs. 4,188 in respect of which a claim had been made under section 9 (1) (*d*) of the Income Tax Ordinance and refused to exclude the balance. The assessees appealed to the Commissioner of Income Tax who confirmed the assessment. The Board of Review were of the opinion that the order of the Commissioner was right. Hence this appeal by way of case stated.

Excess profits duty is imposed by section 2 of the Ordinance upon the amount by which the profits arising from any business to which the Ordinance applies exceed by more than Rs. 3,000, the pre-war standard

of profits. The pre-war standard of profits adopted in this case under section 6 (1) is the profits standard based on the profits of the year ended March 31, 1939. In making the adjustment for increase of capital under section 11 the average capital of the accounting period ended March 31, 1941, has to be compared with the average of the year ended March 31, 1939. The assessees contend that in arriving at the initial capital of the year ended March 31, 1939, all debts that were statute-barred prior to April 1, 1938, should be excluded on the ground that they are not " debts due " within the meaning of section 10 (1) (*b*).

The appeal turns entirely upon what construction we put upon the words " debts due " in section 10 (1) (*b*). It is quite plain that for the purpose of construing these words we are entitled to look not only at the verbal context of the sub-section, if we can get any assistance from that, but also at the other sections of the Ordinance and, at section 9 (1) (*d*) of the Income Tax Ordinance and the language employed in them. Now section 10 (1) (*b*) of the Excess Profits Duty Ordinance deals with debts which are the subject of valuation for income tax purposes. Section 9 (1) (*d*) of the Income Tax Ordinance provides that for the purpose of ascertaining the profit or income of any person from any source there shall be deducted such sum as the Commissioner in his discretion considers reasonable for bad debts incurred in any trade, or business, which have become bad during the period for which profits are being ascertained, and for doubtful debts to the extent that they are estimated to have become bad during the period, notwithstanding that such bad and doubtful debts were due and payable prior to the commencement of the said period. In *Curtis v. J. & G. Oldfield, Ltd.*[1] Rowlatt J. said—

> " When the Rule speaks of a bad debt it means a debt which is a debt that would have come into the balance sheet as a trading debt in the trade that is in question and that it is bad."

There can be little doubt that a statute-barred debt is a bad debt or, at least, a doubtful debt within the meaning of the sub-section.

In *Coombs v. Coombs* [2] Sir J. P. Wilde said—

> " The statute furnishes an absolute legal answer to the hand of the supposed debtor and in the sense of a legal obligation enforceable by law it does therefore extinguish the debt at his volition."

Section 10 (1) (*b*) of the Excess Profits Duty Ordinance provides that the capital of a business shall be taken to be, so far as it consists of assets being debts due to the business, the nominal value of those debts less any reduction which has been allowed for bad and doubtful debts under section 9 (1) (*d*) of the Income Tax Ordinance. It seems to me that on the true construction of section 10 (1) (*b*) it is quite plain as a matter of language that the legislature regards both bad and doubtful debts for which a reduction has not been claimed or allowed under section 9 (1) (*d*) of the Income Tax Ordinance as " debts due ". In the present case no claim having being made or allowed at any time in respect of the debt in question under section 9 (1) (*d*) of the Income Tax Ordinance the appeal must fail. But out of respect for the argument that has been

[1] *9 T. C. 319.*

[2] *1866 L .R 1. P. & D. 288.*

addressed to us by Counsel engaged on both sides I think that I ought to deal with the question whether a statute-barred debt can be regarded as a " debt due ". Counsel for the appellants relied upon the case of *Whatmore v. Murray* [1]. In that case the respondent who was the judgment-oreditor of one Main, a prisoner awaiting trial and detained in gaol, obtained a garnishee order on the appellant as gaoler, ordering him to pay out of the monies in his possession belonging to Main, the monies due by the latter to the respondent under the judgment with costs. The appellant refused to comply with the order, and on the return day opposed the confirmation of the order on the ground that under regulation 493 of the gaol regulations he was prohibited from parting with the money so taken from a prisoner without the sanction of the Director of Prisons, which sanction had not been obtained. In the course of his judgment Innes C.J. said—

> " The real point is whether the money sought to be attached could rightly be made the subject of a Garnishee Order. The provisions for garnishee proceedings constitute a very special machinery provided by the Legislature to enable judgment-creditors to obtain payment of their judgment-debts; but its operation ought to be confined to cases to which it clearly applied under the statute. By Ordinance No. 12 of 1904 it is necessary that there should be a debt due by the garnishee to the judgment-debtor. A " debt due " means a debt actually due at the time when application is made for an order. That was decided in White's case (1906 T.S. 47). There a salary which the debtor could not at the moment claim and which possibly he might never be able to claim, was held not to be a debt due. It seems to me that for a debt to be due there must be a liquidated money obligation presently claimable by the debtor for which an action could presently be brought against the garnishee. If such an obligation exists then, to my mind, a debt is due ".

I do not think this case assists us in the solution of the present problem though some of the words used by the learned Chief Justice appear to be favourable to the appellants. It seems to me that all that the learned Chief Justice meant to say was that a debt which had not actually become payable at the time of the attachment could not be said to be " due ". Counsel for the appellants also relied on the case of *Flint v. Bernard* [2] in which Lord Esher M.R. said—

> " If the words of section 18 sub-section 8 ' so far as relates to any debts due to them ', are to be construed in their strictest sense, the words that follow ' provable in bankruptcy ' are not necessary for such debts must be provable in bankruptcy. If the words are not to be taken so strictly what is a reasonable interpretation ? I think this would be any claim against the debtor such as would be provable in bankruptcy ".

This judgment too is not helpful as the words " debts due " have been used in three different senses in three different sections of the Bankruptcy Act. Moreover, the words have been interpreted in the sections in which

[1] *1908 Transvaal Law Reports 969.*

[2] *1889 L. R. 22 Q. B. D. 90.*

they appear with reference to other sections in the Act and to the scheme of the Act. In *Ex parte Kempe, In re Fastnedge* [1] Sir George Mellish L.J. pointed out that in section 6 the word "due" means payable; in sections 19 it does not mean payable but that all debts which have been contracted, whether the time for payment has arrived or not, were intended to be included; and in section 49 it means all provable demands whether they have been payable or not and whether they are in point of law strictly debts or not.

Counsel for the respondent invited our attention to the case of *Ex parte Cowley* [2] the report of which is not available to us but a note of which appears in Stroud's Judicial Dictionary, 2nd Edition, Page 578. It reads—

> "A debt is still due notwithstanding that the Statute of Limitations may have run against it, for the statute only bars the remedy and does not extinguish the debt."

This decision, I think, is in accord with the primary meaning of the word "due". In Wharton's Law Lexicon the word "due" is defined thus:

> "Anything owing. That which one contracts to pay or perform to another; that which law or justice requires to be paid or done".

In *Re Stockton Malleable Iron Co.*[3] Jessel M.R. said—

> "The word 'due' may mean either owing or payable".

It is well settled law that money paid under a mistake on the part of the payer as to a material fact, such as that no money was due, can be recovered by action for money had and received. But in *Bize v. Dickason* [4] Lord Mansfield observed that if a party voluntarily pays money, which the law has not compelled him to pay, but which in justice he ought to have paid—such as a debt barred by the Statute of Limitations—he cannot recover it back. It has also long been established that an executor does not commit a devastavit in paying a statute-barred debt. In the case of *Arunasalem v. Ramasamy Nayaker* [5] it was held that a payment on account of a debt, whether such debt at the time of payment is already statute-barred or not, is necessarily an acknowledgment of the debt, and the law in the absence of anything to the contrary implies from the acknowledgment a promise to pay the balance.

These authorities appear to me to lend support to the view that the expression "debts due" should not be read in a limited sense as meaning debts, the payment of which can be enforced by action. I, therefore, come to the conclusion that the items included in the sum of Rs. 25,199 are "debts due" within the meaning of section 10 (1) (*b*) of the Excess Profits Ordinance. I would, accordingly, dismiss the appeal with costs.

ROSE J.—I agree.

Appeal dismissed.

[1] *L. R. 9 Chan Appeals 383.*
[2] *34 S. J. 29.*
[3] *(1875) 2 Chan Div. 101.*
[4] *(1786) 1 T. R. 286.*
[5] *3 C. A. C. 134.*