1939 *Present :* **Moseley A.C.J. and Soertsz J.**

THORNHILL *v.* COMMISSIONER OF INCOME TAX

S. C. 137 (Inty.).

Income tax—Tea factory—Depreciation by wear and tear—Outgoings and expenses—No deduction as such—Allowance in respect of repair and renewal—Ordinance No. 2 of 1932, ss. 9 (1) (a) & (c) and 10 (c).

In ascertaining the income of a person from a tea estate, no allowance can be made for depreciation by wear and tear in respect of a tea factory building.

An allowance is expressly made for such premises by section 9 (1) (c) on account of repair and renewal.

THIS was a case stated for the opinion of the Supreme Court by the Board of Review constituted under the Income Tax Ordinance.

The facts, as stated, are as follows :—

1. The appellant was assessed under the Income Tax Ordinance for the year of assessment 1937-38 as being liable to pay a tax of Rs. 5,258.16 on a taxable income assessed at Rs. 19,159. The appellant claimed an allowanc of Rs. 8,893 being the amount of the depreciation in the value of the buildings on his tea estates as being deductible in computing his income which is liable to taxation. The Assessor refused to allow the deduction which was claimed.

2. The appellant appealed to the Commissioner of Income Tax who upheld the assessment of the Assessor and refused the deduction for the reasons given in his decision.

3. Thereupon the appellant appealed to the Board of Review, constituted under the Income Tax Ordinance, upon the grounds of appeal appearing in his petition of appeal dated June 8, 1938.

4. At the hearing it was urged that as the appellant was a tea planter who converted his own green-leaf into tea upon his own estate, he was carrying on a "business", inasmuch as "business" includes an "agricultural undertaking", under the Ordinance, and that he required certain buildings to carry on that business. The buildings themselves, in respect of which he had claimed the depreciation were of the value of Rs. 177,869.75, but upon the appeal, he restricted the claim only to the depreciation in respect of the tea factory which it was contended, was essentially used for the purposes of his "business" as it was there that the various processes of converting green-leaf into tea were carried on. It was contended that as "profits" were only restricted to "net profits", for the purposes of arriving at the taxable income, there must therefore be deducted all necessary expenses of business losses from the gross income before arriving at the "net profits". Authorities were cited as deciding that "profits" means surplus after deducting expenses and replacing capital which is lost. It was argued that the authorities laid down the proposition that any expense legitimately and properly deductable to ascertain the net profits should be allowed to be deducted unless any such deduction was disallowed by any express provisions of

the Ordinance. The absence in any provision in our Ordinance like section 209 (1) (*a*) of the English Income Taxt Act of 1918 was stressed. It was urged that if no deduction for depreciation was allowed, then it would amount to a taxation of capital and not of income. The deduction was claimed either under the words "plant, machinery and fixtures" or under the words "outgoings and expenses" in section 9 (1) of the Ordinance; or else it must be allowed to be deducted as a "business loss" before arriving at the appellant's profits or income from his estates.

5. The Assessor contended that depreciation is a capital loss which cannot be deducted in view of the provisions of section 10 (*c*); that the depreciation of buildings was not an "outgoing" or an "expense" under section 9 (1), and could not be claimed under section 9 (1) (*a*) as there was no depreciation by way of wear and tear arising out of its use in a trade or business; that the appellant was not carrying on a business; that all expenses of a capital nature and all capital lost sunk or exhausted should be ignored in computing income for income tax; and that depreciation is not a loss of income.

6. The Board dismissed the appeal.

7. The appellant being dissatisfied with the decision of the Board, asked a case to be stated on a question of law. The question is whether the appellant is entitled to any deduction for the amount of the depreciation of the value of his tea factory in respect of the year of assessment in ascertaining his profits or income from his tea estates for income tax purposes.

H. V. Perera, K.C. (with him *Iyer, Renganathan* and *Rasaratnam*), for appellant.—The appellant is entitled to a deduction on account of the depreciation, by wear and tear, of his factory. Section 6 (1) of Ordinance No. 2 of 1932 read with section 2 as amended in 1937 speaks of *nett* profits only as chargeable with tax. Depreciation must be regarded as expenditure, according to ordinary commercial practice—*In re The Spanish Prospecting Company, Limited*[1]; *Ammonia Soda Co. v. Chamberlain*[2]. Commercial pratice is taken into account even for purposes of income tax—*Usher's Wiltshire Brewery, Limited v. Bruce*[3]. It is in the light of these decisions that the provisions of section 9 of our Ordinance should be examined.

Depreciation of a factory is caught up by the provisions of section 9 (1) (*a*). The word "plant" includes a factory; *vide* meaning of "plant" in Webster's International Dictionary. If the word "including" in section 9 (1) is to be given effect to, outgoings and expenses should not be confined to monies actually spent and liabilities actually incurred. Section 9 should be read with section 10. According to the spirit as well as the letter of the law, we are entitled to a deduction for depreciation of the factory.

S. J. C. Schokman, C.C., for Commissioner of Income Tax.—The case has to be decided according to our own Ordinance. Depreciation of a building is not an "outgoing" under section 9. Depreciation of a factory would come under loss of capital mentioned in section 10 (c) and no deduction therefore can be allowed for it. Depreciation in plant and machinery

[1] (1911) 1 *Ch.* 92. [2] (1918) 1 *Ch.* 266 *at* 291. [3] (1915) *A. C.* 433 *at* 457.

has been expressly provided for by section 9 (1) (*a*). So far as buildings are concerned, there is provision for a deduction for renewal or repair but not for depreciation—section 9 (1) (c).

Our law is similar to the English law before 1918. The relevant English law before 1918 can be obtained from Snelling's *Dictionary of Income Tax Practice, p. 358 ; Henry Forder v. Andrew Handyside & Co., Ltd.* [1]; *Earl of Derby v. Aylmer* [2]; *Kauri Timber Co., Ltd. v. Commissioner of Taxes* [3]; *Alianza Company, Ltd., v. Bell* [4].

The word plant cannot be construed to include the factory itself—see *Daphne v. Shaw* [5]; *Margrett v. Lowestoft Water & Gas Co.* [6]; *In re Nutley & Finn* [7].

In England, by the Finance Act of 1918, a further allowance was made for depreciation of mills and factories. We have no such enactment in Ceylon.

H. V. Perera, K.C., in reply.—Full effect should be given to the words "outgoings and expenses incurred *in the production thereof*" appearing in section 9. There were no such words in the English law before 1918.

In regard to section 10 (c), loss of capital should not be confused with capital loss ; the former occurs only where capital ceases to be.

It has been held that a warehouse is a plant and entitled to an allowance for depreciation—*John Hall, Junior & Co. v. Rickman* [8].

Cur. adv. vult.

March 23, 1939. SOERTSZ J.—

The question that arises on this appeal is whether the assessee, a tea-planter, is entitled to deduct a sum of Rs. 8,893 on account of "the depreciation by wear and tear" of his tea-factory, that is to say, of the building itself, as distinguished from its contents.

The Commissioner of Income Tax and the Board of Review held against him on this point.

Mr. H. V. Perera who appeared in support of this appeal contended, that this allowance was claimed as an "outgoing" or expense "incurred by the assessee" in the production of his "profits" or "income", and falling within the specially enumerated instance in section 9 (1) (*a*), which provides for such a deduction as the Commissioner considers reasonable for "the depreciation by wear and tear of *plant, or machinery and fixtures*, arising out of their use by the owner thereof in a trade, business, profession, vocation, or employment carried on or exercised by him". Alternatively, he argued that if the assessee's claim did not fall within that particular provision, it was none the less good, inasmuch as it still was an "outgoing" or "expense" and was not taken out of the general operation of section 9 (1), by section 10 or any other section of the Income Tax Ordinance.

The case put forward for the Commissioner of Income Tax was that this claim was not an allowable deduction under section 9 (1) (*a*) because it could not be described as a claim made on account of wear and tear of "*plant, machinery* and fixtures", and that section 10 (c) took it out of the

[1] *1 Tax Cases 65.*
[2] *6 Tax Cases 665.*
[3] *(1913) A. C. 771.*
[4] *(1906) A. C. 18.*
[5] *11 Tax Cases 256.*
[6] *19 Tax Cases. 481.*
[7] *(1894) Weekly Notes 64.*
[8] *(1906) 1 K. B. 311.*

general scope of " outgoings " and " expenses " provided for by sction 9 (1), and that claims in respect of the maintenance and upkeep of buildings had not been ignored by the Ordinance, but that there is provision made, for instance, by section 9 (*c*), for deductions on account of their repair and renewal.

Mr. Perera submitted that words and phrases occuring in this Ordinance should be construed liberally in favour of the taxpayer, and that the meaning that they ordinarily bear should be extended, within reasonable limits, because the same words and phrases have been used in respect of a variety of activities—professions, trades, vocations, and employments, in some of which they are very much at home, while in others they appear somewhat exotic. While agreeing with that submission, I am unable to say that a reasonable extension of the meaning of the word " plant " can be made to include the building or shell which holds it. This view is in accord with that taken by Finlay J. in *Margrett v. The Lowestoft Water and Gas Company* [1]. In that case, the taxpayer contended that a water tower which replaced an engine and pumps for the purpose of increasing the pressure of the supply of water through the pipes, was " plant " for which he could claim on account of depreciation by wear and tear. Finlay J. said " you have to examine what the thing is. It is not enough to say it was used in a particular way. Clearly if one takes the case of a factory with machinery in it, the bricks and motar would not be plant. One would anticipate, I think, that the same principle would apply here, that the pipes and so forth would be plant, but the actual structure would not be " plant ".

In the present case one cannot, I think, say as much as could have been, and was said in support of the claim in that case, for there was the fact that the water tower replaced an engine and pumps, and performed their functions. Again, in *Daphne v. Shaw* [2], Rowlatt J. commenting on a contention addressed to him that the books of a lawyer are " pant ", observed as follows : " I cannot bring myself to say that such books . . . . . are plant. It is impossible to define what is meant by plant and machinery. It conjures up before the mind something clear in the outline, at any rate; it means apparatus, alive or dead, stationary or immovable to achieve the operation which a person wants to achieve in his vocation ". In *In re Nutley and Finn* [3] it was sought to include within the expression " whole of the fixed plant and machinery at the brewery ", (*a*) a chimney shaft which was built just outside the boiler house, but formed no part of it ; (*b*) a double boarded partition forming a malt and grain store. This had been erected solely for the purpose of the business ; (*c*) staging erected by placing joints on the stout bearers built into the walls of the brewery premises. In an affidavit made by an experienced valuer it was stated that the articles enumerated were invariably included under the head of fixed plant on sales of freehold breweries. But, Kekewich J. disallowed the claim. He said that he " thought that as, speaking generally, ' machinery ' included everything which by its action produces or assists in production, so ' plant ' might be regarded as that without which production could not go on. It was, so to speak, dead stock, it did not itself act, but was that through and by means of, and in which, action took place, and included such things as brewers' pipes, vats and the like ".

[1] *19 Tax Cases 481.* [2] *11 Tax 256.* [3] *(1894) Weekly Notes 64.*

If it had been intended to allow for depreciation of the structure itself in which plant, machinery and fixtures are placed, it would have been quite simple for the Legislature to do so by the addition of a word or two. It seems to me that the scheme of the Legislature was to allow deductions only for depreciation of such things as physically deteriorate by wear and tear in the course of constant use, and to make provision for premises employed in producing income such as: such buildings as tea-factories which apart from natural decay, may, in a sense, be said to depreciate by wear and tear, for instance, by being subjected to constant vibration, by allowing for sums expended in their repair or renewal. It is instructive that in 1878 the English Act made allowance for depreciation by wear and tear of plant and machinery. It was only in 1918 that, by another act, an allowance was made to cover depreciation of mills, factories and similar premises.

For these reasons, I am of opinion that when ascertaining the profits or income of any person from any source by deducting all outgoings and expenses incurred in the production thereof, no allowance can be made in respect of premises such as a tea-factory building employed in producing income, for depreciation by wear and tear. Such an allowance is impliedly disallowed by section 9 (1) (*a*). An allowance is, however, expressly made for such premises so employed by section 9 (1) (*c*) on account of repair and renewal.

The appeal, therefore, fails and must be dismissed with costs.

MOSELEY A.C.J.—I agree.

Appeal dismissed.