regard to the properties which are in dispute in the present case, i.e., lands on which houses, shops and factories have been built.

Rameshwar Nath *v.* Jageshwar Nath and others

Kapur, J.

I am, therefore, of the opinion that the learned Judge was in error in ordering that the commissioner could not be appointed by a Civil Court to partition the properties contained in annexure "Alaf" as attached to the plaint. I would, therefore, allow this petition, set aside the order of the Senior Subordinate Judge and make the rule absolute. The petitioner will have his costs of the proceedings in this Court and in the Court below. The parties have been directed to appear in the trial Court on 29th June, 1953.

CIVIL REFERENCE

Before Falshaw and Kapur, JJ.

THE PUNJAB DISTILLING INDUSTRIES LTD., KHASA,—*Petitioner*

versus

THE COMMISSIONER OF INCOME-TAX, SIMLA,— *Respondent*

Civil Reference No. I of 1953

Indian Income-tax Act (XI of 1922)—Section 10—Security deposit received for the purposes of ensuring the return of empty bottles—Whether trading receipts.

1953

June, 16th

The assessee, at the time of sale of liquor in bottles, received from its customers security deposits at certain rates approved by the Financial Commissioner to ensure the return of empty bottles in addition to the price of the bottled liquor. The assessee refunded the security deposit in respect of the empty bottles received but a substantial part of the security deposits remained with the assessee as all the empty bottles were not returned. On a petition made to the High Court the Tribunal was directed to refer the following question to it under section 66(2) of the Income-tax Act :—

> "Whether, on the facts and circumstances of the case the security deposits received for the purposes of ensuring the return of empty bottles was income assessable under section 10 of Income-tax Act" ?

The Tribunal, however, referred the question in the following form :—

> "Whether there was material before the Tribunal on which it could hold that the collections by the assessee company described in its accounts as empty bottles return security deposits were in fact a portion of sale proceeds of bottles and, therefore, trading-receipts of the company ?"

Held, that the amounts received by the assessee as empty bottles return security deposits were trading-receipts and as such assessable under section 10 of the Indian Income-tax Act, 1922.

K. M. S. Lakshmanier and Sons v. *Commissioner of Income-tax and Excess Profits Tax, Madras* (1), relied on ; *Morley (Inspector of Taxes)* v. *Tattersall* (2), held not applicable.

Case referred by the Income-tax Appellate Tribunal, Bombay (Delhi Branch), consisting of Shri K. N. Rajagopal Sastri, Judicial Member and Shri A. L. Sahgal, Accountant Member by their order, dated the 20th November, 1952, under section 66(2) of the Indian Income-tax Act, 1922, for decision of the following question by the Hon'ble Judges of this Court :—

> *"Whether there was material before the Tribunal on which it could hold that the collections by the assessee company described in its accounts as empty bottles return security deposits were in fact a portion of sale proceeds of bottles and, therefore, trading-receipts of the company ?"*

A. N. GROVER, for Petitioner.

S. M. SIKRI, Advocate-General, H. R. MAHAJAN and RAJINDAR SACHAR, for Respondent.

ORDER

Kapur, J.

KAPUR, J. This is a reference made by the Income-tax Appellate Tribunal of Delhi by their order, dated the 20th of November 1952, stating a case under section 66(2) of the Indian Income-tax Act.

The matter arises out of Income-tax appeals which were directed against the assessments for the years 1947-48 and 1948-49, in respect of the profits and gains of the assessee in the previous

(1) (1953) 23 I.T.R. 202
(2) (1938) 3 A.E.R. 296

years ending with November 1946, and November 1947. Besides this there were Excess Profits Tax appeals against an assessment made in respect of the chargeable accounting period 1st December 1945 to 31st March 1946, and there were two Business Profits Tax appeals against the assessments made in respect of the chargeable accounting periods 1st April 1946 to 30th November 1946 and 1st December 1946 to 30th November 1947. Thus there were five appeals but the point involved in all of them was the same.

The assessee company was incorporated in May 1945, and obtained the certificate of commencement on the 2nd of June 1945. In reality it was a reconstructed company, which was originally The Amritsar Distillery Company, Limited and it had taken over the undertaking of the old company with all its assets and liabilities as from the 1st of December 1944. For the purposes of Income-tax the accounting year of the old as well as the new company ended with November of every year.

The point in dispute relates to the 'Empty Bottles Security Deposit' account which arose in the following circumstances.

Before the II World War bottles were cheap but difficulty was anticipated in regard to the supply of these bottles as the war progressed. In January 1940, therefore, the Financial Commissioner of Lahore, issued a circular in regard to the excise auction held in that month. Note 2 to Paragraph 6 of this circular was:—

> "At the time of auction it should be explained to the bidders that for every empty quart, pint or nip excise bottle returned to the retailer by the public, the retailer shall be bound to refund Re 0-3-0, Re 0-2-3 or Re 0-2-0, respectively. This has been necessitated by the adoption, for the year 1940-41, of the buy-back system for excise bottles, which has been explained in detail in the annexure to

The Punjab Distilling Industries, Ltd., Khasa
v.
The Commissioner of Income-tax, Simla

Kapur, J.

this letter. It will be observed that the retail prices (of liquor in bottle) for the year 1940-41, are slightly higher than those for the year 1939-40. When, however, it is recognised that so far the consumer has either thrown away his empty bottles or has been able to secure at the utmost Re 0-1-6 for every quart (bottle), the buy-back system referred to, by which Re 0-3-0 is guaranteed for every quart bottle will actually result in a saving of about Re 0-0-6 on every quart bottle of country spirit purchased in the year 1940-41. Bidders should be informed that retailers will be required to explain the effect of the buy-back system to the public in the form of an explanatory notice displayed at the retail premises."

The annexure to this note was :—

"The buy-back system of bottles has had to be adopted to ensure the return of empty excise bottles to the distilleries. Under this system, the distillery shall refund Re 0-4-0, Re 0-3-0 or Re 0-2-6 for every empty quart, pint or nip, respectively, up to 95 per cent of the number of bottles bearing the distinguishing mark of the distillery issued on or after 1st April, 1940, delivered free at the distillery by the retailer. On the other hand the retailer shall be bound to pay to the consumer Re 0-3-0, Re 0-2-3 or Re 0-2-0, respectively, for every quart, pint or nip returned to him. The retailer will thus gain for every empty quart, pint or nip returned to the distillery Re 0-1-0, Re 0-0-9 or Re 0-0-6, respectively. This will compensate the retailer (even after defraying the cost of transporting empty bottles to the distillery) for the small loss he will sustain, because of the rise in issue price of plain spirit to the extent of Re 0-0-6,

Re 0-0-3 or Re 0-0-1 per quart, pint or nip, respectively, the increase in the issue price of spiced spirit being negligible as explained in the statement below, * * * * *".

The effect of this was that the distillers were to pay for the empty bottles of various sizes varying prices but it does not appear from this that the distillers were authorised to charge any monies over and above the inclusive prices for the liquor in the bottles whether by way of security or otherwise. But it appears that the predecessors of the assessee company collected what in the statement of the case is described as "so-called security deposits" (that is, in addition to the price of bottles and liquor which was duly credited to the trading account) and thus they obtained in the years 1940 to 1944, large sums of money although in 1941 and 1944, they got nothing. And although in the years 1940, 1942 and 1943, large sums were taken as security deposits no empty bottles seem to have been returned or refund of security deposits claimed.

In February 1943, the Financial Commissioner, Lahore, issued another circular by which he raised the prices of the bottles payable by the distillers as also the prices which were to be paid by licensed retailers to the consumers.

The new company continued to take similar security deposits. The company managed to get some official recognition to their practice of demanding security. In March 1944, the Financial Commissioner issued the following circular :—

" (1) Where the licensee for the new year 1944-45, is the same as for the expiring year 1943-44, he should be called upon to supply empty bottles before the first instalment of spirit is issued to him from the distillery.

(2) The Amritsar Distillery Company wish to take an undertaking from licensees

The Punjab Distilling Industries, Ltd., Khasa
v.
The Commissioner of Income-tax, Simla

Kapur, J.

regarding the return of all their bottles during 1944-45, by which they will render themselves liable to pay a penalty of Rs 3, Rs 2 and Rs 1-8-0 per dozen for quarts, pints and nips, respectively, in addition to the cost of bottles not returned. The Financial Commissioner has no objection to such an undertaking being demanded by the Amritsar or any other distillery. Yet the authority was only to demand an undertaking that a penalty would be imposed for non-return of bottles, not to demand security in the shape of present payment down of cash. The only exception was in regard to shops in certain district newly transferred to the zone of the old company, as to which the Financial Commissioner had already issued the following circular in February 1944 :—

* * * * * *.

The effect of this was that if a licensee in 1944-45 was the same as in 1943-44, he could be called upon to return the bottles before the first instalment of liquor could be issued to him and from others the distillers were allowed to get by way of penalty Rs 3, Rs 2 and Rs 1-8-0 per dozen for quarts, pints and nip bottles and this was to be in addition to the price of the bottles and the liquor sold. It was thus an undertaking from the licensee for the return of bottles, and this was an authority to charge a penalty for the non-return of bottles. Thus the licensee was to pay the price of the bottle plus liquor plus some money as penalty for non-return.

On the 15th of March 1945, a circular was issued about Shahpur and Gujrat Districts that the retailer of those districts had to pay deposits which were liable to confiscation if bottles were not returned by the 15th April, 1945.

In February 1945, an element of effective compulsion was introduced to make the liquor dealers "keen to get back empty bottles from consumers

to be delivered to distillers". Paragraphs 6 and 8 of this announcement are important and they were :—

"6. The retailers will not be supplied with any liquor unless they return an equivalent number of empty bottles, except in the case of Kangra District where only 70 per cent empty bottles will be accepted. The initial supply of bottled spirit for the month of April, 1945, will be made to the new licensees without the production of bottles bearing the name of the zone distillery. Wholesalers will similarly be required to return the full number of empty bottles to the distillery."

"8. The buy-back system for empty excise bottles which was introduced with effect from the 1st April 1940, will be continued in 1945-46. Licensed retailer shall not permit empty excise bottles to pass into the possession of consumers except in return for a bottle or bottles of similar capacity. If a bottle is not provided, they shall be bound to refuse supply unless the consumer produces a container of his own for the liquor. Wholesalers shall pay to the licensed retailer for every empty quart, pint and nip returned to them Re 0-5-6, Re 0-2-6 and Re 0-2-3, respectively. The distilleries are bound to take back from every wholesaler up to the full number of bottles issued to him. The prices payable by the distillery are Re 0-6-0, Re 0-3-3 and Re 0-2-6 for every empty quart, pint or nip, respectively, delivered at the distillery premises. If the wholesale vendor does not keep a stock of bottled spirit to meet the monthly requirements of retailers his license will be liable to cancellation.

If the licensees experience any difficulty in getting buy-back prices for any bottles to which they are entitled they should

The Punjab Distilling Industries, Ltd., Khasa
v.
The Commissioner of Income-tax, Simla

Kapur, J.

deposit the rejected bottles with the distillery inspector and the latter will satisfy himself whether they come within the rules or not, and if they do, and the distillery still fails to accept them, he will refer the matter to the Financial Commissioner for his orders. It is expected that the licensees will not experience any difficulty in getting the buy-back prices for bottles returned in good condition."

"Buy-back prices will be payable in respect of bottles issued on or after the 1st April 1940 and bearing the distinguishing mark of the distillery concerned."

This practice was continued by the Excise and Taxation Commissioner of East Punjab, after the partition and Liquor Licence Rules, were amended in March, 1948, but they are not relevant for the purposes of these proceedings.

As given in the statement of the case at page 5 (para 8), the effect of these various notifications was that the assessee company just continued the practice of its predecessor company in the matter of levying and collecting security deposits from the wholesalers but unlike its predecessor it had to refund portions of the security deposits. But there was no evidence to show that any dealer who wanted to buy liquor in bottles was unable to do so on the ground that he had not returned the prescribed percentage of empty bottles.

At page 5 of the statement of the case the amounts which were collected in this security deposit account and what was refunded and the balance are shown and they were :—

Account year ending with November	*Security Deposits.*		
	Collected	Refunded	Balance
	Rs	Rs	Rs
1945 ..	77,699	12,083	65,616
1946 ..	1,01,534	35,284	66,250
1947 ..	64,874	11,595	53,279

In other words about 31 per cent was returned during these years. The Income-tax authorities have treated the balances shown after the refund of security deposits to be company's taxable income.

In paragraph 10 of the statement of the case the Tribunal have stated :—

* * * * *

> If the deposits were in reality only 'security deposits' there is no evidence that the assessee company exercises its right, if any, to forfeit any portion of the security deposits or that the depositors have lost their right to claim refund of the deposits on fulfilling the conditions on which the deposits were made, or that the ownership in the sums deposited has passed from the depositors to the assessee company."

The High Court directed the following question to be referred :—

> "Whether, on the facts and circumstances of the case the security deposits received for the purposes of ensuring the return of empty bottles was income assessable under section 10 of the Income-tax Act ?"

This question as suggested by the Tribunal is :—

> "Whether there was material before the Tribunal on which it could hold that the collections by the assessee company described in its accounts as empty bottles return security deposits were in fact a portion of sale- proceeds of bottles and, therefore, trading-receipts of the company ?"

I would, however, restate the question in the following words :—

> "Whether on the facts and circumstances of the case the collections by the assessee company described in its accounts as 'empty bottles return security deposits' were income assessable under section 10 of the Income-tax Act ?"

The Punjab Distilling Industries, Ltd., Khasa
v.
The Commissioner of Income-tax, Simla

Kapur, J.

In their appellate order the Appellate Tribunal have found that the bottles were expected to be returned within a reasonable period and that the monies were to be refunded when those bottles were returned, and from this they came to the conclusion—

> "Looked at from any point of view, it seems difficult to escape the conclusion that the funds lying now in deposit with the assessee are income in their hands. For, if the bottles are not returned, the assessee has the benefit of the cash lying with it. On the other hand, if they are, they become the stock-in-trade which could be utilised for bottling further manufactures made by it. This is of course assuming that there is no time limit placed for the return of the bottles."

The Tribunal also found—

> "If then sale is complete, what the assessee realises as part of the sale-proceeds is a receipt in the nature of a revenue receipt. Even though by enforcing the right to call for deposits the assessee undertook to 'buy-back' empty bottles at a fixed price."

The Tribunal thus came to the conclusion that these sums which were the unrefunded balances of the security deposits in the years 1945 to 1947, were rightly included in trading-receipts.

In order to answer the question it has to be seen as to what was the nature of the transactions which the assessee company had entered into. From the year 1940 up to the year 1944 the predecessor of the assessee company in order to ensure the return of the bottles started collecting what they called security deposits which were returnable *pro rata* against the bottles returned along with the price of empty bottles. In March, 1944, the Financial Commissioner recognised the claim of the assessee company to charge a penalty from those

who did not return the empty bottles at the rate of Rs. 3, Rs. 2 and Re. 1-8-0 per dozen for quarts, pints and nips, respectively, which was of course in addition to the cost of the bottles which could only be refunded if the bottles sold were returned. Whatever may have been the effect of the various notifications the assessee company continued the practice of its predecessor company in levying and collecting security deposits from wholesalers which was refundable, as I have said, *pro rata* against the return of the bottles. What it came to is this, that when bottles full of liquor were sold the purchasers had to pay the price of the bottles plus a certain sum of money fixed by the Financial Commissioner which was refunded as and when the bottles were returned. Whatever be the name given to security deposits in effect it was nothing more than charging the buyers the real price of the bottles plus the amount authorised by the Financial Commissioner.

Mr. Grover for the assessee submitted that this was a sum which was in deposit with the assessee which remains a liability of the assessee company payable at any time when the buyers bring the bottles and it is not a liability which has become unenforceable by lapse of time and he relied on the rule laid down in *Morley (Inspector of Taxes)* v. *Tattersall*, (1) where it was held that nature of receipt is to be gathered as at the inception of the receipt and it cannot subsequently become trading-receipt if it was not so in the beginning. But that case will not in my opinion be applicable to the facts of this case because there the money which was received was never the money of the recipients but was the money of the customers. The assessees there were a firm of auctioneers and one of the conditions of the sale was that vendors were to receive the purchase money of their horses sold on Monday week following the sale and no money was to be paid or remitted to the vendors by post without a written order. As a result of the operation of these conditions large sums of money remained unclaimed in the hands of the auctioneers. In 1922, when there was a change in partnership the sums lying

(1) (1938) 3 A.E.R. 296

The Punjab Distilling Industries, Ltd., Khasa
v.
The Commissioner of Income-tax, Simla

Kapur, J.

in respect of unclaimed balances up to that date were transferred to the capital account of the old partner and in 1935, when another change took place this amount was transferred partly to current accounts and partly to the capital account of the former partners and later on this liability was assumed by the partnership. It was held that these unclaimed balances had not by the terms of the partnership and the preparation of accounts become trading-receipts and they remained the monies of the firm's clients and were not assessable to income-tax. The Master of Rolls said at page 306 :—

> "This money—using a colloquial and business expression rather than a legal expression—was never the money of Messrs Tattersall. It was the customers' money. It remains the customers' money. The customers can call for it at any moment."

It shows, therefore, that it remained the customers' money and never became the money of the partnership. In my opinion this case does not apply to the facts of the present case.

The finding in the present case is as given in paragraph 7 of the order of the Income-tax Appellate Tribunal—

> "...the collections of deposits are in their inception a part of the sale-proceeds of bottled liquor."

In other words the company was really charging an extra price for the bottles which was repayable on return of the bottles.

Mr. Grover sought to distinguish the two sums charged by the assessee, i.e., the price of the bottles and the security deposits by making a reference to section 4(3) of the Sale of Goods Act, which distinguishes between a contract of sale and a sale, the sale being a contract of sale when the property in the goods is transferred from the seller to the buyer, but when the transfer of the property in the

goods is to take place at a future time or subject to a condition thereafter to be fulfilled the contract is an agreement to sell. I cannot see how this section applies to the facts of the present case. In reality there was no distinction between that sum of money which had been charged as the price of the bottles and the other sum which was called 'security deposits'. On the return of the bottles the assessees were to refund the price as well as the deposit which they had taken. If instead of selling the bottle and the liquor at the price fixed by the Financial Commissioner and charging an extra sum as deposit for the return of the bottle the assessee had charged the whole amount as the price of the bottle plus the liquor, I am assuming that this had the approval of the excise authorities, the arrangement would not have been in any manner different in its effect. In other words if the price of the empty bottles was Rs 3 a dozen and instead of charging Rs 3 per dozen plus another Rs 3 a dozen as security deposit to ensure the return of the bottles the assessee had charged Rs 6 a dozen, the effect of the transaction would have been the same. The assessees would have to return Rs 6 when bottles in accordance with the arrangement were returned. I am not taking into consideration the condition with regard to 95 per cent.

In my opinion this case falls under the rule laid down by their Lordships of the Supreme Court in *K. M. S. Lakshmanier and Sons* v. *Commissioner of Income-tax and Excess Profits Tax, Madras* (1). In that case the assessees were the sole selling agents for yarn manufactured by a textile mill and they distributed yarn to their customers under forward contracts in respect of which they obtained monies from their customers as advance payments which were adjusted towards the final payment of purchase price at the time of delivery of goods. These sums were received under three different arrangements which are evidenced by the circulars which are given at page 206 of the Report. Before the 5th of May 1944, the assessees

(1) (1953) 23 I.T.R. 202

The Punjab Distilling Industries, Ltd., Khasa
v.
The Commissioner of Income-tax, Simla

Kapur, J.

had two accounts for each constituent 'contract deposit account' and a 'current yarn account'. They credited the monies received from the customers in the former account and transferred them to the yarn account in adjustment of the price of bales supplied "then and there", that is, as and when deliveries were made under a contract either in instalments or in full. The amounts received from the customers under this arrangement were merely advance payments of the price which were to be adjusted against the value of the bales supplied from time to time under the forward contracts. In the second period which started from the 5th of December 1944, there was a change in the heading of the account but the legal position was not altered. But by the circular of the 14th February 1945, a departure was made and this is the third arrangement. The amount deposited by a customer was no longer to have any relation to the price fixed for the goods to be delivered under a forward contract. Such price was to be paid in full against delivery in respect of each contract without any adjustment out of the deposit which was to be held by the assessees as security for the due performance of his contracts by the customer so long as his dealing with the assessees continued and the assessees were to pay interest at 3 per cent per annum. At the end of the 'business connection' an adjustment was to be made towards any possible liability arising out of the customer's default. Excepting this the assessees were to repay an equivalent amount at the termination of the dealings. The Supreme Court held that under this last arrangement the deposits which were received constituted borrowed money for the purpose of Rule 2-A of Schedule II of the Excess Profits Tax Act, 1940, but the deposits received by the assessees from the 5th May, 1944 to the 14th February, 1945, that is, under the first two arrangements, were trading-receipts and were not borrowed money for the purposes of Rule 2-A. At page 211, Patanjali Sastri, C. J., observed :—

> "Turning now to the deposits received by the appellants from 5th May 1944 to

14th February 1945 we are of opinion that, having regard to the terms of the arrangement then in force, they partake more of the nature of trading-receipts than of security deposits. It will be seen that the amounts received were treated as advance payments in relation to each 'contract number' and though the agreement provided for the payment of the price in full by the customer and for the deposit being returned to him on the completion of delivery under the contract, the transaction is one providing in substance and effect for the adjustment of the mutual obligations on the completion of the contract. We hold accordingly that the sums received during this period cannot be regarded as borrowed money for the purposes of Rule 2A."

In my opinion the case clearly falls under this rule which is binding on this Court and I would hold that the nature of the receipts was trading-receipts and the Appellate Tribunal rightly held them to be so.

I would, therefore, answer the question in the affirmative, that is the amounts received by the assessee as empty bottles return security deposits were trading-receipts and should be treated as such. The assessee will pay the costs of the Commissioner, Income-tax. Counsel's fee Rs. 1,000.

FALSHAW, J.—I agree.

CIVIL REFERENCE.

Before Falshaw and Kapur, JJ.

M/s. BANKA MAL-LAJJA RAM AND CO.,—*Petitioner*

versus

THE COMMISSIONER OF INCOME-TAX,—*Respondent*

Civil Reference No. 5 of 1951

1953

June, 17th

Indian Income-tax Act (XI of 1922)—Sections 26-A and 66—Indian Partnership Act (IX of 1932)—Section 30—Whether a minor son can, according to law, enter into a partnership through his mother, the natural guardian, with