

Donald Miranda and Others

Vs

Commissioner of Income-Tax, Bombay City II

Civil Appeals Nos. 173 to 175 of 1960

(J. C. Shah, M. Hidayatullah, J. L. Kapur JJ)

01.03.1961

JUDGMENT

KAPUR, J. –

These are three appeals pursuant to a certificate under section 66A(2) of the Indian Income-tax Act (hereinafter called the "Act") against the judgment and order of the High Court of Bombay in Income-tax Reference No. 36 of 1957.

The appeals though directed against the same order are three in number because each partner of the firm has brought a separate appeal. The firm was carrying on the business of wine merchants at Bombay and came into existence prior to April 1, 1939. The firm had been assessed to income-tax under the provisions of the Income-tax Act of 1918. The firm which was registered under the provisions of the Income-tax Act of 1922 (hereinafter termed the "Act") was dissolved on March 24, 1945, and from the day following that, i.e., March 25, 1945, a private limited company, i.e., S. S. Miranda & Co. Ltd., succeeded to the business of the firm. A claim made under section 25(4) of the Act to the effect that no tax was payable on the profits of the registered firm for the period between April 1, 1944, to March 24, 1945, was allowed. In respect of the chargeable accounting period April 1, 1944 to March 24, 1945, the registered firm was taxed to excess profits tax under the Excess Profits Tax Act, 1940. It also deposited as

"Whether the repayment of excess profits tax made by the Central Government in pursuance of section 10 of the Indian Finance Act, 1942, or section 2 of the Excess Profits Tax Ordinance, 1943, is profits from business for the purposes of section 25(4) of the Indian Income- tax Act ?"

The High Court held that the amount so refunded was income from other sources taxable under section 12 of the Act and the appellants were, therefore, not entitled to the benefit of section 25(4) of the Act. In dealing with the nature of the tax the learned Chief Justice said :

"Clearly the view of the Legislature was that this income should be treated as a statutory income with the consequences that must necessarily follow by the reason of its being a statutory income."

It was argued on behalf of the appellants that the amount refunded was income, profits and gains from business and fell under section 10 of the Act was, therefore, exempt under section 25(4) of the Act. For the determination of this question it is necessary to refer to the relevant provisions of the Excess Profits Tax Act, 1940, and the Finance Act, 1946. Section 12(1) of the Excess Profits Tax

Act was as follows :

"The amount of the excess profits tax payable in respect of a business for any chargeable accounting period diminished by any amount allowable by way of relief under the provisions of section 11 or section 11A shall, in computing for the purposes of income-tax or super-tax the profits and gains of that business, be allowed to be deducted as an expense incurred in that period."

The relevant part of section 11(11) of the Finance Act, 1946, provided :

"Any sum being excess profits tax repaid in respect of any chargeable accounting period under the provisions of section 10 of the Indian Finance Act, 1942, or of section 2 of the Excess Profits Tax Ordinance, 1943 (XVI OF 1943), shall be deemed to be income for the purposes of the Indian Income-tax Act, 1922, and shall, notwithstanding the provisions of section 34 of that Act, be treated as income of the previous year which constitutes or includes the chargeable accounting period in respect of which the said sum is repayable :

Provided that any such sum repaid in respect of any profits which are also assessable to excess profits tax under the law in force in the United Kingdom shall be treated, for the purpose of assessment to income-tax and super-tax, as income of the previous year during which the repayment is made."

It is not necessary to quote section 10(1) of the Finance Act, 1942, or the relevant provisions of the Excess Profits Tax Ordinance, 1943. Section 12(1) of the Excess Profits Tax Act shows that the amount of excess profits tax payable in respect of a business for any chargeable accounting period was an allowable expenditure. Under section 11(11) of the Indian Finance Act, 1946, any excess profits refunded under the provisions of the Indian Finance Act, 1942, or of section 2 of the Excess Profits Tax Ordinance, 1943, were deemed to be income and were to be treated as income of the previous year which constituted or which included the chargeable accounting period in respect of which the said sum was repayable. Thus the sum repaid was to be treated as income for the purposes of the Act for the previous year, notwithstanding section 34 of the Act.

The preamble of the Excess Profits Tax Act shows that the object of that Act was to impose a tax on profits arising out of certain businesses. Therefore, when any portion of the tax collected on excess profits was refunded under the provisions of the Finance Act, 1942, or the Excess Profits Tax Ordinance, 1943, it necessarily had the same quality which it had before the amount which was charged with the payment of tax had under the provisions of those Acts. In a judgment of this court, *McGregor & Balfour Ltd. v. Commissioner of Income-tax*, the amount received as a refund by the assessee was held to be income for the purpose of the Act and for assessment it was treated as income of the previous year. After reference in that case to rule 4(1) of the Rules applicable to Cases 1 and 11 of Schedule "D" of the English Income Tax Act, 1918 (8 & 9 Geo. V, c. 40), it was observed :

"The object and purpose of the legislation in each case is the same, and though the two provisions are not *ipsissima verba*, they are substantially in the same words and also in *pari materia*.... there can be no doubt that the intention underlying the two provisions is the same and the language is substantially similar."

Thus this court was of the opinion that the intention of the Legislature in section 11(14) of the Finance Act, 1946, which was the section applicable in that case and of rule 4(1) of the English Income Tax Act was the same. The operative words of section 11(11) of the Finance Act, 1946, and of section 11(14) of that Act are almost identical.

It would thus appear that the amount of excess profits tax was an allowable deduction for the purpose of computation of the business profits of an assessee under section 12(1) of the Excess Profits Tax Act and when it or a portion of it was refunded it had to be treated as income of the assessee. When it was deposited with the Central Government it was a portion of the profits of the business of the assessee and when it was returned to the assessee it must be restored to its character of being a part of the profits of a business. It cannot be said that its nature changes merely because it is refunded as a consequence of some provisions in the Finance Act or the Excess Profits Tax Ordinance. Its nature remains the same. The effect of the deposit under the Acts above mentioned was as if a slice of the business profit was taken and deposited with the Central Government Treasury and then when it was found that a larger amount had been deposited than was exigible a portion of it was returned. By being put in a Gov

In the case of *McGregor & Balfour Ltd. v. Commissioner of Income-tax* this court quoted with approval the observation of the Master of the Rolls in *A. & W. Nesbitt Ltd. v. Mitchell*, where it was said :

"But in respect of what is that payment made ? It is not a legacy, it is not a sum which has fallen from the skies; it is a sum which is repaid because there was too large a sum paid by the company to the revenue authorities over the whole period during which excess profits duty was paid, and that sum means and is intended to represent a repayment of a sum which was paid by them in respect of the duty charged upon the excess profits of their trading. It comes back, therefore, not having lost its character being still the repayment of a sum - too much, it is true, - but a sum taken out of the profits which were made by the company in the course of its trading, profits which at the time they were made were subject to income-tax and subject to excess profits duty, and that is the character of the repayment that has been made."

The amount deposited comes back without losing its character. No doubt the words in the English rule are "shall be treated as profits for the year in which the payment is received" and in section 11(11) of the Finance Act, 1946, such sum has to be treated as income of the previous year but as pointed out by this court in the *McGregor & Balfour* case the intention underlying the two provisions is the same and even the language used in two provisions is substantially the same.

Counsel for the Commissioner drew our attention to *Kirke's Trustees v. Commissioners of Inland Revenue* and it was submitted that the Lord Chancellor held at page 329 that for the amount so received the assessment falls to be made under Case VI as Schedule "D". Lord Shaw of Dunfermline at page 332 said that the repayment was to be treated as trading profits for the year of repayment and, therefore, assessable as such under Schedule "D". He was also of the opinion that the charge was to be one under Case VI. Lord Sumner said that it became a minor matter of decide whether the charge was to be made under Case 1 or Case VI but this is little consolation to the respondent (the Commissioner of Income-tax) because Case VI was also dealing with taxes in respect of annual profits and gains which do not fall in one of the other cases.

In our opinion the amount refunded did not lose its character which it had before the deposit and,

therefore, it is an erroneous view to take that the income was assessable under section 12 of the Act and not under section 10. If it was income falling under section 10, as in our opinion it was, then the appellants were entitled to get the benefit of section 25(4) of the Act and the amount was not liable to taxation.

The appeals are, therefore, allowed with costs. One hearing fee.

Appeals allowed.

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