SUPREME COURT OF INDIA

Union of India (Uoi)

Vs.

British India Corporation Ltd.

(Ruma Pal and B.K. Srikrishna JJ.)

25.03.2003

ORDER

1. This appeal by the Revenue impugns the judgment of the High Court quashing the orders dated 30-1-1978 and 8-3-1983 made respectively by the Inspecting Assistant Commissioner of Income Tax and the Income Tax Appellate Tribunal, and directing refund of a sum of Rs. 32,85,964 to the respondent assessee.

2. The assessee was issued notices by the Income Tax Officer under Section 11 of the *Business Profits Tax Act, 1947* (for short "the Act") and called upon to furnish returns thereunder in respect of the chargeable accounting periods ending on 31-12-1946, 31-12-1947, 31-12-1948 and 31-3-1949. Such returns were filed by the assessee on 31-3-1949 and provisional assessments under Section 13 of the Act were completed on different dates between 27-12-1948 to 22-1-1951 by the Assessing Officer. On 30-12-1969, the regular assessments under Section 12 of the Act were completed in respect of the aforesaid three chargeable accounting periods. The respondent assessee filed appeals before the Income Tax Appellate Tribunal (for short "the Tribunal") impugning the regular assessment orders on various grounds including the ground that the regular assessment orders were barred by time. The Tribunal accepted the said contention and quashed the regular assessment orders. A reference made to the High Court at the instance of the Revenue failed, the High Court holding in favour of the assessee on this issue.

3. On 4-1-1978 and 31-1-1978 (even before the High Court had disposed of the reference made at the instance of the Revenue), the respondent assessee by its applications claimed refund of the tax paid by it under the provisional assessment orders. This claim for refund was rejected by the Assessing Officer who took the view that there was no question of merger of the provisional assessment with the regular assessment and that even if the regular assessment orders were quashed, the provisional assessment order would stand independently. This view was upheld by the Commissioner of Income Tax (Appeals) as also by an order dated 8-3-1983 made by the Income Tax Appellate Tribunal. The assessee impugned the orders of the Tribunal and the Inspecting Assistant Commissioner of Income Tax by way of a petition before the High Court and sought a writ of mandamus to direct the Revenue Authorities to refund the amounts which had been paid as a result of the provisional

assessment orders. The writ petition was allowed and resulted in the impugned order which is challenged in this appeal.

4. The learned counsel for the Revenue contended that the very basis on which the regular assessment orders were quashed was that the refund applications, which could have been made by the assessee, had become time-barred. Our attention was invited to the judgment of the Allahabad High Court reported in *CIT v. British India Corporation*[1], in the assessee's case itself. The High Court following the law laid down by this Court in CIT v. Narsee Nagsee & Co., held, that although the provisions of the *Business Profits Tax Act, 1947* contained no period of limitation within which the regular assessment had to be made under Section 12 of the said Act, such a period of limitation must be read into the provisions of the Act on account of the prescription under Rule 4-A of the Business Profits Tax Rules which applied Section 50 of the Income Tax Act, 1922 mutatis mutandis to assessments under the Act. Under Section 50 of the said 1922 Act, no claim to any refund of tax under the Act shall be allowed unless made within four years from the last date of the financial year commencing next after the expiry of the accounting period which constitutes or includes the chargeable accounting period in respect of which the claim to such refund arises. In Narsee Nagsee case it was held by this Court that this modified Section 50 furnishes a key as to when a notice under Section 11(1) of the Act has to be given and that such notice must be given within the financial year which commences next after the expiry of the accounting period or the previous year which by itself includes the chargeable accounting period in question.

5. It is precisely because the application for refund on the part of the assessee had become time-barred under Rule 4-A, that the High Court held that the regular assessment under Section 12 of the Act had become time-barred.

6. Mr. M.L. Verma, learned Senior Counsel for the respondent assessee, urged two contentions in reply. In the first place, he urged that the contention that the claim for refund had become time-barred had not been urged by the Revenue Authorities at any time. He also urged that a claim for return of the money retained by the Revenue Authorities without the authority of law, by reason of Article 265 of the Constitution, does not amount to a claim for refund within the meaning of Section 50 as modified by Rule 4-A of the Business Profits Tax Rules.

7. As to the first point, the question of limitation is a mandate to the forum and, irrespective of the fact whether it was raised or not, the forum must consider and apply it, if there is no dispute on facts. Section 50 of the 1922 Act, as modified by Rule 4-A, is a provision of the statute which was required to be applied by the High Court at the time of considering the relief, if any, to be granted in the writ petition. The claim being barred by time, the writ petition could not have been allowed nor could any relief be granted. The first contention, therefore, fails.

8. Turning to the second contention, use of the word "return", instead of "refund", does not make any difference to the right, if any, of the assessee. Mr. Verma contends that the right of

the assessee to seek a refund became available for the first time when the High Court held in favour of the respondent assessee and there was no question of making an application for refund or return of the money prior to the date. He, therefore, urges that the provisions of Section 50 of the 1922 Act as modified by Rule 4-A, cannot strictly be applied in such a case. The respondent must fail even assuming the contention of Mr. Verma, based on Article 265 of the Constitution to be valid. We are of the view that the money which was paid as provisional tax became returnable on the date on which the right of the Revenue Authorities to make a regular assessment under Section 12 came to an end. Assuming that there was a right in the respondent assessee to reclaim this money, such a right ought to have been exercised within a period of three years under the residuary Article 137 of the Limitation Act, after which even such a right must be held to be barred. There is no doubt that by the time the assessee asserted his so-called right, even this period had expired in respect of the assessment years in question. The contention based on Article 265 of the Constitution also must, therefore, fail.

9. The contention of the respondent must fail for the principal reason that the respondent's earlier contention that the regular assessment was barred by time had succeeded. The basis for such success itself was that the respondent's right to claim refund had become time-barred under Section 50 of the 1922 Act, as modified by Rule 4-A.

10. Learned counsel for the respondent urged that, though for the purpose of deciding the validity of the regular assessments, the assessee's right to seek refund may have been considered to be time-barred, when it comes to deciding the validity of the refund claim, we must hold that it is not time-barred. This argument, in our view, is an echo of what the Mimamsakas pejoratively dismissed as "ardha jarateeya nyaya". (The argument that an egg can be partly used for eating and partly for hatching). Its Western counterpart is: to have the cake and eat it too. The contention deserves only short shrift.

11. In the result, we allow the appeal and set aside the impugned judgment of the High Court and dismiss the writ petition filed by the respondent. We make it clear that we have not gone into the merits of any other questions canvassed in the matter.

12. There shall be no order as to costs.

[1]*(1979) 117 ITR 651 (All)*